

is not only an authenticated copy, but requires, in addition, a certification by the clerk, certifying that he is the clerk of the court, and that the subject matter of the alleged copy is a true copy of an original forming part of the records of his office, and on file in his office, and further, containing an attestation clause, followed by the clerk's subscription, together with the seal of the court of which he is clerk. These elements, if it is respectfully submitted, are the essential requisites of a certified copy, and plaintiff respondent respectfully contends that the alleged copies of the proceedings in bankruptcy offered in behalf of the defendant, William G. Mulligan, failed to embody the requisite elements, as pointed out herein.

Conclusion.

For the reasons, therefore, that plaintiff's answer, Elizabeth F. McDermott, had complete legal title to the note in question at the time that she endorsed the same to the plaintiff herein, and that the plaintiff herein, David Ehrlich, could legally maintain this action in his name for the benefit of the said Elizabeth F. McDermott, and that the alleged copies of the bankruptcy proceedings of the defendant, William G. Mulligan, failed to embody the requisite element entitling them to be admitted in evidence, and that the alleged discharge in bankruptcy of the said defendant, William G. Mulligan, was never, in fact, offered in evidence, it is respectfully contended, in behalf of the plaintiff respondent, that the judgment of the Superior Court should be affirmed.

Respectfully submitted,

COHEN & KLEIN,

Attorneys for Plaintiff-Respondent.

Louis J. Cohen,
Of Counsel

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Notice and Grounds of Appeal.

NOTICE AND GROUNDS OF APPEAL.

Filed July 11, 1927.

New Jersey Supreme Court

<p style="text-align: center;">SAMUEL B. THOMPSON, <i>Plaintiff,</i></p> <p style="text-align: center;"><i>vs.</i></p> <p style="text-align: center;">CENTRAL RAILROAD COMPANY OF NEW JERSEY, <i>Defendant.</i></p>	}	<p style="text-align: center;">10</p> <p style="text-align: center;"><i>On Appeal.</i></p> <p style="text-align: center;"><i>Notice and Grounds of Appeal.</i></p>
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TAKE NOTICE that the plaintiff, Samuel B. Thompson, 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 ground: 20

The Trial Court directed a verdict against the plaintiff and in favor of the defendant when thereunto moved by counsel for the defendant, whereas the said Court should have denied said motion and should have submitted to the jury for decision the questions involved in the issues.

E. A. MERRILL,
Attorney of Appellant. 30

To William A. Barkalow, 143 Liberty street, New
York City.
Attorney of Defendant.

Summons.

SUMMONS AND COMPLAINT.

Filed February 15, 1927.

The State of New Jersey to Central Railroad of New Jersey.

10 (SEAL) YOU ARE SUMMONED to answer the annexed complaint of Samuel B. Thompson, in an action at law in the Supreme Court. And take notice that unless you file your answer to said complaint with the Clerk of the Supreme Court, at Trenton, within twenty days after the service upon you of this writ, and the annexed complaint, the plaintiff may proceed in the suit and judgment may be entered against you.

20 WITNESS, WILLIAM S. GUMMERE, Chief Justice of the Supreme Court, at Trenton, this 7th day of February, nineteen hundred and twenty-seven.

EDWARD J. KELLEHER,
Clerk.

E. A. MERRILL,
Attorney.

30

40

Complaint.

SUPREME COURT OF NEW JERSEY.

UNION COUNTY.

SAMUEL B. THOMPSON, <div style="text-align: right;"><i>Plaintiff,</i></div>	}	<i>Action at Law.</i>	10
<i>vs.</i>			
CENTRAL RAILROAD OF NEW JER- SEY, a corporation, <div style="text-align: right;"><i>Defendant.</i></div>		<i>Complaint.</i>	

Plaintiff, Samuel B. Thompson, residing in the Township of Fanwood, County of Union and State of New Jersey, says that:

1. On or about August 27th, 1926, said defend- 20
ant had the possession, control and management of a certain building on the northerly side of the right of way of said defendant through said Township of Fanwood, which said building is known and designated as the westbound Fanwood station of said defendant.

2. On or about August 27th, 1926, said plain-
tiff, being then and there lawfully on said prem-
ises and within said building, attempted to leave 30
said building through the east door on the south-
erly side of said building.

3. Defendant by its servants, employees, or
agents, and without warning to plaintiff, had
carelessly and negligently placed an obstruction
across said doorway at about the height of plain-
tiff's forehead.

4. As plaintiff was leaving said station build-
ing, through said doorway, his head came vio-
lently in contact with the obstruction across said 40

Complaint.

doorway and he was thrown violently to the floor, sustaining great injury to his body and to his nervous system, and seriously aggravating certain weaknesses and illnesses from which he was then suffering due to two operations for mastoiditis.

10

5. By reason of said injuries plaintiff has been unable to pursue his usual and necessary occupation, and has suffered and will continue to suffer loss of income and profits; he has been obliged to spend large sums for medical attendance; and he has suffered great pain and will continue for a long time to suffer great pain.

20

6. By reason of the injuries sustained by said plaintiff due to the carelessness and negligence of the defendant by its servants, employees, or agents, and due to the failure of said defendant to perform its duty to those lawfully upon its premises by keeping entrances and exits in a safe condition, said plaintiff has sustained damages in the sum of \$25,000.00.

Judgment will be claimed by the plaintiff in the sum of \$25,000.00 and costs of suit.

30

E. A. MERRILL,
Attorney of Plaintiff.

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Answer.

ANSWER.

Filed February 25, 1927.

NEW JERSEY SUPREME COURT.

UNION COUNTY.

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SAMUEL B. THOMPSON, <div style="text-align: right;"><i>Plaintiff,</i></div> <div style="text-align: center;"><i>vs.</i></div> THE CENTRAL RAILROAD COM- PANY OF NEW JERSEY, a corporation, <div style="text-align: right;"><i>Defendant.</i></div>	}	<i>Action at Law. Answer.</i>
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The answer of The Central Railroad Company of New Jersey, a corporation of the State of New Jersey, having its principal office for the transaction of business in the City of Jersey City, County of Hudson and State of New Jersey, says that: 20

I. It admits paragraph 1 of the complaint.

II. It denies paragraphs 2, 3, 4, 5 and 6 of the complaint.

As a separate defense, it alleges that the plaintiff was guilty of contributory negligence, barring a recovery in this action. 30

As a second separate defense, it alleges that at the time of the accident mentioned in the complaint the plaintiff was a trespasser upon the private property of the defendant.

As a third separate defense, it alleges that at the time of the accident mentioned in the complaint the plaintiff was a mere licensee upon the private property of the defendant.

WM. A. BARKALOW, 40
Attorney for Defendant.

Reply.

REPLY.

Filed March 3, 1927.

NEW JERSEY SUPREME COURT.

UNION COUNTY.

10

SAMUEL B. THOMPSON, <div style="text-align: right;"><i>Plaintiff,</i></div> <div style="text-align: center;"><i>vs.</i></div> THE CENTRAL RAILROAD COM- PANY OF NEW JERSEY, a corporation, <div style="text-align: right;"><i>Defendant.</i></div>	}	<i>Action at Law. Reply.</i>
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The plaintiff, replying to the defenses in the defendant's answer, answers said defenses and says that:

ANSWER TO FIRST SEPARATE DEFENSE.

1. The plaintiff denies that he was guilty of contributory negligence.

ANSWER TO SECOND SEPARATE DEFENSE.

30

1. Plaintiff denies that he was a trespasser upon the private property of the defendant.

ANSWER TO THIRD SEPARATE DEFENSE.

1. Plaintiff denies that he was a mere licensee upon the private property of the defendant.

E. A. MERRILL,
Attorney of Plaintiff.

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Charles T. Decker, direct.

TESTIMONY.

CHARLES T. DECKER, a witness produced on behalf of the plaintiff, being duly sworn according to law, on his oath saith:

Direct examination by Mr. Merrill.

10

Q Where do you practice, Dr. Decker? A Westfield, New Jersey.

Q You are Mr. Thompson's physician? A Yes, sir.

Q Were you called to examine him in August, 1926? A Yes, sir.

Q On what date subsequent to August 27th did you see him? A 29th of August, same year.

20

Q What was his then condition? A Mr. Thompson had a bruise over his right eye, above his eyebrow. He was in a confused state of mind, suffering intense headache, difficulty of vision, weakness of his left side, arm and leg, some in the face. He had blood pressure of 170 systolic. He was pale, dizzy. I think that is all.

Q What, in your opinion, was the proximate cause of that condition? A I believe that he had had a rupture of a blood vessel in the brain which controlled the left side of his body and face and his eyes.

30

Q What, in your opinion, was the cause of the rupture of the blood vessel? A I believe it was the result of an accident, a blow to his head.

Q The testimony of Mr. Thompson shows that he received the blow on August 27th. Do you attribute the condition in which you found him to the blow on that day? A Yes, sir, I do.

40

Charles T. Decker, cross.

Q At any time since the accident, has Mr. Thompson been in a condition to take care of his business? A No, sir.

Q When, in your opinion, is there a reasonable probability of his being able to take up his occupation again as consulting engineer? A I don't believe he ever will be able to.

Q Will he be able to take it up in any degree, partially? A Not for an indefinite time, at least.

Q In your opinion, from your knowledge of his condition since the accident and his present condition, for how long a time is he likely to require medical attention? A Absolutely indefinite. A long time.

Q Do you mean by a long time, several years? A Yes.

Q What do you consider is the reasonable value of your services to Mr. Thompson from August 29th to date? A Approximately a hundred dollars.

Q You are familiar with the fact that Mr. Thompson had a mastoid operation? A Yes, sir.

Q Is that an operation from which one may wholly recover? A Yes, sir.

Mr. Merrill: Cross examine.

Cross examination by Mr. Tomlinson.

Q Dr. Decker, I understood you to testify yesterday that the reasonable value of your services from August 27, 1926, was approximately a hundred dollars? A Yes, sir.

Q Is that the amount for which you rendered a bill? A Yes, sir.

Charles T. Decker, cross.

Q Has that bill been paid? A I think all except the last. It has been sent in sections, not in one bill.

Q Doctor, how long have you been practicing in Westfield? A Since January, 1910.

Q For how long a period have you known Mr. Thompson, the plaintiff in this case? A I have known who he was for maybe more than five years.

Q How long have you treated him? For how long a time have you been his family physician? A Well, of course, Dr. Sinclair and I together have associated together so that I have seen him I think personally the first time along in October, before he had his operation for his mastoid. Before that I hadn't personally treated him any to speak of at all.

Q As I understand it, doctor, you and Dr. Sinclair practice together in Westfield? A Yes, that is right.

Q Mr. Thompson was a patient of your firm, if I may so designate it? A Yes.

Q And he had been a patient of you and Dr. Sinclair for some time? A Yes.

Q For years, had he not? A Yes, I think approximately five years, I should say.

Q And if he should require medical assistance or medical advice, he would come to the office of both of you two gentlemen, and if one of you was absent, the other would treat him; is that correct? A Yes, sir.

Q Now, Dr. Decker, you knew, of course, that Mr. Thompson had a double mastoid operation in the fall of 1925, did you not? A Yes, sir.

Q Before this accident? A Yes, sir.

Q As a matter of fact, it was you, was it not, who sent him to Dr. Slocum, or Dr. Malcolm, was

Charles T. Decker, cross.

it, in New York? A I don't know the name of the man he went to, but I sent him in, because he had his ear abscess first, which was the cause of his mastoid, and I wanted him taken care of. I forget the name of the man who did the work.

10 Q Well, in any event, you diagnosed the trouble as a possible mastoid trouble, did you not? A Yes.

Q And as a result of that diagnosis in order to make assurance doubly sure, you sent Mr. Thompson to an ear specialist in New York? A Yes, sir.

Q And as a result of his examination by that ear specialist in New York he was operated on for a double mastoid, was he not? A Yes, sir.

20 Q Now, Dr. Decker, a mastoiditis is a very serious thing, is it not? A No.

Q It is not? A No, sir.

Q Isn't it a fact that mastoiditis in a great many places results in death? A Not an uncomplicated mastoid.

30 Q Isn't it a fact that mastoiditis in a great many, if not the majority of cases, results in a breaking down or tearing down or depressing of the man's whole system? A Well, he recovers from it. It is a temporary thing from which he recovers entirely.

Q Whether it be temporary, or whether it be permanent, isn't it a fact that the common result of a mastoiditis is to lower a man's whole vitality, to lower the tissues and nerves in his head, and generally result in a condition of depression? A I can't answer that without qualification.

40 Q Well, go ahead and qualify. A The average case of mastoid that I have seen is entirely healed up and the man is usually perfectly well in from two to three months.

Charles T. Decker, cross.

Q Did you ever see a case where a man did not become perfectly well in two or three months, from mastoiditis? A Yes.

Q Did you ever see a case where a man died from mastoiditis? A When there is complications, but not uncomplicated.

10 Q Well, the originating cause was mastoiditis, wasn't it? A Yes.

Q So that we may understand each other, Dr. Decker, is it or is it not a fact that you in your practice have seen cases where men have died, or where a man or a woman has died—we will put it that way—in a case where the mastoiditis or where a mastoiditis was the originating cause? A Well, I would have to qualify that. There is an originating cause behind the mastoiditis. It might be just from a cold in his head, first. The originating cause, of course, would be a cold, in the cold, the simple, ordinary infection, and that would be the beginning cause of the man's death, not just his mastoid. It is a progress through the whole thing.

20 Q Mastoiditis very often does result from colds, does it not? A Certainly.

30 Q Mastoiditis is a condition originating in the middle ear, is it? A It originates in the eustachian tube, the tube from the throat to the middle ear, and that becomes infected. From there it spreads to the mastoid.

Q You have seen cases, have you not, where men have died where a mastoiditis was the first objective symptom that that man had; isn't that true? A No, I have not.

40 Q Never have? A I have seen it where the first originating cause was an ear abscess. I never saw an original mastoid cause death; no, sir.

Charles T. Decker, cross.

Q Whether you say that a cold started the mastoiditis or whether you say that an abscess started the mastoiditis, I ask you, doctor, whether you have ever seen a case of mastoiditis—now, let us not quibble about this thing—whether a cold started or whether an abscess started, where that patient afterwards died? A Yes, sir.

Q And a double mastoid is much more serious than a single mastoid, isn't it? A I can't say that.

Q Have you ever done any operative work for mastoiditis? A I have assisted at them, yes, sir. I am not an ear specialist, but I have assisted at operations for mastoids.

Q For how long a time have you been practicing medicine? A 1906; June, 1906.

Q You can't say whether a double mastoiditis is more serious than a single mastoiditis? A I can't without qualifications, no, sir.

Q If you can't say it without qualifications, go ahead and say it with qualifications. A A single mastoid can be a good sight worse than any double mastoid could be. The effect on the patient, the risk to his life would be ten times greater with a bad single mastoid than it would be with an ordinary double mastoid. For instance, a child has a mastoid double operation, gets well of it without any trouble.

Q And some children die from double mastoid operations? A Very seldom.

Q Some do? A Some do.

Q Any mastoid operation is a serious operation, is it not? A Yes.

Q And any mastoid operation, whether it be single or double, is attended with some risk to life, isn't it? A Absolutely.

Charles T. Decker, cross.

Q Isn't it a fact that a patient may have a mastoiditis and undergo an operation, which operation is apparently completely successful, and later on develop symptoms as a result of that operation or as a result of that original condition of mastoiditis? A It is possible, but very rare.

Q Well, there are such cases, aren't there? A Yes.

Q Now, after this mastoid operation, you again sent Mr. Thompson back, didn't you? A I don't think I did, no, sir.

Q Isn't it a fact that after the operation he came to you complaining of stuffiness in the ear tube, and that you then sent him back for further after-treatment? A I absolutely don't recall.

Q Would your records show? A No, because we don't keep any record of what the patient comes for at that time.

Q But you do keep a record of when the patient comes? A Yes, sir.

Q You keep a record of what you do? A No, sir.

Q You keep a record of that only for your charge? A Only for the charge, yes, sir.

Q You didn't make any chart or history of the patient's case? A No, sir.

Q Now, you are familiar also, are you not, Dr. Decker, with the fact that after the mastoid operation and before this accident, Mr. Thompson suffered a stroke of paralysis? A Yes, sir.

Q When was it that this stroke took place? A I saw him in March; that will be 1926.

Q Is that when he was first afflicted? A The first time that I saw him.

Q Do you know whether or not you were called right after he was afflicted or not? A In March. You mean after the operation?

Charles T. Decker, cross.

Q Yes, sir. A No, I wasn't personally called before March.

Q I say, do you know whether or not he had a stroke before March? A Oh, oh, yes. I beg your pardon. I didn't understand you. Yes, he had.

10 Q Do you know when it was he had this stroke, doctor? A In December of 1925.

Q And the operation for mastoiditis was in October, 1925, was it not, doctor? A Yes.

Q Now, Dr. Decker, you have seen many cases of paralysis, of course? A Quite a few. Yes, sir.

Q What induces a paralytic stroke? A Well, there are different causes for the paralytic stroke.

20 Q Well, isn't, sir, a paralytic stroke caused by cerebral hemorrhage? A Yes, that is one reason for it.

Q Isn't that the common inducing cause of a paralytic stroke, cerebral hemorrhage? A I would not call cerebral hemorrhage the cause of it. The cerebral hemorrhage is the thing that gives you the symptoms, but it is because something causes the cerebral hemorrhage.

30 Q Something causes a cerebral hemorrhage, and then the cerebral hemorrhage causes a stroke and there is the stroke, isn't that right? A Yes.

Q What is a cerebral hemorrhage, Dr. Decker? A Broken blood vessel.

Q Where? A In some part of the brain cavity.

Q In some part of the head, is that right? A Yes.

40 Q And this first stroke that Mr. Thompson had, was, as you said, in December, 1925? A Yes, sir.

Charles T. Decker, cross.

Q Now, as a result of a stroke, Dr. Decker, the patient most always suffers a lessened resistance throughout his system, does he not? A Temporarily.

Q Well, whether it be temporary or whether it be permanent, during the stroke, of course, he is naturally helpless. Isn't it a fact that after 10 he begins to recover the functions of his members, his limbs, he is still weakened and has a lowered resistance? A Yes, sir.

Q Isn't that true? And isn't it also a very well recognized fact in medical science that one stroke is usually followed by a second stroke? A Yes, sir.

Q Now, did Mr. Thompson suffer a second stroke? A After when?

Q Did he suffer a second stroke? A A second one in March, yes. 20

Q When was this second stroke? A March, 1926.

Q The second stroke was in March, 1926? A Yes, sir.

Q So that before this accident he had two strokes, was that right? A Yes, sir.

Q Now, did he suffer a third stroke? A He suffered a stroke, what is ordinarily termed a stroke, as a result of a blow on his head in 30 August, 1926.

Q Did he suffer a stroke of paralysis after the second stroke that you have talked about? A A Not until August 27, 1926.

Q Now you, of course, know that prior to this accident Mr. Thompson had not been in a condition to go to his office for a long time, isn't that true? A The only answer that I can give you to that is that he had been advised not to go, not because of disability in going, but simply to rest 40

Charles T. Decker, cross.

up and take it easy for the sake of his health. That is all. But he was able to go. In fact, he did go.

Q Was he able to go when he had the first stroke of paralysis? A I am talking about from March, after his March attack.

10 Q I am talking about beginning back in 1925, after his mastoid operation. He did not go to his office for a long time after that? A Oh, no sir.

Q And he didn't go for some time after his first stroke? A No, sir.

Q And he didn't go for some time after his second stroke? A No, sir.

Q And, after he did start to go, he went about twice a week, did he not? A As far as I know, that is right. Yes, sir.

20 Q Of course, that is all I am asking for, doctor. And those times when he went, he went with an escort, did he not? A I don't actually know that, no, sir.

Q But you advised him to have someone go with him, did you not? A Yes, sir.

Q You advised him to go with an escort? A Yes.

Q And that was prior to this accident? A Yes, sir.

30 Q When were you first called to see Mr. Thompson after this accident, Dr. Decker? A August 29th.

Q That was two days after the accident? A Yes, sir.

Q Will you kindly tell us just what the symptoms were that you found existing in Mr. Thompson when you went to see him two days after the accident? A At that time he was complaining of pain, severe pain over his right forehead region, which he told me had come immedi-

40

Charles T. Decker, cross.

ately and increasingly since the time that he had hit his head. He had difficulty of vision. He couldn't read. There was weakness on his left side, arm and leg and face, dizziness. Blood pressure was 170 systolic. He had a bruise or contusion over his right forehead region.

Q Where on his forehead was that bruise, Dr. Decker? A Above his eyebrow, in this region where my hand is (indicating). 10

Q Above his eyebrow? A Yes.

Q And about how high above his eyebrow? A It extended probably an inch and a half, two inches. That is something like across here (indicating).

Q Above the right eyebrow? A Right; yes, sir.

Q You say he had a blood pressure of about 170 systolic? A Yes. 20

Q That is the high blood pressure? A Yes.

Q And the other blood pressure is diastolic? A Yes, sir.

Q Did you take his diastolic blood pressure? A I did, but I don't remember what it was.

Q Isn't it a fact that the diastolic blood pressure is the best indication of the person's blood condition or blood pressure, a better indication than systolic? A It is a very good one. 30

Q And 170 systolic blood pressure is not an exceedingly high blood pressure for a man fifty-eight years old, is it? A It is not exceedingly high; no, sir.

Q As a matter of fact, about two days after you examined him—that is about two days after the 29th of August—his blood pressure was down to 140, wasn't it? A Yes.

Q That is his systolic blood pressure? A Yes, sir. 40

40

Charles T. Decker, cross.

Q There wasn't any breaking of the skin, was there, Dr. Decker? A No, sir.

Q Did you have him X-rayed? A No, sir.

Q So that you did not suspect any fracture? A No, sir.

10 Q Now, you saw him on the 29th. At that time was he suffering from any nausea? I mean vomiting. He wasn't vomiting, was he? A I don't think so; no, sir.

Q He was conscious? A Yes, sir.

Q When was the next time that you saw him after August 29th? A I have seen him off and on right along up to this present time, at intervals of anywheres from at first two or three days to maybe once in two weeks.

20 Q You didn't see him after August 29th for three days, did you? A I think so; two to three, these intervals were.

Q You saw him on the 29th and then you saw him about three days later, isn't that a fact? A Yes.

Q And then after that you saw him about four times in two weeks, isn't that correct? A Yes, I think so.

Q At that time you were the sole physician attending him? A Yes, sir.

30 Q You have said, Dr. Decker, that you would give it as your opinion that Mr. Thompson suffered from a rupture of the blood vessel of the brain. Did I get your statement correctly? A Yes.

Q What would be the symptoms of a blood vessel rupture, or a rupture of a blood vessel? A That would depend on what vessel was ruptured, and what part of the brain tissues were pressed upon by the resulting rupture.

40 Q What vessel do you think was ruptured in Mr. Thompson's brain? A I have regarded the

Charles T. Decker, cross.

vessel was on the right side of his brain, rather deep down, which would cause pressure on the parts of the brain which would control his left side, and also controls fibers which went to his eyes to control eyesight.

10 Q Is it your opinion that the blood vessel which you said you think was ruptured was one of the small blood vessels, or one of the large blood vessels? A I have no opinion as to which it was. It makes no difference whether it was small, as far as the symptoms resulting from it are concerned.

Q It makes some difference as to the symptoms, though, doesn't it? A Not at all.

20 Q So you give it as your opinion that the same symptoms will follow and manifest themselves after the rupture of a large blood vessel as will manifest themselves after a rupture of a small blood vessel? A The symptoms aren't dependent upon the size of the vessel at all.

Q I say, then, the symptoms will be the same whether it is a large vessel or a small vessel, is that correct, doctor? A Yes, sir.

Q Now, isn't it a fact that if a man has a ruptured blood vessel in his brain, that almost the inevitable consequence is unconsciousness? A No, sir.

30 Q Isn't it a fact that after a ruptured blood vessel there will be a vomiting? A No, sir.

Q Isn't it a fact that in many cases of ruptured blood vessels there follow periods of unconsciousness, periods of immediate unconsciousness? A One time you say inevitable, and the other time you say many. Many, yes, but not inevitable.

40 Q You say it was not inevitable, now? I am trying to find out what you mean? A Many times, yes.

Charles T. Decker, cross.

Q Usually the consequence of the ruptured blood vessel is unconsciousness, isn't it, or usually the result of it? A I couldn't say usual, no, sir.

Q But many times? A Many times.

10 Q And ordinarily isn't that true? A I can't give you the percentage of cases of where they become unconscious, but there are many of them that do not become unconscious. Some of them do, of course.

Q And many of them do become unconscious? A Yes, sir.

Q And in considering whether there has been a rupture of a blood vessel, one of the things that you consider is to ascertain whether or not the patient has been unconscious right after the accident? A Yes, sir.

Q Isn't that true? A Yes, sir.

Q And one of the things that you consider in determining whether there has been a ruptured blood vessel is to find out whether there has been a vomiting by the patient, isn't that true? A Yes, sir.

Q And you didn't find that either of these conditions existed with Mr. Thompson, did you? No, sir.

Q Now, a mastoiditis is more serious in a person of the age of 58 than it is in a person of the age of 30 or 35? A Yes, sir.

Q In other words, the older you grow the more serious it is if you get mastoiditis? A Yes, sir.

Q In order for there to be a rupture of a blood vessel of the brain there must be a concussion of the skull, must there not? A Yes, sir.

40

Charles T. Decker, cross.

Q And concussion of the skull or of the brain is usually followed by unconsciousness, isn't it?

A Yes, sir.

Q Now, a rupture of a blood vessel of the brain is a cerebral hemorrhage, isn't it, doctor?

A Yes, sir.

Q And in the case of a stroke you have already said that there is a cerebral hemorrhage?

A Yes, sir.

Q So that a cerebral hemorrhage may come from violence or force or it may come from a natural disease? A Yes, sir.

Q Now doctor, in your own experience in the practice of medicine and surgery have you ever observed a state of clear consciousness in a patient immediately after that patient had sustained a cerebral hemorrhage? A Yes, sir, I have.

Q Where did you observe that case? Where was it? A Where was it? A patient of mine was in an automobile accident who had an injury to her head here. She didn't show any signs of any hemorrhage of her brain for four days, who ultimately died of a hemorrhage of the brain seven days after her accident.

Q That patient had a cerebral hemorrhage? A Yes, sir.

Q Have you ever observed any other cases besides this one, where they were not unconscious? A Yes. This woman was never unconscious after her accident.

Q You have told us about that case. Have you ever had any other cases of that type? A Yes, I have.

Q Many? A Not many.

Q Perhaps I do not make myself clear. Was this lady who was in the automobile accident

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Charles T. Decker, re-direct.

clearly conscious all the time? A For four days, yes, sir.

Q Clearly conscious? A Absolutely.

Q Have you ever observed any other cases where the patient was in a state of clear consciousness? A Yes, sir.

10 Q But not many? A Not many.

Mr. Tomlinson: That is all.

Re-direct examination by Mr. Merrill.

Q When prior to August 29th did you last see Mr. Thompson? A As near as I can give you—I can't give you the absolute date. It was towards the end of March of the same year. I

20 beg your pardon; it was in June.

Q Of 1926? A 1926, June.

Q Have you known of cases, doctor, where the same symptoms which were exhibited by Mr. Thompson in March, 1926, were exhibited and the patient lived thereafter for many years without a recurrence of those symptoms? A Yes, sir.

Q When was the advice given Mr. Thompson that he should have an escort when he went into New York? A Following his attack in March,

30 1926.

Q Was his attack in March, 1926, a light attack or heavy attack? A It was a moderately severe attack.

Q When you saw him in June to what extent had he recovered from that? A Practically entirely.

Q May a person 57 or 58 years of age have a light case of mastoiditis? A Yes, sir.

Q In your opinion, was or was not Mr. Thompson's condition prior to August 27, 1926,

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Charles T. Decker, re-cross.

the proximate cause of the condition which you found on August 29th? A No, sir.

Mr. Merrill: That is all.

Re-cross examination by Mr. Tomlinson.

Q You don't consider, do you, Dr. Decker, that a condition of double mastoiditis in a man 58 years of age is a light attack? A It depends upon what condition his mastoid was.

Q Do you say that when a man 58 years old has a double mastoiditis, that that can even be a light attack? A Certainly.

Q Where he has to be operated on for it? A Yes, sir.

Q But any operation for mastoiditis is attended with the danger of death, isn't it? A Any operation is, certainly.

Q You don't say for one minute, do you, Dr. Decker, that this condition of double mastoiditis that Mr. Thompson had that impelled you to send him to an ear specialist in New York to have him operated on, was a light attack? A I don't know how to answer that. In other words—

Q All right. I will put it another way. I will try to make myself clear. I am doing my best in my feeble way. You treated Mr. Thompson, and as a result of your treatment and observation of him, you sent him to New York? A Yes.

Q To consult a specialist, didn't you? A Yes, sir.

Q And as a result of that he was operated on for double mastoiditis, wasn't he? A Yes, sir.

Q You don't for one minute say that this attack of double mastoiditis that Mr. Thompson

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Charles T. Decker, re-cross.

had was a light attack, do you? A I can't answer that without qualification.

Q Well, you have already told Mr. Merrill that a man 57 or 58 years of age might have a light attack? A Yes.

10 Q Now, aren't you in a position to tell us whether this attack that Mr. Thompson had was a light attack or whether it wasn't? A I can't unless you let me explain.

Q So although you could tell Mr. Merrill that a man could have a light attack, you can't tell us whether Mr. Thompson had a light attack? A One case you are talking about general knowledge, and another one you are talking about a specific case.

20 Q You get your general knowledge from cases, don't you? A That generally helps with any specific person.

Q Isn't a doctor's knowledge gleaned not only from text books, but even more than that from observation of specific cases in hospitals, and one's treatment of those cases? A That does not make it necessarily with the case of the particular person and what is in that particular person, from looking in his ear.

30 Q I will just repeat this question once more so as to get my mind straight. You can't tell us now whether this attack of double mastoiditis that Mr. Thompson, 58 years of age, had was a light attack or not? A No, I cannot.

Q When you examined Mr. Thompson on the 29th of August, 1926, you have testified, I believe, that you diagnosed his condition as a cerebral hemorrhage due to a trauma or blow or violence or an accident; did you not? A Yes,
40 sir.

Charles T. Decker, re-cross.

Q Now, when you examined him you not only took the objective symptoms—that is what you can see, and his systolic blood pressure, and I suppose his heart action, etc.—but you also took from him a history of the case, didn't you? A Yes, sir.

Q You got from him a statement of what
10 had happened? A Yes, sir.

Q And he told you that he had hit his head against a plank or some object? A Yes, sir.

Q Now, doctor, unless you had had that history from Mr. Thompson of what had happened to him, you couldn't have told whether that cerebral hemorrhage came from a trauma or accident or whether it came from natural causes, could you? A In his case he had a contusion on his forehead to corroborate the statement. If he
20 hadn't had a contusion, I couldn't have told.

Q All right. Well, now, we will take your statement of the contusion. Now, please just listen to this. Even taking into consideration the contusion, unless Mr. Thompson had told you how he had been hurt you couldn't have told with any degree of certainty, any reasonable degree of certainty, whether this cerebral hemorrhage that you say existed came from an accident, that is a blow, or came from natural causes, could you? A
30 No, sir.

Q That is, the symptoms are practically the same? A Yes.

Q Whether they come from an accident or whether they come from disease? A Yes, sir.

Q Now, doctor, when you examined him you knew that he had already had two cerebral hemorrhages? A Yes, sir.

Q That is, these two strokes. And you found this third cerebral hemorrhage when you examined him? A Yes, sir.
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Charles T. Decker, re-cross.

Q Now, without this history that you got from Mr. Thompson as to how he said this accident occurred, and the bumping of his head, you would have assumed that this third cerebral hemorrhage came from disease rather than a blow and was the thing to be expected after two previous cerebral hemorrhages, would you not? 10

Mr. Merrill: If the Court please, I do not think that that is pertinent in a case where the doctor has testified to a given state of facts, to ask what might have been if another state of facts had existed.

(Last question read by stenographer.)

The Court: It is a perfectly proper question. I will admit it. 20

Q And the thing naturally to be looked for after two previous cerebral hemorrhages.

Mr. Merrill: I ask for an exception, if the Court please.

The Court: Yes, you may have that.

The doctor is simply asked this: If it had not been for what this man told you and the contusion which you found on his head, would you not, as a doctor, have concluded that the third cerebral hemorrhage was something to be naturally expected because there had been two previous cerebral hemorrhages? Is that it? 30

Mr. Tomlinson: I will let it go that way and then one further question and I am through.

A Yes, sir. 40

Thomas R. Crumley, direct.

Q And even with this contusion on his forehead, if he had not shown you that you would have concluded that the third cerebral hemorrhage was from the same cause as the two previous ones, wouldn't you, doctor? A Yes.

Q That is, from disease? A Yes, sir. 10

THOMAS R. CRUMLEY, a witness produced on behalf of the plaintiff, being duly sworn according to law, on his oath saith:

Direct examination by Mr. Merrill.

Q Where do you reside, Mr. Crumley? A Cranford, New Jersey. 20

Q What is your occupation? A I am president of the General Engineering and Management Corporation.

Q What sort of work does that corporation do? A It operates and manages public utility companies and does engineering construction work for them.

Q Are you acquainted with Mr. Thompson, the plaintiff in this case? A Yes, sir.

Q How long have you known him? A I have known him since 1908. 30

Q He has done work for your corporation? A Yes, sir.

Q Prior to August 27, 1927, when or approximately when was the last time you saw Mr. Thompson? A Why it was sometime after the middle of the month.

Q What was the occasion of your seeing him at that time? A I asked Mr. Thompson to come down to my house in Cranford to meet our chief engineer, and at that time we offered Mr. 40

Samuel B. Thompson, direct.

Thompson the position and he accepted it at that time.

Q At what salary? A Salary at \$12,000 a year with expenses.

10 Q Is there any work in particular that that had to do with? A Yes, sir. It was supervising some engineering construction work in Florida and Georgia.

Q How long did you anticipate that that work might take? A Why, from two to three years.

Mr. Merrill: Cross examine.

Cross examination by Mr. Tomlinson.

20 Q How long did you say you had known Mr. Thompson? A Since 1908.

Q Where do you live? A Cranford, New Jersey.

Mr. Merrill: If the Court please, by consent of counsel Mr. Thompson's deposition was taken out of court, and as he is not able to be here today the deposition will be read.

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SAMUEL B. THOMPSON, the plaintiff, being duly sworn according to law, on his oath saith:

(The deposition of Mr. Thompson was read as follows:)

Direct examination by Mr. Merrill.

40 Q Mr. Thompson, do you recall entering the women's waiting room on the westbound side of

Samuel B. Thompson, cross.

the Central Railroad Station at Fanwood, New Jersey, on Friday, August 27, 1926? A I do.

Q For what purpose did you enter the station? A I went in to get my morning paper.

10 Q How long have you been in the habit of going to the railroad station for your morning paper? A Some considerable time.

Q Weeks or years? A Do you mean since I have been living in Fanwood? I generally get the paper when I go to take the train to New York.

Q For how long a period have you been doing that? A Ever since I have been living in Fanwood.

20 Q How many years is that? A Twenty years.

Q When you went into the waiting room what did you do? A I walked over to the paper rack where the paper is generally put, to get the morning paper, and I got the paper. I went out as usual, out of the waiting room, and in stepping down, I came in contact with the plank that was across the door at that time, giving my head quite a severe shock.

Q Was the door opened or closed? A Opened.

30 Q Did you have any warning of this plank or obstruction across the doorway? A No, sir.

Mr. Tomlinson: Gentlemen, I will read the few questions that I put to Mr. Thompson.

Cross examination by Mr. Tomlinson.

Q As I understand it, Mr. Thompson, this station where you went to get your paper was on 40

Samuel B. Thompson, cross.

the westbound side; is that correct, sir? A Yes, sir.

Q And the portion of the station building where you were, or where you went to get the paper, is on the east side of that station building? That is, it is towards Jersey City? A Yes, sir. 10

Q And the door through which you were coming when your head came in contact with this plank—is that the door on the north side or the south side of the station building? When I say south, I mean next to the track, and when I say north I mean farther away from the track on the side where you go in going to New York. The station where you were injured is the station that one uses going away from New York? A Yes, sir. 20

Q And the door of the station through which you were coming when you came in contact with this plank—is that the door nearest to the tracks or farther away from the tracks? A When I went out—I can answer that in a little different way. As I remember the station, I walked out into the women's waiting room door and in stepping down onto the platform there was a plank across the doorway, so that when I stepped down and my body went forward, it came in contact with the plank which struck me across the forehead. 30

Q As you were going out of this door, were you going towards the tracks or away from the tracks? A Towards the tracks.

Q When you went down there that morning, Mr. Thompson, your purpose was to get a newspaper? A Yes, sir.

Q You weren't going to take a train? A No, sir. 40

Claudia Thompson, direct.

Q What door did you use when you entered the station? A I went into the women's waiting room door.

Q Was it the same door that you used to go out, or a different door? A A different door.

Q Can you tell us what time of day it was? A Between 9:30 and 10 o'clock. 10

Q What sort of a day was it? Do you recollect? A clear day or rainy day? A I think it was a clear day.

Q The door that you used to enter the station—was that door opened or closed, do you recollect? A Opened.

CLAUDIA THOMPSON, a witness produced on behalf of the plaintiff, being duly sworn according to law, on her oath saith: 20

Direct examination by Mr. Merrill.

Q Mrs. Thompson, you are the wife of the plaintiff, Samuel B. Thompson? A Yes.

Q Where do you reside? A In Fanwood.

Q What was Mr. Thompson's age in August, 1926? A Fifty-seven. 30

Q What is Mr. Thompson's occupation? A Consulting engineer.

Q What kind of work? Mechanical, civil, electrical? A Mechanical and electrical.

Q Mr. Thompson testified that on the morning of August 27th he went to the railroad station of Fanwood for his morning paper. Do you recall his returning home on that day? A Yes.

Q Did he come alone or with someone? A He came back with Mr. Earl. 40

Claudia Thompson, direct.

Q What was his condition when he arrived home? A He was in a dazed condition.

Q State briefly to the jury what he did after he came home that day and in a general way the subsequent history of his case. A He laid
10 down on the couch and he complained of feeling very badly.

Q What has been his condition, more or less, from, we will say week to week, since that time? A He has been very sick.

Q Has he been confined to the house? A No, not confined to the house. He doesn't go into the city. He doesn't go to business.

Q When he goes out, does he go out alone or with someone? A No, I am generally with him,
20 or I always have someone to go with him.

By the Court.

Q Just go on and tell us, for instance, how you go out with him. A Oh, he walks very slowly and I always have to accommodate my pace to his.

By Mr. Merrill.

Q You have to watch him as he goes up or
30 down stairs, or not? A Yes.

By the Court.

Q Just tell the jury, madam, what you have observed so far as his physical condition is concerned, and his physical appearance is concerned, that is different from what it was before this particular date. A Well, I find that he is very uncertain and that I don't feel that it is
40 safe for him to go out alone, and I always—

Claudia Thompson, direct.

Q But what does he do? Not what you think, because that can't be answered, what you think. A He seems to be so uncertain.

Q Why do you think he seems to be so uncertain? What does he do? What do you see about his motions that makes you conclude as you already have concluded, that he seems to be un-
10 certain? A Well, he starts forward without looking where he is going, and I am always afraid that he will be knocked down.

Q Mrs. Thompson, we will go back to the original question, and will you try to state briefly what you have observed as to Mr. Thompson?

By the Court.

Q Mrs. Thompson, will you listen to me a
20 minute. You may think this hard, but this is not our rule that we made, but it is the result of the experience of ages in the trial of these cases. These rules of evidence say that in a case like this, for example, you cannot say anything that your husband told you. That would be hearsay. You cannot give your opinion because you are not a doctor, as to his physical condition. But it seems to me that you, being the wife, can very readily tell the jury the different things that you found in the conduct and the deportment and
30 general demeanor of your husband since this accident, this alleged accident, which are different from what they were before that accident. Just give facts, and what you saw, and just avoid expressing your own opinion, your own feelings, and don't give us anything that your good husband said to you. Just give us his conduct. That is what the jury want and that is all we are allowed to permit you to tell the jury. Just take your time about it. A He is absolutely different
40 than what he was.

Claudia Thompson, direct.

Q Now, in what respects is he different? A He was always very exact in everything that he said and did, and now he is not. His memory is very bad. He doesn't remember the things that he has said or that he has done, and he can't do any of the things that he did formerly.

10 Q Now, what were the things that he did formerly that he can't do now? You see you have made a general statement, madam, and that amounts to nothing in law. A He used to do so many things for me in the house that he can't do now.

Q What were those things? A If I wanted to have a screw put in he would do it for me, but he can't do that now.

20 Q Why do you say he can't do it? Has he tried to do it? A Yes. I have asked him to do it, and he has told me—he has started and he has said, "I am sorry I can't do that."

By Mr. Merrill.

Q Did he formerly do any work around the lawn or garden? A A little. Never did very much.

30 Q Does he or does he not do any work around the lawn and garden now? A No.

Q When Mr. Thompson went out did he have a hat? A Yes, he was wearing a straw hat, soft straw with a broad brim.

Q What, as you observed it, was Mr. Thompson's general physical and mental condition on the morning of the 27th prior to his going to the station? A I thought he was very good.

40 Q Did you or did you not see anything unusual or abnormal about it? A Before he went to the station? No.

Claudia Thompson, direct.

Q Had you or had you not observed anything unusual or abnormal in his condition subsequent to the previous June? A Well, he was practically normal up until that time.

(Last answer read by stenographer.)

A I mean until August, you know. I thought that is what you asked me. 10

By the Court.

Q Why do you say "practically normal," madam? A Well, he hadn't been well, and when the doctor came to see him in June he said to him that, "I think that you are practically normal."

Mr. Tomlinson: I object to anything that the doctor said. I don't think that is proper. 20

The Court: I have told this lady.

Mr. Tomlinson: I move to strike it out.

The Court: It is stricken out.

By Mr. Merrill.

Q Do you know Mr. Staples, George H. Staples? A Yes.

Q Is he here now? 30

Mr. Tomlinson: Mr. Staples is in the court room. I will concede that.

A Yes.

Q Did Mr. Staples have any conversation with you concerning the accident? A Yes.

Mr. Tomlinson: I object to that. I don't object to her saying yes or no if she is cautioned against saying anything further. I 40

Claudia Thompson, direct.

don't object to a yes or no answer, but I do object to any conversation which she says Mr. Staples had with her.

Q Mr. Staples has what position, if you know, with the Central Railroad? A Yes, he is
10 a ticket agent.

Mr. Tomlinson: To shorten the controversy I will admit that Mr. Staples is now and was at the time of the accident the agent employed by the Central Railroad Company at Fanwood. The purpose of this question is obvious and I want to cut off any chance of this witness answering before I have a chance to object. I object to any conversation which this lady says she had with
20 Mr. Staples.

Mr. Merrill: If the Court please, this is a corporation, and we have here the agent of that corporation. He is present. He can deny the alleged conversation if there was one, and I think he being the agent of the corporation, and it being a corporation, he is in effect a party, and the conversation is admissible.

Mr. Tomlinson: If the Court please, of course, he is not the party to this suit. He is an employee, and Mr. Merrill has evidently overlooked the decision of the Court of Errors and Appeals in the case of *Blackman v. West Jersey and Seashore Railroad*, 68 New Jersey Law, page one, where the Court of Errors held that an employee of a corporation cannot bind a corporation by any statements which he has made or is alleged to have made.
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Claudia Thompson, cross.

(Argument.)

Mr. Merrill: If the Court please, may I write it out for your inspection?

The Court: Yes, please do that.

(At the side bar and not in the hearing of the jury the following question was put by Mr. Merrill: Q. Did Mr. Staples make a statement to you concerning the placing of a flag on this plank after the accident?)
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Mr. Tomlinson: Objected to.

The Court: Objection sustained.

Mr. Merrill: Exception.

Cross examination by Mr. Tomlinson.

Q I have just two questions, Mrs. Thompson. On this morning of the accident, Mrs. Thompson, you said that you saw Mr. Thompson start out from the house, did you not? A Yes.
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Q And he had on a Panama hat? A Well, it wasn't a Panama, but it was a soft straw. I don't know the name of it.

Q A soft straw hat? A Yes.

Q It wasn't one of those soft brimmed hats? A No.

Q And when he came home, he came with Mr. Earl? A Yes.
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Q And he was walking home with Mr. Earl, was he not? A Yes.

Robert N. Earl, direct.

ROBERT N. EARL, a witness produced on behalf of the plaintiff, being duly sworn according to law, on his oath saith:

Direct examination by Mr. Merrill.

10 Q Do you recall the morning of August 27, 1926? A I do.

Q What were you doing around 9:30 or 10 o'clock that morning? A I was walking out with Mr. Thompson to the depot and post office, as is my habit.

Q Where did you go with Mr. Thompson? A I went towards the post office, toward the depot.

Q Did you reach the depot? A We did.

20 Q What did you do when you got to the depot? A I proceeded to the left, rather the southeast corner, and stopped at the corner.

Q The southeast corner is the one nearest the railroad tracks? A Nearest the railroad track.

Q Where did Mr. Thompson go? A Mr. Thompson left me at the corner to go in through the door at the ladies' waiting room for his paper.

30 Q After you went around on the side of the station, was that on the side, or was it not, where the accident was? A It was out on the New York end in front of the newsstand.

Q Did you go beyond the farther corner of the station? A A little beyond it.

Q Then what did you do? A Then I turned around and waited for Mr. Thompson with that intention of meeting him at that time.

40 Q What, if anything, did you see of Mr. Thompson? A When I saw Mr. Thompson he was in a crouched position under a plank, reaching up near the door.

Robert N. Earl, direct.

Q What did you then do? A I went to his assistance.

Q Did anyone else come to his assistance? A No.

Q What seemed to be his condition as you found him crouching under this plank? A 10 Rather dazed, but conscious and standing in a crouched position.

Q Did you see anyone around the station at that time? A Not that I recollect of.

Q Did you see or did you not see any warning or flag or anything of that nature on or around this plank?

Mr. Tomlinson: I object to that as too conjectural. He says "warning." That calls for a conclusion. 20

The Court: Yes, reframe that question. Strike out the question.

By the Court.

Q What did you see? A I saw a plank across the doorway.

Q Did you see anything about the plank? A Not a thing except the plank and the rest it was placed on, your Honor.

30 Q I do not get that clearly in my head about the plank, that is, about how it is laid out. Now, Mr. Earl, assume that is the door you have been speaking about. Will you go down there and indicate to the jury just about where the plank that we have been listening about was? A Your Honor, is this supposed to be the railroad side?

40 Q Whatever the doorway was at which this alleged accident occurred. A Oh, I see. The front of the door, on the platform, facing the track, was a plank across the doorway. I hadn't

Robert N. Earl, cross.

measured it. I couldn't tell you the exact figure, but it was across the plank, resting on two uprights.

Q Where were the uprights? A They were on each side of the door.

10 Q How far away was the plank from the door itself? A It was close. I didn't measure it, but in such a position as a painter would place it for painting.

Q And those uprights—what kind of base did they have? A I am not sure about that. It might have been what is called horses by carpenters, or it might have been ladders. I am not positive of that, but I do know the plank was put across the top and across the doorway.

20 Q About how high was the plank? A I didn't measure, but I judge it was about somewhere a little more or a little less than five feet at a rough guess, but that would only be problematical.

Q How big was that plank? A I should say it was about two by ten.

Mr. Merrill: Cross examine.

30 *Cross examination by Mr. Tomlinson.*

Q Now, Mr. Earl, you said that this plank was two by ten. What do you mean by that? A What is commonly known in lumber as an article that is two inches thick, I should say, by ten inches wide.

Q So that the plank was about two inches in thickness? A Yes, sir.

40 Q As you faced the plank, you faced a thickness of about two inches of plank; is that what you mean? A Yes, sir.

Robert N. Earl, cross.

Q Now, how long had you known Mr. Thompson? A More or less intimately for five years, I would say.

Q And you often walked down to the station with Mr. Thompson, didn't you? A Quite frequently.

10 Q Where did you meet Mr. Thompson on the morning of this accident? A I stopped at his house.

Q And then the two of you came down? A Yes, sir.

Q You didn't see Mr. Thompson go into the station, did you? A That would have been impossible, as I was going around the corner.

Q I say, you didn't see him? A I didn't see him go in the door.

20 Q Now, this plank that you have spoken of, Mr. Earl, that wasn't right across the doorway, was it? A It was outside the doorway.

Q It wasn't right across the doorway forming a bar? A May I show you?

Q Mr. Merrill has asked you some questions. I would just like to ask you just a few, Mr. Earl. A Do you mean between what is known as the door jamb, or directly against the door?

30 Q Yes. A I would say it was outside of the door sides.

Q It wasn't fastened in the door jambs? A No, sir.

Q It was outside? A Outside.

Q Resting on something? A Resting on something.

Q About five feet out, wasn't it? A Nearer than that.

40 Q Are you sure about that? A From where I stood I can only say it was close to the door.

Robert N. Earl, cross.

Q Are you sure, Mr. Earl, that it was any closer than five feet? A I didn't measure it.

Q You aren't sure, are you? A I couldn't give you the distance.

Q So that you can't say, can you, Mr. Earl, on your oath, that that was any closer than five feet? A Well, if I can locate the plank from where I was standing, I think I could convince you that it wasn't five feet.

Q Of course, that is not the question of whether you can convince me. It is a question of whether you can convince the jury. A Well, convince the jury, I beg your pardon.

Q You aren't sure, are you, whether it was any closer than five feet, or whether it was not? A No more sure than I know what my weight is today.

Q All right, sir. But you say that the plank was about five feet from the door? A I hadn't measured it, but I would judge that. It might have been a little more, possibly a little less.

Q Mr. Thompson was wearing a straw hat that morning? A He was wearing a straw hat that morning.

Q You were wearing a cap that morning? A I?

Q Yes. A I don't wear a cap very often, no, sir.

Q Of course, I can't ask you what you ordinarily do. I am asking whether or not on this morning you were wearing a cap? A I don't know whether I had a cap on or I had a hat, but I am quite sure it was a cap.

Q Were you wearing knickerbockers? A I am quite sure I was. I sometimes wear them.

Q This plank was on two "V" shaped ladders, wasn't it? A It was on supports or up-

Robert N. Earl, cross.

rights. I am not positive whether they were the horses or ladders. They might have been one or the other. That I couldn't positively state.

Q You had seen them painting around there for several days before the accident, hadn't you, around the station? A Well, the painting had been going on around the station for probably a week or ten days or longer. I don't really know.

Q And this ladder was placed for the obvious purpose of being used as a scaffold, wasn't it, so the painters could stand on it? A I should judge it was.

By the Court.

Q And the plank was outside and not inside?

A Sir?

Q The plank was outside the building, not inside? A It was outside the building, yes, sir.

By Mr. Tomlinson.

Q Where were you standing when you first saw Mr. Thompson with his head down, as you say? A On the southeasterly side or corner of the platform is when I had turned to look for him to come out.

Q I show you a photograph, which I ask to have marked for identification.

(Photograph marked Exhibit D. 1.)

Q (Continuing.) And ask you if that does not correctly represent the ladders and the supports and the approximate position of the ladder and the supports. A I would think that that ladder was farther out than when I saw it.

Q Well, how much farther? A Well, considerably farther out.

Robert N. Earl, cross.

Q You didn't make any measurements, did you? A No, sir. You asked my opinion.

Q I am asking you whether it does, or it does not, if you can say? A I can't say. I am not just positive. I didn't measure it, but that wasn't in the line of vision with this little—

10

Q I am not asking you anything about the line of vision, sir. Can you say whether or not they are the pipes or supports on which this ladder was placed? A I would say it was that or similar supports.

The Court: Suppose you show that to Mr. Merrill. He may agree to its admission. It will help the jury to get a picture.

20

Mr. Merrill: I must object to its going in evidence at this time unless it is merely to show the plank and the supports that were used, but not to show the position at that time.

The Court: Well, suppose it is understood by the jury that it is not evidence as to just where the plank was at that time. That is to be subsequently proved, if it becomes necessary to prove it. It is just simply as a general illustration of the physical situation there.

30

Mr. Merrill: That is not objected to.

Mr. Tomlinson: That it is to go in with the understanding that it is not to be taken as proof of the position of the supports at the time of the accident.

The Court: Yes.

Mr. Tomlinson: We will prove that later if we have to.

40

Robert N. Earl, cross.

The Court: My point is that the jury should have this as it will enable them to so much more easily follow the evidence.

(Photograph heretofore marked Exhibit D. 1 for identification entered in evidence and marked Exhibit D. 1.)

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The Court: In other words, this is generally illustrative, and that is all. It is admitted by consent for that purpose and that purpose alone.

Mr. Tomlinson: Now, I would like to have another photograph marked for identification.

Mr. Merrill: I am willing that that should go in.

The Court: For the same general purposes, for purposes of general illustration, yes.

20

(Photograph entered in evidence and marked Exhibit D. 2.)

The Court: These all were taken, Mr. Tomlinson, much later than the day of the accident?

Mr. Tomlinson: Yes, sir. Taken some time after the accident.

The Court: Of course the planking had been moved from where it was.

30

Mr. Tomlinson: Oh, yes. I didn't try to say for one minute that we had these pictures taken before they were moved.

The Court: The jury understand these pictures are simply general pictures of the situation and that the location of the planking as indicated on the different pictures is not proof of what the location was upon the

40

Robert N. Earl, cross.

day of the accident. That is something that must be further evidence of.

Mr. Tomlinson: I intend to prove, if the Court please, later on, if it becomes necessary to put in a defense, that the ladder was in identically the same position.

10 Mr. Merrill: Subject to that qualification and that it is not the fact as shown, there is no objection to their going in.

The Court: They are simply illustrations. That is all.

(Photographs entered in evidence and marked Exhibits D. 3, D. 4, D. 5, D. 6, D. 7, D. 8, D. 9, D. 10, D. 11, D. 12, D. 13 and D. 14.)

20 Mr. Tomlinson: May it please the Court, it is stipulated that Mr. Thompson's height at the time of the accident was five feet, nine inches.

By Mr. Tomlinson.

Q Mr. Earl, I ask you to look at this picture, Exhibit No. D. 2. That photograph is facing into the station from the south side, isn't it, Mr. Earl? A I should judge it was.

30 Q And the north door is shown in the photograph, isn't it? A Yes, sir.

Q As well as the south door? A Yes, sir.

Q Now, Mr. Earl, I direct your attention to the plank as shown in the photograph, and ask you if that fairly represents the plank, to the best of your knowledge, that was there that day?

A Yes, to my best recollection, that is correct.

Q After the accident, you walked home with Mr. Thompson, did you not? A I did, yes, sir.

40

George T. Banker, direct.

GEORGE T. BANKER, a witness produced on behalf of the plaintiff, being duly sworn according to law, on his oath saith:

Direct examination by Mr. Merrill.

Q What is your occupation, Dr. Banker? A 10
Physician.

Q A graduate of what institution? A Cor-
nell University.

Q Where do you practice? A In Elizabeth.

Q For how long a time have you practiced here? A About fifteen years.

Q Are you connected with any hospital? A
With the Elizabeth General Hospital.

Q Have you examined Mr. Thompson, the
plaintiff in this action? A I did. 20

Q When? A That was on May 2nd last.

Q What did you find his then condition to be?
A I found him suffering from a form of paraly-
sis.

Q Will you please go into further details as
to his condition? A He is able to be about, and
as near as I could—there was at that time no
interference with the motion of his hands, arms,
or legs, but he did present an inability to concen-
trate when I saw him. He had a memory spell 30
when he paused, and couldn't carry on his idea.

Q You inquired concerning Mr. Thompson's
history? A I did.

Q Assuming that Mr. Thompson had had a
stroke in December, 1925, that he had had a recur-
rence of that condition in March, 1926, that in
June, 1926, he had apparently fully recovered,
that there had been no recurrence of those con-
ditions from June until August 27th or 29th, 1926,
that on August 27th he had received a blow 40

George T. Banker, direct.

on his head, that prior to the receipt of the blow
on his head there had been no unusual or ab-
normal symptoms immediately prior, that im-
mediately following, two days later, there were
evidences of a ruptured blood vessel with the
10 accompaniments of dizziness, affection of the
eyesight, inability to concentrate, and certain
lack of control over his movements of his left
side, and that condition has more or less con-
tinued since that time; what would you say was
the proximate cause of the condition found on
August 29th?

Mr. Tomlinson: I object to that as not
embodying the additional and primary
factor of the mastoid, double mastoiditis.

20 Mr. Merrill: I don't think that is neces-
sary, if the Court please, because the mas-
toiditis is caused by an infection and it has
no necessary connection whatever.

The Court: Well, give the doctor every-
thing that was the matter with the man as
testified to, if you want his opinion.

Mr. Merrill: Well, I will add that and
otherwise leave the question unmodified.

30 The Court: What are you telling the
doctor about mastoiditis?

Mr. Merrill: I am stating that in October,
1925, he had had an operation for mastoid-
itis, a double operation, from which he had
apparently fully recovered.

A The condition which the patient had at that
time could have been produced by the accident,
or it could have been produced by the same
40 factors which gave him the stroke twice pre-
viously.

George T. Banker, direct.

Q In your opinion, in this case which was the
proximate cause? A The symptoms which the
patient presents would not be due to the thing
which produced them. In other words, symptoms
are due to the area of the brain involved, and
there would be nothing about the symptoms that
would tell one whether it was due to the injury 10
or whether it might have been due to disease of
the blood vessels.

Q Is the effect of a blow on the head limited
to any particular part of the brain? A No, the
effect may be felt in any part of the brain.

Q May that effect be felt without any rupture
or breaking or fracture of the skull itself? A
It may.

Q In your opinion, could Mr. Thompson's
condition on the 29th have followed naturally and 20
proximately from the blow he received?

Mr. Tomlinson: Objected to. It is not the
question of whether it could have.

The Court: What was the probable cause
of the condition? That is the question.
When you ask what was the proximate cause,
the doctor has already testified that it may be
one of two causes. How, therefore, can he
say what was the proximate or immediately 30
effective cause when he has already stated
it may have been due to two reasons? He
may be asked what was the probable cause of
this condition, the present condition of the
man, the condition that this man was in after
this accident.

The Witness: I would say very likely due
to the accident.

George T. Banker, direct.

By the Court.

Q What, in your opinion, was the probable cause of the man's condition after this accident?

A I would be inclined to think that the accident had something to do with it.

10 Q "Something to do with it." What do you mean by "something to do with it"? What was the probable cause of that man's condition as it was after this accident? That is the question, doctor. A May I explain that?

20 Q Yes. A The injury to the head could have produced exactly the picture which the patient presented, the paralysis and the subsequent course. It may also have been produced by a spontaneous, so-called, stroke, which are of three kinds. The likelihood of the patient's having a stroke following that accident are no greater than the likelihood of his having a stroke at any time, so that I would say that the probable cause was the injury where the symptoms follow immediately after that injury.

By Mr. Merrill.

30 Q At the time you examined Mr. Thompson were or were not the symptoms he exhibited such as might have been exhibited by a previously healthy person following such a head injury?

Mr. Tomlinson: I object to that.

The Court: I think I will allow that.

Mr. Tomlinson: Exception.

A Mr. Thompson's condition could have been produced by an accident in a perfectly healthy individual.

40 Mr. Merrill: Cross examine.

George T. Banker, cross.

Cross examination by Mr. Tomlinson.

Q Dr. Banker, you say that when you examined Mr. Thompson on the— When was it? A Second of May.

Q May 2, 1927? A 1927.

10 Q You found him suffering from what we commonly call stroke, is that right? A From the late effects of what would commonly be called a stroke.

Q In other words, the stroke had partially cleared up? A Yes.

Q And the stroke which brought about the effects that you found could have been caused by a trauma or an accident, or could have been brought about by natural causes? A Yes.

20 Q As a result of a previous trouble, is that true, doctor? A Yes.

30 Q And you can't exclude, can you, Dr. Banker, the idea or the possibility that Mr. Thompson's condition when you examined him was due or might have been due to natural causes and not to an accident? A There is no way of examining a patient who presents evidence of disease of the brain and telling what that disease is because the symptoms of it are due to the location of the brain involved, and not to the nature of that involvement.

Q Well, then, can you answer my question, doctor, yes or no? Will you read it please?

(Previous question read by stenographer.)

A No, I couldn't exclude it.

40 Q Now, Dr. Banker, the symptoms following a stroke that has brought about an accident are the same, are they not, as those which follow a

George T. Banker, cross.

stroke brought about by disease? A They may be the same.

Q Aren't they usually the same? A The symptoms of that injury would depend upon the area of the brain involved.

10 Q But aren't they generally the same? A No, I wouldn't say so.

Q Well, if you are called upon to examine a patient who has suffered a stroke without any history of how the accident happened, isn't it a fact that you are unable to ascertain from your examination whether that stroke was brought about by a blow or an accident, or whether it was brought about by disease? Don't you have to rely upon the history of the patient? A Upon the history, yes.

20 Q And the objective symptoms themselves don't tell you, do they? A No.

Q Now, a person who has had a stroke has good reason to look for another, hasn't he? A It depends upon what you mean by a stroke.

30 Q Well, what is a stroke? A What is commonly called a stroke is produced in one of three ways. There may be an actual rupture of a blood vessel in the brain. There may be a disease of the blood vessel, a narrowing of the artery so that that portion of the brain does not get a sufficient circulation and it causes disturbances of function in that part of the brain. Then there may be a foreign body, an embolus get loose in the circulation and be carried to the brain, plugging a vessel which supplies a certain part of the brain.

40 Q Could you tell which of these kinds of strokes it was that Mr. Thompson had? A Could I tell now?

George T. Banker, cross.

Q The last stroke, yes. I mean are you able to say? You say there are three kinds of strokes. You say that on May 2nd when you examined Mr. Thompson you found him suffering from effects or results of a stroke. Now are you able to say now with any reasonable probability— A 10 Did you say I had said he was suffering from the late effects of a stroke?

Q Isn't that what you said? A No. I said he was suffering from a form of paralysis.

Q What is the difference between them? A Paralysis is at times the result of a stroke, and may be the result of something else.

Q As a rule paralysis is brought about by a stroke? A Not necessarily.

Q What is that? A No.

Q Not necessarily? A Not necessarily. 20

Q I didn't say "not necessarily." I said what is the rule on that? Isn't it a fact that generally a paralysis is brought about by a stroke? A I would say not.

Q Take an individual who has not had an accident and suffers a paralysis in the latter part of 1926, and in 1927, in March, 1927, that same individual, still without an accident, suffers a second paralysis, wouldn't you say that those two paralytic attacks were brought about by 30 strokes? A In that case, yes.

Q Now, isn't it a fact that a person who has had a paralytic stroke may well look for the second? A They are very apt to have others; yes, sir.

Q And if they have the second stroke, then isn't it quite the common thing for them to have the third stroke? A Not necessarily.

Q Isn't it a common thing? I didn't ask you "necessarily," Dr. Banker. I asked you 40

George T. Banker, cross.

whether it is not a common thing for a person who has had two strokes to have the third stroke?
A Yes. Their having had one stroke points to some disease there which may be progressive.

Q And then they have the second stroke. You, as a careful doctor of medicine, in a situation of that kind, don't you anticipate at least the possibility that there may be a third stroke? A Yes.

Q Now, doctor, I wish you would listen to this question: Assume that a man fifty-eight years old had in October, 1925, an operation for double mastoiditis, and that for some time after the operation he was unable to go to his office in New York. Assume that in December of 1925, the same year, he sustained an attack of cerebral apoplexy or a cerebral hemorrhage, and that in the following March, that is March of 1926, he had a second cerebral hemorrhage. Now, assume further that on August 27, 1926, he sustained a blow on the head which was not followed either by complete or partial unconsciousness, and that he was able to walk from the station at Fanwood where he sustained this blow to his house, some distance away, and wasn't unconscious after reaching his house, and wasn't unconscious at any time thereafter. Assume further that several days after this accident, on August 27, 1926, he had a third cerebral hemorrhage. Now, assuming all of those things, wouldn't you say as an experienced practitioner of medicine that this third hemorrhage was a natural consequence of a disease of the cerebral vessels, which had been in existence for a long time?

Mr. Merrill: I object to the question in that form because it appears that cerebral hemorrhages may be caused from a number

Stewart L. Pach, direct.

of reasons. There may be succeeding hemorrhages from wholly separate and dissociated causes which have no necessary relation one with the other.

The Court: Is there anything in this question that has not been brought out in evidence? 10

Mr. Tomlinson: I don't know of a single thing.

The Court: Objection overruled. You may take an exception.

(Last question read by stenographer.)

A No, I would not. I would not feel that I was justified in ruling out the possibility of an accident as producing that condition.

Q You wouldn't be willing to say, or you wouldn't say, would you, Dr. Banker, that an accident that had followed the mastoid, that had followed the first stroke, that had followed the second stroke, was necessarily the cause of the third? A Not necessarily, no. 20

Mr. Tomlinson: That is all, doctor.

Mr. Merrill: Plaintiff rests.

30

DEFENDANT'S CASE.

STEWART L. PACH, a witness produced on behalf of the defendant, being duly sworn according to law, on his oath saith:

Direct examination by Mr. Tomlinson.

Q Mr. Pach, where do you live? A Plainfield, New Jersey. 40

Stewart L. Pach, direct.

Q What is your occupation? A Civil engineer.

Q How long have you been a civil engineer?

A Seventeen years.

Q Are you connected with the office of the chief engineer of the Central Railroad Company?

10 A Yes, sir.

Q In the capacity of civil engineer for the Central Railroad Company, have you been connected with the Fanwood station? A Yes, sir, I have.

Q For how long a period? A About fifteen years.

Q Now, subsequent to the date of this accident did you make a survey of the station at Fanwood for the purpose of preparing a map?

20 A I did; yes, sir.

Q On what date was that survey made? A March 5, 1927.

Q Are you able to say whether or not the conditions at that time were the same as on August 27, 1926? A They were the same; yes, sir.

Q Will you produce the map, please? A Yes, sir.

30 Mr. Tomlinson: May I have the map marked for identification, please?

(Map marked Exhibit D. 15 for identification.)

Q Now, Mr. Pach, on that map have you portrayed a scaffold consisting of two ladders and a plank? A Yes, sir, I have.

40 Q Now, will you kindly tell us where you got the information? Now, don't give us the conversation, but tell us where you got the informa-

Arthur Chippendale, direct.

tion as a result of which you located the ladders and the plank in the position in which you have located them on that map. A Yes, sir. The foreman painter Chippendale placed the scaffold—

Mr. Merrill: I object to that.

10

The Court: Have you got the foreman?

Mr. Tomlinson: I am going to call him.

The Court: Put him on the stand first.

ARTHUR CHIPPENDALE, a witness produced on behalf of the defendant, being duly sworn according to law, on his oath saith:

Direct examination by Mr. Tomlinson.

20

Q Mr. Chippendale, where do you live? A Plainfield, New Jersey.

Q You work for the Central Railroad Company? A Yes, sir.

Q In what capacity? A Foreman painter.

Q Do you remember the 27th of August, 1926, when Mr. Thompson met with an accident at the Fanwood station? A I do.

30

Q Were you doing anything at the Fanwood station that day? A Was painting the exterior and the interior.

Q Who was in charge of the job? A I was.

Q Did you see Mr. Thompson immediately after the accident? A Yes.

Q Where was he when you saw him? A On the outside of the plank towards the track.

Q On the outside of the plank towards the track. How was this plank placed? On what

40

Arthur Chippendale, cross.

was it placed? A Two sections of ladder makes a horse. Was on two horses, sixteen-foot plank.

Q Did you note the position of the ladders or horses and the plank right after the accident? A Yes, sir.

10 Q Now, did you go out to the Fanwood station with Mr. Pach when he went out to make his survey? A Yes, sir.

Q What, if anything, did you do while you were out there with him on that day in regard to placing any scaffolds? A Why, we put the planks and the scaffolds up exactly as it was the morning when the man bumped his head.

Q And you did that in Mr. Pach's presence? A Yes, sir.

20 Q Was Mr. Pach there when you did it? A Yes, sir. I don't know his name.

Cross examination by Mr. Merrill.

Q Will you please indicate on the map where Mr. Thompson was when you first saw him?

Mr. Tomlinson: May I ask one question further? Do I understand the map has gone into evidence?

30 The Court: I allowed it in evidence.

(Map previously marked Exhibit D. 15 for identification entered in evidence and marked Exhibit D. 15.)

(Last question read by stenographer as follows: Q Will you please indicate on the map where Mr. Thompson was when you first saw him?)

40

Arthur Chippendale, cross.

By the Court.

Q First, was he standing up or was he lying down when you first saw him? A Yes, sir, standing up; standing up.

Q All right. Now, point out on the map, mark on the map where he was when you first saw him. A This here (indicating). 10

Q Now, you are going all over the lot there. How far away from the plank? A I should judge two feet, two or three feet.

Q What is your name? Chippendale? Mark with a "C" where you say Mr. Thompson was when you first saw him. Be careful, now. It is not so easy to mark a map accurately.

The Court: Marked with a "C." He says he is marking on the basis that that "C" is two feet south of the plank. 20

By Mr. Merrill.

Q What was Mr. Thompson's position when you first saw him there by the plank? A What was his position?

Q Yes. A Why, he stood up.

Q Standing up straight? A Yes.

Q Where were you standing when you observed him? A Towards the end of the news-stand. 30

Q Will you please indicate on the map where you were standing?

(The witness marks the map.)

The Court: He marks with another "C," but with a circle around it.

Q How long had you been standing there? A Why, I hadn't been standing there. 40

Arthur Chippendale, re-direct.

Q Where were you coming from? A From the park, from the end railing of the park.

Q When you saw Mr. Thompson standing there what, if anything, did you do? A Why, I didn't do anything. Mr. Staples called me over. I was at the park.

10 Q Where was Mr. Staples when he called you? A On the platform right about where that "C" with the ring around it.

Q Do you mean the first "C" or the second "C"? A No, the second "C."

The Court: The "C" with the ring around, he said.

The Witness: Right by the news stand.

20 Q Did you see anyone else with Mr. Thompson? A Yes, sir.

Q Who was with him? A I don't know his name. A tall man what was on the stand here.

Q Who testified? A Yes, sir.

Q Had you seen Mr. Thompson before you saw him outside of the plank? A Yes, sir.

Q Where did you see him before you saw him outside of the plank? A Walking down to the station with the tall gentleman what was there.

30 Q Had you seen him outside of the southerly side of the station before you saw him outside of the plank? A No.

Re-direct examination by Mr. Tomlinson.

Q Where were Mr. Thompson and Mr. Earl when you saw them before the accident, Mr. Chippendale? A Down the platform towards the new Union News stand.

40

Arthur Chippendale, re-direct.

Q Can you show on the map about where they were? A They were coming down this way, down by the cinder path. I had a man working here.

The Court: Never mind. You say they were coming down on the cinder path, indicating in a southerly direction. 10

Q Did you see them after they got by this corner here, the northeast corner of the station?

A Yes, sir. They were coming down.

Q What kind of hat did Mr. Thompson have on, if you noticed? A A straw hat.

Q How was the man who was with Mr. Thompson dressed? A Had a cap on and a pair of knickers.

Q Now, I show you some photographs, Mr. Chippendale, fourteen photographs, and ask you to look them over and tell us whether the two ladders and plank were in the same position right after the accident when you got there as they are on these photographs? A Yes, sir. It was exactly the same. 20

Q Were you present when those photographs were taken? A Yes, sir.

Q Did you see the man here that took them? A Yes, sir. 30

Q Will you point him out? A Right over there with glasses on.

Q The man with the rose in his coat? A Yes, sir.

Q Mr. Morris. Did you arrange those ladders and that plank for Mr. Morris so he could take the pictures? A We did.

Q And did he take the pictures while you were there? A Yes, sir.

Mr. Tomlinson: Cross examine. 40

Arthur Chippendale, re-cross.

Re-cross examination by Mr. Merrill.

Q The pictures were taken with a view to this suit? A We didn't know that. We had orders to go up.

10 Q You spoke of seeing Mr. Thompson and Mr. Earl coming down the cinder path to the east of the station? A Yes, sir.

Q Where were you at the time you first observed them? A Stood over by the park railing.

Q On the park side of the railing, or on the platform side of the railing? A Well, on the southeast corner going up towards the bridge.

20 Q Would you please look at the map and state whether you were on the park side of the railing or on the platform side? A On the board platform.

Q Did you watch Mr. Thompson and Mr. Earl as they came along? A Yes.

Q Did you observe them pass together around the corner toward the entrance to the women's waiting room? A No. They were passing that corner there when I saw them.

30 Q I didn't get that. A They was down, coming down the board platform, when I see them.

Q Did you watch them as they proceeded along? A Well, most decidedly.

Q Did you notice them when they had reached this easterly corner of the building? A No.

Q What called your attention away from them at that time? A Why, I had a man ask me a question.

40 Q Do you know where they were after passing the easterly corner of the building? A No, I don't.

Arthur Chippendale, re-cross.

Q What next called your attention to them?

A Why, on account of the man claiming he bumped his head on the plank. That was my next attention.

10 Q Do you mean that Mr. Thompson called your attention to the accident? A No. The agent called by attention.

Q Where was the agent when he called your attention to it? A Stood by Mr. Thompson and Mr. Earl.

Q There by the plank? A On the outside of the plank.

Q Mr. Staples was on the outside of the plank? A I said Mr. Thompson was outside of the plank.

20 Q Where was Mr. Staples when he called your attention? A At the corner.

Q Was that the first time you saw Mr. Staples?

Mr. Tomlinson: I object to that.

Q (Continuing.) When he spoke to you from the easterly corner of the building? A No, sir. I seen him the first thing in the morning.

30 Q When had you last seen Mr. Staples immediately before he spoke to you standing by the easterly corner of the building? A Well, that is a hard question to ask. I was walking around the station quite some.

Q Was it sometime before? A No.

Q Shortly before? A Shortly before.

Q But it was before you had seen either Mr. Thompson or Mr. Earl coming up the cinder path? A I saw him early in the morning.

40 Q What did you do immediately after Mr. Staples called you? A What did I do, sir?

Arthur Chippendale, re-cross.

Q (Last question read by stenographer.) A I asked Mr. Thompson if he was hurt.

Q From where you were standing? A Yes, sir.

Q You didn't walk over to him? A Why, surely.

10 Q Oh, you did walk over to him? A Why, surely, naturally.

Q That is, immediately Mr. Staples spoke to you you walked over to Mr. Thompson? A Why, sure.

Q Did Mr. Staples go with you? A Mr. Staples was right there, sir.

Q How long before the accident had you placed the plank there?

20 Mr. Tomlinson: He didn't say he placed it.

By the Court.

Q Well, how long was the plank in that position?

Mr. Tomlinson: I have no objection if he knows.

30 A Why, I should imagine half an hour, but not in the same position.

Q You imagine or estimate? A Why, I don't really get the question right.

Q If you imagine, you have got no basis of having found out. A Do you mean how long was that scaffold that way, or was the scaffold put up? Is that your question?

40 Q How long was the scaffold in the condition it was in at the time when you saw Mr. Thompson about two feet south of it? A About three minutes.

Arthur Chippendale, re-cross.

Mr. Tomlinson: Does your Honor mean condition or position?

The Court: Position.

Mr. Tomlinson: You said condition.

The Court: I mean position and height.

Mr. Tomlinson: Position and condition? 10

The Court: Yes.

By the Court.

Q About how long? A We had been using it all morning, sir.

Q How long had it been at that place? A At that particular point?

Q Yes. A About three to five minutes.

By Mr. Merrill.

20

Q Did you put it there yourself, or superintend its placing? A It was superintended by me, yes.

Q You were right there at the time? A Yes, sir.

Q Were you continually moving it back and forth to suit your work? A Why, sure.

Q Were you continually moving it back and forth to suit the hours of the trains? A Why, 30 yes.

Q What did you do with it after the accident? A Leave it right there while we worked on it.

Q How long did it remain there in that position?

Mr. Tomlinson: If the Court please, I object to it upon the ground that whatever the condition of the premises was after the accident is not material or relevant in the case. 40

Arthur Chippendale, re-cross.

Mr. Merrill: I think, if the Court please, it has to do a good deal with the recollection of the man if he was moving it constantly, as to how he could recall the exact location months after it occurred.

10 The Court: Well, if that is your purpose I might allow it.

Mr. Tomlinson: I didn't understand that to be the purpose.

Q How long did it remain in that position after the accident? A Why, they worked on that scaffold all day, sir.

By the Court.

20 Q I know, but in that particular position you are asked. A Maybe ten minutes more.

By Mr. Merrill.

Q You don't know? A No, sir.

Mr. Merrill: That is all.

By the Court.

30 Q How far was that plank away from the door at the time that you first saw Mr. Thompson on the south side of that plank? How far was it away from the door? A Five feet.

Q You mean what? From the outside of the door? A Yes, sir.

Q That is, the outside of the jamb of the door? A Yes, sir. That is, to the horses.

Q Talking of the plank, the plank itself, the first part of the plank that you had reached from the door, how far was that? A Five feet.

40

James S. Green, direct.

JAMES S. GREEN, a witness produced on behalf of the defendant, being duly sworn according to law, on his oath saith:

Direct examination by Mr. Tomlinson.

Q Dr. Green, where do you live? A In Elizabeth. 10

Q Are you a practicing physician of the State of New Jersey? A I am.

Q For how long a time have you practiced medicine, doctor? A Since 1889.

Q Of what medical institution or institutions are you a graduate? A I graduated from the College of Physicians and Surgeons in New York City.

Mr. Merrill: Qualifications admitted. 20

Q Have you done surgical work as well as general medical work? A Yes, sir.

Q Dr. Green, are you familiar with the disease known as mastoiditis? A I am.

Q Will you tell us in a few words what that is generally? A It is an infection that finds entrance through a tube which runs from the back of the throat into the middle ear. The middle ear being a closed cavity otherwise when infection gets in there the infection is liable to extend backwards into the hollow spaces in the bone behind the ear. That is known as the mastoid bone. The danger of the disease is that the bone is thickest on the outside and quite relatively thin on the inside, so that if the inflammation is going to break it is more liable to break inside and produce an inflammation of the membranes covering the brain, or of the large vein which runs right alongside of the mastoid bone. 30 40

James S. Green, direct.

Q Now, what is a double mastoiditis, doctor?

A A bilateral mastoiditis is a simultaneous inflammation of the mastoid bone on both sides, on the right and left sides.

By the Court.

10 Q You mean on both the thick side and thin side? A No, sir. On the right side of the skull and the left side of the skull.

By Mr. Tomlinson.

Q Can you say, doctor, as to whether a double mastoiditis is more serious or not as a general proposition than a single mastoiditis? A It is.

20 Q Is a mastoid operation, whether is be for a single mastoid or for a double mastoid, a minor or a major operation? A It is considered a major operation.

Q Is an operation for a double mastoid a more serious operation or not than an operation for a single mastoid? A It is more serious where it is double.

30 Q Now, can you tell us, doctor, in a case of mastoiditis, either single or double, where there has been an operation and where the patient has apparently recovered from the operation, made a good recovery, whether it is a common thing for trouble later to develop from that mastoiditis?

Mr. Merrill: I object to that. It has not any connection necessarily with this case as it doesn't appear that any later trouble did develop. It is a suppositious case.

The Court: I allow it, of course.

40 Mr. Merrill: I ask an exception.

James S. Green, direct.

A The question whether there will be future trouble or not depends on whether in each individual case, all of the infected or dead bone has been removed at the time of the operation. If it has all been thoroughly removed and the wound entirely heals up, there should be no future difficulty in the case, but in all cases where you have 10 infected bones it is never sure that you have removed all the infection, so that there is always the possibility of a future breaking down of that bone.

Q Is that future breaking down, if there should happen to be future breaking down, limited to any particular time in the future? A It is more liable to show itself shortly after the operation than it is after a longer period of time. In other words, the longer you go without subsequent trouble the less you are liable to have subsequent trouble. 20

Q Now, doctor, what is a cerebral hemorrhage? A A cerebral hemorrhage is a hemorrhage either into the substance of the cerebrum or brain or on the surface of the brain.

Q Dr. Green, is that what is commonly known as the rupture of the blood vessel? A Yes, sir.

Q Will you state whether or not a cerebral hemorrhage causes a paralytic stroke? A It produces paralysis if the hemorrhage is sufficiently large as to press on a motor area of the brain sufficiently to interfere with its working. 30

Q Now, if a person, doctor, has a cerebral hemorrhage which produces a stroke, what is the likelihood of that patient having a second stroke? A If the cerebral hemorrhage were due to disease, that is to say hardening of the arteries, and a rupture of the artery from its brittle condition—that is a progressive disease—that really never 40

James S. Green, direct.

gets better, and when an artery is once sufficiently brittle to break other arteries are also liable subsequently to break.

Q Does the age of the patient play any part in that likelihood? A Well, hardened arteries is more common in the latter periods of life, but it is also sometimes found in those who have not lived a large number of years.

Q Now, if a person has two strokes brought about by cerebral hemorrhages, what is the likelihood of a third stroke? A If he has had two cerebral hemorrhages as a result of hardened arteries, he is very liable to have subsequent strokes.

Q May a cerebral hemorrhage be brought about by a trauma or blow or an accident? A It may.

Q And if a blow on the skull, for instance, brings about a cerebral hemorrhage, what are the immediate symptoms which manifest themselves in such a case as that, sir? A Manifestly a blow sufficiently severe to produce some tearing of the structure of the brain must be so severe as to shake the brain with that force that is necessary to produce that laceration, and that shaking of the brain we speak of as concussion, and where you have a concussion sufficiently severe to produce a laceration there is an immediate unconsciousness and symptoms preceding, immediately following the injury.

Q Doctor, going back to mastoiditis for just a moment, does the age of the patient make any difference in determining whether the case is a serious one or not? Does it add to the seriousness at all? A Only in the general sense that a young person has more resistance to infection than an older person has.

James S. Green, direct.

Q Coming back to cerebral hemorrhages and paralytic strokes, what condition does a stroke brought about by cerebral hemorrhage where there has been no trauma or violence—what condition does that leave a patient in generally? A That is, as I have previously stated, always a condition of hardened arteries, and usually with the hardened arteries there is a narrowing of the arteries. That leads to some mental or nervous degeneration which is dependent on the area of the brain involved.

Q Can you state, doctor, whether or not a defect in memory and lack of concentration is an incident to a paralytic stroke brought about by cerebral hemorrhage where there has been no accident, where they has been no physical violence? A Yes.

Q Doctor, assume that a man fifty-seven years old, who has had an active physical career as a consulting engineer, has had an operation for double mastoiditis in October, 1925; that following this operation he was unable for some time to resume his usual work and to go to his office in New York; and that in December he sustained a cerebral hemorrhage resulting in a stroke of paralysis; that in the following March, that is March, 1926, he had a second cerebral hemorrhage resulting in a second stroke. Assume further than in August, 1926, this man struck his head against a plank about two inches in thickness; that there was no loss of consciousness at all, either partial or total; that he walked from the scene of the accident to his house; that he was conscious thereafter until his physician got there two days later; and that later on a few days after this accident he sustained a third cerebral hemorrhage resulting in a third stroke

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of paralysis. Now, doctor, is it possible with any reasonable degree of probability to exclude from the third stroke which this man had the results and conditions brought about by the double mastoiditis and by the two strokes of paralysis that this man received.

10

Mr. Merrill: I object to two things, if the Court please, in the question. First there was testimony that Mr. Thompson was dazed; so that the statement is inaccurate that there was no partial unconsciousness. If my recollection is right, Mr. Earl testified, not that Mr. Thompson walked home, but that he helped Mr. Thompson home.

(Argument.)

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The Court: I allow the question.

Mr. Merrill: I ask an exception.

Q Now, doctor, do you want that question read by the stenographer? A Only the last part.

30

(Last part of previous question read by stenographer as follows: "Now, doctor, is it possible with any reasonable degree of probability to exclude from the third stroke which this man had, the results and conditions brought about by the double mastoiditis and by the two strokes of paralysis that this man received?")

A In my opinion you cannot exclude those results.

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Q Would it or would it not be a natural inference in such a case, based upon your medical knowledge, that if this man had had these two

James S. Green, direct.

strokes which have been described, he would be likely to have a third stroke even without any intervening accident?

Mr. Merrill: I object to that question for this reason, that it appears that cerebral hemorrhages may be caused from a number of reasons; also that they may be of different degrees of seriousness. Now, there is nothing in this case which shows how those initial attacks occurred, nor the seriousness of those attacks, nor whether they were related to each other in any way. So I think that placing the dependence of the third upon the first two is wholly inadequate a foundation.

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The Court: It is all the foundation that we have, and the practical question put to Dr. Green is whether, if a man has had two strokes, be they severe or be they light or be they from one cause or from another, he most probably will have a third stroke. That is the question.

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Mr. Tomlinson: That is exactly it. That is what I tried to express.

The Court: That is the question.

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By the Court.

Q If a man had two strokes, be they heavy or light, two paralytic strokes, be they heavy or light, is it probable that he will get a third stroke? A Shall I answer it?

Q Yes. A Yes.

By Mr. Tomlinson.

Q In saying that he will probably have a third stroke, do you mean that he will probably have

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a third stroke even without any intervening accident of any kind? A Yes.

Mr. Tomlinson: Cross examine.

By the Court.

10 Q Doctor, one question before the cross examination. If a man has had two strokes, say from a diseased condition and not from a trauma, neither one of them due to a trauma, would the fact of a blow or trauma increase the chances of having a third paralytic stroke from the original reasons? Do you get what I mean? A I do.

20 Q Whether the blow or trauma would bring on, because of the previous conditions, that paralytic stroke which the blow or trauma would not bring on if he hadn't had such a condition as caused the first two? A I believe that a trauma of sufficient force would be more liable to bring on the apoplexy or cerebral hemorrhage, yes, if there was the diseased condition of the arteries existing beforehand.

30 Q In other words, Dr. Green, is it probable that a blow would bring on a stroke because of the diseased condition of the man's arteries, which diseased condition would not have brought it on if it hadn't been for the trauma? A It depends entirely on the severity of the trauma or injury. If it is simply a slight knock on the head, I don't believe it would produce an apoplexy. You have got to have something within to raise the blood pressure sufficiently high to make that artery break, and I can conceive that being struck on the head or anywhere else in the body would cause the victim to stiffen up and resist and in that way raise his blood pressure, but whether it would sufficiently to break the artery

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James S. Green, cross.

or not depends entirely on how severely he resists any injury.

10 Q Is a man more likely to have a paralytic stroke from a blow if he is in a diseased condition that has caused two previous paralytic strokes, than he would be from a blow of the same severity if he did not have the two previous paralytic strokes from a diseased condition? A I think I have answered that by saying that it depends entirely on how high he raises his blood pressure in meeting that injury.

By Mr. Tomlinson.

20 Q Doctor, do you think that a blow would be sufficient to cause the third stroke if the blow was not sufficiently severe to render the person unconscious? A In my opinion it would not be sufficiently severe to produce an apoplexy.

Cross examination by Mr. Merrill.

30 Q Have you ever known persons to develop conditions of this kind two or three or four days after a shock? A Your question is not sufficiently definite to enable me to answer. I don't know just what you refer to by conditions of this kind.

Q Could you have a hemorrhage develop two or three days after the shock of a blow, due to that shock? A Yes.

40 Q Could you have that result without an intervening total unconsciousness? A I think probably not. Where you have delayed evidence of hemorrhage it is usually where you have a hemorrhage from an artery which is known as the middle meningeal artery inside of the brain. That is usually found where there is some frac-

James S. Green, cross.

ture of the skull, and it is conceivable that that hemorrhage can go on so slowly that it does not give you the symptoms of paralysis until the collection of blood is large enough to press on the motor area, and then these symptoms develop. Those are the typical cases where you have delayed paralysis come on sometimes after the receipt of the injury.

Q It might come on even a week or two weeks after? A Oh, I think not. I think not.

Q But it might come on two days after? A Usually within the first twenty-four to thirty-six hours. Depends entirely on how large the opening is in the vessel as to how rapid it is.

Q It is not uncommon, is it, for a shock to be the critical cause of some forms of latent disease or undeveloped disease? For example, delirium tremens may be precipitated by shock? A Depends entirely on what you mean by shock, sir. If you mean by shock, trauma, yes. Trauma will bring out the symptoms of delirium tremens, but shock and trauma aren't the same thing.

Q Some forms of disease like pneumonia may be brought to a crisis by some form of trauma? A I don't know what you mean by "bringing pneumonia to a crisis." Pneumonia subsides in a certain proportion of cases by crises. By that we mean sudden falling of the temperature and then the disease is over, if that is what you mean, sir.

Q I mean by that, may a person develop pneumonia following some form of shock or trauma where the pneumonia might have been indefinitely delayed except for the shock? A No. Pneumonia is always an infection of the lung, and without that infection being there you can't have pneumonia. Of course, injury will

James S. Green, cross.

lower our resistance to the infection, but that is not the exciting cause.

Q Then a shock may so far lower the resistance to an existing infection as to permit the infection to become immediately active? A I didn't say that, sir.

Q I am asking you a question. The lowered vitality due to a shock may permit an infection to develop which, except for the shock, might not have developed at all? A I don't understand what you mean by shock. If you will determine for me whether you mean injury or trauma I can answer your question.

Q I mean the shock accompanying a trauma or blow, like a blow on the head, or even a broken leg? A In the vast majority of instances you have trauma without shock.

Q But that is hardly an answer to my question. A I can't answer your question because I don't know what you mean by shock.

Q I mean by shock the result of a blow or other condition which so far affects the physical condition as to lower its vitality and its resisting powers. A That is not shock.

Q Irrespective of what it is, may that condition permit the development of something that might otherwise remain dormant? A I can't answer your question, sir.

Q Have you ever seen Mr. Thompson? A Never that I know of.

Mr. Merrill: That is all.

Charles B. Lufburrow, direct.

CHARLES B. LUFBURROW, a witness produced on behalf of the defendant, being duly sworn according to law, on his oath saith:

Direct examination by Mr. Tomlinson.

10 Q Doctor, where do you live? A Plainfield, New Jersey.

Q Are you a practicing physician of the State of New Jersey? A I am.

Q For how long a period of time? A Twenty-eight years.

Q What medical college did you graduate from? A University of Maryland.

Q Are you connected with any medical institutions? A Attending surgeon, Muhlenburg Hospital, Plainfield, New Jersey.

20 Q Doctor, you didn't examine Mr. Thompson, did you? A No, sir.

Q Will you tell us what your definition of mastoiditis is, doctor? A Mastoiditis is an inflammation of the mastoid cells, the mastoid being this bone on the side of the head here (indicating), and this bone inside is much like honey-comb, has little cells in it much like the honey-comb in which the honey is deposited. The infection usually follows a cold in the head, extends through the eustachian tube, which is a tube that communicates with the mouth here, one end of it opening into the throat and the other end into the middle ear. This middle ear becomes inflamed. As the germs that inhabit that region grow, there is an effusion of serum that takes place in there, and then that serum finally turns into pus and this pus finally finds its way into the mastoid cells with an accompanying death of bone.

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Charles B. Lufburrow, direct.

Q Is it a serious ailment or not? A Certainly is.

Q What is a double mastoiditis? A Double mastoiditis is when that same condition exists on either side of the head, both sides at the same time.

Q Is an operation of mastoiditis a major or minor operation, doctor? A Major operation. Always so regarded, I think. 10

Q Is it or is it not attended with a great deal of pain? A It is.

Q Is an operation of double mastoiditis more serious or not than an operation of single mastoiditis? A Much more, sir.

Q Now, doctor, after an operation for mastoiditis, are there or are there not likely to be some future results? A Yes, sir, there are. 20

Q Will you describe? A Many times there is a secondary abscess which forms. Many times there is some distress in the hearing.

Q Is there any particular time within which those results will manifest themselves?

Mr. Merrill: I object to this line of questioning, if the Court please, because there is nothing whatever to indicate that there was not a perfect healing after the operations upon Mr. Thompson, and there is absolutely no evidence of anything having since occurred connected either directly or remotely with that trouble. 30

Mr. Tomlinson: Of course that is what I am trying to bring out by this witness.

The Court: I will allow the question.

Mr. Merrill: Exception.

(Last question read by stenographer.)

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Charles B. Lufburrow, direct.

A I have known them to manifest themselves two years after an operation for mastoiditis.

Q Does the age of the patient play any part in mastoiditis? A Certainly so.

10 Q Is an operation for mastoiditis more serious and more likely to be fraught with after-results in the case of a person of years or not? A I think the same thing obtains in mastoiditis as in other major operations, the younger the patient the more likelihood of repair.

Q And after a person has been suffering from mastoiditis and has had an operation for double mastoiditis, in what condition is the person's general health likely to be for some time?

A Well, he is apt to be weakened, his resistance run down. He is much more feeble than he was before he was subjected to this operation.

20 Q Now, doctor, what is a cerebral hemorrhage? A A cerebral hemorrhage caused by what?

Q Caused by anything. Caused by disease or by violence? A It is a condition in which blood is extravasated or exuded from a tear or rent or hole in a blood vessel within the cranium.

30 Q What is that likely to result in? Cerebral hemorrhage? A That would be determined by the amount of hemorrhage and by the location of the—by that part of the brain which was burst open by the resulting clot.

Q Will a cerebral hemorrhage cause a stroke of paralysis? A It will and does.

40 Q What other causes than cerebral hemorrhages, if any, are there for a stroke of paralysis? A Well, the ordinary stroke of paralysis—we speak of a stroke of paralysis as being a condition in which a blood vessel in the brain has burst and blood has exuded from this opening

Charles B. Lufburrow, direct.

in the blood vessel caused by a hardened, brittle condition of the blood vessel, usually found after forty-five.

10 Q Take the case of a person who has sustained such a stroke, what is the reasonable probability with regard to their having a second stroke? A Well, if his blood vessels are in condition to cause him to have the first one, the same cause still operates and he may get the second; most apt to get the second one.

Q And does age play any part in that? A Yes.

Q What part does it play? A I think the older a person is the more apt he is to have such a condition as that.

20 Q Now, if a person has had two of those strokes what would you, as a medical man and surgeon, look for with reference to a third stroke? A Why, I think it is generally acknowledged all over the world by everybody, physicians and laymen alike, that a person like that is certainly disposed to a third one.

30 Q May there be a cerebral hemorrhage and a paralytic stroke as a result of a blow or a trauma? A Well, there may be a cerebral hemorrhage as a result of a trauma, but we just don't call that paralytic stroke. That is, the ordinary term of paralytic stroke rather signifies cerebral apoplexy. It is sort of a synonymous term with cerebral apoplexy.

40 Q Well, if the person has had a cerebral apoplexy or a cerebral hemorrhage, bursted blood vessel in the brain and the consequent stroke, whatever you call it by, as a result of trauma, what symptoms manifest themselves? A The symptoms are determined by the amount of blood that comes out of this opening in the ves-

Charles B. Lufburrow, direct.

sel and the location of the brain that is pressed upon by this resulting clot of blood, this mass of blood which becomes clotted.

10 Q May a person, in your opinion, receive a blow which would cause a cerebral apoplexy or cerebral hemorrhage sufficient to bring about a stroke without being rendered unconscious? A Not in my judgment; no, sir.

20 Q Now, doctor, take the case of a man fifty-seven years of age who has spent an active career in various parts of the country as consulting engineer, who in the latter part of 1925 sustains a condition of double mastoiditis, and in October is operated on for double mastoiditis, for some time after the operation is unable to attend to his business, and in the same year, December or thereabouts, sustains a stroke brought about by cerebral hemorrhage or cerebral apoplexy, and in March, 1926, sustains a second stroke, and in August, 1926, he receives a blow on the head but is not rendered unconscious, walks to his home, and remains there conscious until the arrival of his physician two days later. Assume that shortly thereafter he receives a third stroke. In your opinion, is it or is it not a reasonable inference that the third hemorrhage was a natural sequence of a disease of the cerebral vessels which had been in existence for a long time.

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Mr. Merrill: I object on the same ground as before, that it does not appear that he was not partially conscious.

The Court: Overruled.

Mr. Merrill: Exception.

40 A Inasmuch as it is the result of human experience, I think, on the part of doctors, and cer-

Charles B. Lufburrow, cross.

tainly my own experience, I know that one attack predisposes to another, and two attacks certainly render a third one much more possible than a second one. That is a course that one would expect to follow in such a case.

By the Court.

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Q Much more possible or much more probable, which? A Much more probable.

By Mr. Tomlinson.

Q In such a case can you in any wise at all, even though there was this accident, exclude the probability that the mastoiditis and that the first two strokes were connected up with the third stroke? Can you exclude that? A Yes.

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Q I say, can you? Did you get my question? A I say one would be expected to follow the other. It is just a natural sequence of events.

Mr. Tomlinson: All right. Cross examine.

Cross examination by Mr. Merrill.

Q After a second stroke does it sometimes happen that a person lives for many years without a third? A Yes.

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Q They may die from some cause totally disconnected with the trouble? A Certainly so.

Mr. Merrill: That is all.

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William J. Arlitz, direct.

WILLIAM J. ARLITZ, a witness produced on behalf of the defendant, being duly sworn according to law, on his oath saith:

Direct examination by Mr. Tomlinson.

10 Q Dr. Arlitz, where do you live? A I live in Hoboken.

Q Are you a practicing physician in this State? A I am.

Q For how long a time? A Thirty-five years.

Q Of what medical institution or institutions are you graduated? A University of Maryland.

Mr. Merrill: Qualifications admitted.

20 Q Are you connected with any medical institutions? A I am a visiting surgeon at Christ Hospital, Jersey City; consulting surgeon at Moses Taylor Hospital; and consultant of the State Hospital for the Insane at Graystone Park; consultant of North Hudson Hospital.

Q Have you been connected in State bodies or State medical boards? A Director in charge of the Rehabilitation Department for Hudson County for the State of New Jersey.

30 Q Doctor, did you examine Mr. Thompson, the plaintiff in this case? A Yes.

Q When? A On the 22nd day of November, 1926.

Q Where? A At his home in Fanwood.

Q What sort of examination did you make? What did it consist of? A Why, it was rather a thorough examination. I went over him rather carefully, had a long conversation with him, then made a physical examination.

40 Q From that physical examination which you made of Mr. Thompson, what did you find? A I

William J. Arlitz, direct.

found that Mr. Thompson was of the intellectual type, that in the course of our talk he had some memory defects for recent events. I found that he had had a severe operation some time prior to my examination. That operation was for the correction of a mastoiditis on the right side and on the left side. His general physical condition was perhaps somewhat below normal. By that I mean his general resistance was below normal. He had no material alteration in his equilibrium; neither were his reflexes materially altered. 10

Q When you speak of reflexes, what do you mean? A I mean certain signs that are found in connection with certain nervous diseases. His reflexes were of the normal type.

Q How do you determine reflexes? That is what I mean. A Reflexes are determined by placing the man in the upright posture, and then shadow the eyes to see whether the pupils contract and dilate. That is one. The second reflex that was determined was the deep knee jerk. Under certain circumstances the knee jerks are absent. Under other circumstances they are exaggerated. So far as I could determine they appeared normal to me. I had him stand in the upright posture with his eyes closed to see if there was any unusual swaying. 20 30

Q Was there? A There was not.

Q All right, sir. Go ahead. A I decided that Mr. Thompson's general resistance was below the average, and I also decided that his memory defects, not knowing of any other condition, I decided that his memory defect was one that is common and characteristic in men of his years who have undergone a serious illness.

Q Would you or would you not consider a double mastoiditis, an operation for a double 40

William J. Arlitz, direct.

mastoiditis, such serious illness? A I regard it as a very serious condition.

Q Does or does not a double mastoiditis leave a memory defect commonly? A The mastoiditis in itself, no, but the illness in connection with it does. A man's resistance is lessened to a very material extent because of the illness, and at his time of life, at my time of life, we are all prone to have, even without illness, to develop a memory defect for recent events, and that grows worse as we grow older.

Q Had he the free use of his legs and arms when you examined him? A Yes, he moved about the house. I wouldn't regard him as a very active individual, but he presented no evidences, no gross evidences of paralysis of the lower or of the upper extremity at the time of my examination.

Q Now, doctor, what is a cerebral hemorrhage? A By a cerebral hemorrhage we ordinarily mean a rupture of a blood vessel within the cranial cavity, a rupture of one of the blood vessels of the brain.

Q And what is a cerebral apoplexy? A A cerebral apoplexy, when we say cerebral apoplexy we mean that a man has had a hemorrhage or a bursting of one of the blood vessels of the brain, and that in connection therewith there are certain symptoms. Those symptoms are in the first instance an unconsciousness that may be complete or not complete, a very decided defect in the respiratory movement at that particular time, and finally some evidence of paralysis. The paralysis is in proportion to the amount of the hemorrhage and in proportion to the pressure that this hemorrhagic mass makes upon certain centers of the brain.

William J. Arlitz, direct.

Q If a person has had a cerebral hemorrhage, an apoplexy, and a stroke, what are the chances or probabilities of that person having a second stroke? A The chances of a subsequent attack are more than probable. If a man has a stroke or a motor or a sensor paralysis, that is due to a plugging up of a vessel or because a certain area of the brain has been deprived of its blood supply, the probabilities are that that will remain just as it is, because that is due to a definite cause which rarely recurs. That is known as an infarct, which gets in some part of the brain. If a man has a lessening of the calibre of the blood vessels of the brain, that produces an anemia of the brain, and the anemia of the brain produces very decided mental disturbances. That is a thing that is progressive, grows worse. With a hemorrhage the probabilities are that that hemorrhage is brought about by an increase in the intracranial blood pressure. It may be due to calcification or it may be due to intoxication, and one attack predisposes to another.

Q Does age play any part in that probability? A Apoplexy is a disease of the middle life and late life. It rarely occurs before the fiftieth year unless the individual has had some very decided systemic infection in his early life, but the ordinary individual who suffers with cerebral apoplexy has his attacks usually after he is fifty years of age.

Q Assume that an individual of the age of fifty-seven has had two hemorrhages and two strokes, what then is the reasonable probability of a third? A The probabilities are that he will have a third, and that is a matter of common medical knowledge, and because of that knowledge all patients who have had one cerebral, one

William J. Arlitz, direct.

attack of cerebral apoplexy, are warned how to live. They are warned how to diet themselves, how much work to do, and how much rest to get, and how to avoid excitation if it can be done.

Q That is where they have had the one stroke? A That is where they had had one.
10 We always try to advise them how to live so they may prevent as long as possible the second or the third attack.

Q May a cerebral hemorrhage be brought about by a trauma or blow? A Yes, if the trauma is sufficiently profound it can do it in several ways. It can be by a fracture of the skull with laceration of the cerebral tissue, or it can do it with a profound concussion with laceration of the cerebral tissue.

Q In your opinion, is it reasonably probable that a trauma or blow may have caused a cerebral hemorrhage where that trauma or blow was not of sufficient severity or of sufficient force to render the person unconscious? A It is not probable. After a severe trauma, even though there is no evidence of a cerebral hemorrhage, a gross cerebral hemorrhage, an individual might have what is known as a leak, a small hemorrhage that would not produce these symptoms until twenty-four hours or thirty-six hours had elapsed, but such an individual would then and there have some very definite symptoms. My
30 experience has been that an individual of that kind would not be able to move about. He would have a very decided concussion with an injury of that kind, and the probabilities are that he would be rendered unconscious or semi-conscious and would not be able to get about.

Q Doctor, in what condition does a cerebral
40 hemorrhage which brings about a cerebral apo-

William J. Arlitz, direct.

plexy and a stroke—in what condition is a man generally left after that? A Every time you have a cerebral hemorrhage, whether it is large or small, the scar that is left produces some damage, always produces a damage. It is a damage that is never repaired. The defect, the mental or the memory defect that occurs in connection therewith is in proportion to the size of the scar. That scar tissue is like scar tissue in any other part of the body. It is an ill-nourished tissue, cannot functionate like normal tissue.

Q Is or is not a memory defect a common result of a cerebral hemorrhage causing a cerebral apoplexy and a stroke, even where there has been no trauma? A It is a common symptom.

Q Now, doctor, assume a man fifty-seven years of age has had a very active career as a consulting engineer, mining engineer, in various parts of the country, and assume that in the fall of 1925 he developed some trouble with his head, that that trouble is diagnosed as mastoiditis, and that on October 20, 1925, he is subjected to an operation for double mastoiditis, that after that operation he is unable for some time to attend to his normal occupation, normal affairs, business affairs, and that in December, 1925, he, as a result of cerebral hemorrhage or bursted blood vessel of the brain, as has been described by one of the medical witnesses, suffers a stroke, that in March, 1926, he suffers a second stroke, that in August, 1926, he strikes his head against a plank but is not rendered unconscious, that he walks from the scene of the accident to his home and is not unconscious after arriving at his home and for two days later till his doctor is called, that when his doctor arrives he is not unconscious, that a few days thereafter he suffers a third
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Stewart L. Pach, recalled, direct.

stroke—basing your answer upon your medical and surgical experience I ask you doctor, whether it is or is not a reasonable inference that the third hemorrhage was a natural sequence of a disease of the cerebral vessels, which had existed in this person for a long period of
10 time? A My best judgment is that this is a natural sequence, and it is in harmony with my experience in clinics and in my general practice.

Q And in any event, in determining the cause of this man's present condition, is it possible to exclude the idea and the probability that the disease of the skull, that the mastoiditis, and that the two strokes were connected up with this injury? A I think the one, the first one and the second one and the mastoiditis, the first stroke
20 and the second stroke, I think that they have all been productive of a lessening of the general resistance, and the third is a continuation of the disease. That is my best judgment.

Mr. Tomlinson: Cross examine.

Mr. Merrill: No questions.

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STEWART L. PACH, recalled.

Direct examination by Mr. Tomlinson.

Q Now, Mr. Pach, when was it that you made this survey as a result of which you prepared this map? A March 5, 1927.

Q On that day did you see Mr. Chippendale at the station? A Mr. Chippendale was there
40 March 23, 1927.

Stewart L. Pach, recalled, direct.

Q Did he place the ladders and the plank in the position from which you prepared your survey? A Yes, sir, he did.

Q Are they shown on your map in exactly the same position as he placed them for you? A Yes, sir, they are.

Q Now, will you just tell us how wide the south door of the women's waiting room is? A The casing is three feet seven inches wide. That is this door on the south side of the women's waiting room. 10

Q How long is this door; that is, the south door of the women's waiting room? A Seven feet six and three-quarters inches.

Q How long is the plank, Mr. Pach? A Sixteen feet.

Q How far away from the west side of the door was the nearest portion of the plank? A From the westerly door casing the nearest portion of the plank was five feet. That is the westerly door casing right here. 20

Q How far from the easterly side of the door was the nearest portion of the plank? A The nearest portion of the plank was four feet six inches from the easterly door casing.

Q Now, can you take the middle of the door, Mr. Pach, and give us the distance to the nearest point of the plank? A That would be four feet nine inches. 30

Q Now, I direct your attention to a window on the south side of the station, and on the east side of the women's waiting room, and ask you how wide that window is? A The casing is forty-four inches.

Q How high is that window? A The bottom sash is forty-three and three-quarters, and the top sash is forty-three and three-quarters. 40

Stewart L. Pach, recalled, direct.

Q How far, if you know, above the floor is the lower part of the window? A The bottom of the window is twenty-four inches above the floor.

Q Now, you have shown on the easterly side of the station a board platform. Will you tell us where that board platform leads to at the north? A At the north the board platform is connected with a cinder walk which leads in a curve up to the next block, which is the corner of Martine avenue and Park avenue.

Q Now, I call your attention to a door in the north side of the station of the women's waiting room, and ask you how wide that door is. A That is the same as the other door, forty-three in each case.

Q And the height the same? A I didn't measure the height of that door. It is approximately the same.

Q Can you tell us whether the north door is on a line with the south door? A Yes, sir; on a direct line.

Q Now, you have shown certain ladders here, have you, Mr. Pach? What is the nature of those ladders upon which the planks were put? A The nature of these ladders were two ordinary ladders leaned together at the top and bolted and the planks laid on the top of the two ladders.

Q How high are those ladders? A The distance from the platform on which they were placed to the bottom of the plank was five feet three inches. The ladders extend about a foot above that.

Q Now, Mr. Pach, I call your attention to the ladder at the west end of the plank, and I ask you how far beyond the west end of the southerly

Stewart L. Pach, recalled, direct.

door that ladder extends? A A little more than half way.

Q Will you take your pencil, please, and trace a line from the east end of that ladder up to the door, a straight line so as to show how much of the door that cuts? A Covers two feet and two inches of the door.

Q How wide is the cement platform at the southerly part of the waiting room; that is, from the women's waiting room? A From the women's waiting room to the edge of the platform is fourteen and a half feet. That is this railing nearest to the railroad track.

Q Mr. Pach, were you out at the station when the photographs were taken? A Yes, sir.

Q Now, I hand you thirteen photographs and ask you to look them over and tell us whether they correctly show the situation at that station, and also the exact position of the ladders and the plank as the condition was and as the position of the ladders was on the day that you were out there and made that map? A Yes, sir; they all show the conditions correctly.

Q Will you state whether or not your map shows the position of the plank and the two ladders exactly as they are shown in these photographs? A Yes, sir, it does.

Mr. Tomlinson: Cross examine.

Mr. Merrill: No questions.

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George A. Morris, direct.

GEORGE A. MORRIS, a witness produced on behalf of the defendant, being duly sworn according to law, on his oath saith:

Direct examination by Mr. Tomlinson.

10 Q Mr. Morris, you are a photographer? A Yes, sir.

Q With the firm of Underwood & Underwood? A New York, yes, sir.

Q I show you thirteen photographs and ask you whether you took those photographs?

Mr. Merrill: I don't believe we need to go into that.

20 Mr. Tomlinson: If you don't question them.

Mr. Merrill: I don't question the accuracy of the photographs as depicting what they appear to depict.

Mr. Tomlinson: I just want to put one question, then.

30 Q Will you tell us, Mr. Morris, whether when you took those photographs Mr. Chippendale, the foreman painter, placed the ladders and the plank shown in these photographs in the position in which you photographed them? A He did, sir.

Mr. Tomlinson: That is all.

Arthur Chippendale, recalled, direct.

ARTHUR CHIPPENDALE, recalled, for the defendant.

Direct examination by Mr. Tomlinson.

Q I show you two ladders and a plank and ask you if they are substantially the same as were involved in this accident? A Why, it sits exactly the same way as what it was. 10

Q Just go down there and make sure that they are in exactly the same position; that is, that the plank is in the same position and that the ladders are folded in the same way as they were on this day of this accident.

(The witness leaves the stand and does as requested.)

20 Q Just take the stand again. Now, I direct your attention to the same two ladders and the same plank and ask you if they are now in the same position as they were at the time of this accident. Do you understand my question? A You mean on which side of the station?

30 Q I am not talking about the station. Whether the two ladders and the plank, irrespective of the station, are in the same position, put together the same way as they were on the day of this accident? A The ladders were put together, but the plank, the ladder should be pulled out a little bit on a diagonal shape.

Q Is the height of the plank the same as it was? A Exactly.

Q When you got there right after the accident? A Exactly.

By the Court.

Q How high? A Five feet. 40

Arthur Chippendale, recalled, cross.

Mr. Tomlinson: Did you measure that plank, Mr. Pach?

Mr. Pach: Five feet three inches from the bottom of the plank.

Mr. Tomlinson: You may cross examine.

10 *Cross examination by Mr. Merrill.*

Q During your painting, did you ever change the mode of supporting the plank? A No, sir.

By the Court.

Q What were you painting at the time it was in the position as shown on the map? A The overhang.

20 Q The overhang? A The overhang of the station.

Q In other words, the men were painting over their heads? A They had finished the first stretch.

Q What is that? A Was painting down the back of the floor.

Q What? A They was painting on the floor on the back of the ladder, and two men what was supposed to be working on the scaffold, was off of the scaffold, had pulled it out of the way.

30 Q Then they weren't using the scaffold at all at the time? A Not at the minute, no.

Q Where were they painting at the time you saw Mr. Thompson to the south of the plank-ing? A One was at the bay window, the other by the door.

Q How long had they been in that position? A I should judge five or ten minutes.

40 Q And before that five or ten minutes they were on the plank, were they? A On the plank, yes, sir.

Arthur Chippendale, recalled, re-direct.

Q Painting overhead, this overhang? A Yes.

Q Where were the ladders and the plank when they were painting overhead? A Close up against the building by the door, by the door and the window.

10 Q How close to the building? How close to the door? A Why, the plank would be six inches or maybe a foot from the door to get at the overhang.

The Court: That is all I have.

By Mr. Merrill.

Q I don't quite understand where the two painters were. Will you please tell us again?

20 The Court: One at the door and one at the window.

A One by the bay window and one by the door.

Q And which is the bay window? A Marked right there (indicating).

Q Oh, yes. A Right by this door (indicating).

The Court: Indicating the south door of the women's waiting room.

30 Q Were they painting there at the time of the accident? A Yes, sir.

Q Both present? A Both present.

Q What did they do at the time of the accident? A I couldn't tell you that, sir.

Re-direct examination by Mr. Tomlinson.

40 Q Just one further question. You were in charge of this painting, you have already said, Mr. Chippendale? A Yes, sir.

Walter Miller, direct.

Q Now, do you know what these men were going to do, what work they were going to do after they got through painting the bay window and painting by the door, as you have said? A Finish up the end of the eave.

10 Q Finish up the end of the eave? A In other words, the ceiling.

Q To finish up the ceiling what, if anything, would they have to do with this scaffold? A Just pull it out maybe six inches more to get the two vents. There is three vents and the eave, and you can't reach the whole three.

20 WALTER MILLER, a witness produced on behalf of the defendant, being duly sworn according to law, on his oath saith:

Direct examination by Mr. Tomlinson.

Q Mr. Miller, were you one of the two painters who were working near this scaffold at the time of the accident? A Yes, sir.

Q Where were you painting at the time of the accident? A Right behind the bay window.

30 Q Right by the bay window? A Yes, sir.

Q And where had you been painting before that? A Well, before that I was on the scaffold doing the overhead.

Q When you were doing the overhead on the scaffold, where did you have the scaffold? A When I was doing the overhead?

Q Yes. You said you were doing the overhead. A I was on top of the scaffold.

40 Q I said, where did you have the scaffold? A Close to the door.

Walter Miller, direct.

Q How long had you been painting by the bay window before this accident happened? A Five or ten minutes.

Q What were you going to do after you got through painting the bay window? A Why, finish the ceiling off.

Q The ceiling at that end of the station? A 10 Yes, sir.

Q To get to the ceiling what would you have to use, if anything? A We have to use a scaffold, yes, sir.

Q And where would you have to have the scaffold to get to the ceiling?

The Court: The ceiling of what?

A That is the overhead. 20

The Court: The ceiling of the overhead. Yes, go on.

A (Continuing.) Well, we would have to put the plank back farther or at least the scaffold back farther to reach it again.

Q How much farther? A Oh, I will say a foot.

Q Now, did you see the accident? A No, 30 sir.

Q Did you see Mr. Thompson right after the accident? A Yes, sir.

Q Where was he? A He was on this side of the scaffolding.

Q Which side? A That is this side of the track.

Q Now, what do you mean by that? A (No 40 answer.)

Momado Molino, direct.

By the Court.

Q Was he between the door and the scaffold?

A Right over here.

Q Was he between the door and the scaffold, or was he outside of the scaffold? A Outside the scaffold.

10 Q How far outside? How far from it? A From about a foot, a foot and a half.

Q How near was the scaffold to the door? A Five feet, about.

By Mr. Tomlinson.

Q Did you see Mr. Earl? A Yes, sir.

Q Where was he? A He was inside between the door and the scaffold.

20 Q How was Mr. Earl dressed? Did you notice? A He had a cap and golf suit on, knickers.

Mr. Tomlinson: Cross examine.

Mr. Merrill: No questions.

30 MOMADO MOLINO, a witness produced on behalf of the defendant, being duly sworn according to law, on his oath saith:

Direct examination by Mr. Tomlinson.

Q Now, Mr. Molino, were you the other painter who was working with Mr. Mueller? A Yes.

Q What were you doing when this accident occurred? A I was standing there near the door.

40 Q Standing near the door? A Painting.

Momado Molino, direct.

Q Painting near the door? A Yes, sir.

Q Painting near what door? A By that door there, by the window.

Q Well, the south door or the north door? A North door.

Q Was it the door nearest to the railroad tracks? A Yes, nearest to the railroad tracks. 10

Q Had you seen Mr. Thompson before the accident? A Yes, I did.

Q Had you seen Mr. Earl before the accident? A Yes, I saw them both; was talking together.

Q Where did you see them? A I saw them here in the corner of the news stand.

Q Were they inside the station or outside the station? A Outside.

Q Did you see the accident? A No, I didn't see the accident. I was working when the accident happened. 20

Q Did you see Mr. Thompson right after the accident? A Yes, I did.

Q Where was he then? A Was outside the ladder.

The Court: Indicating the south of the ladder.

Q That is between the ladder and the tracks? A Yes. 30

Q Did you see Mr. Earl there? A Yes, I did.

Q How was Mr. Earl dressed? A They was both of them together when I saw them.

Q What sort of clothes did Mr. Earl have on? A He had knickers on with a cap.

Q Now, how long had you been painting there? A Oh, about ten minutes, something like that. 40

Momado Molino, cross.

Q Where were you going to paint after you got through painting there? A I was going to paint the ceiling.

Q Could you get to the ceiling without using the scaffold? A No. Didn't get to the ceiling.

10 Mr. Tomlinson: Cross examine.

Cross examination by Mr. Merrill.

Q Will you please indicate on the map there, just where you were while you were painting at at the time of the accident? A Yes, sir.

By Mr. Tomlinson.

Q Do you understand the map? A Yes, sir,
20 I do. I was working right here (indicating).

By Mr. Merrill.

Q Were you painting the floor or the side wall? A The side wall, the weatherboard.

Q Where did you first see Mr. Earl? A I saw him here, coming out of this corner here (indicating).

Q Where did you first see him after the acci-
30 dent? A Right here (indicating).

By the Court.

Q Earl? A I saw both of them together here (indicating).

By Mr. Merrill.

Q Did you see Mr. Earl at any time between the plank and the waiting room wall? A No,
40 I didn't. I saw Mr. Earl here (indicating).

Momado Molino, cross.

The Court: Indicating the south of the ladder.

Q When you saw Mr. Earl first, what were you doing? A I was working here (indicating). I looked up and I saw Mr. Earl here. Then I kept right on and do my work. 10

Q Did you turn around to see Mr. Earl? A Well, I happened to be turned around when I saw him in the corner. Then when I saw him again I saw him here (indicating).

Q When you saw Mr. Earl at the corner, was he alone or with Mr. Thompson? A Was with Mr. Thompson. Both of them was talking.

By Mr. Tomlinson.

Q Both of them what? A Was talking and
20 walking.

By Mr. Merrill.

Q And when you next saw Mr. Earl he was by the plank? A Yes. I saw he was right here by the plank (indicating).

Q You didn't see either of them go from the corner to the plank? A No.

Q You heard nothing when the accident occurred. You heard no exclamation or sound? A
30 No.

Mr. Tomlinson: I don't think he knows what exclamation means.

Q What drew your attention to the fact that there was an accident? A Well, I happened to look over.

Q Then there was nothing to call your attention to it except the fact that you accidentally happened to turn around? A No. 40

Momado Molino, cross.

Q What did you do when you saw there had been an accident? A Well, I asked him if he got hurt and he was talking to me—

10 Mr. Tomlinson: I submit any conversation is not relevant, not proper cross examination.

Q Did you see anyone else there except yourself and Miller and Mr. Earl and Mr. Thompson? A I saw the agent was inside there, and the fellow in the newsstand.

Q And where was the agent when you saw him? A Was inside when I saw him.

Q And that was after the accident? A No, before the accident.

20 Q You saw him inside before the accident? A Yes, sir. And after he came up when the accident happened, he came up.

Q You didn't see Mr. Chippendale there? A No, I didn't.

Q You didn't see Mr. Chippendale? A I saw him after the accident.

Q But you don't know where he was at the time of the accident? A No. I was working.

30 *By the Court.*

Q You say you saw them come out. Did you see them come out? A After the accident.

Q Who? A The foreman. Chippendale.

Q Came out of where? A Where them two fellows was by the planking.

Q What do you mean? Came out of where? A From where they was standing there by the platform.

40 Q Did you see Mr. Thompson go inside the station? A No, I didn't.

Momado Molino, cross.

Q Did you see him come out of the station?

A I didn't. When I see him I saw he was by the plank.

Q When you saw him at the news stand corner what was he doing? A He was walking.

Q Walking? A Yes, sir. 10

Q About how long was it from the time that you first saw Mr. Thompson and Mr. Earl at the news stand corner that you saw the two of them to the south of the plank that was on the ladder? How long a time was that? A About two minutes, about a minute or two.

The Court: Did I understand that the testimony was that he came out of that door?

Mr. Tomlinson: The only testimony to that effect, if the Court please, is the deposition of Mr. Thompson in which he says that he came out. 20

The Court: Came out of that door?

Mr. Tomlinson: Yes. Mr. Earl says that he didn't see him go into the station.

Mr. Merrill: May I amplify that a little further to make it clear, that Mr. Earl's testimony was that as they came along by the building Mr. Earl continued to come around on this end, and Mr. Thompson went through this door, and the next he saw of him was when Mr. Earl came around here and he saw him close to the door crouched under the plank. 30

Mr. Tomlinson: Now I submit, if the Court please, that that is not accurate. Mr. Earl never said that he saw Mr. Thompson go over to this door. He said he saw him 40

Horace G. Young, direct.

going towards the door to the station. He didn't say which door and he never said that he saw him near the door.

Mr. Merrill: That is all.

By Mr. Tomlinson.

10 Q Who was your foreman? A Chippendale.

Mr. Tomlinson: That is all.

HORACE G. YOUNG, a witness produced on behalf of the defendant, being duly sworn according to law, on his oath saith:

20 *Direct examination by Mr. Tomlinson.*

Q Mr. Young, where do you live? A Fanwood.

Q Whom do you work for? A Union News Company.

Q Where do you work? A At the station. At the stand at the station.

Q What station? A Fanwood.

Q What do you do there? A News agent.

30 Q For whom? A Union News Company.

Q Who pays you? A Union News Company.

Q Who gives you your orders? A Union News Company.

Q Do you receive and did you receive any orders and instructions from the Central Railroad Company? A No.

40 Q In what part of the Fanwood station did you have or did you control the Union News stand? A It is this corner down here (indicating).

Horace G. Young, direct.

The Court: The southeast corner.

Q Don't go talking about the map unless you understand it. A Yes.

Q Did you know Mr. Thompson? A I did.

Q For how long a time had you known him? A Ever since I have been in Fanwood. 10

Q How long has that been, approximately?

A I don't know. Fifteen or twenty years.

Q Did you serve him his paper regularly? A Yes.

Q How would you serve it to him? A Why, I leave at nine or quarter-after nine in the morning, and generally he don't get down there by that time since he has been sick. There was a rack inside the station in which his paper was placed in as I went home. 20

Q Would you mark his name on the paper? A Yes, his name was marked on the paper, his with several other papers.

Q Where was this rack on this morning, Mr. Young? A Between the window and the door on the inside.

Q Can you point out on the map between what window and what door? A Right down there (indicating). 30

Mr. Tomlinson: May I put a "Y" there?

The Court: Put "N" to indicate newspaper.

Mr. Tomlinson: "N" and "Y," if I may.

Q And then after putting his paper in that rack, what did you do on this morning? A I started to go home.

Q How did you go out of the station? A Through the door toward the track. 40

Horace G. Young, direct.

Q That is the south door? A Yes.

Q Then after getting out of the south door here, which way did you walk? A I came around under the ladder and out to this corner. This is the southeast corner just beyond the stand.

10 Q After getting to the southeast corner, which way did you walk? A I started toward that corner, toward that cinder walk.

Q That is north? A Up through there.

By the Court.

Q What do you mean you had to go under the ladder? A (No answer.)

By Mr. Tomlinson.

20 Q How did you get under the ladder? A I walked under the plank.

By the Court.

Q How close was it to the side of the building then? A I should say four or five feet. I didn't notice particularly.

30 Q Why did you have to go under the ladder to get to the cinder walk? A I had to get under that ladder to get out, come out onto the platform.

Q Why, if it was four or five feet away from the door? A It wasn't on the back end; it wasn't the same.

Q How much was it there? A I don't know how much it was back there.

By Mr. Tomlinson.

40 Q Was it possible or wasn't it possible for you to walk around the east end of that ladder? A I don't know.

Horace G. Young, direct.

Q Could you walk under the ladder without stooping over? A Why, I had to bend down a little.

Q After you got over to the southeast corner and started to walk north, whom did you see, if anybody? A I hadn't gotten entirely to the corner; that is, the southeast corner. 10

Q You hadn't gotten entirely to the southeast corner? This corner you mean (indicating)? A No. This would be north.

Q Which corner do you mean? A This corner up here (indicating).

Q The northeast corner? A That corner up there, yes (indicating).

Q Did you see anybody? A Before I came to that corner I saw Mr. Earl and Mr. Thompson coming up the walk. 20

Q Where were they when you saw them on the walk? A The cinder walk, just coming out to the platform.

Q Up here (indicating)? A About in there (indicating).

Q How far away were they from you? A About twenty or thirty feet.

Q Then what did you do? A Then I turned and went back, retraced my steps into the station the same as I went out. I went to the rack to get the paper to pass it out to them. There were several papers in there and it may have taken me a moment or so to find his paper, and by the time I came out it was all over. 30

Q How long, approximately, were you in the station before you came out? A I should say two or three minutes.

Q When you came out, where was Mr. Thompson? A Between the scaffold and the rail. 40

Horace G. Young, direct.

Q Between the scaffold and the what? A
And the rail.

Q You mean the tracks? A Track rail, yes.

Q Where was Mr. Earl? A With him. Both
of them outside.

10 Q Do you remember how Mr. Earl was
dressed? A No.

Q When you went into the station to get the
paper, where did you go? What part of the
station? A Between that door and the window
by the newspaper rack.

20 Q Why was it that you came back here to go
into the station to get Mr. Thompson's paper
when you had marked it with his initials? A
I very frequently do that, seeing anybody coming
in that way, I go and take out their paper for
them and pass it out to them.

Q Did you or did you not know that Mr.
Thompson had been ill? A Yes. That is one
reason I went back.

Q When you went into the station you say
you went to the newspaper rack? A Yes.

Q Did you go anywhere else? A No.

Q Did you see Mr. Thompson come in
through that door at any time? A No.

30 Q Was he entering in the women's waiting
room when you went in to the rack? A I
didn't see.

Q You didn't see him walk across or from
the north door to the south door? A No.

Q As I understand your testimony, Mr.
Young, you came in here, got the paper, and
started out, and then the accident was all over?
A Was all over when I got out there, yes. I
didn't see it at all.

40

Horace G. Young, cross.

By the Court.

Q Was there anyone in the women's waiting
room while you were getting that paper? A
No.

Q When you started back after seeing Mr.
Thompson and Mr. Earl, did you see where they
went? A No. After I turned my back I never
saw them again until I came out with the paper.

10

By Mr. Tomlinson.

Q The last time that you saw them they were
together? A They were together.

Q And the next time you saw them? A
They were together.

Q Now, had you seen the men painting around
this station before the accident? I do not mean
only that morning? A They had been there
four or five days, I should judge, something like
that; I don't know how long.

20

Q Had Mr. Thompson been down to get a
paper during any of the time that they had been
painting around there? A That I don't know.
You see they came so often after I had gone.
The majority of the time I leave the paper in
the rack and they got the paper after I left.

Q What sort of day was it? A Clear.

30

Mr. Tomlinson: Cross examine.

Cross examination by Mr. Merrill.

Q You say that Mr. Earl and Mr. Thompson
were about twenty or thirty feet away from you
when you saw them? A Yes, sir.

Q Will you please indicate on the map about
your position on that board platform at the time

40

Horace G. Young, cross.

you first saw them? A About up in here somewheres (indicating).

Q And where were Mr. Thompson and Mr. Earl at that time? A Just coming out of the platform from the dirt, off the walk.

10 Q When you walked back, did you go immediately to the rack? A Yes.

Q How many steps did you take from the door to reach the paper? A I don't know.

Q More than two steps? A Yes; must be ten or fifteen, I don't know.

Q You mean to say that the rack in right here under the first door? A Why, it is anywheres from the door jamb and the windows, no set place. There is a space in there (indicating), anywheres in that space.

20 Q You don't recall where the rack was at that particular time? A Somewheres between that door and there (indicating).

Q Did you do anything else except go immediately to the rack, pick out the paper, and go immediately back? A No.

Q Then during the time in which you went from this door to this rack, picked the paper out and got back, Mr. Thompson and Mr. Earl had caught up the twenty or thirty feet away they were, the accident had occurred, and it was all over? A Well, there may have been—

30 Q Just say yes or no. A I can't answer it yes or no.

By the Court.

Q Go on. Answer it your own way. A There were a dozen or more papers in that rack. I had to select Mr. Thompson's from that number of papers, with his name on it.

40

Horace G. Young, cross.

By Mr. Merrill.

Q As you came back, who, if anyone, did you see beside Mr. Thompson and Mr. Earl? A When I came back with the paper?

Q When you came down the board platform after seeing Mr. Thompson approaching? A 10 Two men painting.

Q Do you know who the two men were? A The two men that just testified.

Q Did you see Mr. Chippendale? A No.

Q Did you see Mr. Staples? A No.

Q Where was Mr. Molino? A I think he was painting around there. I am not sure.

Q In front of the bay window? A In front of the bay window, but I am not sure.

Q Where was the other one? A The other 20 man was painting on the side. Which I don't know.

Q Where was he painting? On the floor? A On the floor or down the foot of the floor.

Q Did you notice whether he was painting the floor or the side wall? A He wasn't painting the floor, but he was painting under the window.

Q Will you please indicate on the map at what point each man was working, as you went in? A I can't tell which was which. One man was working there, and one man was working here (indicating). Which, I really don't know.

Q What did you do when you saw that the accident had occurred? A Why, I came up and there was an accident, apparently a slight accident, and I turned and went home.

Q You paid no further attention? A No.

Q What did you do with Mr. Thompson's paper? A I handed it to someone.

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Horace G. Young, re-direct.

Q You don't know who? A I don't know which one. I turned and went home.

Q And said nothing to anybody? A No.

Q Paid no further attention to it? A No.

Q What was Mr. Earl doing at the time you came out? A The two of them were there together, standing there together.

Q Standing together? A Yes.

Q What were they doing as they stood there?

A Nothing particularly.

Q You didn't hand the paper to Mr. Thompson? A I don't know.

Q You don't recall that? A I don't recall.

Q But it was after the accident? A It was after the accident.

20 *Re-direct examination by Mr. Tomlinson.*

Q I show you a photograph marked Exhibit D. 3 and ask you if that shows the rack that you have referred to? A Yes.

Q Does that show? Please state whether or not that shows the approximate location of the rack on the morning of the accident? A Yes, but it doesn't show the approximate number of newspapers there would be in at that time of the morning. It shows the location, the approximate location and the rack, but it doesn't show the approximate number of papers that would be in.

Arthur Chippendale, recalled, direct.

ARTHUR CHIPPENDALE, recalled.

Direct examination by Mr. Tomlinson.

Q Mr. Chippendale, if I recollect your testimony correctly, you testified yesterday that you had been, or your gang that you were in charge of had been painting around the Fanwood station for about nine or ten days before this accident? A About nine or ten days, yes, sir.

Q Now, during those nine or ten days, while you were painting around that station; that is, you and your men; had you ever observed Mr. Thompson come to the station and in and around the station? A Yes, sir.

Q Your answer is what, sir? A Yes.

Mr. Tomlinson: Cross examine.

Mr. Merrill: No questions.

Mr. Tomlinson: That is all. Now, if the Court please, I offer in evidence an agreement between the Central Railroad of New Jersey and the Union News Company, dated October 2, 1923, and covering the Fanwood station, among other stations, of the Central Railroad.

Mr. Merrill: I object to its introduction in evidence on the grounds that I stated yesterday. Shall I restate them?

The Court: Yes, surely.

Mr. Merrill: In the first place, the pleading itself admits that the defendant had the control, management, and possession of the station. In that event they had the control, possession and management of it all, and they cannot now deny what they have al-

Arthur Chippendale, recalled, direct.

ready admitted in their pleading as a part of the record.

10 In the second place, there was an implied invitation, and if there was an implied invitation the leasing of this particular part of the station is of no consequence. It is so well known that I think the Court may take judicial cognizance of the fact that the leasing is for the advantage of the railroad company, that it is for the advantage of the patrons of the railroad company. The railroad company has an income from it. That use and income is more or less affected by the use made by the public of it, that they are given a permanent place in the station, a conspicuous place, and inducements of an attractive character are made in order to invite the public to use it, and the public becomes an invitee.

20 The third ground is the well-known rule that where a landlord leases a part of the premises, he still remains liable for those parts of the premises over which he himself retains control, and he is obligated to exercise reasonable care not only toward those who come to the premises for his particular purposes, but also with respect to any person who comes by the actual or implied invitation, lawfully upon the premises, with respect to the business of the lessee. The fact that there may have been a sublease is of no consequence, as was held in the Phillips case, to which I referred yesterday.

(Argument.)

30 The Court: I am admitting the paper over the objection. You may have an exception.

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Motion for Direction of a Verdict.

(Paper referred to entered in evidence and marked Exhibit D. 17.)

Mr. Tomlinson: With that, if the Court please, we rest.

Mr. Merrill: No rebuttal.

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MOTION FOR DIRECTION OF A VERDICT.

Mr. Tomlinson: May it please the Court, the defendant now moves for a direction of a verdict upon the grounds which I mentioned in my motion for a non-suit:

First, upon the ground that it affirmatively appears and is not controverted by any evidence whatsoever, that at the time of this accident, Mr. Thompson, the plaintiff, went upon the station premises, not for a purpose connected with the railroad company or the business of the railroad company, but solely for the purpose of buying a paper from the Union News Company, which was a licensee upon the property of the defendant railroad company. It is our contention that under those circumstances and under those facts, none of which are in dispute, Mr. Thompson occupied the status solely and simply of a licensee, and that that being so, our sole duty to him was to refrain from wilful or wanton injury; and in this case there is neither the allegation nor the proof of any such willful or wanton injury. That is our first ground.

30 The second ground is that the plaintiff has not shown that the maintenance of the scaffold at the place and at the time of the accident was any act of negligence or any breach of any duty towards the plaintiff.

(Argument.)

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Court's Direction of a Verdict.

Mr. Tomlinson: The third ground is that the plaintiff, under all the testimony, was clearly guilty of contributory negligence.

(Argument.)

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COURT'S DIRECTION OF A VERDICT.

The Court: This is a motion for a directed verdict as to a suit in which the plaintiff claims damages for an injury which, according to the plaintiff's claim, was a very serious injury. It is the contention of the plaintiff that the result of the plaintiff's bumping his head against this plank resulted in a cerebral hemorrhage, which
20 hemorrhage has had the effect of completely incapacitating him not only physically but almost to a totality of ordinary mental power. He was a man that, according to the evidence, was of a high order of intelligence and ability, and a short time previous to this accident had received an offer of \$12,000 a year for a very substantial
30 tenure of time to take the office or position of consulting mechanical or electrical engineer or both. This is a suit looking for damages that are appropriate to such a man as that, judged by his earning capacity and because of the injuries of that extent. I am asked to let that case go to the jury.

As to the damages, the jury would not be justified upon the basis of a preponderance of the evidence in finding, if this plaintiff bumped his head as he claims, that his present condition was due to that, and they would not be justified in finding from the evidence that there was already such a condition that the bumping of the
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Court's Direction of a Verdict.

head aggravated that in such a way that the bumping was the proximate cause of his present condition. Even though this case went to a jury, they would not be justified in finding damages for anything else except the immediate effect of the mere bumping of the head and the annoyance that came from that, whatever it was. 10

Therefore so far as the amount involved in this case is concerned, it could be but very, very slight if the jury followed, as they unquestionably did, the great preponderance of the evidence in this case. They could not base their verdict upon mere speculations or mere sayso of anybody, but the medical testimony in this case is such that this man, who had already had two strokes, who had already had two cerebral hemorrhages, was in such a diseased condition that the third cerebral hemorrhage, which
20 happened after this accident, was due to the diseased condition and not to this bumping of the head.

But aside from that, that would still leave a question as to how far they would measure that mere bumping of the head, without any thought that the man's unfortunate present condition, a serious condition, was due to that. 30

The motion for a directed verdict is based upon, first, the ground that the Union News Company, which occupied a place in this railroad station at Fanwood, was a mere licensee. 30

I have read the agreement between the Central Railroad of New Jersey and the Union News Company, which comprehends not only this particular occupancy but also all of their stations and even the use of their railroad trains for the purpose of selling papers, magazines and periodicals, and I cannot agree with Mr. Tomlinson 40

Court's Direction of a Verdict.

that the railroad has not a duty so far as the public is concerned, and particularly as to that part of the public who desire to buy papers or magazines or periodicals in these Union News Company stands that are within their stations. The Union News Company stand has nothing to do with the entrances to the station, and I hold that clearly from the facts in this case there was an implied invitation upon the part of the railroad company to the public to use these entrances at the station so that they might get to these news stands to buy papers, because the news stands are paying them a substantial amount of money every year for such use. Regardless of the form of the agreement, practically the position of landlord and tenant exists between the railroad company and the news stands.

The next point is that there is no negligence upon the part of the railroad company. Negligence is never presumed; it must be affirmatively proved. Upon such a motion as this the Court must act upon the basis of the extreme that may be favorable to the plaintiff's case, and the Court is doing so in the consideration of this motion.

Where is there any negligence upon the part of the railroad company? The railroad company not only had a right, but under the present public supervision had a duty to paint their station, and from the facts in this case, in order to paint their station they were required to use just such scaffolding as was used in this case, scaffolding of the kind that embraced two ladders and a plank, two ladders for supports and then the plank upon which the men stood so that they could paint overhead and also along the sides

Court's Direction of a Verdict.

where height was necessary to be obtained beyond the ordinary reach of the painter. According to the uncontroverted testimony, they had been doing that painting at such a height that was beyond their reach from the ground, and these two painters were painting the sides along the bay window and along the door and had moved the scaffold away from the closeness, about six inches, that it had been at, and left it this four or five feet away from the door. That is uncontroverted as to the distance. Mr. Earl said it did not seem so to him, but he did not dispute that it was so. The evidence is such that the conclusion which the jury would have to reach from the preponderance of the evidence would be that this plank was about between four and five feet away from this door. They intended, as soon as they had painted the side, according to the program that was ahead of them, to again use this scaffold in order to paint the ceiling and the eaves.

Now, where was there any negligence upon the part of the railroad company through these painters in the placing of this ladder? What did they do? They placed these two ladders and the planking five feet away from what is called the southerly door of the women's waiting room in this station. Where is there any negligence in that? Is it because they placed it too close? Is it because they placed it in such a position that anyone using that door—and we must assume from the evidence of the plaintiff himself that the door was open—could not safely do it because he could not see what was in front of him?

This planking was five feet three inches from the ground. This plaintiff was five feet eight or nine inches tall. If he looked he could not have avoided seeing it.

Court's Direction of a Verdict.

So, therefore, it seems to me that the painters, when they placed this ladder five feet away from the door, weren't doing anything that was a negligent act. They weren't doing anything that an ordinarily prudent person would not have done. They did not fail in doing anything
 10 that an ordinarily prudent person would have done. Therefore, where was the negligence? It was necessary to have the ladders and the planking there, and the only question is was it negligently placed? I cannot see what it was.

There is another point, and that is contributory negligence. It is claimed that this man, if he did that which an ordinarily prudent person would have done, would not have bumped his head against this plank. The door was open
 20 according to his own testimony, and I am taking his own testimony. Why did he not see the planking? A man must look ahead of him. That is the law. He must look ahead of him to the same extent that an ordinarily prudent person looks ahead of him to see that his passageway is reasonably safe. While a man does not have to constantly look down on the ground or constantly look up in the air for obstructions, yet he must so look as the ordinarily prudent person
 30 must look to see that he may safely progress. In this case this man Mr. Thompson had the duty of looking ahead of him, and if he had that duty from the standpoint of its exercise, such exercise as would have been made by an ordinarily prudent person, he must necessarily have seen these ladders and this planking.

The Court is constrained to the conclusion from all of the evidence in this case and looking at the evidence from the most favorable standpoint, first, that there was no negligence upon
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Court's Direction of a Verdict.

the part of the railroad through its servants; and, second, even though that would be a jury question, that the great preponderance of evidence is to the effect that Mr. Thompson unfortunately was guilty of contributory negligence in such a way that without such negligence there would have been no accident to him even
 10 though there was negligence upon the part of the painters in the placing of these ladders.

Feeling as I do, I am constrained to grant the motion for a directed verdict. That settles this case.

Mr. Merrill: I except to the order of the Court directing a verdict for the defendant.

The Court: The Court directs the jury to return a verdict in favor of the defendant and against the plaintiff, no cause of action. You
 20 may formally render that, Mr. Foreman, so that we may have the record.

30

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Postea.

POSTEA.

Filed June 15, 1927.

NEW JERSEY SUPREME COURT.

UNION COUNTY.

10

SAMUEL B. THOMPSON,

Plaintiff,

vs.

THE CENTRAL RAILROAD (COM-
PANY) OF NEW JERSEY,

Defendant.

*Action
at Law.*

Postea.

20

The above case was tried before Honorable Peter F. Daly, Judge of the Circuit Court, with a jury, in the Union Circuit Court, at Elizabeth, New Jersey, on June 6, 7 and 8, 1927.

By direction of the Court the jury rendered a verdict against the plaintiff and in favor of the defendant of no cause of action.

Dated, June 13, 1927.

PETER F. DALY,
Judge.

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Notice of Argument.

NOTICE OF ARGUMENT.

Filed July 18, 1927.

New Jersey Court of Errors and Appeals

SAMUEL B. THOMPSON,

Plaintiff-Appellant,

vs.

CENTRAL RAILROAD COMPANY OF
NEW JERSEY,

Defendant-Respondent.

10

On Appeal.

*Notice of
Argument.*

TAKE NOTICE of the argument of the issue joined in this cause before the Court of Errors and Appeals to be held at the State House in the City of Trenton, New Jersey, on the third Tuesday of October, 1927, at 11:00 o'clock in the forenoon, or as soon thereafter as counsel may be heard.

20

Westfield, New Jersey, July 9, 1927.

E. A. MERRILL,
Attorney of Plaintiff-Appellant.

To William A. Barkalow, 143 Liberty street, New York City, attorney of defendant-respondent.

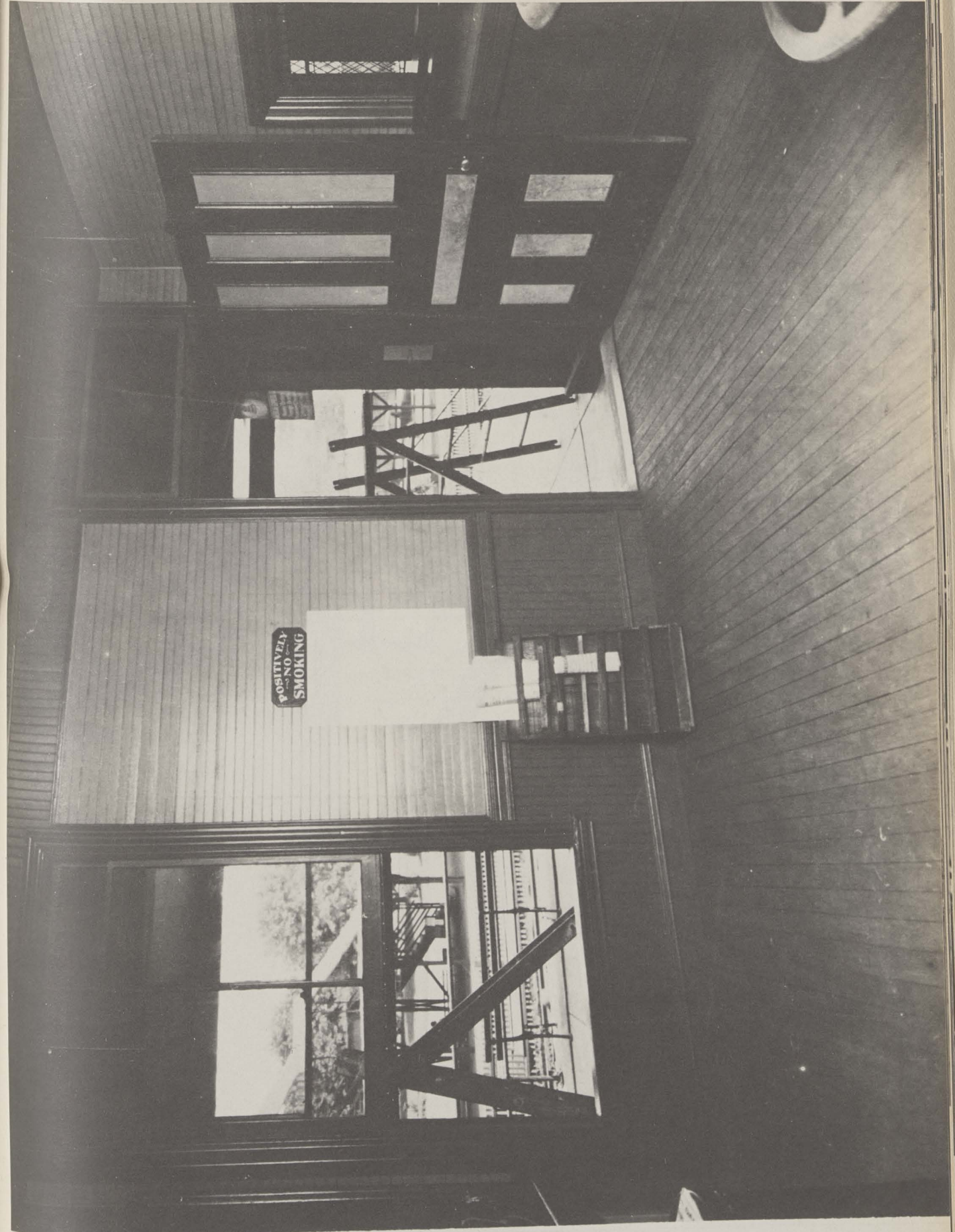
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EXHIBIT D. 1.



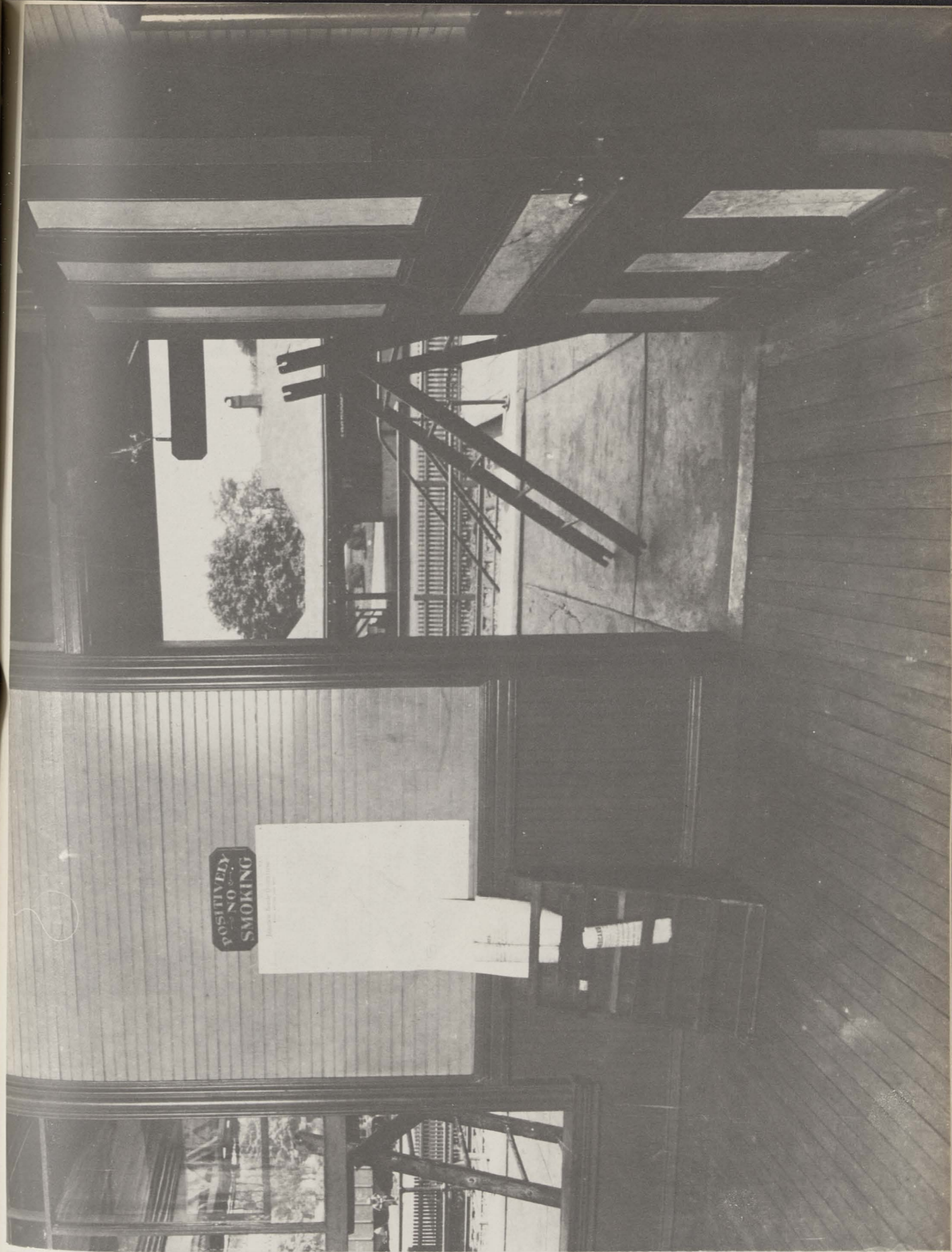
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EXHIBIT D. 4.



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EXHIBIT D. 5.

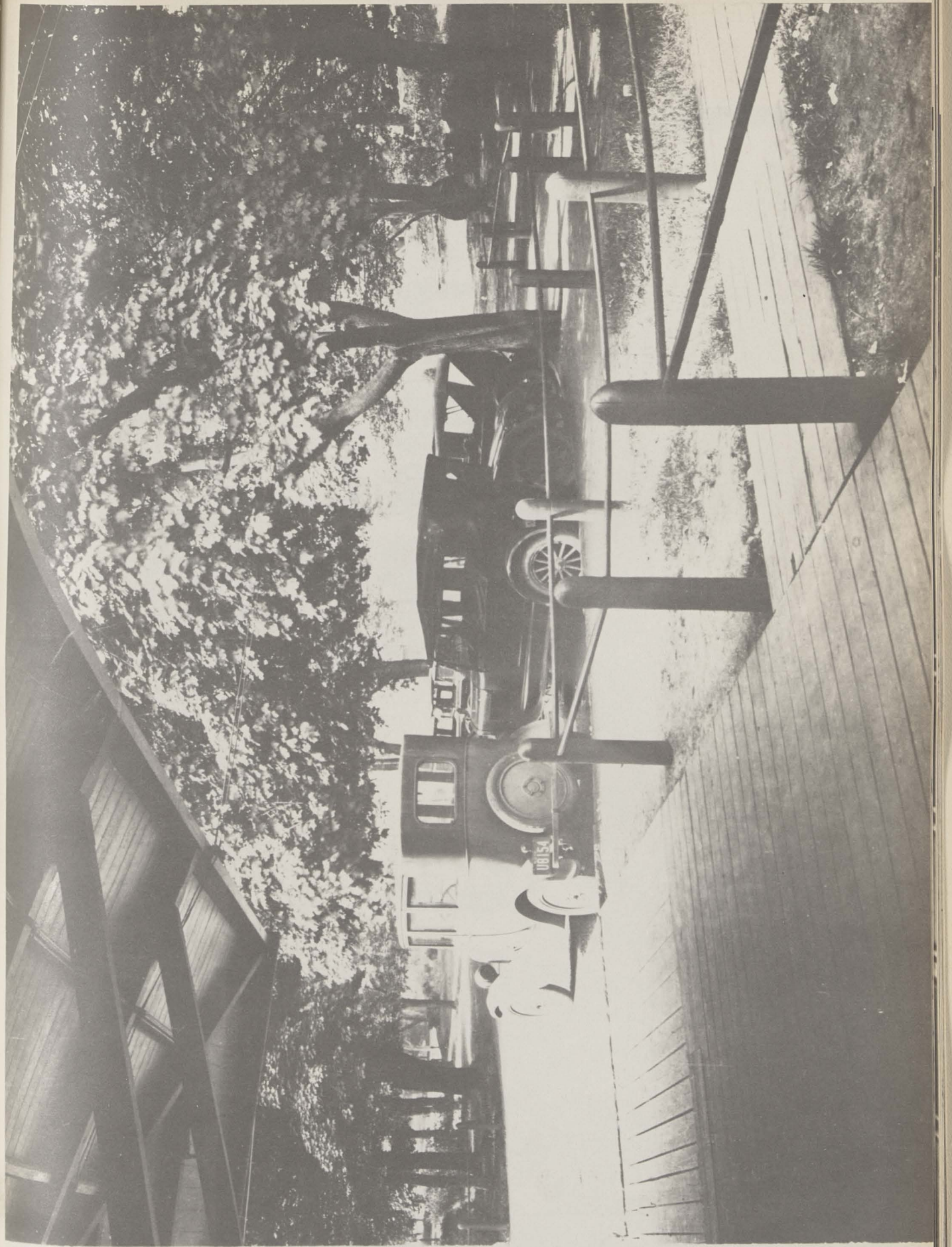


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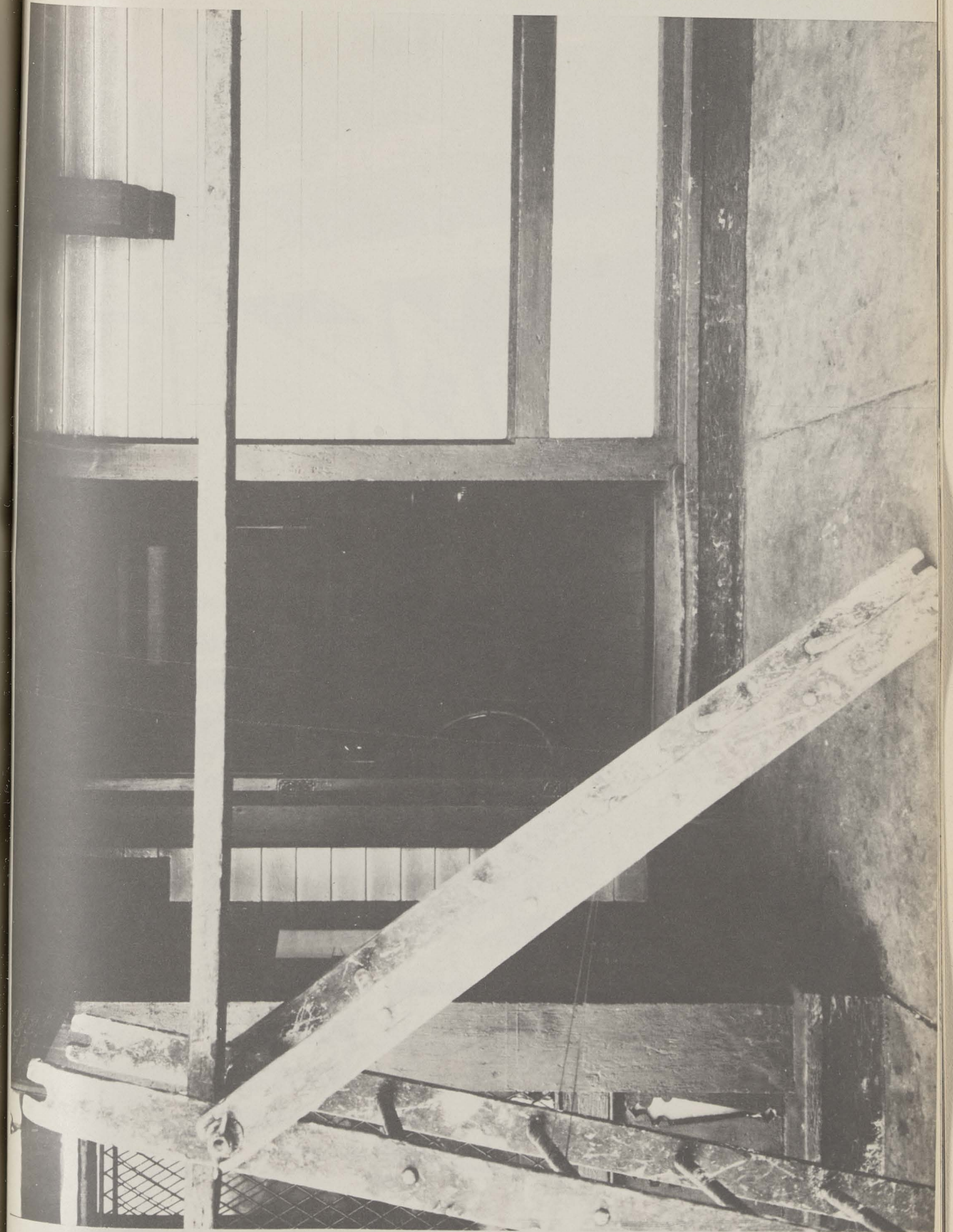
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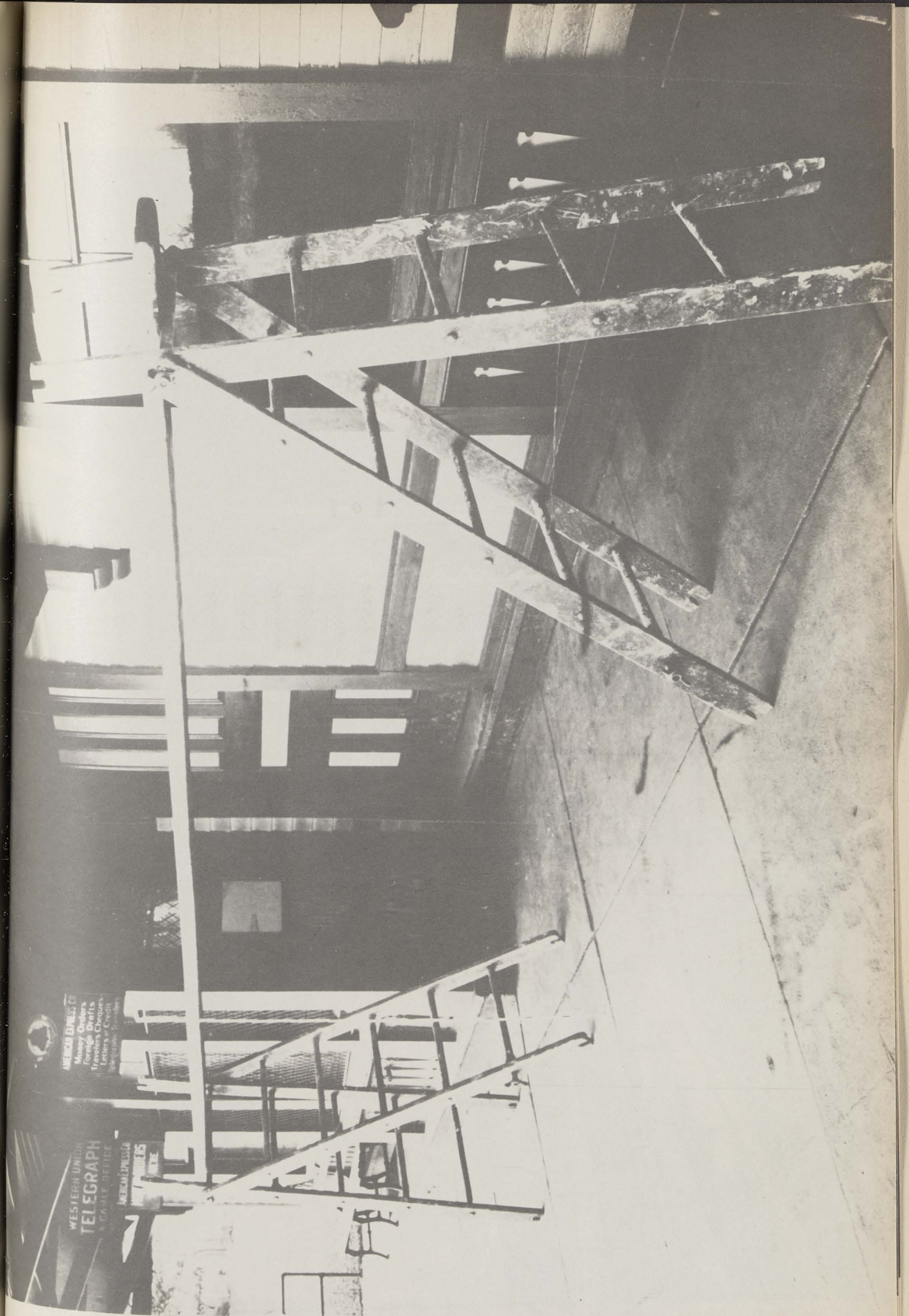
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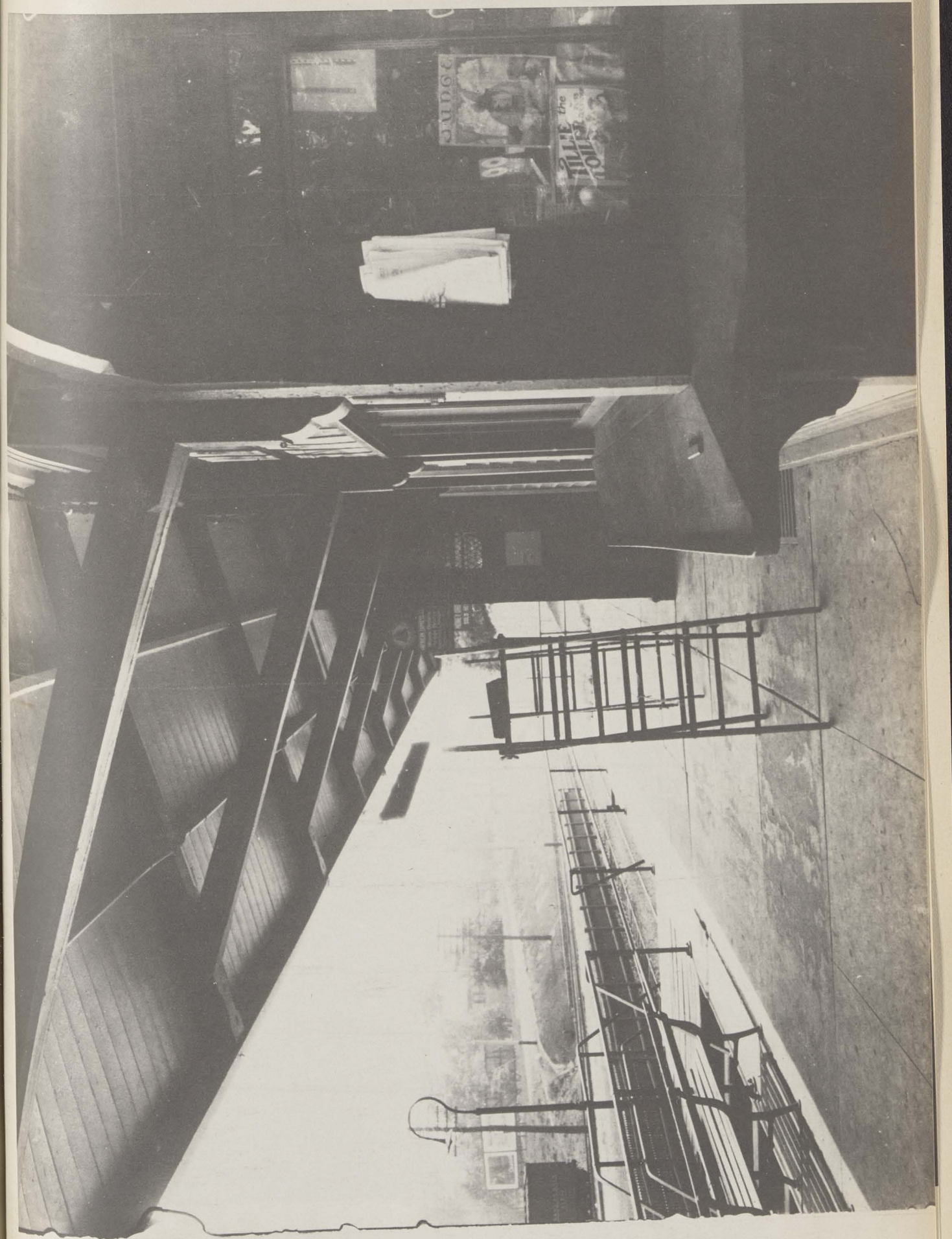
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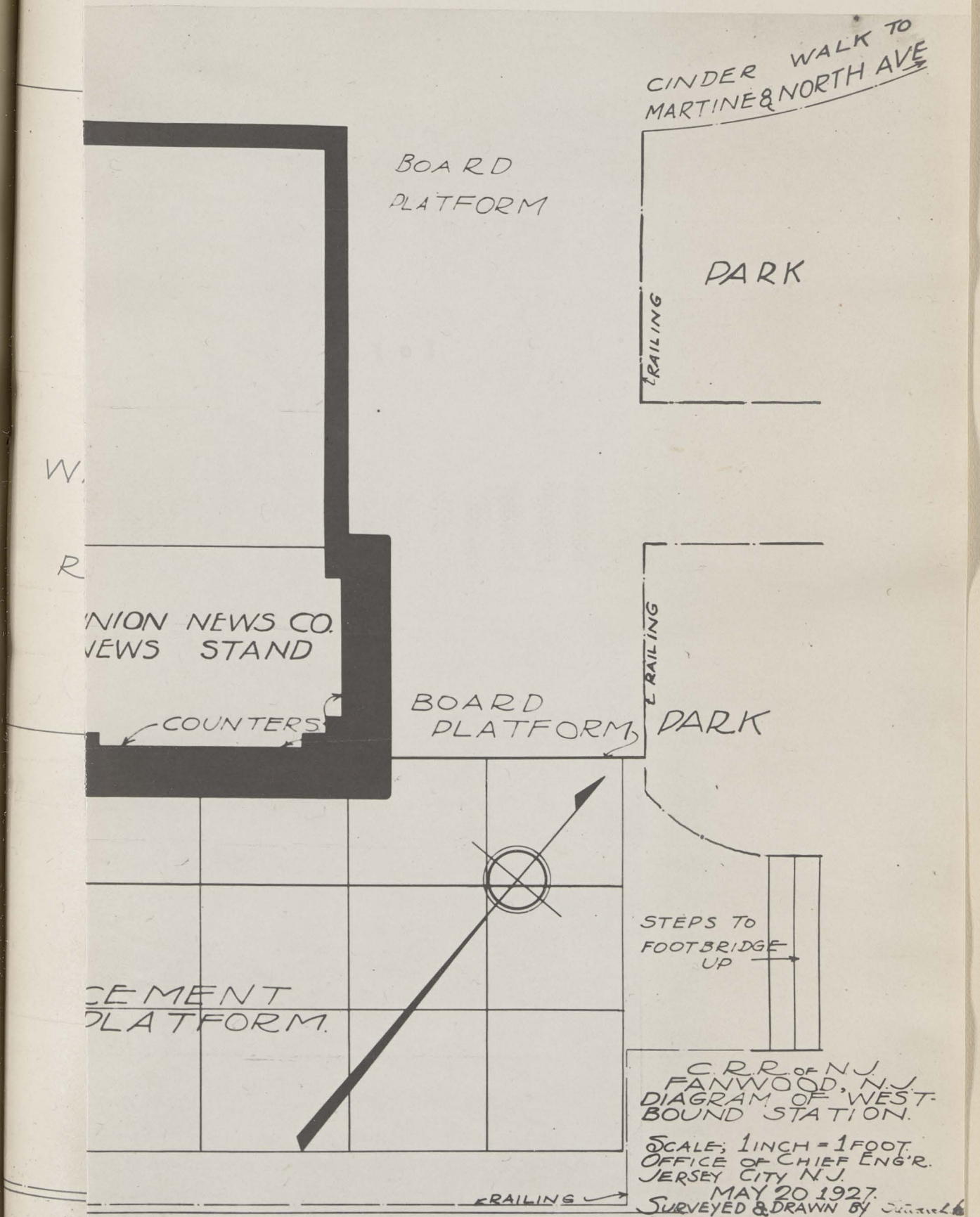
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EXHIBIT D. 13.



CINDER WALK TO
MARTINE & NORTH AVE

BOARD
PLATFORM

PARK

RAILING

W.

R.

UNION NEWS CO.
NEWS STAND

COUNTERS

BOARD
PLATFORM

PARK

RAILING

CEMENT
PLATFORM.

STEPS TO
FOOT BRIDGE
UP

C.R.R. of N.J.
FANWOOD, N.J.
DIAGRAM OF WEST
BOUND STATION.

SCALE: 1 INCH = 1 FOOT.
OFFICE OF CHIEF ENG'R.
JERSEY CITY N.J.
MAY 20 1927.
SURVEYED & DRAWN BY

RAILINGS

EX. D-15

6-7-27

Defendant's painters had placed across the outside of that door, close to it and at about the height of a man's head, a very heavy plank supported by two frames, but had failed to in any way indicate, for the protection of those using the door as an exit, the presence of the obstruction.

As the plaintiff was "stepping down onto the (station) platform," from the waiting room, and as his "body went forward, it came in contact with this plank," striking him a violent blow across the forehead.

In the meantime Mr. Earl had proceeded along the easterly wall of the building, and, turning the southeasterly corner, he saw plaintiff "rather dazed, but conscious, and standing in a crouched position" under the plank.

Mr. Earl testified that at that time there not only was nothing attached to the plank as a warning, but no one was in sight.

During the next two days plaintiff's condition grew worse, and he complained of a severe pain over his right forehead region which had come immediately after the blow and increasingly since. On the 29th his family physician, Dr. Decker, found that he had difficulty of vision, that he could not read, that he was troubled with dizziness, that he had a weakness on his left side, arm, leg, and face, and that his blood pressure was abnormally high. It was Dr. Decker's opinion that plaintiff's condition was due to a cerebral hemorrhage, resulting from a blow.

At the time of the trial, while considerably improved, plaintiff's condition was such that his physician deemed it inadvisable for him to testify from the stand, and a deposition previously

taken at an examination at his home was read to the jury.

At the close of plaintiff's case, defendant's motion for a non-suit was denied; but at the close of defendant's case a verdict was directed for the defendant rested upon three grounds which were resolved in defendant's favor—that the defendant was not negligent, that the plaintiff was contributorily negligent, and that, even if defendant was negligent, and there was no negligence on the part of the plaintiff, plaintiff's injuries were not caused by the blow, but resulted from a physical condition ante-dating the blow, and that if any injuries were proximately caused by the blow such injuries were inconsequential.

A further ground urged by the defendant, that plaintiff was a mere licensee or trespasser, was resolved in favor of the plaintiff, but may be again urged here and is therefore argued.

This appeal, then, brings before the Court four meritorious questions:

First: Was the plaintiff an invitee of the defendant, or merely a licensee, or a plain trespasser?

Second: Was the defendant, as a matter of law, free from negligence, notwithstanding its employees left a heavy plank across, and just outside of an open door leading from the waiting room to the platform—the plank being at about the height of plaintiff's forehead and wholly unguarded?

Third: Was the plaintiff, as a matter of law, guilty of contributory negligence when he failed

to see the plank, and struck his forehead against it as he attempted to pass out of the waiting room, and stepped down from the waiting room level to the platform level?

Fourth: Assuming the defendant to have been negligent, and the plaintiff to have been free from contributory negligence, were such of the plaintiff's injuries as resulted proximately from the blow of so trivial a character as not to raise a jury question?

POINT I.

Plaintiff-Appellant Was an Invitee.

The plaintiff-appellant had been a commuter over the lines of the defendant-respondent for over twenty years, and during all that period had been in the habit of getting his morning paper from the news-stand in the station building (Case, p. 29, l. 6). On this particular morning it was not his intention to go to the city, but his sole object in going to the station was to get his paper. Nevertheless, even as a member of the public there was an implied invitation from defendant to visit the station for that sole purpose, and a direct invitation from the lessee of the news stand which gave plaintiff the status of an invitee of defendant.

Doubtless the Court will take judicial notice of the well known fact that it is the custom of railroads to provide, by lease or otherwise, accommodations for the general, as well as for the traveling public, where persons may procure papers, magazines, books, cigars, candies, and soft drinks. Conspicuous and convenient parts of station buildings are reserved for that purpose. The railroads derive a revenue there-

from, and have an interest in promoting the patronage thereof.

Furthermore, the defendant-respondent was a landlord. The news stand in this particular station was leased to the Union News Company, but the defendant-respondent admits that it retained control over the public ways, rooms, and passageways. Because of such control it was subject to the liability of a landlord for any neglect of its duty not only to the patrons of the road, but also to invitees of the lessee, of whom the plaintiff-appellant was admittedly one. *Siggins v. McGill*, 72 N. J. L. 263; *Mayer v. Splitdorf Elec. Co.*, 94 N. J. L. 460.

The defendant-respondent, therefore, was under a duty to exercise reasonable care for the protection of the plaintiff-appellant as its invitee, or as the invitee of its tenant and lawfully upon the premises.

POINT II.

The Alleged Negligence of the Defendant Was a Jury Question.

Plaintiff's testimony that there was no warning of the presence of the plank is uncontradicted (Case, p. 29, l. 31), and is corroborated by the testimony of Mr. Earl, who testified that he had no recollection of seeing anyone around the station at that time (Case, p. 39, l. 13).

No witness for the defendant claims to have seen the actual occurrence. The trial judge does not comment upon this circumstance, although it is an element to be considered in any event, and assumes large importance if the plank was, as claimed, close to the door.

The memory of the trial judge was clearly at fault in finding that "the conclusion which the jury would have to reach from the preponderance of the evidence would be that this plank was about between four and five feet away from this door" (Case, p. 121, l. 17), and that "they placed these two ladders and the planking five feet away from what is called the southerly door of the women's waiting room in this station" (Case, p. 121, l. 27), *at the time of the occurrence of the accident*, and that this "is uncontroverted as to distance" (Case, p. 121, l. 14).

The testimony of Chippendale and Miller, two of the three painters, read in the light of actual conditions, will reveal that neither testified that the scaffold was five feet from the door *at the time of the accident*.

After questioning Chippendale and Miller counsel for defendant wisely refrained from questioning Molino, the third painter, on that subject.

Chippendale was not present at the time of the accident. He "was at the park" (Case, p. 60, l. 9), "over by the park railing" (Case, p. 62, l. 13). He knew nothing of the accident until Staples, the station agent, had learned of it, and had come out to hunt him up (Case, p. 60, l. 5). An appreciable time, therefore, had elapsed before his arrival at the scene.

This overhead work was an all day job. "They worked on that scaffold all day" (Case, p. 66, l. 15). "Two men *what was supposed to be working on the scaffold was off the scaffold, had pulled it out of the way.*" (Case, p. 96, l. 27). That is to say, as soon as Chippendale had disappeared in the park the two men got "off the scaffold" and, perhaps, disappeared around the

other corner for a quiet smoke—at least they were not in sight when Mr. Earl arrived. Staples, learning of the accident (how is not disclosed as defendant did not call him as a witness), came out and, probably, first found Miller and Molino, who hastily returned, "pulled the scaffold *out of the way,*" and then made a pretense of being busily at work painting from the floor.

It is quite possible, therefore, that when Chippendale arrived the scaffold was, in fact, some five feet from the door.

Now, what is Chippendale's testimony?

Q Where were the ladders and the plank when they were painting overhead? A *Close up against the building* by the door, by the door and the window.

Q How close to the building, how close to the door? A Why the plank would be six inches or maybe a foot *from the door* to get at the overhang (Case, p. 97, l. 5).

Q To finish up the ceiling what, if anything, would they have to do with this scaffold? A Just pull it out maybe six inches more to get the two vents (Case, p. 98, l. 11).

The Court asked him this question:

Q How far was that plank away from the door *at the time you first saw Mr. Thompson* on the south side of that plank? A Five feet (Case, p. 66, l. 29).

But Chippendale did *not* testify that the plank was five feet from the door *at the time of the accident*, nor did anybody else.

Now, what was Miller's testimony? Miller, before the accident, "was on the scaffold doing the overhead" (Case, p. 98, l. 31).

Q Where did you have the scaffold? A *Close to the door* (Case, p. 98, l. 38).

Q Where would you have to have the scaffold to get at the ceiling? A Well we would have to put the plank back farther,

or at least the scaffold back farther to reach it again.

Q How much farther? A Oh, I will say a foot (Case, p. 99, l. 15).

Afterward the Court, referring to the situation *after* the accident, but without any inquiry as to whether or not this was after they had pulled the scaffold "out of the way," asked him "how near was the scaffold to the door," to which Miller replied, "five feet, about" (Case, p. 100, l. 13).

The testimony of defendant's witness, Young, the newsdealer, also tends to support plaintiff's allegation that, *at the time of the accident*, the plank was close to the door. Such is the only possible inference from Young's testimony that, in going out of the waiting room he "came around *under* the ladders" (Case, p. 108, l. 4), that he "walked *under* the plank" (Case, p. 108, l. 20), and that he "*had* to get *under* the ladders to get out, to come out on the platform" (Case, p. 108, l. 27). He "*had to get under*" because the plank was close to the door.

His further statement that the ladder was "four or five feet" from the side of the building was so palpably in aid of the defendant as not to be entitled to consideration, especially as he "didn't notice particularly" (Case, p. 108, l. 24).

The plaintiff testified that "I went out as usual, out of the waiting room, and *in stepping down* I came in contact with the plank" (Case, p. 29, l. 24). And "when *I stepped down and my body went forward* it came in contact with the plank

which struck me across the forehead" (Case, p. 30, l. 29).

Mr. Earl testified on his direct examination:

Q How far away was the plank from the door itself? A It was close (Case, p. 40, l. 9).

And on his cross examination:

Q About five feet out wasn't it? A Nearer than that.

Q Are you sure about that? A From where I stood I can only say it was close to the door (Case, p. 41, l. 37).

And further, after looking at the photograph:

A I would think that that ladder was farther out than when I saw it.

Q Well, how much farther? A Well, considerably farther out (Case, p. 43, l. 39).

That such situation raises a jury question was explicitly held in *Dickinson v. Erie R. R. Co.*, 85 N. J. L. 586, where it was held that:

"A trial judge is only justified in granting a non-suit or directing a verdict upon a court question arising from the *admitted or uncontroverted* facts of a case. *The weight of conflicting testimony should always be submitted to a jury for their consideration and determination*" (Italics mine).

The conclusion of the trial judge that there was no negligence on the part of the painters in placing "these two ladders and the planking five feet away from the southerly door" (Case, p. 121, l. 27) not only assumes as a proven fact a condition which is contradicted by the testimony, but also requires the weighing of evidence.

“In passing upon motions to non-suit and for the direction of a verdict, the court cannot weigh the evidence, but must take as true all evidence which supports the view of the party against whom the motions are made, and must give him the benefit of all legitimate inferences which are to be drawn therefrom in his favor.” *Andre v. Mertens*, 88 N. J. L. 626; *Seftler v. Vanderbeek & Sons*, 88 N. J. L. 636; *McCormack v. Williams*, 88 N. J. L. 170; *Littman v. Slack*, 135 Atl. 776 (not officially reported); *Kerner v. Zerr*, 135 Atl. 866 (not officially reported).

If there was *any* testimony, no matter how meager, adduced on the part of the plaintiff tending to show the liability of the defendant, and no incontrovertible fact was established by the defendant which fact, as established, would constitute an absolute bar to the plaintiff's right of recovery, the defendant was not entitled to succeed on its motion. *Dellabello v. C. R. R. Co.* 99 N. J. L. 348.

Admitting that “the railroad company not only had a right, but, under the present public supervision, had a duty to paint their station,” and was “required to use just such scaffolding as was used in this case” (Case, p. 120, l. 31), it does not follow that such duty, and such right, absolved defendant of its duty to use reasonable care not to negligently injure, in the performance of that duty, any party lawfully on the premises.

It is important to note that the three painters who testified for the defendant were not only its own employees, but were the very persons whose negligence it is alleged caused the injury complained of. They were under a strong temptation to give such testimony as would exculpate themselves and save their jobs. They were vitally interested parties and their testimony is

subject to special scrutiny. Their relationship to the defendant immediately and peculiarly raised an issue of credibility, which is also a jury question.

In *Brush v. Long Island R. R. Co.*, 10 App. Div. (N. Y.) 535, affirmed on appeal without opinion, the Court says, upholding the refusal of the lower court to charge as requested by counsel:

“The only evidence as to the construction of locomotives Nos. 132 and 135 * * * came from persons in the employment of the railroad company; and the defendant was not entitled to have the jury instructed that the facts to which they testified were established by the proof. It was for the jury to say whether such facts were proved or not.”

A word as to Young, the news agent. His testimony that, in leaving the waiting room, he “walked *under* the plank” may be accepted for the reason that it tends to corroborate the testimony of all the other witnesses, to the effect that the plank was close to the door. But his further testimony is incredible. He may have seen the plaintiff and Mr. Earl as he left the station, but he did not come back for plaintiff's paper.

He testified that, as he was leaving the station, he saw the plaintiff and Mr. Earl approaching, and that they were then some twenty or thirty feet away (Case, p. 109, l. 27). Having known plaintiff for some fifteen or twenty years (Case, p. 107, l. 11), and wishing to save him a few steps, he turned back to the station to get his paper for him. Although the rack was not more than two steps from the door he took “ten or fifteen” steps (Case, p. 112, l. 14), and during

the short interval required to step within and pick the paper from the rack plaintiff and Mr. Earl had traversed the twenty or thirty feet, and the accident "was all over," he "didn't see it at all" (Case, p. 110, l. 38). Thereupon, without waiting to see if he could be of any assistance, without so much as a friendly inquiry as to plaintiff's injuries, and without waiting even to be sure that the plaintiff got his paper, he "turned and went home" (Case, p. 114, l. 4).

"A witness is not entitled to credit whose testimony is inconsistent with the common principles by which the conduct of mankind is naturally governed" (*Earle v. Hosiery Co.*, 36 N. J. E. 188).

The photographs and the drawing do not help the defendant. There is no testimony that these exhibits show the location of the plank *at the time of the accident*. The photographs were taken and the drawing made for the purposes of the trial some ten months after the accident, and the plank was placed by the foreman painter—an employee of the defendant and the very person responsible for plaintiff's injury. These exhibits, taken in connection with the testimony, simply emphasize the improbability of the injury having been received at the place where he alleges he saw the plank an appreciable length of time *after* the accident.

These exhibits were admitted in evidence "merely to show the plank and the supports that were used, but not to show the position at that time" (Case, p. 44, l. 19). "It is to go in with the understanding that it is not to be taken as proof of the position of the supports at the time of the accident" (Case, p. 44, l. 33). By the Court: "In other words, this is gen-

erally illustrative, and that is all. It is admitted by consent for that purpose and that purpose alone" (Case, p. 45, l. 11). "The jury understand these pictures are simply general pictures of the situation and that the location of the planking as indicated on the different pictures is not proof of what the location was upon the day of the accident" (Case, p. 45, l. 35).

A motion for a directed verdict is subject to the same rules as a motion for a non-suit, and "as a motion for a non-suit admits the truth of the plaintiff's evidence, and of every inference of fact that can be legitimately drawn therefrom" (*Fox v. Great A. & P. Co.*, 84 N. J. L. 726), defendant's motion admitted that the door was a public passageway, that it was under the exclusive control of defendant, that the agents or servants of defendant placed the plank, that the plank was across, and close to the door, that there was no warning of its presence, and that no person was present to call attention to the obstruction.

In this situation an inference of negligence was so manifestly legitimate that the trial judge was bound by the rule that :

"Where fair minded men might honestly differ as to the conclusions to be drawn from facts, *whether controverted or uncontroverted*, the question at issue should go to the jury" (*Nolan v. Traction Co.*, 74 N. J. L. 559),

and the same language is used by this Court in *McCarthy v. Met. Life Ins. Co.*, 75 N. J. L. 887.

From the testimony of the plaintiff and of Earl the jury could legitimately infer that one

ladder was in front of the ticket office and the other ladder was close against the wall between the window and the door. In those positions the ladders would not have been seen either through the window or the open door, and the plank would have come so near the easterly edge of the door that plaintiff must have struck it as he attempted to come out of the door, close to its easterly edge.

The jury could also legitimately infer, from the improbability that the painters could fail to be conscious of plaintiff's approach and the accident if they were actually present, that the painters were absent at the time, and did not move the ladders and plank until *after* the accident.

The finding of defendant's freedom from negligence, as a matter of law, rests upon, and is dependent solely upon, the assumption that the location of the plank as pictured by defendant was an uncontradicted and uncontroverted fact :

"Now, where was there any negligence upon the part of the railroad company through these painters in the placing of this ladder? What did they do? *They placed these two ladders and the planking five feet away from what is called the southerly door of the women's waiting room in this station? Where is there any negligence in that?*" (Case, p. 121, l. 25).

This is not an uncontradicted, or uncontroverted, or admitted, or proven fact—very much to the contrary. The foundation of such finding being destroyed, the finding itself falls.

The plaintiff was entitled to go to the jury on the issue of defendant's negligence.

POINT III.

The defense of contributory negligence on the part of plaintiff was a jury question.

The plaintiff entered the southerly door of the waiting room and proceeded in a generally diagonal direction across the room to the paper rack. It is a fair inference that he may have been looking toward the rack, or he may have been counting change. He was wearing a broad-brimmed straw hat, which, it being a clear day in August, may have been pulled down over his eyes.

In any event, in crossing the room for his paper he was under no duty to look out of either the doors or the windows, and that he did not so look cannot be imputed to him as negligence.

Furthermore, if, as may fairly be inferred, one support was against the wall between window and door and the other support was beyond the ticket office projection, the supports would not have been visible, and the plank would not have been noticeable in the shadow of the overhang (see Exhibits 4 and 5).

The paper rack was against the same wall in which is located the door through which plaintiff attempted to make his exit (Exhibit 3). The door was open, and opened away from him. Having taken his paper and stepped to the door, *the natural, the instinctive, and the usual thing, the thing which the "ordinarily prudent person" does, the thing we are constantly admonished in the interest of safety to do, was to "watch his step,"* and to *look down* as he stepped from the room level to the lower platform level.

A person lawfully in a building, by invitation express or implied, has a right to rely on the presumption that the passages, entrances and exits,

for the use of the public, are in reasonably safe condition for such use and free from obstructions; and he need not keep his eyes constantly fixed on the pathway, or look far ahead for defects or obstructions which should not exist.

In *Van Pelt v. Sturgis*, 133 Atl. 303 (not officially reported), the court said that

“A pedestrian is not obliged to look constantly where he is going, nor to give unremitting attention to his steps, and it follows that he is not guilty of contributory negligence as a matter of law merely because, failing to do so, he falls into a hole or trips over an obstruction in the way.” See also *N. J. Exp. Co. v. Nichols*, 33 N. J. L. 434, and *Phillips v. Lib. Co.*, 55 N. J. L. 307.

The rule that a railroad “company must also provide safe means for access to and from its station for the use of passengers, and passengers have a right to assume that the means of access provided are reasonably safe,” is equally applicable to anyone having lawful business upon the premises.

It is not negligence not to anticipate the negligence of another. It is not negligence not to see a danger, although it *might* have been seen, where one is under no duty to anticipate danger and his attention is directed to some other object.

One lawfully using a public passageway, whether it be a street, a sidewalk, or a way provided for ingress to and exit from a public building, need only take such care as is commensurate with the dangers he knows, or, as a prudent man, should know, surround him; he is required to use only as much circumspection as would serve to protect him from such dangers as are usually incident to public passageways.

In the instant case the only danger which, as a reasonably prudent man, he was called upon to anticipate, the only danger incident to this passageway, was the step from the waiting-room level to the lower platform level. To make the observation required to meet that danger he necessarily and prudently looked *down*, and *watched his step*.

In the instant case the scaffold was supported from below. In *Matheke v. U. S. Exp. Co.*, 86 N. J. L. 586, a scaffold was supported from above, but the situations are legally the same. There the driver of the express wagon, failing to see the scaffold, ran into it, and it was urged that it was the duty of the driver to have looked up and to have seen the scaffold. But this court said:

“The law, however, imposed no such duty upon the driver who, as correctly stated in the request, had the right to presume that the street was free from a temporary obstruction in so unusual a place. * * * if he did not see it or know of it he was under no duty to look for something he had the right to presume did not exist. * * * merely temporary obstructions to travel, such as an open area or coal chute, the piling up of building materials, a lowered arc light or a sign or awning suspended so low as to impede travel, are matters as to which, in the absence of knowledge or of actual warning, the presumption is that no such obstructions to travel will be encountered.”

Of the request to charge the jury, referred to in the above quotation, the court said:

“that the driver of the wagon had the right to presume that the street was free from a scaffold suspended from the elevated structure embodied a proper statement of the law, and ought to have been charged as correctly presenting the legal aspect of the

case if the driver of the wagon did not see the scaffold or know of its existence, which the jury must have found to be the fact if they accepted the statement of the driver, who testified that he did not see the scaffold because he was looking at his horses, and that he did not look up because he was looking where he was going."

This case was followed in *Doherty v. Romano*, 135 Atl. 62 (not officially reported), where the Supreme Court sustained the propriety of the charge by the trial judge that the traveling public had the right "to assume that there is no dangerous impediment or obstruction of a temporary nature in any part of the highway, unless proper warning is given of its existence by the person responsible for its presence there." By parity of reasoning this holding is applicable to persons lawfully using a public passageway.

Citations might be multiplied of cases where this court has affirmed verdicts for the plaintiff when the plaintiff failed to see a danger because looking in another direction, and was injured. In *Deronet v. Woolworth Co.*, 89 N. J. L. 669, and in *MacDonough v. Woolworth Co.*, 91 N. J. L. 677, this court affirmed such verdicts for the plaintiffs. The plaintiffs were looking up, at objects on a shelf, and failed to see an open stairway in the passageway, and the verdicts could have been affirmed only on the theory that plaintiffs' failure to look down was not negligence as a matter of law.

The statement of the trial judge that "a man must look ahead of him. That is the law" (Case, p. 122, l. 22), is, appellant contends, erroneous. To be sure, the court then qualified that remark, but immediately re-stated it in even stronger terms—"this man Mr. Thompson had the duty of looking ahead of him, and if he had that duty

from the standpoint of its exercise, such exercise as would have been made by an ordinarily prudent person, he must necessarily have seen these ladders and the planking" (Case, p. 122, l. 31). *Not necessarily.* Whether the ladders and plank, at the time of the accident, were in the location indicated by the foreman painter was a controverted question. That the plank was "close to the door," and not five feet away, seems to be supported by the great preponderance of the evidence. That the plaintiff could have seen the ladders through the window or the door was not admitted. Whether it was or was not negligence for the plaintiff to look down and "*watch his step*," instead of looking up to see if an open and public doorway was obstructed, was an issue to be determined by the jury in view of all the surrounding circumstances.

The finding of the trial judge that plaintiff was guilty of contributory negligence was based upon the assumption, first, that the painters had "placed these two ladders and the planking five feet away from what is called the southerly door of the women's waiting room" (Case, p. 121, l. 28); second, that "that is uncontroverted as to the distance" (Case, p. 121, l. 13); and third, that the plaintiff "had the duty of looking ahead of him, and if he had that duty from the standpoint of its exercise, such exercise as would have been made by an ordinarily prudent person, he *must necessarily* have seen these ladders and this planking" (Case, p. 122, l. 31), *at a distance of five feet from the door.*

But, manifestly, as the testimony as to such distance is contradicted and controverted, as it is neither admitted nor conclusively proven, and as, on the contrary, there is ample testimony that the plank was *close* to the door, the very basis

and foundation of the finding of contributory negligence as a matter of law crumbles away, and the finding goes with it.

The plaintiff being entitled to go to the jury on the issue of defendant's negligence, he was also entitled to go to the jury on the issue of his own contributory negligence.

POINT IV.

The determination of plaintiff's damages was for the jury.

The trial judge held that "the medical testimony in this case is such that this man, who had already had two strokes, who had already had two cerebral hemorrhages, was in such a diseased condition that the third cerebral hemorrhage, which happened after this accident, was due to the diseased condition and not to this bumping of the head." *(Case p. 119, l. 17).*

Let us go to the testimony and see if, in fact, the medical testimony supports any such conclusion.

It is plaintiff's insistence that such testimony strongly and clearly supports quite the opposite conclusion.

When Dr. Decker saw the plaintiff two days after the accident

"he was complaining of pain. Severe pain over his right forehead region which he told me had come immediately and increasingly since the time he hit his head. He had difficulty of vision, he could not read. There was a weakness on his left side and arm and leg and face. Dizziness. Blood pressure was 170 systolic" (Case, p. 16, l. 38).

His testimony as to the cause of plaintiff's condition is clear, concise and unequivocal:

Q What, in your opinion, was the proximate cause of that condition? (Referring to the condition testified to just above.) A I believe that he had had a rupture of a blood vessel in the brain which controlled the left side of his body and face and his eyes.

Q What, in your opinion, was the cause of the rupture of the blood vessel? A I believe it was the result of an accident. A blow to his head.

Q Do you attribute the condition in which you found him to the blow? A Yes, sir, I do (Case, p. 7, l. 34).

On cross examination the cause of plaintiff's condition was again touched upon:

Q Now did he suffer a third stroke? A He suffered a stroke, what is ordinarily termed a stroke, as a result of a blow on his head in August, 1926 (Case, p. 15, l. 28).

Dr. Decker was plaintiff's family physician and acquainted with his previous medical history; he was, therefore, far better qualified than any of the other medical witnesses to testify as to what was the proximate cause of plaintiff's condition.

Q In your opinion was or was not Mr. Thompson's condition prior to August 27, 1926, the proximate cause of the condition which you found on August 29, 1926? A No, sir (Case, p. 22, l. 38).

Dr. Banker gave it as his opinion

"that the probable cause was the injury where the symptoms follow immediately after the injury" (Case, p. 50, l. 22).

Plaintiff had, long prior to the accident, recovered from his mastoiditis operations, and no attempt was made to connect that trouble directly with his condition immediately following the accident. The whole defense rested substantially upon the claim that such condition followed upon, and was proximately and solely due to, cerebral hemorrhages occurring in December, 1925, and March, 1926. That such hemorrhages had resulted in "a diseased condition," and that the last hemorrhage "was due to the diseased condition and not to this bumping of the head" (Case, p. 119, l. 22).

But Dr. Decker testified that in June plaintiff had recovered from the March attack.

Q When you saw him in June to what extent had he recovered from that? A *Practically entirely* (Case, p. 22, l. 34).

So far recovered, in fact, that he required no further medical attention.

We have further corroboration in Mrs. Thompson's testimony:

Q What, as you observed it, was Mr. Thompson's general physical and mental condition on the morning of the 27th prior to his going to the station? A I thought he was very good.

Q Did you or did you not see anything unusual or abnormal about it? A Before he went to the station? No.

Q Had you or had you not observed anything unusual or abnormal in his condition subsequent to the previous June? A Well, he was practically normal up until that time. I mean until August, you know. I thought that is what you asked me (Case, p. 34, l. 34).

Of the highest significance is the fact that Mr. Crumley, who had known plaintiff for many years, did not hesitate, just a few days before the accident, to enter into a contract for his services covering an anticipated period of several years (Case, p. 27, l. 37).

Again, in the succeeding nine months, up to the time of the trial, there was no recurrence of hemorrhages, *notwithstanding plaintiff's weakened condition.*

Surely, these are not the indicia of such "a diseased condition" of the brain tissues as to make recurring hemorrhages immediately imminent. The fact that, nine months after the injury, and in spite of his enfeebled condition, plaintiff had suffered no further hemorrhage, is cogent and convincing evidence that except for the blow no hemorrhage would have then occurred.

On the testimony of Dr. Decker a jury question was raised, as was held in *Berglund v. Hild*, 135 Atl. 52 (not officially reported). There the defendant claimed that plaintiff's decedent died from endocarditis, and not from the injury received in the accident. The attending physician was asked:

"Would you say that the endocarditis would have been sufficient to produce the physical decline which resulted in death?"

And he replied:

"No; I think Ruth would have been alive today if it had not been for the injuries received."

It was held that the cause of decedent's death was a jury question.

Further doubt as to the presence of such diseased condition lies in the circumstance that *not one* of the five doctors, of whom three examined plaintiff, testified as to the actual presence of such condition. No one asserts that any of the hemorrhages was, in fact, due to disease, or hardening of the arteries, and *not one* testified that plaintiff was then, or ever had been, suffering from hardening of the arteries or from any other specific cause of cerebral hemorrhages.

How, then, could the court find that, as a matter of law concerning which there could not be two opinions, the medical testimony conclusively proved plaintiff's condition to be solely due to his "diseased condition"?

The sum and substance of the testimony of the three doctors who testified for the defendant appears in their answers to the following hypothetical question, asked by counsel:

Q Doctor, assume that a man fifty-seven years old, who has had an active physical career as a consulting engineer, has had an operation for double mastoiditis in October, 1925; that following this operation he was unable for some time to resume his usual work and to go to his office in New York; and that in December he sustained a cerebral hemorrhage resulting in a stroke of paralysis; that in the following March, that is March, 1926, he had a second cerebral hemorrhage resulting in a second stroke. Assume further that in August, 1926, this man struck his head against a plank about two inches in thickness; that there was no loss of consciousness at all, either partial or total; that he walked from the scene of the accident to his house; that he was conscious thereafter until his physician got there two days later; and that later on a few days after this accident he sustained a third stroke of paralysis. Now, doctor, is

it possible with any reasonable degree of probability to exclude from the third stroke which this man had the results and conditions brought about by the double mastoiditis and by the two strokes of paralysis that this man received (Case, p. 71, l. 21).

The essential part of the inquiry lies in that portion which was repeated:

"Now, doctor, is it possible with any reasonable degree of probability to exclude from the third stroke which this man had, the results and conditions brought about by the double mastoiditis and by the two strokes of paralysis that this man received?"

to which Dr. Green's reply was:

"In my opinion you cannot exclude those results" (Case, p. 72, l. 36),

and the replies of Dr. Lufburrow and Dr. Arlitz were to the same effect.

But no one has sought to "exclude" "the results and conditions brought about by the double mastoiditis and the two prior strokes." On the contrary, it is admitted that doubtless plaintiff's condition was such that the result of the blow was more serious than it would have been had plaintiff not been subjected to the strain incident to his prior illnesses. As stated by Dr. Lufburrow, in answer to the question:

Q After a person has been suffering from mastoiditis and has had an operation for double mastoiditis, in what condition is the person's general health likely to be for some time? A Well, he is apt to be weakened, his resistance run down. He is much more feeble than he was before he was subjected to this operation (Case, p. 80, l. 14).

Dr. Arlitz, who examined Mr. Thompson on behalf of the defendant, found that "his general resistance was below normal" (Case, p. 85, l. 12), and that "his general resistance was below

the average" (Case, p. 85, l. 33); but *not a word* concerning any disease of the brain, or hardening of the arteries.

This absence of any testimony that plaintiff was, in fact, suffering from hardening of the arteries is significant in view of the qualified way in which defendant's medical witnesses testified upon this subject.

For example, Dr. Green said: "*If the cerebral hemorrhage were due to disease, that is to say, hardening of the arteries, and a rupture of the artery from its brittle condition—that is a progressive disease—that really never gets better, and when an artery is sufficiently brittle to break other arteries are also liable subsequently to break.*" (Italics mine.) (Case, p. 69, l. 37.)

The absence of such testimony is further significant in the light of Dr. Green's further statement that:

"You have got to have something within to raise the blood pressure sufficiently high to make that artery break, and I can conceive that being struck on the head or anywhere else in the body would cause the victim to stiffen up and resist, and *in that way* raise his blood pressure, but whether it would be sufficient to break the artery or not *depends entirely on how severely he resists any injury*" (Case, p. 74, l. 34) (Italics mine).

Taken in connection with plaintiff's weakened condition due to prior illnesses, we have here an adequate explanation of the hemorrhage, free from any doubtful question as to its having been caused *proximately* by disease.

The great weight of authority is fairly expressed in the following terms:

"The duty of care and of abstaining from injuring another applies to the sick, the weak and the infirm as well as to the strong and healthy."

"It may be stated generally, that if the negligence of A produces a hurt to B, which aggravates a pre-existing tendency to disease in B, the negligence, and not the disease, is deemed in law the proximate cause of the injury." *Thompson on Negligence*, 2nd Ed., Vol. 1, Secs. 150 and 151.

"A person or corporation has no more right to negligently inflict injuries upon a sick person than upon a well person, and the existence of latent disease brought into activity by a fall or other injury would not constitute a defense to an action to recover damages for such injuries." *Jones v. City of Caldwell*, 116 Pac. 110.

The following citations illustrate the application of the above rules.

In *L. & N. R. Co. v. Jones*, 83 Ala. 376, 3 So. 902, Mrs. Jones died following injuries received in a railroad accident, and her administrator brought suit for damages for her death. The railroad company defended on the ground that Mrs. Jones had pneumonia at the time of the accident, and that death resulted proximately from the disease, and not from the accident.

Upon appeal a verdict for the administrator was affirmed, and the court said:

"Even if Mrs. Jones had pneumonia, or incipient pneumonia, at the time she received the injury, and it could be known that she would ultimately die of that disease, this would not necessarily, and as a matter of law, relieve the railroad of all responsibility. If the injury was caused by the negligence of the railroad company, under the rules declared above, and if it contributed to and

hastened her death, then the corporation would not be guiltless. * * * If the plaintiff's intestate had pneumonia at the time she was injured, and died of it, it does not follow that the injury was not the real cause of her death, in this—that it so impaired her strength and vital force as to render the disease incurable, when, without the injury, it would have yielded to treatment. Nor, in such case, is there any presumption that the disease alone caused her death rather than that the disease augmented and accelerated by the injury produced the result."

In *McCahill v. N. Y. Trans. Co.*, 201 N. Y. 221, 94 N. E. 616 (citing many supporting cases), judgment for the plaintiff was affirmed. The plaintiff was struck and severely injured by a taxicab, and died a few days later of delirium tremens. But the court upheld the finding of the jury that the *injuries* received were the proximate cause of death, saying:

"The injuries precipitated, hastened, and developed delirium tremens, and these caused death. There can be no doubt that the negligent act directly set in motion the sequence of events which caused death at the time it occurred. * * * The principle has become familiar in many phases that a negligent person is responsible for the direct effects of his acts, even if more serious, in cases of the sick and infirm, as well as in those of healthy and robust people. * * * The principle is also true, although less familiar, that one who has negligently forwarded a diseased condition, and thereby hastened and prematurely caused death, cannot escape responsibility even though the disease probably would have resulted in death at a later time without his agency."

In the above case a physician testified, referring to the plaintiff:

"He rapidly developed delirium tremens. * * * I should say with reasonable cer-

tainty the injury precipitated his attack of delirium tremens, and understand I mean precipitated, not induced. * * * He might have had it anyway. Nobody can tell that."

Commenting upon the defense, the court remarked that:

"Closer analysis shows that the real proposition urged by the appellant is that it should not be held liable for the results which followed its negligence, either, *first*, because those results would not have occurred if intestate had been in a normal condition, or, *secondly*, because his alcoholism might have caused delirium tremens and death at a later date even though appellant had not injured him. This proposition cannot be maintained in either of its branches which are somewhat akin."

"The principle has become familiar in many phases that a negligent person is responsible for the direct effects of his acts, even if more serious, in cases of the sick and infirm as well as in those of healthy and robust people, and its application to the present case is not made less certain because the facts are somewhat unusual."

Mr. Justice Vann, in a concurring opinion, remarked that:

"The acceleration of death causes death according to both the civil and the criminal law. * * *

"A person with an incurable disease may be so injured as to aggravate the trouble and hasten it to a fatal result. In such a case death is owing to two concurring causes, disease and violence, neither of which would have caused death when it occurred without aid from the other. One cause may be more efficient than the other, yet, unless acting alone it would have resulted in death, not in the future, but when death actually came, it is not of itself the proximate cause. While in this case delirium tremens was not caused by the accident it was set in motion by the accident and thus became an effective

agency of death; the same as if the decedent had had heart disease, but would have continued to live a while longer had it not been set in motion and hurried to a fatal end by violence."

Immediately prior to the accident of August 27, 1926, plaintiff was practically a well man. There were no external indications of any latent weaknesses which he may have had. Neither his doctor, nor his wife, nor his business friend, Mr. Crumley, found anything in his condition to cause alarm or apprehension. He, himself, evidently felt no doubt as to his ability to meet the demands of his professional work.

Then came the blow upon his head, and *immediately* following that blow those conditions developed which it is alleged were caused proximately by the blow. The blow was a possible and a sufficient cause. His family physician says, positively, that it was the cause. There was no other apparent cause.

No hemorrhage followed in the succeeding nine months, notwithstanding plaintiff's weakened condition. The subsequent history of the case practically excludes the possibility of a diseased condition of the brain having been the proximate cause of plaintiff's trouble, and that possibility being excluded, there remains no other cause to which it may be attributed except the blow.

The testimony raised a jury question, and it was error to find, as a matter of law, that plaintiff's injuries were solely caused by his "diseased condition."

POINT V.

Plaintiff was entitled to damages for such injuries as proximately resulted from defendant's negligence.

The trial judge was also in error in holding that

"even though this case went to a jury, they would not be justified in finding damages for anything else except the immediate effect of the mere bumping of the head and the annoyance that came from that, whatever it was. Therefore so far as the amount involved in this case is concerned, it could be but very, very slight if the jury followed, as they unquestionably did, the great preponderance of the evidence in this case" (Case, p. 119, l. 6).

The clear import of this statement is that the injury resulting proximately from that "mere bumping of the head" was no more than an "annoyance" to the plaintiff, and too trivial and inconsequential for the attention of the jury.

To that view plaintiff dissents.

That it was a severe blow cannot be doubted. It was no "mere bump," and resulted far more seriously than a mere "annoyance." Plaintiff was dazed and in pain. On returning home he was obliged to go to bed, and later it was necessary to call a physician. If his condition was proximately due only in part to the blow he was entitled, so far, to compensation. The difficulty in drawing the line between the injuries due to the blow and troubles collaterally arising due to latent disease, is not a reason for being so tenderly solicitous of the alleged rights of the tortfeasor as to do substantial injustice to the injured party.

The negligence of the defendant being established and the plaintiff having been free from

contributory negligence, plaintiff was entitled to go to the jury for an ascertainment of a reasonable compensation for such of his injuries as were proximately due to defendant's negligence.

The trial court having erroneously directed a verdict for the defendant-respondent, the plaintiff-appellant is entitled to a reversal thereof and to a *venire de novo*.

Respectfully submitted,

E. A. MERRILL,
Attorney for and of Counsel
with Plaintiff-Appellant.

New Jersey Court of Errors and Appeals

SAMUEL B. THOMPSON, Plaintiff-Appellant, <i>vs.</i> CENTRAL RAILROAD COMPANY OF NEW JERSEY, Defendant-Respondent.	}	On Appeal from Supreme Court.
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BRIEF FOR DEFENDANT-APPELLANT.

Samuel B. Thompson instituted this action against The Central Railroad Company of New Jersey, alleging that on August 27th, 1926, while at the Fanwood station, for the express and sole purpose of purchasing a newspaper from the newsstand of The Union News Company, which was located at such station, he received certain injuries which were occasioned by the negligence of the defendant.

The case was tried at the Union Circuit with the result that the Trial Judge directed a verdict in favor of the defendant.

From the judgment entered on said verdict, plaintiff now takes this appeal.

Statement of the Case.

The tracks of the defendant at Fanwood run east and west. East is towards Jersey City and New York. This accident occurred at the station on the north side of the tracks, i.e., at the west-bound station (Rec. 30).

The general layout of the station is shown on the map, of which a photographic reproduction to a reduced size is attached to the State of the Case, being marked "Exhibit D-15." Various portions of the station are shown in the photographs, "Exhibits D-1, D-2, D-3, D-4, D-5, D-6, D-7, D-8, D-9, D-10, D-11, D-12, D-13, D-14," copies whereof to a reduced size are also annexed to the State of Case.

As will be perceived by reference to the map, the men's waiting-room is situated at the west end of the station, while the women's waiting-room is located at the east end of the station. Between these two waiting-rooms is the ticket office, at the southerly side of which is a bay-window. Leading into the north side of the women's waiting-room is a door 3 feet 7 inches in width and 7 feet $6\frac{3}{4}$ inches in height. Directly opposite this door is another door on the southerly side of the same width and height (Rec. 91, 92).

Both of these doors are clearly shown on photograph "Exhibit D-2," this photograph being taken from the southerly side of the station and looking through, first, the door on the south side and then the door on the north side of the station.

The Union News Company maintained a news stand and counters at the southeast corner of the station, such stand and counters being clearly depicted in photograph D-1. Between this newsstand and the door on the southerly side of the station was a window, 44 inches in width, the bottom of which was 24 inches above the floor (Rec. 91, 92).

On the southerly side of the station, i.e., the side adjacent to the tracks, was a cement platform $14\frac{1}{2}$ feet in width (Rec. 3).

On the easterly side of the station was a board platform which ran northerly to a cinder walk,

which then led in a curve up to the corner of Martine and Park Avenue (Rec. 92).

Mr. Thompson, the plaintiff, lived on Martine Avenue, and on the morning of the accident had gone from his home to the Fanwood station for the purpose of purchasing a newspaper from The Union News Company stand at such station (Rec. 29).

For a period of approximately nine or ten days prior to the accident, the defendant's painters had been and still were engaged in the work of painting both the interior and exterior of said station (Rec. 115).

On the morning of the accident and before the occurrence thereof, these painters had been engaged in painting the inside, or under part of the roof, or overhang, on the south side of the station, and in order to enable them to reach the particular part of such roof, or overhang which they were painting they had been using a scaffold. This scaffold consisted of a plank 16 feet in length and 2 inches in thickness, laid on or across two ladders, which were "V" shaped ladders, and which were leaned together at the top and bottled. The plank so laid on said ladders was between 5 feet and 5 feet 3 inches from the ground (Rec. 40, 58, 91, 92).

This scaffold, including both the ladders and plank is accurately and correctly depicted in photograph D-2, (Rec. 40).

During the time that the painters had been using this scaffold, prior to the accident, for the purpose as aforesaid, of painting the overhang of the roof, the scaffold had been located at a point close to the south door of the station, i.e., approximately 6 inches or a foot away from such door. It was necessary for them to have this scaffold in this position in order that they might

thus get at the particular portion of the roof which they were painting (Rec. 96, 97, 98).

After finishing such portion of the roof, however, they moved the scaffold back or away from the door to the position in which it was at the time of the accident. The scaffold in such position was at a distance of approximately 5 feet away from the southerly door and had been in such position or location for a period of approximately 3 to 5 minutes before the accident occurred. At the time of the accident the painters were engaged in painting the bay-window and weather boards at the south side of the station. After finishing this work their next work would be the finishing of the overhang or eaves of the station roof at the south side of the station, and in order to do this work it would be necessary for them to use the scaffold either in the position in which it was at the time of the accident or at a point about 6 inches south of such position or location (Rec. 64, 65, 66, 96, 97, 98, 99, 100, 108, 112).

In other words they were constantly using this scaffold and would move it as occasioned as the exigency of their work required.

The evidence produced upon the part of the plaintiff was to the effect that on the morning in question the plaintiff, together with a friend named Earl, proceeded from his residence, southerly, on his way to the station to buy a newspaper; that on arriving at the station the plaintiff entered the north door of the station, which at such time was open, while Mr. Earl proceeded around the east side of the station and thence to the southerly side thereof; that after entering such door the plaintiff went to the newspaper

rack, which was kept and maintained by the Union News Company for its regular patrons, and which on the day of the accident was located on the south side of the station up against the wall between the window and the southerly doorway (such rack being clearly shown in photograph D-3); that after having taken his paper from the rack the plaintiff then proceeded through the door on the southerly side, which was open; and that after having gotten through said door his head came in contact with the plank on the scaffold causing the injuries complained of (Rec. 28, 29, 30, 38, 39, 40, 41); that as the plaintiff entered the station, both the door on the north side, through which he entered, and the door on the south side were fully opened.

Defendant's proof was that the plaintiff did not enter or pass through the door on the north side of the station at all; that, instead, both Mr. Earl and the plaintiff after leaving the cement walk, which has already been described, proceeded southerly along the east side of the station on the board platform or walk (such platform being shown on the map, Exhibit D-15); that after having reached the southeast corner of the station they then turned and walked westwardly on the cement platform along the southerly side of the station, and that the plaintiff was injured while attempting to *enter* the station through the door on the south side; that he was not at such time, as alleged by him, leaving the station by such door; that a man named Young, who was in the employ of The Union News Company, was in charge of the news stand in the station and had marked the plaintiff's paper with the latter's name and put it in the news rack which, as already stated, was located against the wall on the south side of the station between the

window and the southerly door; that Young had started for his home, having left the station by the door on the southerly side; that on his way from the station he saw Mr. Earl and the plaintiff proceeding towards the station, whereupon, he, Young, retraced his steps, re-entered the station through the southerly door, went to the rack wherein the plaintiff's paper was contained, took out said paper and then again started out the door on the southerly side for the purpose of delivering the paper to the plaintiff; that as he came out of the door he saw the plaintiff on the southerly side of the plank and scaffold, i.e., between the scaffold and the tracks and not between the scaffold and the station; that although, after perceiving, as aforesaid, the plaintiff and Earl, he had immediately re-entered the station, yet, he at no time saw the plaintiff come through the door on the northerly side or saw the plaintiff in any part inside of the station building (Rec. 57, 59, 60, 61, 62, 63, 96, 99, 100, 101, 103, 105, 106, 107, 108, 109, 110, 111, 114).

This accident occurred at about 9:30 or 10:00 o'clock in the morning on a bright, clear day (Rec. 31, 111).

In the nine or ten day period, during which, as aforesaid, the painters of the defendant had been working around this station prior to the accident, the plaintiff had on days previous to the day of the accident, visited the station and had been in and around the premises (Rec. 115).

The plaintiff was 5 feet 9 inches in height (Rec. 46). That is to say, of course, that the plaintiff was at least 6 inches taller than the plank was high.

The Alleged Negligence.

The negligence of which the plaintiff alleges the defendant was guilty is set forth in paragraphs 3 and 4 of the complaint as follows:

3. "Defendant by its servants, employees, or agents, and without warning to plaintiff, had carelessly and negligently placed an obstruction across said doorway at about the height of plaintiff's forehead.

4. "As plaintiff was leaving said station building, through said doorway, his head came violently in contact with the obstruction across said doorway and he was thrown violently to the floor. * * *" (Rec. 3, 4).

The Issues Involved on This Appeal.

The plaintiff was 57 years of age (Rec. 31).

The accident took place on August 27, 1926.

The evidence disclosed that in the fall of 1925 the plaintiff had undergone an operation for double mastoiditis (Rec. 9); that in the month of December, 1925, the plaintiff had suffered a stroke of paralysis, or cerebral hemorrhage (Rec. 14); that in the month of March, 1926, the plaintiff had suffered a second stroke, or cerebral hemorrhage, which was a "moderately severe attack" (Rec. 15, 22).

It was the defendant's contention that the third stroke, or hemorrhage, which was suffered by the plaintiff after the accident, was not caused by, or the result of the accident, but was simply the natural sequence of the disease of the cerebral vessels which had existed in plaintiff for a long period of time and which had been responsible for the first and second hemorrhages or strokes.

And in fact the medical witnesses produced upon the part of the plaintiff testified that it is common for a person who has had one stroke to

have a second stroke; that it is common for a person who has had two strokes to have a third stroke; that the symptoms are the same whether the stroke be caused by natural causes or by a traumatic injury; that plaintiff's condition after the accident "could have been produced by the accident, or it could have been produced by the same factors which gave him the stroke twice previously" and that there was nothing about the symptoms that would tell one whether it was due to the injury or whether it might be due to the disease of the blood vessels (Rec. 26, 27, 50, 53, 54, 55).

At the end of the entire case, defendant moved for a direction of verdict upon three grounds:

FIRST: That the plaintiff at the time of the accident was a mere licensee, and that therefore the defendant owed him no duty save to refrain from wilful or wanton injury, of which injury there was neither the allegation nor proof.

SECONDLY: That there was no evidence of negligence upon the part of the defendant, and

THIRD: That the plaintiff was guilty of contributory negligence (Rec. 117, 118).

The Court rejected the first ground, i.e., that the plaintiff was a mere licensee. It, however, directed a verdict for the defendant upon the ground that there was no evidence of negligence on defendant's part, but that even if there was such evidence the testimony conclusively showed the plaintiff to have been guilty of contributory negligence.

In directing the verdict the Court commented upon the medical testimony which had been presented upon the question of whether or not the plaintiff's condition, after the accident, was due

to natural causes or to an injury sustained by the accident, and remarked that the preponderance of the medical testimony was to the effect that the third hemorrhage which plaintiff suffered after the accident was due to a natural disease and was not caused by the accident (Rec. 118, 119, 120, 121, 122, 123).

Plaintiff's counsel has evidently conceived a mistaken idea that the Court's action in directing a verdict for the defendant was based upon its review of the aforesaid medical testimony as to the probable cause of plaintiff's third stroke, for counsel has exhaustively discussed and reviewed such testimony under Point IV and Point V of his brief.

The record conclusively shows, however, that although the Court commented upon this testimony as aforesaid, this played no part in the Court's direction of the verdict, for such direction was based solely upon two grounds, i.e, first the absence of negligence on the part of defendant, and, secondly, the plaintiff's contributory negligence (Rec. 120, 121, 122, 123).

This being the case, this brief will therefore be limited to a discussion of two questions, as follows:

FIRST: Was there any evidence of negligence upon the part of the defendant?

SECONDLY: Was the plaintiff guilty of contributory negligence?

ARGUMENT.**POINT I.****There was no evidence of negligence upon the part of the defendant.**

It is conceded that the defendant owed to the plaintiff a duty of care. However, such duty was not to exercise a high degree of care, but was merely to exercise only ordinary care to render its premises reasonably safe. *Nolan vs. Bridgeton and Millville Traction Co.*, 74 N. J. L. 559; *Sommer v. Public Service Corporation*, 79 N. J. L. 349; *Seftler v. Vanderbeek & Sons*, 88 N. J. L. 636; *Mayes v. Splitdorf Electrical Co.*, 94 N. J. L. 460; *Fitch v. Central Railroad Company*, 74 N. J. L. 135; *Holtzman v. Hudson and Manhattan R. R. Co.*, 101 N. J. L. 255.

Where then was there any breach of such duty or any negligence upon the part of the defendant?

The plaintiff, both in his complaint and at the trial, contented himself with, and rested his case upon the mere broad allegation that the defendant should be held negligent because it allowed this scaffold (which at the time was unquestionably being used in connection with the lawful purpose of painting the station) to stand upon the station platform "without warning." Neither in his pleadings or proof did plaintiff suggest, nor does he now suggest in his brief, what nature of warning the defendant should have given to the plaintiff.

There was no endeavor made to prove that it is customary to protect a situation of this sort by any specific kind of "warning." It was not shown, or attempted to be shown that there was any rule, which was breached, requiring any particular kind of "warning" on or near this scaffold. In fact all

that the plaintiff did was to show that the scaffold was on the defendant's station platform where it had a perfect right to be, and then, without proof of what, if anything, was customary under such circumstances in the matter of protection, or was reasonably practicable in the matter of protection, simply argue in broad generality and words of conclusion rather than of proof, a lack of "warning" without making the slightest effort to indicate for the enlightenment of the court or of the jury what kind of "warning" should have been given.

It must be borne in mind that this accident occurred in broad daylight. Concededly the north door and the south door of the station were open. There was not the slightest lack of visibility inside of the station or outside the station where this accident occurred. The case, therefore, is not one of a trap created by the plaintiff nor a case where the scaffold lurked in darkness into which the plaintiff might step.

The defendant was engaged in performing the laudable purpose, and the fulfillment of its probable duty, in painting its station. It is unquestioned that to do this work the scaffold was required. It is likewise unquestioned that just a few minutes before the accident the painters had been actually using this scaffold for the purpose of painting the eaves of the station building, and that a few minutes later would be required to use it again in substantially the same position that it was in when this unfortunate accident occurred. Certainly, the defendant had a right to use the scaffold at such point and for such purposes.

What then should the defendant have done? Should the defendant have stationed men all over the premises to announce in loud tones the very obvious presence of this scaffold? Should there

have been flags of some sort? The plaintiff does not even suggest that it was defendant's duty to do any of these things.

Let us assume that other persons lawfully on the station premises had been standing just outside of the door through which plaintiff, according to his testimony, came. Can it be seriously urged that the defendant should have had employees present to warn plaintiff of the presence of these persons so that the plaintiff would not collide with them?

It is a matter of common knowledge that in connection with its lawful business, a railroad company maintains baggage and similar trucks upon its station premises. Is it to be said that every time the defendant had a baggage truck upon the station platform at Fanwood it would be thereby under a duty to see to it that every person coming upon the station premises was duly notified and apprised of the presence of such truck?

In short, the plaintiff in this case asserts that the defendant failed to perform its duty, but it neglects to allege or prove what the defendant should have done.

Defendant's proof was that the distance from the westerly casing of the south door, i. e. through which plaintiff alleges he proceeded, to the plank on the scaffold was 5 feet (Rec. 91).

Plaintiff's testimony was to the effect that the plank was closer, but plaintiff's witness who testified to this fact, admitted that he could not give the distance (Rec. 42).

In any event, whatever the distance, there was not the slightest contention that this ladder was placed in the frame of the door itself, and it was conceded that the plank did stand south of the door, for some distance, whatever that distance

might have been. It is earnestly urged that the case is entirely barren of proof that the defendant in doing this act, which was unquestionably done in connection with the lawful purpose of painting and keeping in condition the station premises for the use and benefit of the public, failed to use ordinary care or failed to do anything that an ordinary person would have done under the circumstances.

This, of course, is not a case where the doctrine of *res ipsa loquitur* applies, but the burden was upon the plaintiff to prove that the defendant was guilty of some *act* of negligence.

It is submitted that there is not the slightest scintilla of evidence on this score. Plaintiff's brief stresses with great repetition and reiteration the duty of the defendant to use due care but fails utterly to point out or suggest in what respect the defendant breached this duty.

Briefly summed up, therefore, the case is one in which the plaintiff charges the defendant with failing to perform some act, but fails and neglects to point out or produce any proof as to what such act it was that the defendant failed to perform.

This being so, it seems clear that to have submitted the case to the jury upon the question of the defendant's negligence would have been simply forcing the jury to guess and speculate, without affording any legal foundation for a verdict.

POINT II.

The evidence showed conclusively that the plaintiff was guilty of contributory negligence.

It is, of course, a familiar principle that the law imposes on every person a bounden duty to exercise reasonable care in his conduct to avoid injury, and that a failure on his part to exercise that degree of care, resulting in injury, leaves him remediless.

Smith v. Van Sciver, 58 N. J. L., 190.

And it is likewise settled that a pedestrian is bound to exercise ordinary care, not only to avoid dangerous places known or seen, but also those of the existence of which he is ignorant.

Quimby v. Filter, 62 N. J. L., 766.

See also

Van Pelt v. Sturgis, 4 N. J. Advance Reports, 889.

Applying these rules of law to the facts of the instant case it would seem plain that the plaintiff was clearly and unquestionably guilty of contributory negligence.

Plaintiff was a construction engineer and had been engaged in this work for a number of years in various parts of the United States. According to the testimony produced upon his behalf, he was at the time of this accident vigorous and healthy and alert both mentally and physically. This, therefore, is not the case of a person with some mental or physical defect or impairment becoming involved in an accident but is the act of a normal individual endowed with the same faculty as any

other normal healthy individual for the purpose of seeing and observing any obstruction which might be in his path.

The day was bright and clear, so that there was nothing in the way of weather conditions to interfere with the plaintiff's vision or view.

The defendant's testimony was to the effect that the plank on the scaffold was distant 5 feet from the westerly end of the casing of the door on the south side of the station; that it was distant 4 feet 6 inches from the east end of such casing, and that it was distant 4 feet 9 inches from the middle of the doorway (Rec. 91). The plaintiff's testimony was to the effect that the plank was nearer to the door, but how much nearer plaintiff's only witness who testified on this score was unable to say, testifying that he did not measure the distance (Rec. 40).

It was, however, undisputed that the ladder on the west end of the plank extended eastwardly from the west end of the door on the south side in such a manner as to cover and stand in front of more than half of the doorway (Rec. 92, 93). The map marked "Exhibit D-15" plainly shows this. This being so, a person leaving the station by the south door, as plaintiff claims he was doing, at the time of the accident, was bound to see not only the plank on top of the ladders, but also the ladder itself at the west end of such plank. This is clearly shown by photographs "Exhibits D-3, D-4, D-5, D-9, D-14." This ladder, of course, was of such height and such size that it could not possibly escape one's view and notice if such person was in any way watching or paying any attention to his own progress.

The plaintiff claims that he entered the station through the doorway on the north side and at such time not only the door in that doorway was open,

but also the door in the southerly doorway was open. Attention is therefore respectfully invited to photograph, "Exhibit D-2," which shows plainly that these doorways are directly opposite each other, and that a person entering through the northerly doorway would have been bound to see (provided, of course, he had looked at all) through the southerly doorway not only the plank but also the ladders on the station platform. In addition all of the other photographs which were taken from the inside of the station distinctly and clearly show that no matter from what portion of the waiting room a person approached the southerly door he would be bound to see, if he looked at all, through such doorway, the plank and the ladder.

Plaintiff had no right to assume that there would be nothing on the station platform and was not entitled to go blindly through this doorway without making any observations in the direction towards which he was proceeding. If there had been a person standing on the station platform, just outside of this door and plaintiff, because of his failure to look had collided with such person, would he not clearly have been guilty of contributory negligence? Likewise, if plaintiff had gone through the doorway upon the station platform, without making any observation at all, and as a result thereof had stumbled over a baggage truck or a passenger's suitcase, would he not have been guilty of contributory negligence?

We must bear in mind that the station platform was perfectly light, and that the inside of the waiting room was light, and that there was nothing here in the nature of a trap. This was not the case of a traveler going in a strange place at night; neither was it the case of a person opening a door and suddenly stumbling into an obstruc-

tion. This was simply the case of a man in broad daylight going through an open door and running into an object which was perfectly visible. The plank was between 5 feet and 5 feet 3 inches from the ground. The plaintiff was 5 feet 9 inches in height. This makes it perfectly obvious that at the time plaintiff met with this accident he was walking in a stooped position or at least with his head bent over and was not directing his eyes towards the path ahead of him to see where he was going, and what, if anything, lay in his path. Even with his head stooped, however, he was still in a position to see the ladder at the west end of the plank if he had been using his eyes at all, and this ladder would, of course, have afforded him adequate notice of the presence of some obstruction.

In addition, plaintiff had concededly been in and around these same station premises while this painting work was being carried on during a period of nine or ten days before the accident. He, therefore, knew that these painters were working with scaffolds around the station, and that he was likely to find such a scaffold at any point on the station premises. This fact, of course, should have served to put him doubly on guard.

Plaintiff cites in his brief the cases of *Van Pelt v. Sturgis*, 133 Atlantic Reporter 303 (4 N. J. Advance Reports 889); *Matheke v. U. S. Express Co.*, 86 N. J. L. 586; and *Doherty v. Romano, et al.*, 135 Atlantic Reporter 62 (not officially reported).

All of these cases, however, are entirely different both in fact and principle from that at bar, for each of those cases involves an accident arising out of an obstruction in a *public highway*. It is, of course, the rule that as to a *public highway* the traveling public has the right in the absence of notice or warning to the contrary, to assume

that the highway is safe. *Suburban Electric v. Nugent, Admr. of Otto*, 58 N. J. L. 658; *Fox v. Wharton*, 64 N. J. L. 453.

That rule, which is limited to public highways, is of course not applicable to the situation in the instant case, where such a highway was not involved.

Moreover, in the *Van Pelt* case the plaintiff, while going along a public highway tripped over a marble block 8 inches in height. The highway was an extremely busy one and the plaintiff was constantly obliged to watch out for and give way to other pedestrians. The distinction between that case and the case under consideration is obvious, for in the instant case (laying aside the consideration that no public street or highways was involved) the obstruction was over 5 feet in height and there were no persons or things to distract the plaintiff's attention.

In the *Matheke* case a scaffold was suspended 8 or 10 feet above the level of a public street along which a *covered* express wagon of the defendant was being driven. The top of the wagon scraped against the bottom of the scaffold causing the planks to fall and thereby causing the plaintiffs, who had been standing on said scaffold to be injured. The suit was against the owner of the wagon. There was no question of contributory negligence involved. The sole question was whether or not the driver of the express wagon was guilty of negligence in not having observed the scaffold in time to prevent striking it. There is, of course, a plain distinction between that case and the one under discussion for there, in the first place, the driver was proceeding along a public highway. In the second place, he would have to look up in the air to see this scaffold, and thirdly, as he got

near to the scaffold the top of his wagon would obscure his view. Here, all that the plaintiff had to do was to simply look right straight ahead of him and if he had done this he would not have been injured.

In the *Doherty* case the plaintiff was driving an automobile along a public highway. The defendants were engaged in laying a sewer in the highway and had an excavating machine standing on one side of the road. Attached to this machine was a boom from which a chain was suspended, at the end of which was attached a large bucket used for the purpose of shifting earth. The top of the boom was about 20 feet or more above the surface of the road. As the plaintiff's machine approached the place where the excavating machine was standing, the boom, with the cable and bucket attached, suddenly swung across the road so as to overhand that part of it along which plaintiff was traveling. As a result plaintiff's car collided with the bucket. The distinction between the *Doherty* case and the case *sub judice* is clear. There the defendant created a sudden danger which the plaintiff did not have time to avert. Here the scaffold was standing still. The view was plain and the plaintiff had time to look.

Plaintiff also cites *Deronet v. Woolworth Company*, 89 N. J. L. 669. In that case the plaintiff was in defendant's store for the purpose of making purchases and at the time of the accident was seeking to buy a five-pound sugar box. She was asked by the saleswoman (the employee of the defendant) to point out the box, and the saleswoman walking slightly in advance of the plaintiff and followed by the latter, walked through an open space between two rails, the plaintiff still following, and at the same time pointing to a sugar box on a shelf against the

wall of the store. While the plaintiff was doing this she fell down a flight of stairs which she did not see, and of the existence of which she had no warning. In addition to this there was testimony that there was a gate protecting this flight of stairs which was opened by the saleswomen in order to let the plaintiff through. Of course, that case is not at all apposite to the case at bar. In that case there was a trap in the nature of a flight of stairs into which the defendant's employee led the plaintiff by opening the gate. The plaintiff's failure to see this stairway was plainly due to and caused by the act of the defendant's employee in requesting the plaintiff to point out an article on the shelves and thereby directly and necessarily causing the plaintiff to keep her eyes raised and away from the stairway.

Likewise in the case of *MacDonough v. Woolworth*, 91 N. J. L. 677, upon which plaintiff also relies, the plaintiff was in the defendant's store for the purpose of buying a book and went to a book rack in order to read the titles of the books in such rack and make her selection. There was a dim light over the rack. In order to get to these books it was necessary for the plaintiff to go into a passageway, which was dimly lighted. In going into this passageway plaintiff stepped a little to one side and fell down a stairway which she did not, and in the dim light was not likely to see. In addition there was a gate to this stairway which at the time of the accident was tied open. Discussion seems unnecessary to distinguish that case from this. There, in the first place, the defendant had created a dangerous situation in the shape of a stairway and had improperly lighted it. In the second place, it had virtually converted this dangerous situation into a trap by leaving

open the gateway. In other words, no matter how much care the plaintiff exercised, it was questionable whether she would have perceived this open stairway. In the present case, as has been pointed out, there was no absence of light, but the accident happened in the broad daylight. There was absolutely nothing to divert plaintiff's attention from the obstruction, consisting of the ladders and plank. All that the plaintiff had to do to see this obstruction was to keep his eyes in the direction he was walking.

Counsel argues at great length in his brief that since the plaintiff's witness, Earl, testified that he did not think the plank was as far away from the doorway as the defendant's witnesses testified it to have been, this fact of itself necessarily involved a jury question. Even aside from the fact that Earl did not measure the distance and testified that he did not know what the distance was, we think that the fallacy of such argument or theory is obvious.

No matter how great the distance between the door and the plank, it was undisputed from all of the testimony that the plank was *some* distance from the door. Moreover, it was undisputed that the ladder at the west end of the plank covered and stood in front of the greater portion of the door. It was undisputed that the southerly door was open, at all times, as was the northerly door. Therefore, the case revolves itself into the simple proposition of a normal man with all of his faculties, walking in broad daylight into an obstruction which was directly in front of him, and which he could not have helped seeing had he looked at all.

We think that further argument is unnecessary to demonstrate that plaintiff's "conduct on this occasion was such as would be condemned as neg-

ligent by men of ordinary care and prudence, and contributing as it did to his injury, under principles well established in this state he is debarred from a recovery. If he had not been negligent he would not have received any injury from negligence arising from any other source."

Smith v. Van Sciver, 58 N. J. 190.

It is submitted, therefore, that the trial court was not only justified, but indeed required under all the evidence to hold that as a matter of law the plaintiff was guilty of contributory negligence.

POINT III.

The trial court properly directed a verdict for the defendant and the judgment should be affirmed.

Respectfully submitted,

DEVOE TOMLINSON,
WM. A. BARKALOW,
Of Counsel with
Defendant-Respondent.

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