

NEW JERSEY SUPREME COURT.

Filed Sept 18, 1913

ISAAC MILLER,

Plaintiff-Respondent,

vs.

DELAWARE RIVER TRANSPORTA-
TION COMPANY,

Defendant-Appellant.

10

ACTION AT LAW.

NOTICE.

20

To Albert S. Woodruff, Attorney of Plaintiff:

Take notice that the defendant appeals to the Court of Errors and Appeals from the whole of the judgment entered in this cause.

GREY & ARCHER,
Attorneys of Appellant.

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NEW JERSEY COURT OF ERRORS AND
APPEALS.

Filed July 5, 1913

ISAAC MILLER,

Plaintiff and Respondent,

VS.

10 DELAWARE RIVER TRANSPORTA-
TION COMPANY,
Defendant and Appellant.

GROUNDS OF AP-
PEAL.

The appellant states the following grounds of appeal:

1. The trial court erred in refusing the motion made by the defendant for a non-suit.
- 20 2. The trial court erred in refusing to direct a verdict in favor of the defendant at the close of the case.
3. The court erred in refusing to charge the defendant's third request to charge.
4. The court erred in refusing to charge the defendant's fourth request to charge.
- 30 5. The court erred in refusing to charge the defendant's sixth request to charge.
6. The court erred in refusing to charge the defendant's seventh request to charge.
7. The court erred in charging that the defendant would be liable for injuries received "if it had been the custom of the plaintiff to go where he was that night in seeing about his consigned fruit in the way that he was looking after it."
8. The court erred in charging that the plaintiff might recover damages for the lessening of his ability to work,

in the absence of any proof of earning capacity either before or after the alleged accident.

9. The court erred in charging, after referring to the nature of the dispute, "now if that is the correct version of the facts, then there was an invitation."

10. The court erred in charging the jury that they might consider future pain and suffering, future outlay for medical expenses, in the absence of any proof to the effect that such pain would be suffered or that such outlay would be required. 10

11. The court erred in permitting the plaintiff to amend his complaint setting up another and a different cause of action after the proofs were all in.

GREY & ARCHER, 20
Attorneys for Appellant.

NEW JERSEY SUPREME COURT.

BURLINGTON COUNTY.

	ISAAC MILLER,	} Plaintiff,
	vs.	
10	DELAWARE RIVER TRANSPORTA-	} JUDGMENT RECORD.
	TION COMPANY,	
		} Defendant.

Delaware River Transportation Company, defendant in this cause, was summoned to answer unto Isaac Miller, the plaintiff therein, in an action at law, upon the following complaint:

20 Plaintiff, Isaac Miller, of Burlington, Burlington county, New Jersey, says:

1. That defendant, on February thirteenth, A. D. nineteen hundred and thirteen, was and still is a corporation, and was then a common carrier operating on the Delaware river with wharves and docks at Burlington aforesaid and elsewhere; defendant transported goods for hire and provided a wharf and dock at Burlington aforesaid, for the shipping and receiving of same by its patrons.

30 2. That on said day plaintiff, Isaac Miller, went to the wharf of the defendant company, at Burlington, with a wagon, to receive a consignment of fruits shipped to him by boat of the defendant company; said consignment was stored by defendant on its wharf; as plaintiff was backing his wagon up to the platform a portion of the flooring of said wharf broke precipitating plaintiff through an opening until caught by his clothing.

3. That plaintiff, in so falling, was injured internally, severely bruised and wounded about the legs and thighs, and became, in consequence of said injuries, disabled and disfigured.

4. By reason of said injuries plaintiff has been and will be prevented for a long time from attending to his business, and thereby has lost and will lose his earnings, and has incurred and will incur expenses for nursing and medical attendance, and was and will be caused to suffer pain.

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5. Plaintiff demands as damages \$15,000.

ALBERT S. WOODRUFF,
Attorney of Plaintiff.

The State of New Jersey to Delaware 20
[L. s.] River Transportation Company:

You are summoned to answer the annexed complaint of Isaac Miller, 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 service upon you of this writ and the annexed complaint, the plaintiff may proceed in the suit and judgment may be entered against you.

30

Witness, WILLIAM S. GUMMERE, Chief Justice of the Supreme Court, at Trenton, this fifteenth day of March, A. D. nineteen hundred and thirteen.

WILLIAM C. GEBHARDT,
Clerk.

ALBERT S. WOODRUFF,
Attorney.

The defendant answered as follows :

Defendant, Delaware River Transportation Company, a corporation created by and existing under and by virtue of the laws of the State of New Jersey, having its principal and registered office at No. 104 Market street, Camden, New Jersey, answering the complaint filed herein, says :

- 10 1. Defendant admits the first paragraph of the complaint.
2. Defendant denies the second paragraph of the complaint.
3. Defendant denies the third paragraph of the complaint.
4. Defendant denies the fourth paragraph of the complaint.

GREY & ARCHER,
Attorneys for Defendant.

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This case was tried before Judge Howard Carrow, with a jury, at the Burlington County Circuit, on May 8, 1913. The jury rendered a general verdict against the defendant and in favor of the plaintiff for \$1,000.00.

- 30 Whereupon it is adjudged that the plaintiff recover of the defendant the sum of \$1,000.00, and his costs, which are taxed at the sum of \$63.57, making in the whole the sum of \$1,063.57. Judgment entered May 22d, 1913.

NEW JERSEY SUPREME COURT.

BURLINGTON CIRCUIT.

ISAAC MILLER, vs. DELAWARE RIVER TRANSPORTA- TION Co.,	}	Plaintiff, Defendant.	ACTION AT LAW.	10
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Mt. HOLLY, N. J., May 7, 1913.

ISAAC MILLER, sworn for plaintiff. 20

Direct examination.

By Mr. Woodruff:

Ques. Mr. Miller, how old are you?

Ans. Fifty-five years.

Ques. Where were you born?

Ans. In Russia.

Ques. When did you come to this country? 30

Ans. In this country I come here twenty years.

Ques. When did you come to America?

Ans. To America about twenty years.

Ques. What is your business?

Ans. Fruit business.

Ques. Where have you your place of business?

Ans. A place of business in Burlington.

Ques. How long have you been selling produce here
in Burlington county?

Ans. One year.

Ques. Were you here in Burlington before that?

Ans. I live here eight years.

Ques. How long have you had your store here?

Ans. More than a year yet.

Ques. Where is it, the store, what street, what town?

Ans. In High street. I forget the number.

Ques. In Burlington?

Ans. Burlington.

Ques. You are a married man?

Ans. Yes, sir.

Ques. Your wife is living?

Ans. No; she is dead. This is my second wife.

10

Ques. You have been married twice?

Ans. Yes.

Ques. And your present wife is living?

Ans. Yes; this is my second wife.

Ques. Your second wife is living?

Ans. Yes.

Ques. Any children?

Ans. I have got one boy here and I have got three boys in New York, and a girl.

20 Ques. They were all your first wife's children, by your first wife?

Ans. The first wife, yes.

Ques. You have no children by your second wife?

Ans. No.

Ques. Who else is in your family?

Ans. Mrs. Miller, Ida Miller there, my sister-in-law.

Ques. Is her husband dead?

Ans. Dead. My brother is dead.

Ques. How many children has she?

Ans. She has got two children.

30

Ques. And have they all lived with you?

Ans. Yes.

Ques. Have you supported all of them?

Ans. I supported my family and the sister and the two, the four.

Mr. Archer: I don't care to go into the ramifications of the family, because we can hardly be held responsible for supporting all of them.

The Court: I will hear you in justification of the question.

Mr. Woodruff: I will withdraw the question if there is objection to it.

Ques. Now what was your health before February of this last year? What has been your health? Have you ever been sick before February of this last year?

Ans. Last year I was strong, I can work. I can make a living for the two families, and now I can only make a living for one family. 10

Ques. Had you ever been sick before February?

Ans. No. You can ask anybody.

Ques. When had you been to the doctor's before that time?

Ans. Before I never was sick, and I never was to a doctor before. This time when I fell in the wharf this time I was sick, and before I never was sick, never.

Ques. Before you fell on the wharf you never had been sick? 20

Ans. No; never.

Ques. Had you ever received any injury? Had you ever been hurt by anything?

Ans. No, no, no.

Ques. Now, for how many years had it been since you had been to a doctor?

Ans. I never was to a doctor in this country.

Ques. In this country you never were? How about the old country? 30

Ans. I was in New York.

Ques. How about in Russia?

Mr. Archer: It seems to me it is irrelevant as to whether or not he ever went to a doctor in Russia.

Mr. Woodruff: We can, if by my medical testimony which comes later, this going to a doctor in Russia thirty

years ago is tied by the character of their testimony to the result of the present injury.

The Court: I do not understand that they question the fact that your client was in reasonably good health prior to February 13th, do you?

Mr. Archer: We have no knowledge on the subject. I do not like to make any admission because I don't know anything about it.

10

Mr. Woodruff: I have to bring this out in order that the doctors may have a groundwork upon which to testify.

The Court: Proceed, then.

Ques. What was it that happened to you in Russia?

20

Ans. In Russia I got a big lot of business and I was about thirty years ago.

Ques. How long ago?

Ans. In Russia about thirty-five years ago.

Ques. About thirty-five years?

Ans. Yes.

Ques. What was it that happened to you? How did you get hurt?

30

Ans. I got off a wagon, you know, one time in Russia; thirty-five years it was.

Ques. And the horse did what? What did the horse do?

Ans. He hit me one time.

Ques. You mean kicked you?

Ans. Yes.

Ques. Where did it strike you

Ans. Right in this way. (Indicating left side of upper abdomen.)

Ques. How long were you hurt by that? How long did it give you pain?

Ans. I was strong. This time I come to America and I was strong, and I never had a doctor in America.

Ques. How long did you go to that doctor in Russia?

Ans. In Russia? I guess about a couple times.

Ques. And did you ever feel any trouble after that?

Ans. No more.

Ques. Up till the present?

10

Ans. After it was all right.

Ques. Have you ever felt any pain there?

Ans. The doctor told me you go up—

Mr. Archer: I object to what the doctor may have told him.

Ques. You can't tell what anybody told you. Have you ever since the time you were in Russia, have you ever felt any pain there or any trouble?

20

Ans. I feel at this time, this time thirty-five years, I got one time in trouble; no more. And after a couple days I feel better.

Ques. And after that you felt all right up until what time? You felt all right from then till when?

Ans. The time I fall in the wharf I was all right.

Ques. Now, what happened to you at the wharf? What time of day was it?

30

Ans. This was in the afternoon, half-past eight, maybe.

Ques. Half-past eight in the evening?

Ans. In the evening.

Ques. What did you go there for?

Ans. I go for my fruit, to get my fruit, you know. I get bananas from Philadelphia and bananas and oranges and apples. I go with my wagon to take them away.

Ques. Are they the bills of lading that you received for this stuff? (Paper shown witness.)

Ans. Yes.

Ques. On that day?

Ans. Yes.

Ques. That you were hurt?

Ans. Yes.

Ques. Had you received fruit by this boat before this time?

By Mr. Archer :

Ques. When did you get these freight receipts?

Ans. From three months.

10 Ques. When did you get them?

Ans. Yesterday I pay the freight.

Ques. Got them yesterday?

Ans. Yesterday I pay the freight.

Ques. Where from

Ans. I was a poor man; I am working. I got no money to pay them.

Ques. Where did you get them yesterday?

Ans. My cousin Harry Miller paid the freight.

Ques. You got them yesterday?

20 Ans. Yes.

Mr. Archer: I object to their use as receipts paid yesterday.

By Mr. Woodruff:

Ques. Mr. Miller, when did you get these papers?

Ans. These papers was from this steamer, when I fall in the wharf.

30 Ques. You got these papers the same time you fell on the wharf?

Ans. Yes, sir.

Ques. What time?

Ans. Afternoon, half-past eight.

Ques. The same afternoon you fell?

Ans. Yes.

Ques. Where did you get them from? From whom did you get these? What person did you get them from?

Ans. I no versteh,

Ques. Where did you get these papers?

Ans. These papers was by the man when I pay the freight. You know I got no money to pay it.

Ques. Who gave you these papers?

Ans. The man from the wharf.

Mr. Woodruff: Now, if your Honor please, I think they are admissible.

The Court: They are admitted.

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(Papers marked Exhibits P1 and P2.)

Mr. Woodruff: The exhibits offered are two bills of lading on the stationery of the Delaware River Transportation Company, dated February 13, 1913, to H. Miller, for freight from P., steamer S, waybill 1146; two barrels of apples, three boxes of oranges, 96 cents. The other bill is three bunches of bananas, 90 cents.

Ques. Now, what did you go to this wharf for, Mr. Miller? 20

Ans. I went to get my stuff; I come with my wagon.

Ques. What stuff?

Ans. The same stuff you got here.

Ques. That is mentioned in the papers?

Ans. Yes.

Ques. Now, where did you go on the wharf? What is there on the wharf? Is there any building there?

Ans. No.

30

Ques. Is there a house on the wharf?

Ans. No; there was from the freight.

Ques. What, you mean there was a house for the freight?

Ans. The wharf.

Ques. Did you have your wagon with you that night?

Ans. I bring the wagon and wanted to take my stuff and take it in the wagon, and I stopped with the wagon.

I go on the wharf. I want to see my stuff that was on the boat.

Ques. Where was your stuff?

Ans. In the boat. This time it come by the boat in the afternoon. And I wanted to see my fruit in the boat, you know, and he told me to get the fruit off the boat. After somebody to take the fruit and carry them inside, inside of the wharf, you know.

Ques. Some one took you and carried you inside?

10 Ans. No; the people from the wharf carried the fruit inside. And I wanted to go back up my wagon and take my fruit and I go back and I fell right in the middle of the wharf in the floor. The wharf broke.

Ques. Where did you go before you fell in?

Ans. I go straight this way and I go to the boat and see my stuff and somebody carrying the stuff inside, and I went to go there to back my horse and wagon and go back right here.

20 Ques. No; after you backed your horse and wagon, after you left your wagon, to what part of the wharf did you go?

Ans. I will tell you. I stopped the wagon by the floor, you know, and I want to see the stuff inside the boat. I see the people carrying my stuff inside.

Ques. Inside of what?

Ans. Inside in the end of the wharf, you know, inside.

Ques. Inside the freight house?

Ans. In the freight house; yes.

30 Ques. And now, where is the door in the freight house?

Ans. In the back.

Ques. Is there more than one door in the freight house?

Ans. There is a big door in the freight house.

Ques. Towards the water or towards the land?

Ans. No; there is no water where the freight was. It was by my wagon.

Ques. It was there by your wagon?

Ans. Yes.

Ques. You went from your wagon on the other end of the wharf, went back?

The Court: What do you mean by the other end of the wharf?

Mr. Woodruff: The river end; the outer end.

Ques. You went where the boat came in?

Ans. Yes.

10

The Court: Is that where the storehouse was?

Mr. Woodruff: The storehouse is on the wharf.

The Court: Is it on the end of the wharf?

Mr. Woodruff: It runs almost the whole length of the wharf. The platform runs in front of where the steamer comes up. 20

Ques. You went to the end of the wharf; then where did you go?

Ans. I go first on the floor to see if my stuff is in the boat and it was all right. After this I want to go to take my wagon, back it up, and to go back, and fell right inside the middle of the wharf. The floor broke. I no see what it was. I had no light. It struck me right here. (Indicating.) 30

Ques. Where was the light?

Ans. The light no was light enough.

Ques. Is there a light there on the wharf?

Ans. No; there was no light.

Ques. Is there any light on the wharf?

Ans. No; no light.

Ques. There was no light at all?

Ans. No; no light at all.

Ques. Where is the nearest light?

Ans. The nearest is about—I don't know; about a couple hundred feet, I guess; maybe one hundred and fifty feet. I don't know. There was a light in the street.

Ques. In the street one hundred and fifty feet away?

Ans. Yes.

Ques. Now what sort of a hole was it you fell in, what kind of a hole?

10 Ans. My coat and I fell inside; my coat catch me and I feel it right here, and after the officer, I started hallooing, "Please, Officer, ret me."

Ques. Now where were you hurt?

Ans. Right in this side here. (indicating.) Here come the board right here. (Indicating left upper abdomen.)

Ques. When the officer came how were you? What position were you in? When the officer came how were you, where were you?

Ans. Right in this same place.

Ques. In the hole?

20 Ans. In the same place.

Ques. And how big a hole was it, how wide?

Ans. A couple wooden blocks, about two woods, right here, and the length was like this. (Indicating.)

Ques. The length was like the table?

Ans. Yes.

Ques. And it was two planks wide?

Ans. Yes.

Ques. Did any plank break?

Ans. No; it was open.

30 Ques. Then what did the officer do?

Ans. He catched me in the place you know. If there wasn't an officer I would fall dead or fall in the water and never come back.

Ques. Did it hurt you very much? How much did it hurt you?

Ans. I no versteh.

Ques. How much pain? Where did it hurt you?

Ans. I will tell you. Right here. (Indicating.)

Ques. How much?

Ans. The first time—

Ques. When you fell?

Ans. One time right here.

Ques. Did it hurt you much? Did it hurt you a great deal?

Ans. I no understand English.

Ques. Now, the officer helped you up, did he?

Ans. Yes.

Ques. Who else came there? Who else was with him? 10

Ans. There was more people.

Ques. How many?

Ans. I don't know. I no can see anybody. I no feel good.

Ques. What did you say about the eyes?

Ans. I no can see everybody. I no feel good. Like dead, I was. I no can see how many people there was.

Ques. But there were some other people there with him?

Ans. There were some people, yes. 20

Ques. Then where did you go?

Ans. After the officer told me and after I feel a little better I go myself a little bit by the floor, and I go myself, I go right to the floor and I step on the floor after, and after I feel a little better.

Ques. Then where did you go, home?

Ans. And after there was some boys take my wagon and I go on slow, slow go on; and the boys throw my stuff in the store.

Ques. How far is your house from there, how many squares? 30

Ans. I guess about—I don't know; a square and a half, maybe two squares.

Ques. Did you fall hard or not?

Ans. I fall very hard.

Ques. Did you hurt yourself anywhere except here? besides in your abdomen did you hurt yourself anywhere else?

Ans. Catch my foot, too.

Ques. Did you hurt your foot? What happened to your foot?

Ans. My foot was sore, too.

Ques. Your foot was sore?

Ans. Yes.

Ques. Whereabouts?

Ans. Right here. (Indicating.) Dr. Dingee give me some grease to smear on my foot.

10 Ques. Dr. Dingee gave you some grease to smear it?

Ans. Yes; that was the next day.

Ques. Did you go to bed?

Ans. I go on bed; yes.

Ques. How long were you there?

Ans. I go to bed an afternoon and go back and I no feel good and I no can work. When I come back I tell you. I take the stuff and I feel a little better, and after
20 I go on and I fall in my bed and tell the children, "I no feel good. You help me," my children and my sister-in-law.

Ques. You told your children and your sister to help you?

Ans. Yes. I was like dead, you know. She take water and pull me all night, water right here, and all blood.

30 Ques. Where was the blood?

Ans. Right here. After a couple minutes was blood from my mouth.

Ques. From where?

Ans. From inside, you know.

Ques. How much blood?

Ans. I guess there was about ten times.

Ques. How many days?

Ans. It was from my mouth about three days. One day stopped, one day I see him again.

Ques. And that was over how many days?

Ans. I can say about six days.

Ques. Did you ever cough blood before?

Ans. Never in my life, neyer, and this time, inside of thirty-five years. Since Russia never in my life.

Ques. Now, after that how did you feel?

Ans. After that I feel very bad. I no can work. I work a little bit, after about eight days I go working, but I am poor. I make a living. I must drive the horse.

Ques. Did you go out on the wagon sometimes? 10

Ans. I no can myself. I go with my boys. I got a boy. I send for my boy. This same day I send a telegram. He come to me from New York, my boy.

Ques. What is that boy's name?

Ans. His name?

Ques. I mean what is his first name. What do you call him?

Ans. Solly Miller.

Ques. How old? 20

Ans. I guess about seventeen.

Ques. How long did he work for you?

Ans. He worked this time he come. When I get in this trouble he come and he helped me every day and my cousin's little boy, too.

Ques. What did the boys do?

Ans. They boys helped me in the wagon. I am poor and I make a living and I feel better in the wagon when I go for fresh air. I feel better. I was very sick. I am worse in the bed. 30

Mr. Archer: I think he is volunteering something now. I don't know whether it is relevant or not.

The Court: Proceed.

Ques. Now, did you go to the doctor after you were hurt?

Ans. After I was by the doctor I was a couple times.

Ques. What doctor?

Ans. The first time I was by Dr. Dingee.

Ques. Dr. Dingee?

Ans. Dingee was the first doctor.

Ques. And that was right after you were hurt?

Ans. After I go to Camden to the doctor.

Ques. Dr. Dingee is a Burlington doctor?

Ans. Yes, sir.

Ques. How many times did you go to him?

Ans. Maybe a couple of times, no more.

Ques. Do you still have trouble, pain?

10 Ans. I tell Mr. Dingee I got on the wharf and no feel good.

Ques. Where do you feel bad, Mr. Miller?

Ans. I feel more bad this time and I tell him to give me—

Ques. No; not what Dr. Dingee told you. Where do you feel bad now? Where are you sick?

Ans. Right here and in the side. (Indicating left side of abdomen.)

Ques. How sick are you? What way?

Ans. What is that?

20 Ques. In what way are you sick?

Ans. I no versteh.

By the Court:

Ques. How do you feel?

Ans. Very bad, very bad.

By Mr. Woodruff:

30 Ques. Where?

Ans. Right here, very bad. I no can eat, no sleep all night.

Ques. How long has it been since you can't eat nor sleep?

Ans. I no can sleep sometime. I sleep a couple of hours, maybe, in the night, about till two o'clock. I no can sleep all night. I no feel very good. Feel very bad.

Ques. That has been since how long?

Ans. What?

Ques. Since how long? How long has it been since you can't sleep?

Ans. From this time when I fall in the wharf, in the same time. The same time when I am very bad. I am sick.

Ques. Has there been any more blood come after the six days?

Ans. No; it stop a little bit and it has gone about a couple weeks and I see him again. A couple weeks after I see it again, blood come, and I drink milk and eggs and after I feel a little better. 10

Ques. How did you feel better?

Ans. Very bad. It is like a fire inside. And I no can eat no bread.

Ques. What have you been eating?

Ans. Soda crackers, a couple soda crackers and milk, a couple eggs, no more.

Ques. Have you been able to eat since you were hurt?

Ans. Yes. 20

Ques. Now, how many times, Mr. Miller, had you been going on the wharf before?

Ans. Before any time when I was no sick I taken my stuff any time.

Ques. On the wharf?

Ans. Yes; any time.

Ques. How many times a week?

Ans. About two or three times.

Ques. And where was the fruit on the wharf when you would go for it? 30

Ans. Any time in the freight house. Any time when I would take away my freight. I go three times in the week when I no was sick.

By the Court :

Ques. Had you been going to the wharf before? Before the time you fell in the hole you had been going there three times a week?

Ans. I no versteh.

Ques. Had you been going to the wharf before the day you fell in the hole?

Ans. I was before when I no fall, I go to the wharf any time for fruit, you know, for my business, you know, when I got business, you know.

The Court: Ask him if he had ever seen this hole in the wharf.

10

By Mr. Woodruff:

Ques. Had you seen this hole in the wharf, before?

Ans. No; never.

Ques. Did you see it this night before you fell in?

Ans. No, no; never. I see nothing at all.

Ques. Why didn't you see it?

Ans. I no was in this place never. I go right in the back and take my fruit in the wagon.

20

Ques. Why did you go there that night?

Ans. The night boat coming this time.

Ques. Was your freight coming on this boat?

Ans. Yes the boat this same time.

Ques. Had you got it at night before? Had you got freight at night before?

Ans. Before the night.

Ques. Other times did you get freight at night?

Ans. Any time, after it come on the boat.

Ques. In the day time or night?

30

Ans. Sometimes in the day, sometimes in the night.

Ques. Why did you go out on the end of the wharf this time?

Ans. What do you say? I no versteh. I will tell you. I go to the wharf when I seen the boat coming and my sister-in-law told me, "You go take the stuff in the boat," and any time in the wintertime I try. It must be in a warm room or they will freeze.

Ques. What must be in a warm room?

Ans. In the wintertime I went to see my stuff is inside in a warm room in a boat. I get there when I see my stuff is in a warm room.

Ques. Was this wintertime?

Ans. Yes; wintertime.

Ques. Was it cold?

Ans. It was cold, yes. It was ice.

Ques. When there was ice and it was cold how did you get your bananas?

Ans. When the bananas come I want to see that the bananas is in a warm room, and after the people in the freight boat they carry them in the freight house. 10

Ques. And then what happens to them?

Ans. I want to go back to my wagon to take my stuff and I go back and I haul it right inside in the middle of the wharf.

Ques. How much did you have to pay the boys to work for you? 20

Ans. What boys?

Ques. The boys that worked for you, the son that came from New York and your cousin? How much do you pay them?

Ans. Me no pay anything. I am the father. He see I am sick. I no pay anything. I am poor. I no can pay.

Ques. Where was he working? Where was he living, your son? 30

Ans. My boy, he lived before in New York.

Ques. Did he work there?

Ans. He worked there.

Ques. Where is he now?

Ans. He is here, right here.

Ques. He came from New York to-day?

Ans. No this time when I got the trouble. He is working with my wagon, you know.

Cross-examination.

By Mr. Archer:

Ques. How old are your children?

Ans. Ask him. I don't know. Ask my boy.

Ques. Don't you know? How many boys have you?

Ans. Well, I have got four boys.

Ques. Four boys?

Ans. Yes.

Ques. And how old are they?

Ans. Well, my boys? I don't remember.

Ques. Don't remember their ages? Are they grown up? Are your boys full grown?

10 Ans. I no versteh.

Ques. Is that a good picture of the place where you backed up your wagon to the wharf? (Photograph shown witness.)

Ans. This is a picture, yes.

Ques. When you would get fruit, when you would come there to get your fruit you would back up your wagon to this platform, wouldn't you?

Ans. I no back up the wagon. I want to go back from the boat. I see my fruit is in the boat.

20 Ques. You were in the habit of going there? You went there often to get fruit, didn't you?

Ans. I told you before.

Ques. No, tell me now.

Ans. Just I was looking for my fruit and I want to go back with my wagon and I fall in the wharf. I tell you before. I no talk nothing.

Ques. You don't understand me. You used to go there two or three times a week, didn't you, to get your fruit?

Ans. Yes.

30 Ques. And you would get your fruit on this platform, wouldn't you, to load it in your wagon there? That is the way you would get your fruit on that platform?

Ans. Yes.

Ques. And the people that brought that fruit on the boat would bring it into this warehouse here and then you would get it from the warehouse into your wagon, wouldn't you? Wasn't that your regular practice?

Ans. The people bring the fruit right inside.

Ques. Right into this house?

Ans. Inside, in the back of the porch. And when I want to take my stuff I back up in the porch, you know, in the fruit room.

Ques. And you would get the fruit delivered to you; you would get the fruit at this platform, wouldn't you?

Ans. Yes.

Ques. What?

Ans. I no versteh.

10

Ques. You don't understand?

Ans. No.

Ques. Do you see this framework here, this spot here on the side of the shed, on the side of the freight station? Is this where the crane was on the side here?

Ans. I no see nothing.

Ques. Is this a picture of the crane here? Look at it. Can you see it?

Ans. No.

Ques. Can't you see it?

20

Ans. I no know this picture.

Ques. You can see the picture, can't you?

Ans. I can no versteh.

Ques. Didn't you tell me a few minutes ago that the picture was all right?

Ans. I see the picture here.

Ques. You mean you can see a picture here and you can't see it there?

Ans. I no see the floor.

Ques. Oh, you can't see the hole in the floor?

30

Ans. No.

Ques. Oh, no; I am not asking you to see any hole in the floor. I am asking you does that represent where the crane was? Is that where the crane was?

Ans. I no versteh what crane was.

Ques. The lift where the iron chain was, the iron chain that hung down. Isn't that where it was?

Ans. I no see any chain.

Ques. Don't remember any chain that hung down?

Ans. I see the chain in the wheel.

The Court: Where they hoist goods from the boat and put them on that wharf.

Ques. Is this where they hoisted things from the boat and put on the wharf?

10

Mr. Woodruff: It is not for that purpose. It was inside. It was an old structure.

Ans. In the night I no see nothing.

Ques. Now, do you mean you didn't see it?

Ans. No; in the night.

20 Ques. You can see this picture now, can't you? Tell me where you fell in. Where was the spot on here you fell in?

Ans. Right here on the wharf, you see. (Illustrating.) Here was the floor, and I go right off the floor and I want to see my stuff, and after I go back I no see this was the floor where the wood come out. I come right in this way right to the boat; I want to see my stuff After I come back in this way.

30 Ques. Where did you fall in? Put your pencil on the place where you fell in?

Ans. Here is the wharf, here is the freight house, and my wagon stopped right in the back, right by the floor.

Ques. I don't care about your wagon in here. Will you point out on that picture the spot where you fell in? Where did you fall in?

Ans. When I go back from the boat.

Ques. On this picture where did you fall in? Put your pencil on the spot as near as you can.

Ans. I go away first to the boat. I wanted to see my stuff and I go back here this way and fall right in the floor.

Ques. Where is it on that, the place?

Ans. I no see by the night anything. It was in the night.

Ques. Mark it on there.

Ans. I no see by the night nothing.

The Court: Whenever you are asked any questions you are required to answer, if you understand the question. If you don't understand the question say so. At times you have seemed to understand questions and answered them with reasonable intelligence. At other times you seem to be utterly oblivious to what examining counsel is endeavoring to get at. Now, it is important and it is to be hoped that you will pay attention to the questions and answer them, because we can't try this case, we can't get anywhere with this case unless the questions are answered. 10 20

Ans. I want to tell you. I no versteh English good. But it might if they give me one little girl to talk for me and I will tell you everything. Give me one girl, some Jewish girl. It might a favor.

The Court: You talk well enough for me to understand you now. You talk to the jury. Those gentlemen must hear you. 30

Ans. I no versteh English and versteh German. If somebody can talk German I could tell.

By Mr. Archer:

Ques. Where is the spot where you fell in?

Ans. Right in the middle of the wharf.

Ques. Where is it on this picture? Look here. Don't tell me about the wagon again, tell me where you fell in. You didn't fall in the wagon, did you?

Ans. No; up in the middle of the floor.

Ques. Up here?

Ans. No.

Ques. Then take your hand and point to the spot.

Ans. I come here and I come back this way. Here was the opening in the floor.

10 Mr. Archer: Maybe you will admit on the picture where he fell in.

Mr. Woodruff: Just exactly underneath this chain. Just exactly where the chain is hanging now.

Mr. Archer: It is admitted that the plaintiff fell in at at or near where the hanging chain touches the platform of the wharf.

20 Ques. Why did you go around to the front of the wharf that night?

Ans. I will tell you. I wanted to see my stuff; that it was in the boat. Any time when the boat come, any time I come this way and I see my stuff.

Ques. You wanted to go around there to see whether your fruit was on the boat?

Ans. On the boat; yes, sir.

Ques. At the time you went around to the front of the wharf, had the boat come in?

Ans. Yes; this same time.

30 Ques. Do you mean that you fell in after the time when the boat had arrived? Was the boat there when you fell in?

Ans. Yes; the boat was there. This time was the boat there.

Ques. You don't misunderstand me on this. The boat was there?

Ans. Was there; yes.

Ques. When you fell in?

Ans. Yes.

Ques. You are sure?

Ans. Yes, the boat at this time; this time come peoples, too.

By the Court:

Ques. Where was the freight which you were expecting to get at the time you fell in?

Ans. The freight.

10

By Mr. Archer:

Ques. The Court asked you where was the freight, where was your fruit at the time you fell in; where was your fruit?

Ans. My fruit at this time was in the boat, and after when I fall the people gathered the fruit in the freight room.

Ques. The people from the boat carried your fruit into this freight house?

20

Ans. Yes.

Ques. And you got your fruit from this platform, didn't you?

Ans. No; I got it in the boat.

Ques. No; you, I say. You got your fruit here, didn't you, out at the end of the platform? You loaded your wagon here; didn't you?

Ans. I no loaded the wagon. I want to go back my wagon up. Somebody tell me the fruit is inside. I wanted to go back up my wagon and take the fruit, you know, and I fell inside in the middle of the wharf.

30

Ques. They carried the fruit into this house, didn't they?

Ans. Yes.

Ques. And you got it from here, didn't you, from this platform? You got the fruit there; didn't you?

Ans. In the platform; yes.

Ques. Now hadn't you been told not to go around this side of the wharf?

Ans. Everybody go on this side.

Ques. No; never mind what everybody did. Do you know Mr. Britton? Stand up, won't you, please?

(Mr. Britton stands.)

10

Ques. Do you know that man?

Ans. Yes; I know him.

Ques. Don't you remember his telling you not to go around the side of this house near that crane?

Ans. He no tell me anything.

Ques. He never told you that?

Ans. Never in my life; never. When he tell me I no go. I look for my life. He no tell me nothing.

Ques. Never told you that?

20

Ans. Never.

Ques. Did anybody else tell you never to go around there?

Ans. No; nobody told me anything.

Ques. It was dark, wasn't it, along here?

Ans. No; I tell you nobody told me.

Ques. Was it dark or light?

Anc. There was no light. It was dark.

Ques. Why did you go around there in the dark?

30 Ans. Well, I feel first when I go this way I can see anything. Any time I walk on the floor I can see the floor and after when I go back it was empty, you know.

Ques. Now, Mr. Miller, when you fell in this place you fell in a hole where a plank had been taken out, didn't you? Did you fall in a hole that was there because a plank was taken away from there, or did the plank break down with you, or was there a plank out?

Ans. No; I go straight and fall right here. I no see a plank.

Ques. The hole that you fell in?

Ans. All open.

Ques. Was open?

Ans. I no see it was open.

Ques. No board broke with you, did it?

Ans. The board broke.

Ques. Didn't you say a little while ago—

Ans. After I see it was open, after I hallooed, I seen—
my overcoat hold me right here. Never I see broke.

10

(It is further agreed between counsel that the place into which the plaintiff fell was an opening occasioned by the removal of a plank and that the board did not break and let the plaintiff through.)

Ques. You went to this wharf two or three times a week at least, didn't you, for fruit?

Ans. Any time I go. Sometimes I go and sometimes
I send a boy. 20

Ques. You used to go there very often for fruit before the accident, didn't you?

Ans. No; any time. Not many times. Sometimes I go to the wharf and sometimes I send a boy.

Ques. And you would take your horse and wagon there to get the fruit, wouldn't you?

Ans. Sometimes I go myself, sometimes I send the
boy. 30

Ques. With the horse and wagon?

Ans. Yes, sir.

Ques. And you would always get your fruit from this platform, wouldn't you?

Ans. Yes; from the platform.

By the Court:

Ques. How did you happen to be at a place where there was a hole in the wharf when you fell in and not

at the place where you had been in the habit of receiving your fruit?

Ans. I tell you, Judge. Sometimes when the boat coming, sometimes I take my horse and wagon right on this same floor and I carry them on the floor, too, sometimes; sometimes take it right in this same floor when the boat coming. Sometimes I take the fruit right from the boat right in the wagon.

Ques. Well, would that be in the daytime or at night?

10 Ans. The night boat; half-past eight in the night.

By Mr. Archer:

Ques. When did you go to the Camden doctors?

Ans. I guess about the second day. I don't remember. A couple days I no feel good, I go to the Camden doctor.

Ques. When?

20 Ans. I don't remember. I was very sick. I no could remember nothing. A couple days, three or four days, five days; I don't know.

Ques. Had you started this suit when you went to the Camden doctor?

Ans. My suit? I don't remember. I no versteh.

Ques. I mean this lawsuit. Do you know what a lawsuit is? Had you employed Mr. Woodruff when you went to the Camden doctors?

Ans. Yes.

Ques. Did he take you to the Camden doctor's?

30

Mr. Woodruff: Yes, I will admit that.

(It is admitted that the plaintiff consulted Camden physicians before suit was brought but after the counsel had been employed to bring the suit.)

Ques. You helped load your wagon, didn't you, that night?

Ans. No, I was sick. I no can carry to my wagon.

Ques. Didn't you help load your wagon the night this freight came?

Ans. No, somebody.

Ques. Who did load your wagon?

Ans. Some strangers, boys. I was sick and I no could see.

Ques. Haven't you been working just the same since this accident?

Ans. No.

10

Ques. You have been on your wagon nearly every day, haven't you?

Ans. No, no. Every day?

Ques. Pretty nearly every day?

Ans. I tell you I no been working every day.

Ques. Haven't worked every day? How many days have you missed?

Ans. Sometimes when I feel a little better I go on the wagon and when the boys help me I go for fresh air. I feel a little better, you know. I was sick. I go for fresh air. I no can work.

20

Ques. Did you stop work until your son came from New York?

Ans. I no work a little bit. I work on the wagon for fresh air, you know. I no work a little bit, you know.

Ques. Don't you often help to carry barrels of apples now?

Ans. No, I can't carry them well. I am sick.

Ques. Haven't you helped carry a barrel of apples since the time of this accident?

30

Ans. No.

Ques. You understand me now, don't you?

Ans. I no can carry them.

Ques. Do you carry your banaras?

Ans. No.

Ques. You don't carry anything?

Ans. No.

Ques. You understand me, don't you, Mr. Miller?

Ans. I versteh. What do you mean? I no can work. The boys carry them. I was in the wagon.

Ques. Do you mean to say that you haven't been helping carry bananas and apples since the time of this accident?

Ans. This accident? I tell you.

Ques. Well, tell me.

Ans. I no can work. I was in the wagon for fresh
10 air, you know, no more.

Ques. You were in the wagon for fresh air?

Ans. I work a little bit and tell the boys I am sick, I no can work. I tell the boys that.

Ques. But you didn't help to carry either apples or bananas since the time of this accident?

Ans. I will tell you—

Ques. I want you to answer that yes or no. Have you
20 or haven't you?

Ans. I no carry them.

Mr. Archer: I insist that I am entitled to know from this witness whether or not he has helped to carry fruit in connection with his business since the time of this accident. He can answer that question yes or no.

Ans. When I was on the wagon I tell the boys I no
30 can carry.

Ques. You mean that you haven't since the date of this accident carried any bananas or apples.

Ans. I won't carry them. I no can. I want to help a little bit. I guess I will try the best, maybe I will work a little bit and it will be better for me. I no can work and I tell the boys I am more sick and the boys help me. I will try a little bit working and it was too heavy for me.

Ques. Will you look at this crane, please? (Picture shown witness.) Out here is the river. This is the river. You see that, don't you?

Ans. Yes.

Ques. And here is this platform.

The Court: No, you answer the questions.

Ques. Is it not a fact that this place here where this platform is is the place where you got your fruit on that night? It was brought there by the people that worked on the boat; that is true, isn't it? 10

Ans. Yes.

Ques. And isn't that the place where you always got your fruit, right on that platform?

Ans. I will tell you.

Ques. You can answer that yes or no.

Ans. Sometimes when the people bring the fruit inside in the horse and wagon, sometimes when the boats come in the night I take my horse right here and stop right on the floor and the people from the boat bring the fruit and put it in my wagon. 20

Ques. Where would your wagon be then?

Ans. This time I no can back up my wagon. I go to the wagon and fall in the hole, you know. Sometimes when the boat come in the afternoon I take my wagon right on the wharf, on the floor, and the people from the boat bring the bananas and carry them right in my wagon. 30

Ques. And where would your wagon be?

Ans. My wagon would be on the wharf.

Ques. Point out on here.

Ans. It was here, by the roof on the wharf.

Ques. When the people from the boat brought your fruit to you usually they brought it to the platform; isn't that what you mean?

Ans. I tell you. I see the people carrying the fruit inside the fruit house.

Ques. That is what you saw that night?

Ans. I see this night. I see them carry them inside and I want to go back, and I was on the floor by the boat. Everybody was in this place. More people was

in the floor, in the floor by the boat, everybody was. I was, too. I see the people carry them inside from the freight house. I want to go back straight to my wagon.

Ques. You knew that you were going to get the fruit delivered to you on that platform, didn't you, on that night?

Ans. I tell you before and I tell you now I seen the people carrying the freight inside.

10 By the Court:

Ques. Where was your wagon? When you fell in the hole where was your wagon?

Ans. It was—

Mr. Archer: Out in the street, wasn't it?

20 Ans. The wagon in the street and I go back to the porch.

By the Court:

Ques. What were you doing so far away from your wagon?

Ans. My wagon was like in this place right here by the people—

By Mr. Archer:

30 Ques. You expected to get your fruit delivered to you on this platform on this night, didn't you?

Ans. Yes.

Ques. Now, you are sure of that? That is perfectly plain, isn't it?

Ans. I will tell you before and I tell you now, do me the favor, give me one little boy and I will tell you. Give me one that German can talk.

Re-direct examination.

By Mr. Woodruff:

Ques. Now, you say that sometimes when the night boat came the men took the fruit off of the boat right into your wagon, sometimes?

Ans. That is right.

Ques. That is right, is it?

Ans. Yes. 10

Ques. It was the night boat?

Ans. The night boat.

Ques. Now, where was your wagon when they would take it off the boat and put the freight right in your wagon? Where would your wagon be?

Ans. The wagon, I would take it from the yard.

Ques. To where?

Ans. From the yard I take the wagon and go right on the floor and stop in the wagon and back up my wagon and the people from the boat carry them in the wagon, sometimes. 20

Ques. How near then is your wagon to the boat, how near?

Ans. Back up a little bit.

Ques. Is it close or far from the boat? When the men put the fruit from the boat to your wagon, sometimes, how many feet away from the boat is your wagon, five feet, ten, fifteen, or what?

Ans. Maybe about fifteen or twenty feet. 30

Ques. About fifteen or twenty feet from the boat?

Ans. Yes.

Ques. Between the freight house and the boat? Is that right?

Ans. Yes.

Ques. Do you understand me, between the freight house and the boat?

Ans. And the boat; yes

Ques. And when does that happen, when the night boat comes?

Ans. When the night boat comes; yes.

FLORENCE MORRIS, sworn for plaintiff.

Direct examination.

10 By Mr. Woodruff:

Ques. Miss Morris, where do you live?

Ans. My home is at Essington, Pennsylvania.

Ques. Where do you work?

Ans. I am employed in the Bell Telephone as chief operator at Burlington.

Ques. How did you get from your home to Burlington?

20 Ans. I have been obliged since the 9th of December to go back and forth on the ferry. At the time of this accident I was required to go on the freight boat, the Springfield.

Ques. That is, from Burlington to Bristol?

Ans. From Burlington to Bristol.

Ques. What sort of passageway is there for people using that wharf from the land side to where you would go aboard the boat?

30 Ans. Well, now, in the morning I came across there I noticed this arrangement on the side, a scale or something, I believe they call it; but I was in a hurry and just simply glanced at the thing. And I had to go back again at night and I came up there about six o'clock.

Ques. What did you see in the morning?

Ans. I noticed that scale arrangement there, but there was no protection up there at all.

Ques. Was there a hole there at that time?

Ans. I couldn't tell you. I don't remember that.

Ques. And then you came back what time?

Ans. I came back shortly after six o'clock and inquired there of the agent at the wharf if he knew what time the Springfield boat would be there. He told me he didn't know anything about it, the river was frozen and perhaps I would have to stay a long time. I didn't care to go up around Burlington and couldn't go to Trenton.

Ques. You came back afterwards, did you?

Ans. I did.

Ques. With whom?

Ans. In the meantime I met Miss Scott and Mrs. Shinn. Miss Scott was also going to Bristol.

10

Ques. Were you on the wharf when Mr. Miller came there?

Ans. I was standing there. As near as I can recall, it was nine o'clock.

Ques. What portion of the wharf?

Ans. On the portion near the river. We were standing there talking.

20

Ques. Then what happened?

Ans. Mr. Miller came up and addressed Mr. Shinn. I don't know what he asked him. The boat hadn't come in yet. We were still standing there talking. It was moonlight, and as far as my memory will tell me I cannot recall any light at that time except the light in the office. The telephone bell had been ringing there about ten or fifteen minutes, and Mr. Shinn and Miss Scott and I looked in to see if there was any one in there and there was no one in there, and I don't recall any light outside. I wouldn't say positively.

30

Ques. Was there any other person outside of the building?

Ans. No one except Mrs. Shinn and myself. To the best of my knowledge if there was any one there they were standing where we couldn't see them.

Ques. The only light you say was in the office?

Ans. There was a light in the office.

Ques. After Mr. Miller came out there and spoke to you he went where?

Ans. He started back, as I thought, to go to his wagon and all of a sudden we heard some one yelling. We couldn't understand what he was yelling and we finally discovered that he was yelling "officer." I said to Mr. Shinn, "That man has fallen through there," and like a flash it dawned on me. Because when I came up there I came within a dot of going in that same place
10 myself.

Mr. Archer: I object. This is not a responsive answer to the question asked her at all, about her experience in connection with this matter.

Mr. Woodruff: I was asking her what happened then, the entire circumstances.

The Court: I see no objection to the testimony.
20

Ans. I say I came near going through myself. I always walk on the right and I started up there. Miss Scott and Mr. and Mrs. Shinn went behind me. I was first. I just started up to the dock to look for the boat.

The Court: That part may be stricken out.

Ques. What did you observe with regard to Mr. Miller?
30

Ans. Mr. Miller simply asked Mr. Shinn something and walked back again, and the next thing I saw was Mr. Miller down this hole and Mr. Shinn trying to get him out.

By the Court:

Ques. Could you see the hole?

Ans. Could I have seen it if I had been going across there?

Ques. Yes.

Ans. If I had been looking down I would have seen it.

Ques. Did you see it that night?

Ans. I don't recall seeing any hole or anything of the kind.

Ques. Well, why did the circumstance occur to you that you might have fallen in the hole if you hadn't changed your course? 10

Ans. Because when I heard about this thing it was my first impression that I could have gone down that hole and nobody would have ever know what became of me. I considered it was carelessness.

Mr. Archer: I don't want to be disagreeable to this lady, but I move that that remark of hers about something in her judgment appearing to be careless be stricken out. 20

The Court: That may be stricken out.

By Mr. Woodruff:

Ques. Now you had seen the hole there, you said, in the morning of the same day?

Ans. I can't say I saw any hole there in the morning.

Ques. Had you used this passageway where Mr. Miller fell down before? 30

Ans. I had never used it.

Ques. What was Mr. Miller's position when you got back there in regard to the hole?

Ans. He was down the hole. I remember seeing the upper part of his body and his head.

Ques. What did the officer do?

Ans. The officer tried to assist him to get out of there the best he could.

Ques. Were there any guardings against this hole around there that you noticed?

Ans. I didn't notice any guardings of any description.

Ques. Was there any light at that point?

Ans. No light at all to my knowledge.

Ques. Any boards up to protect this hole from passersby?

Ans. There was no board at the time. There was a board put up afterwards.

10

By the Court:

Ques. What kind of a board?

Ans. A plank, I judge.

By Mr. Woodruff:

20

Ques. How big was the opening?

Ans. I can't say how large it was.

Ques. Do you know how many planks wide?

Ans. Well, I judge one plank wide.

Ques. What did they do with Mr. Miller?

Ans. Mr. Shinn assisted him out of it and asked him if he was hurt. We all asked him if he was hurt.

Ques. What was his condition?

30

Ans. He said that it hurt him pretty badly and he started mumbling something which I couldn't understand and no one else could, and he walked away from us.

Ques. Then you took the boat?

Ans. Not then I didn't. Mr. Shinn then tapped on the window for the man who was inside and informed him that that should be attended to.

Ques. Do you see that gentleman here?

Ans. I don't know whether I would know him if I did.

Ques. Was it this gentleman? (Indicating Mr. Britton.)

Ans. I can't say. I didn't look that closely.

Ques. Was there any other person out there at that time to fall in except Mr. Shinn and your party?

Ans. No, sir; not to my knowledge.

Ques. When Mr. Shinn was lifting him out of the hole was there any one else came there?

Ans. I don't remember seeing any one.

10

(An additional photograph was offered in evidence and by consent was admitted and marked Exhibit P 34.)

Ques. Now will you indicate where it was that this hole was that Mr. Miller fell in?

Ans. Right about in there. (Indicating.)

Ques. Indicating between the uprights which support the crane, or carrier, and the freight building itself?

Ans. Yes.

20

Cross-examination.

By Mr. Archer:

Ques. How long before the time of the arrival of the boat was it, as near as you can recall, that this accident occurred?

30

Ans. Well, I should say five or ten minutes; now perhaps not that long; but the boat was drawing near. We could see the boat below Devlan's.

Ques. But she hadn't tied up to the dock?

Ans. No.

Ques. at the time this accident occurred no fruit being delivered from that boat could possibly have been put into the warehouse, could it?

Ans. No.

Ques. The boat had not yet come in?

Ans. No.

Ques. You say that you never passed, in going back and forth as a passenger, you never passed, as I under-

stand, between the freight house and these uprights where the iron chain hung?

Ans. I never did. I always walked here. The once that I did walk I never came across there. I had been using the ferry previous to that time.

Ques. I beg your pardon. I thought you said you had been going back and forth.

Ans. No, I had been using the ferry and the river was frozen and that was the only way I could possibly get
10 across the river, was to use this Springfield.

DR. JOSEPH E. ROBERTS, sworn for plaintiff.

Direct examination.

By Mr. Woodruff:

20

Ques. Your profession is what, Doctor?

Ans. Physician.

Ques. And you are a resident where?

Ans. Camden, New Jersey.

Ques. Through what institution did you prepare?

Ans. University of Pennsylvania.

Ques. You have practiced since then in what place?

Ans. In St. Joseph's Hospital, Philadelphia, and in
Camden.

30

Ques. Connected with any hospital at Camden?

Ans. Cooper Hospital.

Ques. What particular branch of work?

Ans. I have charge of the X-ray department.

Ques. Your experience with X-rays has been over what period?

Ans. For a period of five years at St. Joseph's Hospital in Philadelphia and over a period of five to five and a half years at Cooper Hospital, at Camden.

Ques. Now what is the nature of your work with regard to examining of bodies?

Ans. Well, any kind of examination that may be called for; the determination of the existence of a fracture or disease and pain; the examination of the chest for broken ribs or some disease of the chest which a plate would show; abdominal examination for stone in the kidney and head injuries.

Ques. You know Mr. Miller, the plaintiff in this case, who was just on the stand?

10

Ans. I have met him, yes.

Ques. And you took photographs of Mr. Miller?

Ans. Yes; I took two photographs of Mr. Miller.

Ques. Have you the plates?

Ans. Yes, I brought them here this morning. (Produces plates.)

Ques. When were those photographs taken?

Ans. the first one was taken on the 5th of May and the second one taken on the 6th of May.

Ques. Now will you refer to the plate which you first took and illustrate to the jury what you found?

20

Ans. I don't know whether you can see these plates by this light. This plate was taken of the man's abdomen and the lower part of his chest. This is the right side, to my right, and this is the left side. This shadow down here is the spinal column. Now we took it to see if there was any injury to these ribs on the right side and including some of the left side of the lower ribs. On looking at the plate I found that the right side of the chest, above the liver, was normal, apparently.

30

Ques. As indicated by what?

Ans. By this dark area, which is air. The air gives a dark shadow. While on the left side there was an opacity, a white more or less dense shadow, to the left of the vertebral column.

Ques. Now will you illustrate, Doctor, the second plate that you took?

Ans. The second plate was taken to confirm what the first plate showed and to go higher for a further examination of the chest. This is the right side and this is the left. This opacity, this white shadow here, is a continuation of the shadow the other plate showed, and the various white shadows scattered throughout the plate are shadows of some substance which obstructs the ray, the passage of the X-ray through the tissue, causing a white shadow. And this area at the apex—each apex

10 of the lung there is a more or less dense white shadow which shows something intervening between the ray and the tissue which is not normal. These white shadows are scattered pretty generally throughout the right side and also throughout the left, with a much denser area of opacity at the left side.

Ques. Now, Doctor, from that plate what diagnosis did you make?

Ans. From the first plate, the area of opacity which I spoke of on the left side of the vertebral column, would

20 be caused by the passage of the ray through some denser substance than normal lung. It would indicate one of two conditions: either an affection of the covering of the lung, an old pleurisy or an effusion of fluid into the pleural cavity, the cavity covering the lung.

Ques. Now the second plate.

Ans. From the second plate the same area of opacity is shown as on the first plate on the lower left hand side, while on both apices are rather dense shadows which are caused in a tuberculous consolidation of the lung.

30 Ques. That would indicate what disease?

Ans. It would indicate tuberculosis.

Ques. And what form of the disease as concerning its advancement? In what state was this disease?

Ans. Merely a shadow on the two apices would indicate a rather stage of the disease. That would

indicate an early stage of the disease, just those two shadows that I spoke of. There are other shadows throughout that plate I spoke of.

Ques. Now, the opacity in the lower left lung would indicate what, that greater shadow there?

Ans. It would indicate, most likely, a thickening of the pleura, which would be necessarily of some duration, probably some old pleurisy which had thickened the pleura, which had been there for some time.

Ques. How great a time had that been there?

Ans. It might be three or four months, might be three or four years or longer.

Ques. Might it have been back thirty or thirty-five 10 years?

Ans. A pleura that has once been thickened will often stay thickened. Yes; it could be that far back.

Ques. Now, what would the small dots or points and indentations that you have pointed out there indicate as regards this disease?

Ans. They indicate what we call a tuberculous infiltration, because the tubercule, the tubercule cells, find lodg- 20 ment in small foci in the lung, and it is the early stage of development and what becomes later the consolidation or cavity.

Ques. And with regard to the speed at which the disease had advanced, what would that indicate?

Ans. Well, in this place they are very generalized, universally distributed throughout both lungs, showing that the disease had been of some standing or had been of 30 rapid development.

By the Court:

Ques. When you say of some standing, what do you mean, doctor?

Ans. I mean of some length of time since infection first occurred.

By Mr. Woodruff:

Ques. To cause this shadow in a normal course of the disease of how many months running would the disease have to be?

Ans. That is a very hard question to answer definitely, because tuberculosis is a disease which sometimes advances very rapidly and sometimes slowly. I could give you a general probable course of the disease. A man perfectly well might develop such things from a blow in a year or two years, or in a very virulent infection he could develop that in a few months.

10 Ques. And if that shadow came about from the natural development of the disease, then the disease must have been developed for some months?

Ans. Some months; yes.

Ques. What effect would that have on a patient, that disease, anterior to three months, anterior to February 13th last, to be specific?

Ans. If this patient had this condition before three months ago?

Ques. Yes.

Ans. He ought to have had symptoms; he ought to have had a cough and to have had some expectoration.

20 Ques. Any pain?

Ans. He ought to have pain from that left side, particularly if he had caught cold. That would probably be the point where he would have his pain.

Ques. Now, taking the other view of it that you have expressed, presuming that this shadow was caused by an old injury to that particular section, might that injury have become healed so that the patient would have suffered no inconvenience from it?

Ans. Yes; that is possible.

30 Ques. And if that injury had occurred back thirty-five years and there had been injury to that particular section which had caused the patient no inconvenience or any suffering for that length of time, thirty or thirty-five years, what would have been the probability of its later development into a disease which would have affected his life or his health?

Ans. If that tubercular pleurisy had occurred thirty-five years ago it would seem that in the ordinary course

of events that he would have gotten colds or taken colds which would have given him symptoms if that condition had been that long. I do not think it is probable that that condition could exist for thirty-five years.

Ques. Otherwise if he had caught cold in the meantime there would have developed what, disease, irritation?

Ans. Yes; it would have produced some symptoms there.

Ques. Now, to what extent are tubercular bacilli found in the human body?

10

Ans. Well, that is variously reported by different observers. In rather a large percentage of people, in autopsies they are found in either healed tubercles or healed tuberculosis, either in the lungs or some of the other organs, and found in a large per cent., eighty-five or ninety per cent. of all the autopsies made from all causes.

Ques. And what cause is it that permits these tubercular bacilli to grow and develop?

Ans. Often some disease like influenza, croup, typhoid fever, exposure to cold and wet—any other disease which a man have which would lower his vitality or break down his resistance.

20

Ques. Would an injury which broke down resistance or lowered his vitality have the same result?

Ans. Providing the man had a tuberculous condition, and providing he had an injury of some severity enough to prey upon him, to incapacitate him for awhile, which might lessen his resistance so that he could develop a tuberculosis.

Ques. Now, doctor, presuming that the plaintiff in this case had had no symptoms of the disease, no coughing or pain prior to February 13th of this year, and that on that day he received a severe blow to the upper abdominal region, from which he was incapacitated from work for a period of six days, during which time he spit blood and severe pain in that region, what would that indicate?

30

Ans. It would be hard to explain why he would spit blood following an injury to his chest unless he had had an old tuberculosis or unless he had ruptured some vessels at the time of his fall, which had bled into the lungs. My understanding was that he coughed up blood, from your question?

10 Ques. Yes. And if there had been some previous trouble which had healed over and had given no inconvenience for some years, what would that coughing up of blood after this accident, after this fall, indicate?

Ans. It might have been a coincident condition, or it might have been brought about by the severe blow against the lower chest, causing a contraction of his abdomen and increased muscular effort might have made him have a cough and expel and dislodge at that time a blood clot, I should think.

20 Ques. If there had been an old tubercular trouble there and the lesion, the sores, had healed over, what would have been the probability of the recurrence of the injury under normal conditions and its effect on his health and length of life?

Ans. It might or might not have caused a subsequent lighting up of the old tuberculous lesion.

30 Ques. Would the fact that the patient lived out of doors and was in an out of door business affect that condition in either way?

Ans. An out of door life, of course, would make him less likely to get that condition as a consequence.

Ques. Now, doctor, from the points that show on this plate, the development of the disease that shows on this plate and your experience with other cases in which the photographs have shown the same relative development, what is the probability of length of life?

Ans. Considering the man's age also?

Ques. Yes, he is fifty-five years of age.

Ans. It would depend a good deal on the care and life that he lives. If he lives quietly and out of doors and

sleeps out of doors, has plenty of fresh air and is able to go on with a proper line of treatment he might live for some time. If, on the other hand, he could not have those advantages and not live the life which is led in a sanitarium, for instance, where the proper treatment is carried out, from the condition that his chest is in I should say that he would not live very long, probably 10 less than a year.

Cross-examination.

By Mr. Archer:

Ques. Of course, doctor, if this man received other injuries since the date of February 13th, such as a blow from another man's fist or something of that sort, the same conditions which you have mentioned or described as being shown by that blow might have been occasioned, might they not? 20

Ans. They might have been occasioned; yes. I do not think I get that question exactly the way you meant it.

Ques. What I mean to say is, as I understand your testimony, from certain indications on those plates, that this man had certain injuries at about the point which the laymen speak of as the floating ribs, somewhere in that neighborhood, isn't it? 30

Ans. I think I did not say that these plates showed any result of his injuries at this time, at the time of this accident.

Ques. I thought your testimony was to the effect that these plates did show some shadows which indicated what you spoke of as an affection.

Ans. No; I didn't say that it was the result of this injury.

Ques. Then let me understand. Is it your opinion that as a result of the X-ray treatment that there is no

present indication of any injury which this man might have received by a fall in February of this year?

Ans. There is no indication on that plate of any injury that he received at that time.

Ques. Well, then, as I understand the situation these plates disclose a condition of tuberculosis in this man?

Ans. That is it.

By the Court:

10

Ques. Which may or may not have been of long standing, as I understand?

Ans. Which may or may not have been of long standing.

DR. EDWARD A. Y. SCHELLENGER, sworn for plaintiff.

20

Direct examination.

By Mr. Woodruff:

Ques. Dr. Schellenger, you are a physician?

Ans. Yes.

Ques. You live where?

Ans. Camden.

Ques. And you are a graduate of what school?

Ans. University of Pennsylvania.

30 Ques. What experience have you had since your admission?

Ans. I have been connected with the Cooper Hospital ever since that time.

Ques. In what capacity?

Ans. Surgeon.

Mr. Archer: I am perfectly willing to admit Dr. Schellenger's capacity to testify in this respect.

Ques. You made an examination of Mr. Miller, the plaintiff?

Ans. Yes.

Ques. How many examinations?

Ans. Three.

Ques. When did you make the first examination?

Ans. About six weeks ago.

Ques. What did that examination reveal?

Ans. Revealed evidence of tuberculosis of the lung.

Ques. That was located on what particular part of the lung if any? 10

Ans. In the top part of both lungs and in general over all the lungs.

Ques. What did your subsequent examination develop?

Ans. That the same thing existed.

Ques. They were made when?

Ans. One day before yesterday and one yesterday.

Ques. Did your examination develop the development of the disease, the extent?

Ans. I think it has been more progressive. I know it has been more progressive in yesterday's examination than the one before it. 20

Ques. In the past six weeks?

Ans. Yes.

Ques. How rapid?

Ans. I couldn't state exactly how rapid but it has been progressive. It has not been quiet at all. It has not remained the same.

Ques. What would cause the disease to progress speedily? 30

Ans. Anything that would lower his resistance.

Ques. Presuming, Doctor, that an injury to the upper abdominal region of some severity happened on February 13th of this year, could or could not this tuberculosis condition have arisen from that?

Ans. The conditions as we see of his lung?

Ques. Yes.

Ans. I don't think so, no.

Ques. Under what other conditions or correlative conditions could it have been brought about?

Ans. I believe that the man has tuberculosis or consumption.

Ques. And of how long duration?

Ans. That is indefinite. It may have been a condition—a latent tuberculosis could be ten or fifteen or twenty years.

10 Ques. And if it had been over that length of time what effect would it have had upon him anterior to three months?

Ans. He could go around to his work; it may not affect him to any great extent.

Ques. Would there have been any outward manifestation of it?

Ans. No, except he might get a little tired.

Ques. With regard to his work how would it have affected him?

20 Ans. Usually a man with a latent tuberculosis goes around and they do their ordinary work. They might not do prolonged physical work, but they can do the ordinary work; have to sort of accommodate themselves to conditions.

Ques. And in the state that we find the disease now, prior to February 3rd would this man have felt any inconvenience from that if it had been an ordinary development?

30 Ans. I don't think it is possible for that man to have been in this condition such as to-day and to do work, that is, hard work.

Ques. Or in this condition that you found him six weeks ago?

Ans. No, I don't think he could.

Ques. Or in the usual development of the disease at its stage or the stage it would have been in on February 13th? Perhaps you don't understand me. If the disease

had developed naturally to the extent that you found it six weeks ago upon your examination would he have been able to work on February 13th?

Ans. He could do a certain amount of work, but he couldn't do any laborous work. I think the man, if he did any prolonged physical effort, I think he would be very apt to have a hemorrhage.

Ques. And coughing?

Ans. Yes.

Ques. Expectoration?

10

Ans. Yes, sir.

Ques. Now is it possible that tubercular bacilli might affect a portion if the body and a cure be effected?

Ans. Well, yes. From the general word as employed in the layman's mind, a cure is effected, yes.

Ques. And to the physician's mind to what extent is that cured?

Ans. Well, we use the word arrested rather than cured. 20

By the Court:

Ques. But there is always a tendency for a recurrence of the disease?

Ans. Yes, always.

By Mr. Woodruff:

30

Ques. And in a normal life, a man living a normal life, what would be the probability of the recurrence?

Ans. Anything that would come along that would lower his resistance, whether it is a fever or any disease, a blow, injury, that will lower his resistance at that point, would be liable to break it out afresh.

Ques. Is that also true if the tubercular bacilli were present and in any particular area the resistant forces were lessened?

Ans. Yes.

Ques. By some outside blow?

Ans. Yes.

Ques. Even though there had not been an actual development of the tubercular bacilli previously, if they were present in the locality that was affected?

Ans. Yes.

Ques. Now with what rapidity would the disease develop after the lowering of the resistant forces through a blow?

10 Ans. It just depends upon the vitality of the patient himself, the amount of resistance he can throw out against the tuberculosis.

Ques. Finding the disease in the form that you found it in this plaintiff, at his age, fifty-five years, what is the probability of its effect on his health and his length of life?

Ans. I cannot state that, because it depends entirely upon the environment, the position the man is put in, the manner of his life. He may have several years or he
20 may go down rapidly.

Ques. What inconvenience or manifestation will it make as regards his well-being?

Ans. Well, I don't think he will be able to do his usual work. I don't think there is any doubt about that.

Ques. What about pain?

Ans. He will have more or less pain. I think the cough and the sweats which will develop will give him more inconvenience than pain.

Ques. What conditions would alleviate the disease,
30 living under what conditions?

Ans. A regular condition that we generally know is outlined for tubercular people—fresh air, stuffed with foods, milk and eggs, etc.

Ques. With the present development of the disease under normal conditions would he live one, two or three years? Can't you give us an estimate?

Ans. I cannot state that, no.

Ques. What effect would living out of doors, an out-of-door life for a period of twenty or thirty years have had on the development of the disease of tuberculosis?

Ans. Benefit them.

Ques. Would the disease be more liable or less liable to develop in a man living that sort of a life?

Ans. Less liable.

Cross-examination.

By Mr. Archer:

10

Ques. Dr. Schellenger, your first examination of this patient was about six weeks ago?

Ans. Yes, sir.

Ques. And you examined him again yesterday?

Ans. Day before yesterday and yesterday.

Ques. And you find that during that period of six weeks the disease had progressed?

Ques. Normally progressed during those six weeks? I mean by that was it about what you expected when you made the recent examination? 20

Ans. I can't say that I expected it. I found that it had developed as they usually do.

Ques. Is it your opinion, based upon examinations made yesterday and day before yesterday and six weeks ago, that this plaintiff was a well man on the 13th of February last?

Ans. No.

Ques. Is it your opinion that on the 13th of last February this plaintiff then had tuberculosis which was then latent? 30

Ans. I cannot state that.

Ques. You can't say?

Ans. I never saw the man till about six weeks ago.

Ques. I am merely asking you, Doctor—

By the Court:

Ques. What is the reasonable probability, in your

opinion, as to the condition of this man with regard to this specific disease?

Ans. He had tuberculosis, he had consumption.

Ques. Prior to the 13th of February?

Ans. Yes, he did.

JUDSON SHINN, sworn for plaintiff.

10 Direct examination by Mr. Woodruff:

Ques. Where do you live, Mr. Shinn?

Ans. Burlington, New Jersey.

Ques. You have lived there how long?

Ans. Thirty-seven years.

Ques. What is your business?

20 Ans. Police officer.

Ques. At Burlington?

Ans. Yes, sir.

Ques. Do you know Mr. Miller, the plaintiff in this case?

Ans. Yes, sir.

Ques. How long have you known him?

30 Ans. I have saw him around there ever since he came there to Burlington.

By the Court:

Ques. How long has that been, Mr. Shinn?

Ans. Well, I can't give any reasonable time. I suppose probably a year, maybe less.

By Mr. Woodruff:

Ques. During that time have you seen him at his work?

Ans. Yes, sir.

Ques. And what sort of work has he been doing?

Ans. He is in the fruit and like of that there.

Ques. Was he doing actual manual labor himself?

Ans. Yes.

Ques. What did that consist of?

Ans. Well, it consisted of—I never seen him much around the wharf, but I saw him up around his place of business handling fruit and apples and bananas and the like of that. 10

Ques. You were on the wharf the night the accident happened?

Ans. Yes, sir; I just happened to be there that night.

Ques. Who was with you?

Ans. When I went down on the wharf?

Ques. Yes.

Ans. No one was with me when I went down.

Ques. You went on the wharf alone? 20

Ans. Yes.

Ques. Where did you go on the wharf, what part of the wharf?

Ans. I went down and naturally I usually keep to my right and I got close under this place here and my wife and some friends happened to be standing down there and they halloed at me, "Look out, there is a hole there." And I seen it. The first I thought it was a shadow there and I jumped clear over it. 30

Ques. That is the hole that afterwards you found Mr. Miller in?

Ans. That is the hole, yes.

Mr. Archer: I object to what his wife said.

Mr. Woodruff: That may be stricken out.

By the Court:

Ques. You saw the hole, did you?

Ans. I certainly saw the hole.

By Mr. Woodruff:

Ques. And jumped across it?

By the Court:

Ques. Was it plain enough for anybody to see?

Ans. Well, you might take it for a shadow from this porch if the moon had not been shining and shone into
10 it.

Ques. Was it a moonlight night?

Ans. Yes, it was a moonlight night, but not very brilliant.

By Mr. Woodruff:

Ques. And you jumped because of the exclamation of your wife?

Ans. Yes. Of course it drew my attention and I
20 saw it was a hole and I jumped over it.

Ques. Where did you go then?

Ans. Went out to the end of the wharf and asked them if the boat had come. They said no and I asked them if it was coming and they said they thought it was.

Ques. How long did you stay there?

Ans. I stayed there probably talking with them ten or fifteen minutes.

Ques. Then where did you go?

Ans. Mr. Miller he was not there then.
30

Ques. You were speaking to the other people then?

Ans. Yes, sir.

Ques. When did you see him first?

Ans. I saw the boat below Devlan's and it had blowed, I think it had blowed—I am not just positive about—but the boat was below Devlan's, which is probably about a thousand yards before it had landed.

Ques. And you were in front of the wharf at that time?

Ans. Yes; and he came out and asked me if the boat was coming up to-night and I said yes, they said it is on the way.

Ques. Then what did he say?

Ans. He turned around and he left me probably half a minute when we heard somebody mumble, sounds like a man calling for an officer.

Ques. Did you go to his assistance?

Ans. Yes; immediately.

Ques. Where did you find him?

10

Ans. Found him hanging through this hole, suspended right across under his ribs like, with his hands out holding himself.

Ques. And what was his condition?

Ans. Well, after I had gotten him out he seemed to be pretty badly hurt. He seemed to complain of the right leg and all up under him here. (Indicating.)

Ques. How big a hole was it?

Ans. Well, I think it was the width of only one plank. I am not just positive about that, because I don't think it was over that.

20

Ques. Now then, after that he went away; did you see him later that evening?

Ans. No; I walked him down from that; I walked him down to the little landing platform there, I suppose, where they load their wagons from the wharf, and set him on there. There was a little boy come up and I says, "Son, you stand there with him"; and that is when I called Mr. Britton out.

Ques. Have you seen him since?

30

Ans. Who, Mr. Miller?

Ques. Yes.

Ans. Yes; I have seen him occasionally.

Ques. Have you noticed any change in his appearance since the accident?

Ans. Well, yes. The man does not look as good as he did before.

Ques. What degree of difference is there, if any?

Mr. Archer: I don't think this witness can testify.

The Court: The witness may testify to anything that he observed with regard to the man's physical condition.

10 Ans. Well, I think the man has grown thinner, although his complexion seems to be much yellower than it was formerly prior to the accident.

Ques. What condition of health did he appear to be in before the accident?

Ans. Appeared to be all right; seemed to be always working.

Ques. You didn't examine the leg where he complained of it?

Ans. No, sir; I didn't.

Cross-examination.

20

By Mr. Archer:

Ques. Have you seen him work since the accident?

Ans. No, sir; I have not.

Ques. Have you seen him at work at all?

Ans. No; I saw him at the store but I haven't saw him working.

Ques. Saw him at his store?

30 Ans. Well, I don't know whether he has a store, but it is his place of business.

Ques. You haven't seen him on his wagon going around?

Ans. No, sir; I worked at nights. You will have to excuse me on that point.

Ques. At the time this plaintiff fell in this hole, the boat hadn't come to the dock?

Ans. No, sir.

Ques. How far away do you suppose she was?

Ans. I suppose probably a thousand yards or maybe sixteen hundred yards.

Ques. Did you tell him that?

Ans. I told him the boat was on its way.

Ques. There couldn't possibly have been any freight landed from that boat there in that warehouse or being carried in the warehouse at the time of this accident, could there?

Ans. I don't know. The warehouse was locked up. I don't know who was inside.

10

Ques. From that boat?

Ans. From that boat that was coming up?

Ques. Yes.

Ans. That is unreasonable.

Ques. You are quite certain that at the time of the accident no freight could have been landed from her at the Burlington wharf or put in that warehouse, aren't you?

20

Ans. Certainly not.

Ques. Certainly not or certainly?

Ans. Certainly not; it could not have been landed sixteen hundred yards away.

Ques. I asked you if you were quite certain and you said certainly not.

Ans. Why, quite certain. Not off of that boat.

Ques. That is a pretty fair picture of that place, isn't it? (Photograph shown witness.)

30

Ans. Identical.

Ques. And what is this little place that looks like a gal-
lows out here on the side?

Ans. I don't know what it was built there for.

Ques. What is it now?

Ans. I never saw it used for anything. I suppose it to be for weighing purposes.

Ques. There is an iron chain hangs down there, isn't there?

Ans. Appears to be; yes, sir.

Ques. That has been hanging there for a long time, hasn't it?

Ans. I didn't notice it that night.

Ques. Where was the plank out when you went out over it?

By the Court:

Ques. Where was the hole?

10 Ans. The hole is right opposite this post here, the center post running through towards the building.

Ques. Was it outside of the chains or inside?

Mr. Archer: These are upright posts.

Ques. Was it on the outside or inside?

Ans. On the inside from here, running underneath, I suppose, this chain, possibly about where that is now, going right under there.

By Mr. Archer:

20 Ques. When you first noticed it was there was just a moment or two before the accident?

Ans. Oh, no; possibly it was fifteen minutes.

Ques. And at the time you were on your way out to the end of the dock?

Ans. Yes.

Ques. And at that time you were conversing with whom?

Ans. My wife and her two friends.

30 Ques. There was the young lady who was on the stand this morning?

Ans. Yes, sir; one of them.

Ques. Did you do anything towards putting the plank back in its place? Did you see the plank there?

Ans. There was no plank there except one that was pushed one side of the building here. It was a little out there.

Recess till 1.30 P. M.

(Trial of the cause resumed at 1.30 P. M.)

JUDSON SHINN, resumed.

Cross-examination continued.

By Mr. Archer:

Ques. As I understand, when you went out on the wharf and saw this hole, it was the plank out under this projection here where the iron chain hangs down, wasn't it? 10

Ans. Somewhere near there; yes. I think it was just under it. I am not certain. I didn't notice the iron chain being there that night. It might have been hanging back to the side.

Ques. Did you say that you didn't see the plank that belonged in that space lying about there anywhere?

Ans. No, sir.

Ques. That night at any time? 20

Ans. No, sir.

Ques. Did you look for it?

Ans. I looked for the man that had charge.

Ques. And couldn't find him?

Ans. He was not there; no, sir.

Ques. Mr. Britton, you mean?

Ans. Mr. Britton, I mean.

Ques. Didn't you and Mr. Britton within a short time after that on that same evening put that plank back together? 30

Ans. It was not the plank. The plank never fit in there. The plank was three times as long as the one that went in there. It was another plank altogether.

Ques. But you and Mr. Britton later endeavored to put a plank back in there, put a plank in that hole?

Ans. After the accident; yes, sir.

Ques. When had you been out on that wharf before that time?

Ans. I couldn't say. It was by accident I was there that night.

Ques. Had you noticed whether that plank had been out before in this particular location?

Ans. I never noticed it before; no, sir.

Ques. Now, after the boat had come in, did you see Mr. Miller again that evening?

Ans. No, sir.

Ques. Are you sure?

10 Ans. Sure.

Ques. You helped him out of the hole that he had fallen in?

Ans. Yes, sir.

Ques. And then where did you say you left him with the little boy?

Ans. Right here on the corner of this wharf here.

Ques. Right by the platform?

20 Ans. I left him sitting right there. I went back to look for the wharf tender.

Ques. Was that the last you saw of him?

Ans. That was the last I saw of him. I didn't notice when we came off the wharf where he was.

Ques. Did you make any further inquiry about him at all?

30 Ans. No, sir; I just made a report of it and turned it in to the police captain.

Ques. You didn't see him loading or helping to load his wagon on the platform later?

Ans. No, sir; I didn't notice any one there. I think there was some teams there but just how many I don't know.

Ques. I understood you to say that you thought the plaintiff did not look so well after the time when this accident happened as he had before; is that right?

Ans. I say don't look as good to-day as he did before the accident happened, not to me.

Ques. Well, how does he look changed to you now?

Ans. I think the man is much thinner, more sallow complexioned is about all that I can notice.

Ques. And when did you first make an observation of the change?

Ans. Well, I don't know as I could say as to that. I just saw him yesterday for the first time for possibly two or three weeks; because my beat has been off of there. 10

Ques. And you think that he has failed in appearance in that time, two or three weeks?

Ans. Yes; I think he has somewhat in that way.

Ques. Well, you saw him at the time of the accident. When did you next see him after that?

Ans. Well, it might have been possibly eight or ten days afterwards.

Ques. And did you notice any change in this eight or ten days? 20

Ans. I just asked him how he was feeling. I didn't notice anything about his looks at that time. I asked him how he was feeling.

Ques. Then, as I understand you, eight or ten days after the accident you didn't see anything marked in his appearance?

Ans. Except he was bent over a little more, that is all.

Ques. Bent over a little more? 30

Ans. Yes, sir.

Ques. The change you noticed particularly was between the present time and the time of the accident or a time prior to it?

Ans. A time prior to it; yes, sir.

Re-direct examination.

By Mr. Woodruff:

Ques. When you jumped over this opening what was there to warn any one going there that there was a hole?

Ans. There was no fenders up whatever.

Ques. Now during this time, the time that you were

on the wharf, until the accident happened, what other persons were there?

Ans. No one except—

Ques. Your party?

Ans. The party, that is all.

Ques. And no other person around there at all?

Ans. No, sir.

Ques. You are sure of that?

Ans. I am sure of it.

10 Ques. When did you first see Mr. Britton?

Ans. Mr. Britton, you mean?

Ques. I think the name is Britton.

Ans. I saw him right after the accident occurred, right after I had gotten Mr. Miller out of the hole.

Ques. From what direction did he come?

Ans. He came out of the office in front. I knocked on the front there and told him about the accident.

Ques. Then he came out?

Ans. Yes, sir.

20

MISS EMILY D. SCOTT, sworn for plaintiff.

Direct examination.

By Mr. Woodruff:

Ques. Miss Scott, where do you live?

30 Ans. Bristol, Pennsylvania.

Ques. And where do you work?

Ans. Bristol, in the Bell Telephone exchange.

Ques. And you were in Burlington the night of this accident?

Ans. I was.

Ques. And were with Mr. Shinn and his party on the wharf?

Ans. I was. I was visiting their house.

Ques. They were taking you to the wharf to see you off?

Ans. They were.

Ques. Did you notice this hole when you went on the wharf?

Ans. When I went down to the wharf?

Ques. Yes.

Ans. Yes, I did.

Ques. What did you notice about it at that time?

Ans. Well, I noticed that the hole was there and that there were no fenders at all there; nothing to warn any one that there was no hole there whatever; and of course any one making a— 10

Mr. Archer: Just a moment.

Ques. When did you first see Mr. Miller?

Ans. When he came and asked Mr. Shinn whether the boat come up yet.

Ques. The boat was not there at that time? 20

Ans. No, sir.

Ques. When next did you see him?

Ans. When he was in the hole.

Ques. What next attracted your attention?

Ans. Him hallooing. He was calling for help.

Ques. What did you see when you got there? What was taking place?

Ans. Well, nothing had taken place then any further than he had fallen in the hole and when Mr. Shinn got there he helped him out. 30

Ques. What was his condition as you noticed him at that time?

Ans. His condition was very bad, I thought. He couldn't straighten up; and he complained of such severe pains all through his—just below the chest, like, around the ribs.

Ques. Did he complain of any other feature?

Ans. Complained of his limb hurting him.

Ques. How big was the hole?

Ans. Well, I judge it was about the width of a good sized plank, the good width of a plank.

Ques. What lights were there on the wharf?

Ans. Not any whatever.

Ques. This hole was alongside of the freight house?

Ans. Yes.

10 Ques. What was the wharf with regard to light on that side of the building?

Ans. I didn't see any only from the office window.

Ques. What was the nearest light towards the street, do you know?

Ans. The nearest one was out on the street somewhere.

Ques. That is some distance away?

Ans. Yes, sir.

Ques. What other persons did you see on the wharf?

Ans. There wasn't no one but our company.

Ques. And when did you first see Mr. Britton?

20 Ans. When Mr. Shinn went and called him on the office window. He tapped on the office window for him to come out.

Ques. Did any other persons come there?

Ans. No one at all at time.

Ques. Did you see a young boy here back of me, Harry?

Ans. After Mr. Shinn had showed him this hole then he came out.

Ques. Then he came out?

30 Ans. Yes, and he wanted to know what the trouble was.

Ques. And he and Mr. Britton were the only ones that came there at that time?

Ans. Mr. Britton was the only one that came.

Cross-examination.

By Mr. Archer:

Ques. This accident happend prior to the time that the boat came to the dock?

Ans. The boat hadn't come into the dock yet.

Ques. Was the hole that you speak of where a plank was out under this projection?

Ans. Yes, it was right the middle one, right on the side of that middle post.

Ques. Are you familiar with the premises? Do you go back and forth?

Ans. No, sir; I don't. I use the ferry.

Ques. Do you recollect the iron chain hanging down?

Ans. I do not.

10

Ques. Didn't see that?

Ans. No, sir; I didn't see any.

Ques. You don't know whether it is there or not?

Ans. I don't remember seeing any so I wouldn't say it is there.

Ques. I am merely asking you for your best recollection on the subject. I would like to know whether you can say positively that it was or was not there.

20

Ans. I can't say it was there. I didn't see it.

Ques. Can you say that it was not there?

Ans. I can't say that it was not there or was.

Ques. Neither one?

Ans. I can't say for I don't know.

Ques. Well, that is what I am asking you. When you passed out to go to the boat which way did you go?

Ans. I went right through here. (Indicating on 30 photograph.)

Ques. Around on the outside of that trestle work?

Ans. Yes.

Ques. Why didn't you go through there?

Ans. Because I noticed the hole there.

Ques. That was the reason you went around it?

Ans. It was; yes, sir.

Ques. Otherwise you would have gone through there?

Ans. I certainly would.

Ques. How long do you suppose you were out there on the end of the wharf?

Ans. We were out there about ten or fifteen minutes.

By the Court:

Ques. Did I understand you to say that you saw the hole before Mr. Miller fell into it?

Ans. I noticed it; yes, sir.

Ques. You saw it?

Ans. Yes, sir.

Ques. How far were you away from it when you saw it?

10 Ans. Well, I was about the distance to the end of this projection there.

Ques. That would not indicate anything to me in feet. Approximately how far were you away?

Ans. I judge fifteen or twenty feet.

Ques. Fifteen or twenty feet?

Ans. Yes.

Ques. And you could see the hole?

Ans. Yes, I could see it, but it looked like a shadow. Anyone not knowing that it was there would think it was

20 a shadow from that post that came down.

By Mr. Archer:

Ques. How did you know it was not a shadow?

Ans. How did I know it was not a shadow?

Ques. Yes.

Ans. There was a little board sticking right up straight.

Ques. Where?

30 Ans. Right in the center.

By the Court:

Ques. The center of the hole?

Ans. No, right near the building.

Ques. It was light enough for you to see the hole or light enough for you to see at a distance of fifteen or twenty feet away?

Ans. Yes, sir; it was light enough—no, not enough to see that it was a hole, to see that it was a shadow. So I didn't go over that way. I went right out there.

By Mr. Archer:

Ques. The shadow was made by the moon, a moon-light night?

Ans. I presume it was.

Ques. Well, you know it was a shadow; don't you?

Ans. Certainly.

Ques. Then it was the moon; wasn't it?

Ans. Yes, it was the moon that made it there but it was not a shadow, it was a hole; but anyone would have taken it for a shadow.

Ques. But there were other shadows made by the moon?

Ans. Certainly.

Ques. You thought this was one?

Ans. Yes, sir.

Ques. And you walked outside to escape the shadow?

Ans. Yes; I walked on the outside.

Ques. Didn't you say a few minutes ago that you saw this hole when you were fifteen or twenty feet away from it?

Ans. I did. I saw what I thought—

Ques. Was a hole?

Ans. Was a hole.

Ques. And you were right, were you?

Ans. Yes; I was right.

Re-direct examination.

By Mr. Woodruff:

Ques. You saw that when with regard to these upright posts? There are upright posts that divided the two passageways, are there not?

Ans. Yes.

Ques. And there are three or four of them?

Ans. Three, and I was right on the end.

Ques. The end of the first post?

Ans. Yes.

Ques. And seeing that shadow you took the left hand side instead of the right?

Ans. I took the left hand side instead of the right.

10

MRS. EMMA SHINN, sworn for plaintiff.

Direct examination.

By Mr. Woodruff:

20

Ques. You are the wife of the officer who testified?

Ans. Yes, sir.

Ques. And you were there on the wharf this evening with this party, your husband and Miss Scott and Miss Morris?

Ans. Yes, sir.

Ques. When did you first notice the hole?

Ans. When I went down to see if the boat had come in.

30

Ques. You went with whom?

Ans. Miss Scott and Miss Morris.

Ques. Where were you with regard to this picture when you saw it?

(Photograph shown witness.)

Ans. When we saw the hole?

Ques. Yes. Where is the hole first with regard to this picture?

Ans. Right in here.

Ques. Between the three upright posts and the building?

Ans. Yes, sir.

Ques. And where were you with regard to these posts when you noticed the hole?

Ans. We were walking down and it was right in there, and I says, "Supposing any of us had gone through there."

Ques. And then what did you do? 10

Ans. We walked on to the front of the wharf.

Ques. On the left hand side of those upright posts?

Ans. Yes.

Ques. How close were you to this first post when you noticed the hole?

Ans. We were somewhere along here. It was dark. You couldn't see.

Ques. Indicating by the first post?

Ans. Yes. 20

Ques. How dark was it along there?

Ans. Well, it was moonlight but it wasn't very light, to say very light. There was no lights on the wharf whatever except in the office.

Ques. And that is which end of the freight house?

Ans. Why, on the opposite end, towards the river.

Ques. Then when did you see Mr. Miller?

Ans. I didn't see him until he came to the end of the wharf and asked my husband if the boat had come in yet. 30

Ques. And then he turned and went back around the building?

Ans. Yes; he turned and went back.

Ques. What first attracted your attention?

Ans. When he first began to halloo for help.

Ques. You went there with the rest?

Ans. Yes.

Ques. What did you see?

Ans. Well, he was down in this hole where the plank was out and was resting here (indicating), and when my husband got him out he was pretty well bent over.

Ques. Complaining?

Ans. Yes, sir.

Ques. Did you see him after that?

Ans. Just saw him sitting on the wharf, on the end of the freight house, as we came up from the wharf.

Ques. That is when you went out?

Ans. That is when I went home.

Ques. After the boat had come and gone?

10 Ans. No; the boat hadn't gone yet. The boat was still at the wharf when we left the wharf.

Ques. What was there in the way of obstructions to prevent you from going in there between those posts and the building?

Ans. There was nothing. Any of us would have been likely to have gone down there if we had gone through there.

Cross-examination.

20 By Mr. Archer:

Ques. But you didn't go there?

Ans. No, sir.

Ques. You were not going down to become a passenger on the boat?

Ans. No, sir; I live in Burlington.

Ques. You were merely going down with two friends?

Ans. Yes; just merely with my friends.

Ques. She was going on the boat?

Ans. Yes, sir.

30 Ques. And you, in going to the boat, could pass on the outside of this frame there on which the crane is located?

Ans. Yes.

Ques. Are you familiar with the wharf?

Ans. No, sir; very seldom go down there.

Ques. Do you recollect seeing the heavy iron chain hanging down there from the middle of that crane?

Ans. No, sir; I couldn't say positive there was one there.

Ques. How far away did you say you were from the hole when you first saw it?

Ans. We were right there by the first post when we saw it. You couldn't see it, that is, going in, you couldn't see it from this side very plain until you got pretty close to it.

Ques. Did you see Mr. Miller, the plaintiff, when he came out to the end of the wharf?

Ans. Not till he came to speak to my husband.

Ques. You don't know whether in going out to the end of that wharf he walked over that hole or whether he went outside of these uprights, do you? 10

Ans. I don't remember that.

Ques. You don't know which way he came?

Ans. No, sir.

Ques. After he had gone back you heard him call for help, after he had fallen in?

Ans. Yes.

Ques. Was it moonlight?

Ans. It was moonlight, but the moon was very dim. 20
It was not to say real light.

Ques. Light enough to throw heavy shadows?

Ans. Yes; it showed a shadow but any one that couldn't see very well couldn't see that hole until they got right down into it.

Ques. Let's go back to the moon for a minute. Was the moon shining brightly enough to throw heavy shadows there?

Ans. Yes; there was a shadow there but you couldn't see that it was a hole till you went right up to it, unless anybody knowed it was there. 30

HARRY MILLER, sworn for plaintiff.

Direct examination.

By Mr. Woodruff:

Ques. Harry, you live with Mr. Miller, the plaintiff, in this case?

Ans. Yes, sir.

Ques. What relation are you to him?

Ans. He is my uncle.

Ques. Your father is dead?

Ans. Yes, sir.

Ques. Did you help him about his business before the accident?

Ans. Yes, sir.

Ques. Did you ever go with him?

10 Ans. Well, once in a while with him.

Ques. What was his condition of health before the accident?

Ans. He was good and strong; done heavy work.

Ques. Done what?

Ans. Done very heavy work.

Ques. What sort of work?

Ans. Well, cart bananas. He didn't have a horse then. He used to take a pushcart and put twenty or twenty-five bunches on there and shove it over to Bristol and sell wholesale around to the stores.

20

Ques. Up until what time did he have his pushcart?

Ans. I can't just remember. When he got his horse he cut it out.

Ques. How long ago?

Ans. I don't think I can remember.

Ques. Well, has it been since he has been at Burlington continuously for the past year?

Ans. Yes.

Ques. Since that time?

30

Ans. Yes.

Ques. Do you know whether it was a month or two months before the accident?

Ans. I think it was.

Ques. You don't know sure about that?

Ans. No.

Ques. What work did he do after he got the horse and cart?

Ans. The same thing.

Ques. Did he ever complain?

Ans. No.

Ques. How long had you lived with him?

Ans. Oh, he had lived in Burlington going on for eight years, but one year steady.

Ques. How long had you lived with him?

Ans. Well, the same as he has lived with me, about a year, I guess.

Ques. This last year he came there to be with you all the time?

10

Ans. Yes.

Ques. Before that he only came there occasionally, is that it?

Ans. Yes.

Ques. Off and on for eight years?

Ans. Yes.

Ques. Now were you at the wharf this night when this happened?

20

Ans. No, sir.

Ques. When did you first go there?

Ans. Well, after some boy ran up and told me he was hurt.

Ques. That was the first that you got there?

Ans. Yes.

Ques. What did you first see?

Ans. Well, I just seen him, he was coming around the corner and he was limping along. He said, "Carry me home," and told me about it. I took him home and two boys took the stuff—I don't know who they were—took the stuff out and put it in the store, and he come back and gave them some bananas and things like that for doing it.

30

Ques. What was his condition when you took him home?

Ans. Well, he complained about his foot and his wrist.

Ques. Did you see the hole?

Ans. Yes, sir.

Ques. Where was he when you got there? Was he out of the hole?

Ans. Yes, sir.

Ques. Now after he got home how did his condition improve, if it did improve?

Ans. Well, he was groaning very bad, you know, and we rubbed him down with alcohol and rubbed his ribs. We put some cold water and all of that until he got Dr. Dingee and he gave him some grease to put on it.

10 Ques. What has been his condition ever since?

Ans. Well, it has been very bad. He has been coughing and at night he can't sleep, complaining about his chest all the time.

Ques. How about his appetite?

Ans. He don't eat much; only a few crackers.

Ques. Not his appetite, but how has he been eating?

Ans. Not very well.

Ques. What has he been eating?

Ans. Crackers and eggs and milk and things like that.

20 Ques. Have you worked with him since the accident?

Ans. Yes, sir.

Ques. How much, all the time?

Ans. Not all the time.

Ques. Who else has worked with him?

Ans. His son.

Ques. What has he done since the accident in the way of work?

Ans. Who, my uncle?

Ques. Yes.

30 Ans. He just rode on the wagon to get the air, and in Florence, you know, we would go to the houses. He would stay on the wagon and of course when anybody would come over it was not a hard job to put off a dozen bananas at some place in a bag and he done that.

Ques. How about loading the wagon?

Ans. We done all that.

Ques. Had you been with him at the wharf before, before the night of the accident?

Ans. No, sir.

Ques. You had never been to this wharf with him before?

Ans. No, sir. Well, been with him then before, but not so very often, only about once or twice, I think.

Ques. When was that, daytime or night?

Ans. Night.

Ques. What did you go there for at that time?

Ans. To get some freight. It was cold, you know, and he come from Florence. He was tired. He said, "Help 10 me out a little."

Ques. What time of day was it? Oh, you said it was night?

Ans. Yes, sir.

Ques. What would you get there in the way of freight?

Ans. Bananas, and there was a big load, you know, and we would cart about twenty-four barrels.

Ques. Where did you get the freight, what part of the wharf?

Ans. Always in front. 20

Ques. In front of what?

Ans. Of the wharf.

By the Court:

Ques. Did you ever go out to the end of the wharf to get fruit from the wharf?

Ans. Yes.

Ques. I mean go out on the end of the wharf to get it from the boat? 30

Ans. Yes, sir.

Ques. I thought you said you always got it from the front of the wharf?

Ans. Well, that is what I mean, right in front.

Ques. What do you mean by the front?

Ans. On the river side.

Ques. Oh, on the river end?

Ans. Yes.

Ques. And not the other end?

Ans. No, sir.

By Mr. Woodruff:

Ques. These times that you got it out there you say was the night boat?

Ans. Yes; sometimes in the daytime I would get it in the back.

10 Ques. Why would you go out on the end of the wharf at night for it?

Ans. Because if I put myself off, as soon as that boat leaves he closes up and I have got to leave my stuff there till the next morning and it is cold there and it will all get froze on you. So that is the reason we used to pass that out off the boat, just pass it off into the wagon.

20 Ques. Did you take your horse and wagon out on the wharf?

Ans. Yes, sir.

Cross-examination.

By Mr. Archer:

Ques. How old are you?

Ans. Sixteen.

30 Ques. Have you had any conversation with any one with regard to your testimony in this case?

Ans. No, sir.

Ques. Not a soul?

Ans. No, sir.

Ques. Haven't talked to your uncle about it?

Ans. Yes.

Ques. Or his lawyers?

Ans. No, sir.

Ques. Never with his lawyers?

Ans. I have been with them.

Ques. Have you talked with them about the case?

Ans. No, sir.

Ques. Haven't talked with his lawyers about the case at all?

Ans. No, sir.

Ques. You have talked with him?

Ans. Yes, sir.

Ques. When was the last time that you talked to your uncle about the case? 10

Ans. Well, we talked every once in a while in the house about it.

Ques. Have you talked with him about it this morning?

Ans. Yes.

Ques. Talked with him about it during this noon recess?

Ans. Yes, sir.

Ques. Who told you, if anyone, to say that it was your custom, that you were in the habit of going out to the end of this wharf to get fruit? 20

Ans. I know it. I did it myself.

Ques. How many times have you done that?

Ans. Oh, lots of times. Every time the boat gets up late.

Ques. What do you mean by every time the boat gets up late?

Ans. Well, when it gets up after six o'clock or something like that, the employees are in a hurry to get their supper and they won't wait for you to get them out. 30

Ques. How many times have you been down there yourself?

Ans. Where?

Ques. To this wharf to get freight.

Ans. Every time they come for me.

Ques. What?

Ans. Every time we have fruit down there.

Ques. For how long a time back?

Ans. Oh, I guess for six years.

Ques. You have been going there about six years to get fruit?

Ans. Not myself. We used to have a helper when I was small, but now I can manage it myself.

Ques. With your uncle?

Ans. No, sir.

Ques. Alone?

Ans. Yes, sir.

Ques. Did you ever go down there with your uncle and go out on the wharf to get the fruit?

Ans. Yes, sir.

10 Ques. When was that?

Ans. Night.

Ques. When?

Ans. I can't just remember; wintertime; I only went about once or twice with him; every time I went out.

Ques. You went out to the end?

Ans. Yes.

Ques. Did you ever see him get freight from the platform inside there?

Ans. Yes; when the boat got up early.

20 Ques. But otherwise he would go out to the end?

Ans. Yes, sir.

Ques. When he would go out to the end, how would he get there?

Ans. Just start around here; go around here with the horse like that.

Ques. Back out all the way?

Ans. I would back him out all the way out and then turn that way. The boat would lay there. (Indicating.)

30 Ques. Which way would he back out, on which side of that upright there?

Ans. Right through here.

Ques. On the outer side?

Ans. Yes, sir.

Ques. He couldn't back under it, could he?

Ans. No, sir.

Ques. Why couldn't he?

Ans. Too small a place, I suppose. Perhaps he could do it, but it is pretty hard job to back out.

Ques. Did you ever go out with the wagon and back under that upright?

Ans. No, sir.

Ques. You went around the driveway on the outside?

Ans. Yes, sir.

Ques. Which is provided for that purpose, isn't it?

Ans. Yes, sir. Well, once it was loaded up with truck—

Ques. Never mind. Just answer my questions. What time did you get down there on the night of this accident? 10

Ans. I guess about ten minutes past eight, somewhere around there.

Ques. Where did you find your uncle's horse and wagon?

Ans. It was right there. (Indicating on photograph.)

Ques. Right here?

Ans. Yes.

Ques. Backed up to this platform?

Ans. No, sir; it was not backed up. 20

Ques. Standing out here by this platform?

Ans. Standing right about there.

Ques. Out here in the street?

Ans. Yes.

Ques. He hadn't taken it around that night because the boat was late, had he?

Ans. No; because he couldn't. He got hurt before he had a chance to do it.

Ques. Before he could back the wagon around?

Ans. I guess he would have done it if he hadn't got hurt. 30

Ques. How do you know?

Ans. He generally does.

Ques. Did you hear what he said this morning?

Ans. Yes, part of it.

Ques. What?

Ans. Yes, sir.

Ques. You are now saying that he could have taken it around to the front of this wharf?

Ans. Yes, sir.

Ques. If he hadn't been hurt?

Ans. Yes, sir.

Ques. Where did you get that valuable information?

Ans. Well, I know he generally does. There wouldn't have been any use backing it back. They would have closed the doors on you. They would have closed it up.

10 So the doors were closed when he got here.

Ques. In fact, when the wagon was loaded it was loaded from this platform, wasn't it?

Ans. In the daytime.

Ques. I say this night, I am talking about. When it was loaded it was loaded from that platform, wasn't it?

Ans. No, sir.

Ques. Where was it loaded?

Ans. Left it outside and the boys rolled it out to the street and put it on.

20 Ques. On the street?

Ans. Yes, sir.

Ques. You mean the fruit was brought all the way out here?

Ans. The fruit was rolled out here. The boys did it.

Ques. This particular night when this freight was delivered to your uncle's wagon it was brought off the wharf all the way from this place, was it?

Ans. Yes, sir.

30 Ques. Did you help load it?

Ans. No, sir.

Ques. Who did? Who loaded it?

Ans. These boys did.

Ques. Well, where did you get it?

Ans. Got it out front there.

Ques. Out here?

Ans. Yes, sir.

Ques. Who brought it out there?

Ans. The boys did.

Ques. Where did they get it?

Ans. Right out in front of that wharf. The boat unloaded the stuff there, because he generally gets his stuff at night, so they left it out there purposely.

Ques. Left it out there?

Ans. Yes, sir; in front of the office,

Ques. At the end of the wharf?

Ans. Yes, sir.

Ques. Do you know where these boys got it that night?

Ans. Got it out front.

Ques. You mean to say that these boys went around the front there and got it and brought it out to the street? 10

Ans. No, sir.

Ques. Did you see them do it?

Ans. No, sir.

Ques. How do you know?

Ans. Well, that is what they told me.

Ques. Which way did they bring it down? Did they 20
tell you that, too?

Ans. No; they said they rolled them down.

Ques. Rolled them down this way?

Ans. Yes, sir.

Ques. That is what they told you?

Ans. Yes, sir.

Ques. When did they tell you that?

Ans. Well, they told me about it after the next day, 30
I think.

Ques. Are they here?

Ans. I don't know.

Ques. Have you seen them to-day?

Ans. No, sir.

LILLIAN MILLER, sworn for plaintiff.

Direct examination.

By Mr. Woodruff:

Ques. You are what relation to Mr. Miller?

Ans. He is my stepfather.

Ques. How long have you lived with him?

Ans. Eight years.

Ques. What has been his condition of health during that eight years up until the time of this accident?

Ans. He has been in pretty good condition. He never complained; always been strong since four years since my aunt's husband died. He made a living for her and my mother both.

10 Ques. Has he been ill at any time during that eight years?

Ans. Yes, sir.

Ques. Did you ever know him to go to a doctor during that time?

Ans. No, sir.

Ques. What sort of work did he do?

Ans. Huckster.

Ques. What manual labor did he do, if you know?

Ans. I don't know.

20 Ques. You don't know about that?

Ans. No, sir.

Ques. You were there the night they brought him home?

Ans. Yes, sir.

Ques. What was his condition then?

Ans. Why, he came home and laid down, he did, and he started to faint. My aunt put water on him and she asked him what was the trouble. He couldn't speak, but he just showed her, you know. And my aunt took his things off and seen he was all black and blue there, and he fainted several times. We started to put cold water on him and my aunt put cold water on him all night.

30

Ques. What was his condition after that from day to day?

Ans. Pretty bad, he was.

Ques. What did you notice about him that makes you say it was bad?

Ans. He looked so pale and started to spit blood.

Ques. When did he start to do that?

Ans. Right after he came home, about three days after.

Ques. How long did that continue?

Ans. I think it is around six days.

Ques. Have you noticed that since, after the six days?

Ans. A few times he would spit.

Ques. Since that time?

Ans. Yes, sir.

Ques. What work has he done since?

10

Ans. He hasn't done any work at all. My step-brother was working for him and he would sit on the wagon just to get the air.

Ques. What has he been eating?

Ans. Why, just, he can't eat nothing; just milk and crackers, that is all, and eggs, fresh eggs.

Ques. Have any of you attended to him during this time?

Ans. Yes, sir.

Ques. What have you had to do for him?

20

Ans. Why, wait on him, put cold water on him, you know, and rub him down with liniment sometimes.

Ques. Has there been any cough?

Ans. Yes.

Ques. Do you notice any difference in his appearance?

Ans. Yes, he looks bad, gets thinner.

Cross-examination.

By Mr. Archer :

30

Ques. This gentleman is your uncle, is he?

Ans. No, sir; my step-father.

Ques. You live with him?

Ans. Yes, sir.

Ques. Have you talked with him about the case?

Ans. No, sir.

Ques. Not at all?

- Ans. No, sir.
Ques. Not a word?
Ans. No, sir.
Ques. But you know that he lives on crackers and milk and eggs?
Ans. Yes, sir.
Ques. And he rides on the wagon for fresh air?
Ans. Yes, sir.
Ques. And you know that he spits blood?
10 Ans. Yes, sir.
Ques. And you know that he began to spit blood three days after the accident?
Ans. Yes, sir.
Ques. And that he spit blood for six days?
Ans. Yes, sir.
Ques. You remember all those things perfectly, don't you?
20 Ans. Yes, sir.
Ques. And since the accident you have never talked to him about this case; is that right?
Ans. No, sir.
-

SOLOMON MILLER, sworn for plaintiff.

- 30 Direct examination.
By Mr. Woodruff:
Ques. You are Mr. Miller's son by his first wife?
Ans. Yes, sir.
Ques. How long has it been since you have lived with him?
Ans. Two years.
Ques. Where have you been working?
Ans. Working down in New York.
Ques. When did you come back to live with him?
Ans. I come the 13th of February.

Ques. Why did you come at that time?

Ans. My father sent a telegram to me he is very sick.

Ques. And in response to this telegram you came down?

Ans. Yes, sir; I received a telegram to come.

Ques. What did you do for him after that?

Ans. I worked for him. I was driving a wagon. I 10
was selling his bananas and apples and some oranges
and had some oranges on the wagon—all kinds of fruit.

Ques. What did he do?

Ans. He didn't do a thing. He just ride the wagon.

Ques. What has been his condition since you came
back this last time, since the 13th of February?

Ans. I don't know.

Ques. What has his health been?

Ans. His health? He was strong. He was a strong 20
man. I remember when I left home the last two years
he was a very strong man.

Ques. That is two years ago?

Ans. Yes. Sometimes he sent me a letter he was all
right; he makes a nice living.

Ques. Two years ago you left home; how long before
that had you lived with him, all your life?

Ans. About ten years I lived with him. 30

Ques. You lived with him ten years before that?

Ans. Yes, sir.

Ques. What was his health for that ten year period?

Ans. He was a very strong man and did the same
business.

Ques. Did you ever know him to have a doctor?

Ans. No; he never had a doctor in his life.

Ques. Now what has his health been since February
13th?

Ans. He is weak. He can't work. I done all the
work for him. I left a job in New York. I left my
job; I gave up my position. I had a position.

Ques. What have you noticed about his health, what
particular things?

Ans. I don't know any particular things.

The Court: Let that other portion of the testimony, that his father never had a doctor in his life, be stricken out.

The Witness: Maybe he did before I was born.

10 Ques. During that ten years did you ever know him to have a doctor?

Ans. No, sir.

Ques. During the ten years you lived with him?

Ans. Yes, sir.

Ques. When did you know him to have a doctor?

Ans. I don't know when; maybe before I was born.

20 The Court: Well, it is only reasonable and rational testimony that is to be regarded by the jury and court, Mr. Woodruff. Testimony that is far fetched and unreasonable and almost impossible of belief is of very little significance.

Mr. Woodruff: There are a great many people in the world who do not have the necessity of going to physicians.

The Court: Well, how could this man know? How old is he? Have you found out his age?

30 Ques. What is your age?

Ans. I guess about eighteen or nineteen years.

Ques. And your father is fifty-five?

The Court: Now how could he testify?

Mr. Woodruff: He speaks of the time when he lived with him; he knows he never has had a physician.

Cross-examination.

By Mr. Archer :

Ques. Is your name Solomon?

Ans. Yes, sir.

Ques. Miller?

Ans. Yes, sir.

Ques. What is your real last name?

Ans. Last name?

10

Ques. Yes.

Ans. The same name as this.

Ques. Well, is your real name Miller?

Ans. Yes, sir.

Ques. Always has been?

Ans. The second name is Miller.

Ques. Have you ever had any other name than Miller that you can recall?

Ans. They call me some different names. Some call me Bill Miller, or some fellows call me Solly Miller.

20

Ques. What is your real name?

Ans. Solomon Miller.

Ques. Have you ever had any other name?

Ans. Yes.

Ques. What was your other name?

Ans. A Russian name. They call me Sone Miller.

Ques. How do you spell that in English?

Ans. S-o-n-e.

By the Court :

30

Ques. How long have you been in this country?

Ans. I don't know. I can't remember. I can't tell you that.

Ques. Well, do you remember when you came here?

Ans. No, I don't. I forgot to keep my papers in the ship.

By Mr. Archer :

Ques. Did you come here when you were a child, a small boy?

Ans. Yes, sir.

Ques. Did your father bring you here?

Ans. No, he left me there. I was a child in Russia and he sent for me.

Ques. You were born in Russia?

10 Ans. Yes, sir.

Ques. And he came here first?

Ans. Yes, sir.

Ques. Then he sent for you?

Ans. Yes, sir.

Ques. And your name was the same thing in Russia, was it, as it was here, with the proper changes? Do you know what I mean? Have you had any other name than Miller since you have been in this country?

20 Ans. No, only my name was Sone Miller in Jewish. In English it is Solomon.

Ques. That is all right for the first name. The last name, is that the same thing?

Ans. Yes.

Ques. That is, whatever you had in Russia was the same as Miller in English?

Ans. Yes.

Ques. And you never had any other name than Miller in English?

30 Ans. No, sir.

Ques. Sure of that, are you?

Ans. Yes, sir.

Ques. Never known by any other name?

Ans. No.

Ques. Did you get back on the 13th or 15th, did you say here?

Ans. I received a telegram the 13th. I came, I guess, the 13th or 14th—I don't remember—the same day.

Ques. You don't know anything about how this accident happened?

Ans. No, I don't know. The only thing I know he is sick, that is all.

Ques. Do you know what is the matter with him?

Ans. I don't know. I know he is sick and that is all. He didn't tell me anything.

10

MRS. IDA MILLER, sworn for plaintiff.

Direct examination.

By Mr. Woodruff:

Ques. You are what relation to Mr. Miller?

Ans. Sister-in-law.

20

Ques. You live with him?

Ans. Yes, sir.

Ques. How long have you lived with him?

Ans. One year, last year coming.

Ques. Up until the 13th of February past what was his health?

Ans. Oh, he is come from the wharf some night—

30

Ques. No, before the accident?

Ans. Oh, before the accident?

Ques. What was his health?

Ans. He would be all right.

Ques. Did he ever complain?

Ans. Never.

Ques. Did you ever notice him coughing?

Ans. Never.

Ques. Ever complain of any pains?

Ans. No.

Ques. Now what happened, as far as you are concerned, on the 13th? When did you see him?

Ans. I see him come some night, he is coming his fruit from Philadelphia to Burlington; gone to the wharf for the fruit and then he is come back and fell down in the bed and cry, "Sister-in-law, I am very sick, and it hurts me here." I said, "What is the matter with you?"

Ques. You can't tell what he said?

Mr. Archer: I object to the conversation.

10 The Court: The objection is sustained. If there is any conversation strike it out.

Ques. What has been his health since?

Ans. He say, "I am very sick. It hurts me here."
(Indicating abdomen.) And I say—

(Objected to.)

No cross-examination.

20 Plaintiffs rests.

MOTION FOR NONSUIT.

30 Mr. Archer: If your Honor please, I have one or two cases here which I would like to discuss in connection with a motion for nonsuit on these proofs. It seems to me that on the plaintiff's own case he cannot get himself in the class of those persons to whom the defendant company may have owed a duty with respect to providing a safe place at the point at which he alleges that he had this accident. According to his own statement, although it was afterwards somewhat qualified, yet it remains unqualified with respect to this particular night—he came to this wharf with his wagon to get freight, and without it being in any way qualified whatever he has said that at the point to which he came with the wagon for the

freight that night is this platform which is on the street end of this wharf. Now, then, he said that he left his horse and wagon at this point and went around the side of this building to the end, after the boat had come in, his story is, for the purpose of looking to see if the freight which was consigned to him on that boat had been brought into the warehouse; he spoke about its being cold weather and he was afraid that the fruit would freeze, and after the boat had come in he went around to see if that thing had happened, admittedly expecting that the fruit would be delivered to him at this point. 10

Now that seems to be absolutely his statement, without any qualification. All of the witnesses who were present and saw the accident and the circumstances underlying it or surrounding it say that before this boat had made her landing at the dock, while she was still out in the stream—I think one of the witnesses testifies one thousand feet, something of that sort—this man came around there and had a short conversation with this officer and then came back and on his way back he fell into this opening in this wharf. 20

Now if that all be true, how can he recover as a person who was either expressly or impliedly invited to use that wharf in the manner in which he did; and if not, upon what theory can the plaintiff rest his case, which would carry this to a jury? I have a number of cases which seem to me to be in point. There was one case—perhaps your Honor is familiar with it—that is the case of *Abbott vs. the D., L. & W. Railroad*. In that case the plaintiff brought suit against a carrier and it was held that there was no cause of action because from the station the carrier had provided one method of egress, and the plaintiff instead of going out this way provided by the railroad company, in going out of the station across the track went across at another point and met with this accident; and the court held that at that other point, having provided one place for ingress and egress to the 30

station, that the carrier was under no duty, and that the plaintiff therefore should have been nonsuited, or if he had been nonsuited that it was proper; at any rate, that the railroad company was under no duty.

Now when you look at that photograph it seems to me that the doctrine that is laid down in that and similar cases is perfectly applicable, even if you should reach the conclusion—

10 The Court: What do you do with the boy's testimony?

Mr. Archer: About going around?

The Court: Yes.

Mr. Archer: Well, I was just coming to that. Even if you reach the conclusion—that is, if the situation is not controlling with this respect to this particular in-
20 stance, I mean to say that the plaintiff himself says that he came on this particular night with his wagon to this place and that was where he expected to get that freight; and that he simply walked around there for the purpose of seeing whether the freight had been brought into the building.

Now, if you think there is testimony in the case that indicates that on other occasions the wagon had been taken
30 to the end of the wharf and the freight had been delivered to it there it does not help it, it seems to me, for this reason: there is a situation, it seems to me, in which a driveway is provided for wagons on the outside of this scaffolding. This photograph does not show it very perfectly, because this rail comes out and stands in the way; but there is evidently a wide space, which is in fact—I don't know how many feet wide—which is ample for them, even if that were the situation, to drive around that to the end of the wharf and back again. Now if on foot, at night, in the dark, this man chooses to bring his wagon here and walk around, not even in the way—

if he was an invited person, not even in the way in which he was invited, namely, by a driveway, he still is outside of the pale.

The Court: I will hear you, Mr. Woodruff.

(Mr. Woodruff replies.)

10

The Court: The motion will be denied, Mr. Archer, at this time. You may renew it at the conclusion of your case.

DEFENDANT'S TESTIMONY.

FREDERICK D. BRITTON, sworn for defendant.

20

Direct examination.

By Mr. Archer:

Ques. Mr. Britton, what is your business?

Ans. I work as agent of the Delaware Transportation Company in Burlington.

30

Ques. How long have you been in their employ?

Ans. Very nearly eight years.

Ques. Do you know the plaintiff, Miller?

Ans. Yes, sir.

Ques. What is his business?

Ans. He sells bananas, pineapples, apples and oranges—kind of a truck business, I would call it.

Ques. Do you recall whether he was in the habit of coming to the wharf of the company in Burlington to receive goods shipped to him?

Ans. Yes, sir.

Ques. Do you recollect the 13th day of last February?

Ans. The day that he fell there was the 13th of February.

Ques. Did you have any conversation with Miller that day?

Ans. That night.

Ques. Tell us what it was, how it came about.

10 Ans. I was in the freight house and a team drove down to the wharf and I walked out of the back of the freight house. When I was back around the land end whoever had this team had got out and was starting to walk out on the wharf. I walked out a little ways to see who it was. They walked right straight under the crane and tried to climb up and look in the office window. They looked in this window and seen the light shining out and I saw it was this Miller. I says, "Mr. Miller, don't come back under this crane. Only last week I took you by the arm and took you out from under it. You are under that crane and you will get hurt." Miller hallooed and said, "How long before the boat will be up?"

Ques. This Miller?

Ans. This Miller.

20 Ques. Which end of the wharf was that? Which window did he look in?

Ans. On the river end.

Ques. Go ahead. Tell us the whole situation.

Ans. He hallooed and asked me how long before the boat would be up. I don't remember just what time I told him. He then went back of the freight house again and I went to work.

Ques. How long was it after that that you heard of the accident?

30 Ans. It must have been between fifteen and twenty minutes. Officer Shinn knocked on the window and told me.

Ques. Had you ever had any conversation with him prior to the 13th of February with regard to the use of the wharf?

Ans. Miller?

Ques. Yes.

Ans. Well, now, what do you mean?

Ques. Well, as to how he should—

Ans. About how he should get his bananas?

Ques. Yes.

Ans. No, come to the back of the freight house and get them.

Ques. Won't you show the back of the freight house?

(Photograph shown witness.)

Ans. I mean the land end, right here. (Indicating.) 10

Ques. Right here, the land end?

Ans. Yes, sir.

Ques. What was the usual custom with regard to receiving freight?

Ans. From the boat?

Ques. Yes.

Ans. All freight is brought into the freight house and loaded on wagons from the back there.

Ques. On the platform?

Ans. On the platform.

Ques. Did this man to your knowledge ever receive freight from any other point? 20

Ans. They have received it from the front when they have a team load, but only in the daytime, nothing at night.

Ques. How often do you suppose that has happened, in the summertime or wintertime or when?

Ans. Well, if it was daytime in the wintertime they could receive it, or in the summertime in the daytime; any time in daytime.

Ques. And how would they get freight then? Suppose you look at that picture. 30

Ans. Right here.

Ques. Out on the end of the wharf?

Ans. Out on the far end, on the side of the freight house, if the boat landed here and if they had a solid load. They only could get it off if they had a solid load. They couldn't get a box, only three or four boxes off that

way, because we would have to store it and carry it. The deckhands loaded it here under the hood.

Ques. When you say here you mean all the way out to the wharf?

Ans. Well, out fifteen or twenty feet.

Ques. The deckhands would carry it here and put it in the wagon?

10 Ans. No; when they had solid loads. When the boat landed at the slip they could back further over on the wharf.

Ques. Do you know whether this accident to Miller happened before or after the time when this boat got in on that night?

Ans. Happened before.

Ques. How do you know that?

Ans. Why, Officer Shinn knocked at the window for me and I went out and the boat wasn't in there then.

Ques. Was that when he said he had fallen in?

Ans. He said he had fallen in.

20 Ques. Did you have any conversation about this at all?

Ans. After that, yes. I asked him to come in the office. About five or ten minutes afterwards he came in the office and I asked him where he was hurt, and he told me on the leg. I won't say which leg now. And I asked him to show it to me and he refused to do it. We talked there.

Ques. Did he complain of being hurt anywhere else?

Ans. Not then, only on his leg.

30 Ques. Who loaded his wagon that night after the fruit was brought there?

Ans. There was one boy or two boys. A man by the name of Walter Jones and Miller loaded the wagon.

Ques. Did he go away with the wagon or did you see him?

Ans. He went up the street after the wagon. The boys got after the team and licked the horse up and Miller got after them.

Ques. What did you see him do?

Ans. He was standing on the platform when the horse started. He jumped off the platform—that is about a rise of eighteen inches—and ran up after the boys, hallooing to stop driving so fast, they would kill the horse.

Ques. Did you see him again that night?

Ans. Not that night; no.

Ques. Have you seen him since?

Ans. Seen him the next morning.

Ques. What was he doing then?

Ans. He was unloading apples out of his wagon, what he got off the wharf that night, barrels of apples. 10

Ques. Barrels that were brought to your place?

Ans. Barrels that he would get in from that night.

Ques. Did he load them himself or was he assisted?

Ans. He was by himself then unloading them.

Ques. Loading or unloading?

Ans. Unloading them out of the wagon. 20

Ques. Full barrels?

Ans. Full barrels, yes. At his place he was unloading them.

Ques. At his place?

Ans. At Miller's place.

Ques. How many times do you suppose you have seen him since?

Ans. Twenty-five or thirty. 30

Ques. What has he been doing when you have seen him?

Ans. I have seen him selling bananas, seen him loading bananas.

Ques. At the wharf? At your wharf?

Ans. Yes; he has loaded those at the wharf that I can remember and I have seen him at his home or any place.

Ques. Now, Mr. Britton, did you have any further conversation with him, any other conversation with him about his injuries?

Ans. I was in his house one day but I couldn't understand what he said.

Ques. Going back to that wharf, do you know how it came to be that there was a plank out of this wharf on this night?

Ans. No, sir.

Ques. Where was the plank out through which this accident is supposed to have happened?

10 Ans. You can see them chains. The plank was right underneath them chains.

Ques. What is that chain? What is that under there?

Ans. That is used to hoist heavy castings off a wagon. All heavy castings come under there and we hook this hook on here and hoist those castings off and lower them on the wharf. If any heavy casting comes up it is put under there and that hook raises them right into the wagon.

Ques. And they are swung in on the wagon?

Ans. Yes.

20 Ques. You call it a crane, don't you?

Ans. A crane or an endless chain.

Ques. Ordinarily does that iron chain that is hanging down there remain in that position?

Ans. Always in that position.

Ques. Do you happen to know whether it was in that position on the night of this accident?

Ans. Well, it was in the same way, the same way as it shows in this picture.

Ques. Always the same way there?

30 Ans. It might be a little higher or a little lower.

Ques. Hanging there in the middle?

Ans. Yes; hanging there in the middle.

Ques. On the night that this accident happened, when did you pass along that portion of the dock; how late in the evening before the time when the accident is alleged to have happened?

Ans. About six o'clock.

Ques. Was it then dark?

Ans. Yes; it was dark then at six o'clock.

Ques. Do you know whether a plank was out from under the crane there at the time you went through?

Ans. At the time I went through there was an eight-inch plank under that crane.

Ques. You mean there was no hole there at all?

Ans. No hole; maybe a two-inch hole; couldn't have been over two inches.

Ques. Do you know how that plank got taken out 10 of there?

Ans. No, I don't.

Ques. Well, after the accident, after your attention had been called to this hole, what did you do about it?

Ans. I walked right straight back. I had to come out and go through under this crane and the plank what was in there was pulled across the driveway, cat-a-cornered, right cat-a-cornered across the driveway.

Ques. Who was with you?

Ans. Officer Shinn. 20

Ques. Is he the officer that was on the stand this morning?

Ans. Yes, that is the officer.

Ques. And what did you and he do?

Ans. He and I lifted up this plank and put it back in this hole. It was the same plank that was in the hole when I went home to supper.

Cross-examination.

30

By Mr. Woodruff:

Ques. You are sure that that chain was hanging there on the night of the accident?

Ans. Yes, sir.

Ques. Hanging how close down to the wharf?

Ans. Well, now; some of the chain, it wouldn't matter how it was, would always be on the wharf.

Ques. I mean the evening of the accident.

Ans. Some of the chain would be on the wharf.

Ques. No; what you saw on the evening of the accident.

Ans. I don't quite understand that.

Ques. Did you see this chain the evening Mr. Miller was hurt?

Ans. The chain was there the evening Mr. Miller was hurt.

10 Ques. Did you see it?

Ans. I seen it that day. I see it every day.

Ques. Did you see it at six o'clock, when you noticed the plank?

Ans. Yes, sir.

Ques. What condition was it in then, or what position was it in?

Ans. The chain was just like it always is.

20 Ques. How is it always then?

Ans. Why, there is a hook on the chain. It is about that high, always, from the ground. When it was that high, I mean about that high (indicating) always a little higher or a little lower. I couldn't say just how many feet it was from the ground that night.

Ques. You are sure it was suspended there that evening?

30 Ans. It was there that night.

Ques. How did you come to notice that plank this evening?

Ans. Sir?

Ques. How did you come to notice that the plank was there earlier in the evening?

Ans. That this plank was in there? I went out to see if it was in there.

Ques. Why did you go out to see that?

Ans. This was an eight inch plank, not nailed on one end, not nailed, I mean, on the end. It was laid on stringers, laid on them stringers not so it could fall off.

Ques. Why wasn't it nailed?

Ans. It wasn't the plank that belonged in there. The plank was out. This was an eight inch upright. I was waiting to get that in a plank.

Ques. How long had it been out?

Ans. Maybe a day.

Ques. When did you put this eight inch piece in there?

Ans. That morning or the morning before. I won't 10
just say what morning it was. I couldn't.

Ques. Was that the only plank that was then there?

Ans. Yes, sir.

Ques. Just the one plank?

Ans. One plank,

Ques. That has been fixed, hasn't it?

Ans. Yes, sir.

Ques. Has more than one plank been put back in place
of it? 20

Ans. Let me understand you; you mean more than one plank in that twelve inch space or in the ground?

Ques. In making repairs there has more than one plank been put down?

Ans. Yes, sir.

Ques. How many?

Ans. I don't remember how many.

Ques. Only one inside of this twelve inches? 30

Ans. Only one inside of this twelve inches.

Ques. But alongside of that twelve inches there is another plank put down?

Ans. Yes; not right alongside of it. When they fixed this side of the crane and that side of the crane and outside of it—

Ques. As a matter of fact hasn't there been three new planks put in there?

Ans. On the wharf, you mean?

Ques. Yes.

Ans. Yes; there has been three.

Ques. Underneath the crane?

Ans. Yes.

Ques. You say that was used for lifting heavy castings?

Ans. Yes.

Ques. Did the wagons back right in underneath there?

Ans. Drive or back either one.

Ques. Loading up the heavy castings the wagons drove on there and went out?

Ans. Yes; lowered it down.

Ques. Now, you say that you undertook to speak to Mr. Miller once about the accident at his home?

Ans. Yes.

10 Ques. When was that?

Ans. That must have been six weeks afterwards. I won't say exactly the time.

Ques. Did you go to his house?

Ans. Went to his house.

Ques. And you say you couldn't understand him?

Ans. I couldn't understand him, no.

Ques. Is that the only time you have spoken to him about it?

Ans. About the accident?

20 Ques. About the accident.

Ans. I was talking to him the next day about it. I asked him how he felt.

Ques. Night before last did you go to his house and talk to him about the accident?

Ans. No, sir.

Ques. Now you say on this evening, on the evening that he was hurt, he came into your office?

Ans. Yes.

Ques. That is in front of the building, isn't it?

30 Ans. Yes, sir; the river end.

Ques. The river end of the building?

Ans. Yes, sir.

Ques. He came around through the freight house?

Ans. I don't know how he got in the office. He came in alone. I was in the office working there and he came in.

Ques. He came in alone?

Ans. He came in alone.

Ques. And then he turned around and went back to the land end of the building?

Ans. No; he sat in a chair for a little while after he came in the office.

Ques. The only complaint to you was as regards his leg?

Ans. At that time.

Ques. He didn't complain of any pains across the upper abdomen here?

Ans. Not to me.

10

Ques. Not at all?

Ans. Not to me.

Ques. Did you see him putting his hands there?

Ans. He was rubbing his leg.

Ques. Did you see him put his hand across here?

Ans. I didn't take notice of it.

Ques. When you went inside the building and the officer tapped on the window did he make any complaint besides his leg?

Ans. He was sitting down when I went outside the building. I didn't hear him make any.

20

Ques. You are hard of hearing, aren't you?

Ans. I am hard of hearing; yes.

Ques. Then after the boys had loaded the wagon he jumped down off this platform, did he?

Ans. Yes.

Ques. Which one of the boys was driving the horse?

Ans. Now I don't know who the boys were.

Ques. They whipped up the horse?

Ans. They whipped up the horse.

30

Ques. He jumped down and ran after them?

Ans. Ran after them.

Ques. What was it he hallooed?

Ans. He hallooed, "Boy, don't drive that horse so fast. You will kill him;" something of that order. That might not have been just the exact words but he had "kill the horse" in there.

Ques. He said at least that many words?

Ans. Yes.

Ques. You understood him?

Ans. Yes; I understood him.

Ques. He spoke plainly at that time?

Ans. Very plainly.

Ques. And you are sure that he ran when he ran after the horse?

Ans. Yes, sir.

Ques. How many barrels of apples did he have the
10 next day?

Ans. That is pretty hard for me to remember. I have got freight in and freight out all the time. I couldn't just remember.

Ques. But you remember sure that he was there the next day?

Ans. I remember surely he was there the next day?

Ques. Yes.

Ans. At the wharf, you mean?

Ques. Yes.

20 Ans. No; I said I seen him at his house the next day.

Ques. At his house?

Ans. He was unloading at his house.

Ques. What street is that on?

Ans. Pearl street.

Ques. Whereabouts was he unloading apples there?

Ans. He was unloading them out of his wagon on to the street, wheeling them in his yard.

Ques. And you have seen him twenty-five or thirty times since then?

30 Ans. Yes, sir.

Ques. Now you say that the only time that he received fruit there, as I understood you, in front of the water and of the wharf, was in the daytime?

Ans. Yes, sir.

Ques. What time do you close the rear of the building, the rear doors, the land end doors, and landward doors?

Ans. I have to understand it. Do you mean when the boat is on time? We close them at six o'clock at night.

Ques. Usually you close the doors at six o'clock at night?

Ans. Mostly; yes, sir.

Ques. And you go home?

Ans. If the boat is on time.

Ques. You wait until the last boat comes, usually?

Ans. Either me or my assistant waits until the last boat comes.

10

Ques. Your assistant is sometimes there in your place?

Ans. Yes, sir.

Ques. How frequently?

Ans. Well, that is all according to how the boat gets in.

Ques. No; I mean how frequently does he take your place.

20

Ans. Every other night. That is, we work, when the boat is late a night I would work and the next late night he would work.

Ques. And it was always daytime when he came after freight at the end of the wharf that you were there?

Ans. He never got any freight from the end of the wharf at night. There could be nothing got from the end of the wharf at night.

30

Ques. You waited there until it was carried through and he got it from the other end?

Ans. The other end; yes.

Re-direct examination.

By Mr. Archer:

Ques. One question I omitted to ask. What is the distance between the supports of the crane and the side of the wharf?

Ans. Eight feet.

Ques. You mean eight feet from the crane to the side of the building?

Ans. To the side of the building.

Ques. I am asking you also the distance from the upright there of the crane to the other side of the wharf?

Ans. Twelve or fourteen feet.

Ques. Is there room there for two wagons to pass each other?

10 Ans. Not two big wagons; two small wagons could pass.

Ques. And it is eight feet in width, the crane itself?

Ans. Yes, sir.

Ques. That is a correct representation, is it, of the situation of the wharf property? (Photograph shown witness.)

Ans. Yes, sir.

Ques. Is this a correct picture of the end of the wharf?

Ans. Yes, sir.

20

JOHN MULLEN, sworn for defendant.

Direct examination.

By Mr. Archer:

Ques. Mr. Mullen, where do you live?

Ans. Florence.

Ques. Florence, Burlington county, New Jersey?

30 Ans. Yes, sir.

Ques. What is your business?

Ans. Police officer.

Ques. Do you know the plaintiff in this case, Isaac Miller?

Ans. Yes, sir.

Ques. How long have you known him?

Ans. About eight or nine months, I guess. First, I met him in Florence.

Ques. Do you recollect a transaction in which Mr. Miller appeared as a complaining witness on a criminal charge recently?

Ans. An assault and battery, where he was whipped in Florence, you mean?

Ques. Yes.

Ans. Yes.

Ques. You didn't see the assault and battery, I suppose, did you?

Ans. Well, I didn't exactly see it. I stood about one hundred feet away from it. There were about one hundred and fifty people in the street at the time. It was down Second street in Florence during the strike.

Ques. What was the date, Mr. Mullen?

Ans. It was the 5th of March.

Ques. Of this year?

Ans. Of this year, about three o'clock in the afternoon—between three and four o'clock in the afternoon.

Ques. Was this plaintiff Miller there?

Ans. Yes, sir.

20

Ques. What was he doing there?

Ans. He had his wagon there selling bananas.

Ques. Alone?

Ans. Alone.

Ques. Or with some one else?

Ans. No one with him.

Ques. How far is Florence from Burlington?

Ans. It is considered five miles.

Ques. What time of day was it?

Ans. Between three and four o'clock in the afternoon.

30

Ques. Tell us what you saw of the assault.

Ans. Well, I was standing up on the corner of Second and Iron street and he was down not over one hundred feet and there was a whole gang of fellows there, the strikers and officers. I was there trying to keep these fellows out of the street, peddlers, and he got in somehow, I don't know how, and the first thing I seen a gang rush

towards the wagon and I ran down there and seen some fellows run. The fellow that hit him, Romaine, he ran up the railroad and down to the street on the corner of Third and Library, Third and Church—I don't know the name of the street—and he got headed towards an officer and I said, "Officer, get him there and take him up to Peacock." He arrested him and I goes back and talks to Mr. Miller.

Ques. Tell us what condition Mr. Miller was in.

- 10 Ans. He was sitting there bleeding pretty bad, crying. He had two or three wet handkerchiefs, putting water on his face. I asked the fellows who did it. They told me who the fellow was and we knew who the fellow was and we would get him again.

Ques. Tell us what conversation you had with Miller, that you had with this man.

- 20 Ans. I asked him what was the matter and he said some fellow took some bananas from the wagon.

(Objected to.)

Mr. Archer: You don't object to what Miller said to him as to how he was injured?

- 30 Mr. Woodruff: The manner in which he was injured, or what part of the body.

Ques. The manner and what part of the body.

Ans. Well, he was hit in the face. The fellow struck him in the face. His lips were bleeding or his nose was bleeding. I couldn't understand whether he said he knocked him down or knocked him up against the wheel. And he complained that his side and face were hurt. I know his hand was hurt, because he showed it. And I got him out of the wagon and told him to drive on out of the street. He drove on out of the street and drove on up to Roebling's with his load on, bananas, or whatever it was he was selling. That night we watched him

when he came down and took him in to Peacock's and told him we had that fellow who struck him.

Ques. You mean the justice of the peace?

Ans. Yes. We got this fellow and held him under bonds here to court.

(Objected to. Objection sustained.)

10

Ques. Do you know anything about what happened when the case came before the grand jury?

(Objected to. Objection sustained.)

Ques. Did you have any further conversation with Mr. Miller as to how he was injured and the effect of his injuries?

Ans. Well, the day that I served the summons on him at his house I did. 20

Ques. When is that?

Ans. The day I served the summons on him for him to appear before the grand jury I did.

Ques. What was your conversation with him that day?

Ans. Well, he told me he hadn't been well; this fellow up in Florence gave him a hard beating and ever since he said, "My head has been aching ever since and my side has been sore and I haven't been able to do much work." I have seen him several times since the time— 30

(Objected to.)

Ques. Since the time of this assault have you seen this plaintiff, seen Miller about Burlington or Florence?

Ans. I have seen him in Florence.

Ques. What have you seen him doing?

Ans. I seen him selling bananas. The night—the 22d he was supposed to be here before the Grand Jury here. When I left here and went back to Florence he was going through Florence there, him and that gentleman there, with a load of bananas, about dark.

Ques. Him and his son, you mean, this young man?

Ans. Yes.

Ques. About dark, with a load of bananas?

Ans. About dark, with a load of bananas.

Ques. Did you have any further talk with him?

Ans. I asked him why he didn't appear over to Mount Holly; "You are liable to get in trouble. There was a summons served on you." "Well," he says, "I was sick, Giddap," and he went on.

10 Ques. Did you have a talk with this Mr. Miller to-day?

Ans. Just shook hands with him, is all, with the old gentleman.

Ques. I mean the old gentleman, the plaintiff.

Ans. Just had to shake hand with him.

Ques. Was there anything said by him with respect to your testimony?

Ans. Not him.

Ques. Not by him?

20 Ans. Not by him. I was talking to his son and the young fellow there when I was down at the restaurant, stopped in having dinner.

Ques. Never mind about the son. You didn't have any talk with the father?

Ans. No, sir.

Ques. Did you ever have a chance to observe his conduct when he has been in Florence with the wagon as to how he gets about since the accident, since February of this year?

30 Ans. I have seen him jump off the wagon and run into Ackerman's store once and buy a box of paper bags and I made the remark then he was more supple than I would be getting on and off a wagon.

Cross-examination.

By Mr. Woodruff:

Ques. When was that?

Ans. That was just about the time of the strike. It was some time after he was hurt, got hurt in Florence. I couldn't give the exact date.

Ques. Was the son with him that time?

Ans. Yes; the young fellow. Not that night he wasn't. I have seen him in Florence.

Ques. I mean when he jumped off the wagon and ran in.

Ans. No; not that night he wasn't. He was by himself. 10

Ques. What about the night he was assaulted? Was the son there then?

Ans. The son wasn't with him.

Ques. Did you see the other man there?

Ans. Didn't see either of them.

Ques. The first you noticed was the crowd gathered around the wagon?

Ans. Yes.

Ques. And when you arrived there you found that his eye and cheek were battered and bleeding. 20

Ans. Yes; he was bleeding from his lip and nose.

Ques. And at that time he didn't complain of having been struck in the side?

Ans. He didn't complain about being struck, but he said his side hurt him and his face hurt him.

JOSEPH GARDNER, SWORN for defendant. 30

Direct examination.

By Mr. Archer:

Ques. Where do you live?

Ans. 517 Maple street, Bristol.

Ques. Do you know the plaintiff here?

Ans. Yes, sir.

Ques. How long have you known him?

Ans. About a year.

Ques. What is his business?

Ans. Peddling bananas.

Ques. Are you in a similar business to him?

Ans. Yes, sir.

Ques. Have you seen much of him since February 13th of this year?

Ans. Yes; met him two or three times a week.

Ques. What have you seen him doing?

10 Ans. Seen him working just the same as anybody else.

Ques. What have you seen him do? Describe to the jury.

Ans. I saw him lifting bananas and apples, barrels and boxes of oranges off the wagon.

Ques. Were you used to seeing him before the 13th of February?

Ans. Yes, sir.

20 Ques. Did you notice any difference between the way he transacted business between the 13th of February and since?

Ans. No, sir.

Cross-examination.

By Mr. Woodruff:

Ques. When was it you saw him lifting those things off a wagon?

30 Ans. When did I see him? This winter. I just couldn't particularly tell you the days, but all this winter since Christmas.

EDGAR WATTS, sworn for defendant.

Direct examination.

By Mr. Archer:

Ques. Mr. Watts, where do you live?

Ans. Exchange Hotel, Burlington.

Ques. What place?

Ans. Burlington.

Ques. Do you know Mr. Miller here, the plaintiff in this case?

Ans. Yes, sir.

Ques. What is your business, Mr. Watts?

Ans. Landlord of the hotel.

Ques. How long have you known the plaintiff?

Ans. Ever since he has been in Burlington. 10

Ques. Several years?

Ans. I don't know. I couldn't say that. I know him ever since he has been there because he has been in and around the place. I don't know the date.

Ques. Have you seen much of him this spring and late winter about Burlington?

Ans. I saw him around there. I couldn't say how much, because I never took notice. 20

Ques. Describe to the jury what you have seen and what you have observed as to his conduct, say since the 13th day of February.

Ans. I couldn't say that I have seen any.

Ques. Haven't seen him at all?

Ans. I saw him; yes, sir.

Ques. What was he doing?

Ans. Come into my place and asked for some change. 30

Ques. Did you see him on his wagon?

Ans. No, sir.

Ques. Oh, haven't you ever seen him on his wagon?

Ans. I have but couldn't tell you when, the exact date.

Ques. I don't mean the exact date, but I want you to tell the jury what you have seen him during the past couple months say or do.

Ans. I don't know that I have seen the gentleman since the day he was hurt at Florence. That is the day he came in and asked me for some change. But outside of that I couldn't say anything. I remember him coming in and I asked him how he got hurt and that is all I know.

Ques. What did he say about how he got hurt in Florence?

Ans. He said a fellow hit him is all.

Ques. Did he say where or how he was hurt?

Ans. No, didn't tell me how. He said he was hit.

Ques. Did he give any evidence on the 5th of March of his having been hurt, anything visible?

Ans. Yes, he was plastered up around his face here and nose.

10 Ques. Did he describe it to you, how it was?

Ans. He just said the fellow hit him, is all.

No cross-examination.

RICHARD SHINN, sworn for defendant.

Direct examination.

20 By Mr. Archer:

Ques. Mr. Shinn, where do you live?

Ans. Burlington, No. 10 Federal street.

Ques. Do you know the plaintiff?

Ans. I do.

Ques. What is your business?

Ans. Teamster.

Ques. For yourself?

Ans. No, sir; J. L. Shedaker.

30 Ques. What business are they in?

Ans. Expressmen.

Ques. Have you seen the plaintiff Miller since say about the 13th of February about Burlington?

Ans. I have.

Ques. Had you seen him there prior to that time?

Ans. I have.

Ques. What business was he in?

Ans. He was in the fruit business, handling oranges, bananas, apples and things.

Ques. Did you have any chance to observe him, his work?

Ans. No; I did not.

Ques. You have seen him with some frequency, have you, during this last spring?

Ans. I have.

Ques. Did you have any conversation with him?

Ans. No, sir.

10

Ques. What was he doing when you saw him?

Ans. Well, I saw him loading his wagon on Pearl street and saw him loading and unloading on Main street.

Ques. Describe what he did when he was loading the wagon.

Ans. Well, he would handle bunches of bananas or boxes of oranges, whatever he had to load.

Ques. What did he do when he had to unload, the same thing?

Ans. The same thing.

20

Ques. How many times do you suppose you have seen that sort of thing done?

Ans. Oh, a dozen or so.

Ques. Had you seen him do that same thing before the 13th of February?

Ans. Yes, sir.

Ques. Can you describe any difference in the way in which he would conduct the business before the 13th of February and since?

Ans. I haven't noticed any difference at all.

30

Cross-examination.

By Mr. Woodruff:

Ques. When was it that you saw him loading and unloading his wagon?

Ans. In the morning, generally, on my way to Devlan's.

- Ques. What time of the month was that?
Ans. It has only been a few days ago, not over a week or so.
- Ques. And what was he doing?
Ans. Loading his wagon. He was handling bunches of bananas in his wagon. The son was handling them in the wagon to him and he was loading them in the wagon.
- Ques. That was where?
Ans. On Pearl street.
- 10 Ques. He was stowing them in his wagon?
Ans. Yes, sir.
- Ques. When did you see him loading barrels of apples?
Ans. That was only a couple weeks or so ago.
- Ques. What was he doing that time?
Ans. His son was helping lift them in the wagon.
- Ques. What was he doing?
Ans. Helping his son lift them in the wagon.
- 20 Ques. Who was up in the wagon stowing them away?
Ans. No one.
- Ques. Are you interested in this case in any way?
Ans. No, sir; I am not. I don't care to be neither.
- Ques. Do you do any business with Mr. Perkins?
Ans. No, sir.
- Ques. For him?
Ans. No, sir; cart freight from the wharf for whoever
- 30 chooses me to cart for them.
- Ques. From the Delaware River Transportation Company?
Ans. The Delaware River Transportation Company.
-

Mr. Archer: We have no other witness except Dr. Dingee, and I have sent for him and I think he will be here before I finish the motion that I desire to make subject to that.

I now ask your Honor to direct a verdict in favor of the defendant company in this case upon the ground

that it appears from the testimony that the plaintiff was not an invited person in the sense of the law upon that portion of the wharf upon which this accident took place; and upon the further ground that he was guilty of contributory negligence in going through that portion of the wharf which has been referred to here as the crane portion of the wharf after dark, at a point which was presumably, in the nature of things, a dangerous place for him to be walking in the dark. 10

Now with respect to the first point I do not know that I can say much more or anything different than what I have said upon the motion for a non-suit. It seems so perfectly clear, upon an inspection of these premises as marked upon this photograph, that this plaintiff, who was a teamster and who was to come here for the purpose of securing goods consigned to him— 20 you see it is out completely, by all manner of question, out of the passenger class. If one of the persons who were here as witnesses, one of the telephone operators, so alleged, who was bound for Bristol, had fallen in that hole, my argument would fall to the ground. But this is the case of a man who was not going there at all in that capacity, who was there as a teamster, who, according to his own statement, was to go—on that night at 30 any rate—was to go to this platform for the purpose of receiving his consignment and taking it away. That was the point of delivery for him. Now if it be true that perhaps on some other occasion when the man was expecting—a huckster, for instance, who was expecting what they call a full load, if under those circumstances at times it had been customary for these men to drive along the sides of this wharf outside of this part of the dock that was reserved for the crane, to the end of that wharf, and there receive them, there again I say that my argument would fall to the ground if while driving out there, for instance, his horse had broken his leg on a plank that was taken out. But the mere fact that he at one time may have gone out to the end of the wharf by permission

of the company for the purpose of receiving his goods certainly does not help the man when it comes to a situation, first, where he expressly says that on that particular night he knew, he understood what his invitation was, said so himself. His invitation was to come to this wharf and receive there the goods. Then, according to his own story, instead of being content to wait there with his horse and wagon until it was time to cart away the goods he goes in the dark on foot, not even along
10 the line which he could have gone with his horse and wagon, but through this part of the wharf which is called the crane part, where the chain hangs down, and under these uprights, and he falls through a hole. Now surely there is no implied invitation there. He has got to be treated as a trespasser as far as that part of this case is concerned.

Then there is the second ground, that it was a moonlight night, where apparently there was sufficient light, according to the testimony of these witnesses, to throw
20 some shadows or something of that sort. For him to go around the end of that building and through a space that was not reserved for either vehicles or foot passengers and get into trouble of that kind, by so doing he would be guilty of contributory negligence as a matter of law. And the uncontradicted testimony on that point is that he had been warned. No, I beg your pardon; that is so. He did deny on cross-examination that this man had warned him. I had overlooked that.

There is this further ground as a reason for non-suit,
30 I take it, that even as to a passenger a corporation owning a wharf of this sort is not bound at its peril to maintain a place where its passengers even could walk back and forth. The uncontradicted testimony in the case at present is that of Mr. Britton to the effect that as late as six o'clock on that night he passed through this wharf and that this plank was then in place; that some hour or two afterwards, or two hours afterwards, after dark, when this plaintiff attempted to go through there, the

plank was out. Now as soon as the accident had occurred, the matter had been called to his attention, he goes with this officer and puts back the plank that had been formerly there which would cover up the hole. Now if some trespasser, some third party, an outsider, comes along and removes a plank from the wharf, for instance, under the circumstances it seems to me that even if this man were a passenger and had fallen into a hole which some outsider had made within an hour or so prior to the accident, you could not hold the company liable. So even on that third ground it seems to me, with all due respect, that we are entitled to the direction of a verdict in this case. 10

The Court: The motion is denied.

(Whereupon the defendant, by its counsel, prays a bill of exceptions, which is hereby allowed and sealed accordingly.)

[SEAL.]
Judge. 20

PLAINTIFF'S TESTIMONY IN REBUTTAL.

ISAAC MILLER, recalled for plaintiff.

Direct examination.

By Mr. Woodruff: 30

Ques. Mr. Miller, you were hurt at Florence, weren't you?

Ans. Yes, sir.

Ques. Where were you hurt? What part of the body?

Ans. Right here: (Indicating face.)

Ques. Anywhere else?

Ans. No more.

Cross-examination.

By Mr. Archer :

Ques. Mr. Miller, what happened to you at Florence?

Ans. Florence I go with my little boy, my cousin, and he took a couple bunches bananas and apples, and he told me, "Uncle I see you no feel good. Go with me and I sell the bananas. You look out for the wagon."

10 Ques. You got into some trouble over there or a man assaulted you over there, didn't he, at Florence?

Ans. Yes, sir.

Ques. What was his name?

Ans. I don't know; an Italian man.

Ques. An Italian man?

Ans. Yes, sir.

Ques. What did he do to you?

Ans. He took a couple bananas from the wagon.

20 Ques. Now, what he took out of the wagon, how did he hurt you? What did he do to you?

Ans. I didn't want my boy—

By the Court:

Ques. Where did he hit you?

Ans. Right here. (Indicating face.)

Ques. Did he knock you down?

Ans. One time here and he go.

By Mr. Archer :

30 Ques. Did he knock you down?

Ans. No more.

Ques. No more, but once? I say did he knock you down? Did you go down on the ground?

Ans. No.

Ques. Did you up against the wheel of your wagon?

Ans. No.

Ques. Did he hurt you any?

Ans. No, nothing, only right here. (Indicating face.)

Ques. Did he hurt you at all?

Ans. No more. One time here; no more.

Ques. Did he knock you down?

Ans. No.

Ques. Well, didn't he hit you across the body here somewhere?

Ans. No; nothing.

Ques. You know this Mr. Mullen, don't you? You know Mr. Mullen who was here? You know Mr. Mullen, the officer, the police officer at Florence? 10

Ans. The police officer? Nobody was. Nobody; no, sir. Nobody was.

Ques. You know him, don't you? You are acquainted with him?

Ans. I know him. I no see him at this time.

Ques. Didn't you tell him that this man hurt you very badly? 20

Ans. No.

Ques. You didn't tell him that?

Ans. No.

Ques. You never told him that?

Ans. I told him he hit me right in the face, no more.

(Adjourned till May 8, 1913, at 9.45 A. M.)

30

MR. HOLLY, N. J., May 8, 1913.

(Trial of the cause resumed at 9.45 A. M.)

ROBERT PEACOCK, sworn for defendant.

Direct examination.

By Mr. Archer:

Ques. Mr. Peacock, you are a member of the local bar here?

Ans. Yes, sir.

Ques. Who is your father?

Ans. John Peacock, of Florence.

Ques. And is he a justice of the peace?

Ans. Yes, sir.

Ques. Do you recall his taking a complaint as a justice on a charge being made of assault and battery by Isaac Miller, the plaintiff in this case?

Ans. I do.

10 Ques. Have you that complaint in your possession?

Ans. I have.

Ques. Was it sworn to in your presence?

Ans. It was.

Ques. Were you present at the hearing given by your father as justice of the peace to the defendant named in the complaint?

Ans. I was.

Ques. Did you see him make it?

20 Ans. I saw him sign the complaint, the witness attached to the complaint.

The Court: If there is no objection it will be admitted.

(Mr. Archer reads complaint as follows):

“STATE OF NEW JERSEY, }
BURLINGTON COUNTY, }ss.

30 ISAAC MILLER, on his oath, declares that on the 5th day of March, 1913, at Florence, Burlington county aforesaid, one Orlando D. Annunzio did commit an assault and battery upon him, the and then and there did beat and ill treat the said against the peace of the State, the government and dignity of the same.”

Ques. Did you hear the testimony given by the plaintiff, Isaac Miller?

Ans. I did.

Ques. Was he under oath at the time?

Ans. He was.

Ques. Do you recall how he said he was injured on this occasion, in substance what he said?

Ans. He testified he was huckstering bananas in Second street, which is the Italian district of Florence, and that Annunzio stole a banana out of his wagon. He remonstrated with him and had an argument with this man and he struck him and then struck him the second time and knocked him down. His eye was swollen and cut and he was sent to Dr. Adams to have his eye treated. 10

Ques. Did he say anything about being injured anywhere else or complain of being injured anywhere else?

Ans. Not as I recall. He was knocked to the ground. His clothes were soiled from the contact, is all.

Cross-examination.

By Mr. Woodruff:

Ques. Did he use the expression "knocked to the ground?" 20

Ans. He said, "I was knocked down." From the appearance of his clothes I thought he had struck the ground somewhere. He was all dirty.

DR. CHARLES DINGEE, affirmed for defendant.

Direct examination. 30

By Mr. Archer:

Ques. Dr. Dingee, you are a resident of the city of Burlington, are you not?

Ans. Yes, sir.

Ques. A practicing physician there?

Ans. Yes, sir.

Ques. Do you know the plaintiff, Isaac Miller?

Ans. I do.

Ques. Do you recall seeing him on or about the 13th of February last?

Ans. I think it was the 14th.

Ques. Where did you see him, doctor?

Ans. In my office.

Ques. What time of day was it?

Ans. It was during the evening office hours, from six to eight.

Ques. Did you make an examination of him?

Ans. Partially; yes.

Ques. Will you state to the jury, please, what you discovered with regard to his condition?

Ans. Well, he complained of a pain in his side, but the physical signs were an abrasion of the hip and upper leg, the thigh.

20 Ques. What do you mean by an abrasion, doctor?

Ans. Bruise.

Ques. Did you examine his body in the neighborhood of his ribs and chest?

Ans. Yes; he flinched on the left side, it was, I think; but there were no marks there.

Ques. You say he flinched. What do you mean by that?

30 Ans. I examined him to see if his ribs were broken or anything of the kind. He said he had fallen through a hole in the dock and I wanted to see if his ribs were broken.

Ques. Was there any external sign of an injury there?

Ans. No.

Ques. How many times did you touch him on the ribs?

Ans. Two or three.

Ques. Did he flinch every time?

Ans. Every time. I think the last time it didn't hurt him so badly.

Ques. What did you prescribe for him, or what did you suggest?

Ans. Just liniment and a bandage, but I didn't put the bandage on.

Ques. Did he ever come back for that injury?

Ans. I don't think he came to my office. I think he saw me the next time in the drug store. 10

Ques. And when was that, doctor?

Ans. Two or three weeks ago.

Ques. Two or three weeks from the present time?

Ans. From the present time; yes.

Ques. Was that after the—

Ans. I can't give you the date, but it strikes me it was Sunday three weeks ago.

Ques. Was it after the 5th day of March?

Ans. Oh, yes. 20

Ques. What occurred at that time, doctor?

Ans. He just said that he had a pain in his side and he was a poor man and wanted to get relieved and wanted to work; that was about all.

Ques. Had you seen him at all between those dates?

Ans. Seen him on the wagon, on a banana wagon, with the little boy in the back several times; yes.

Ques. Had you seen him doing any work? 30

Ans. Driving the wagon is all.

Ques. Doctor, from your examination of him is it your opinion that he was injured in any way so that he would be incapacitated from carrying on his work?

Ans. Well, only for a few days after the injury. The injury, I guess, was sore for a few days, but that was all. I didn't see any serious injury there.

Ques. Did he pay you anything for your services?

Ans. Yes.

Ques. On which occasion?

Ans. Both.

Ques. How much?

Ans. Fifty cents, office fee.

Cross-examination.

By Mr. Woodruff:

Ques. What sort of an examination did you make, doctor, and what was the character of your examination?

Ans. Pulled up his shirt and pants down and I examined—he complained of his ribs being hurt, and I examined to see if the ribs were broken. I didn't think they
10 were.

Ques. However, there was a sensitiveness to the touch there?

Ans. Apparently, yes.

Ques. How serious was the abrasion of the hip and the leg?

Ans. Slight.

Ques. Bleeding?

Ans. No, sir; it was not.

Ques. It was not?

20 Ans. Not the slightest.

By the Court:

Ques. Did you see any abrasion about the ribs?

Ans. No, sir.

Ques. Or in the region where he complained of pain in the side?

Ans. No.

Ques. Were there any objective symptoms observable?

30 Ans. Objective; no, sir.

Ques. Not the slightest sign?

Ans. Unless the flinching would be.

Ques. I mean anything that you could observe, objective?

Ans. No; subjective there was.

Ques. Objective would mean that he was then—

Ans. Visible to the naked eye, you mean?

Ques. Visible to the naked eye. You saw nothing?

Ans. Nothing on the ribs, you understand.

Ques. Well, now, might he have had, without any objective symptoms of the external injury, might he have had an internal injury?

Ans. I believe that does occur, Judge, but not very often. I think I can recall one or two where there was a case of broken ribs without any external sign. Of course that is from muscular action; it is not from the bruise or the fall.

Ques. Here is a man who fell in a hole, as I understand it, and was caught by his coat from falling his full length down the hole. 10

Ans. Yes.

Ques. And you say within twenty-four hours afterwards you saw no sign?

Ans. No.

Ques. That would indicate that he had been injured about the ribs?

Ans. Positively nothing objective. 20

By Mr. Woodruff:

Ques. The fact, doctor, that a man was protected by winter clothing might make it more possible that he would be injured internally without leaving external bruises, wouldn't it?

Ans. I will say that; yes.

Ques. You say this man came to you first?

Ans. Yes.

Ques. He came to your office and came to the office a second time? 30

Ans. Didn't come to the office the second time; saw me at the drug store.

Ques. You gave him a prescription and he paid you for it?

Ans. At the drugstore; yes.

Ques. You never had attended him before?

Ans. Not him personally. I have attended the family.

Ques. Did you examine him at that time in regard to his lungs?

Ans. No.

Ques. Have you examined him since?

Ans. No; he wouldn't come. I had an appointment with him.

Ques. Did you go to his house during the past week?

Ans. No.

Ques. Since this court has been open?

10 Ans. No.

Ques. You made no examination during that time?

Ans. No.

Ques. When were you first asked about this matter from the representatives of the company or Mr. Mitchell?

Ans. The first day of the trial. No; the night before the trial I got a subpoena.

Ques. Weren't you told that you would go and examine Mr. Miller at his home?

20 Ans. Yes; but I said that he would come to the office to be examined.

Ques. And that is the reason that no examination has been made?

Ans. He promised to come, I believe. That was my understanding of the case.

Ques. Were you here the other morning when court opened?

Ans. No; not when court opened.

Ques. You were in Mount Holly before court opened?

Ans. No; after court opened.

30 Ques. You were not here before ten o'clock in the morning?

Ans. No, sir.

Ques. You came on the 10.15 car?

Ans. I came in sixteen minutes after eleven or sixteen minutes of ten leaving Burlington.

Ques. And where were you after court opened when they were seeking for you?

Ans. What day is this?

Ques. The day court opened, Tuesday.

Ans. Why, I was over at Mount Holly at that time. I came here to Mount Holly about the time the judge said we would postpone the case until the next day.

Ques. And before that time, while we were trying to find you, you were over at the Moose Home, weren't you?

Ans. No, sir; hadn't been to the Moose Home until after that.

Ques. Hadn't been there at that time?

10

Ans. No, hadn't got here in time. I came right out of the court here. We were over to the Moose Home afterwards, if you want to know that.

Both sides rest.

During the course of the argument it was ordered that the plaintiff's declaration be amended as follows: 20

Paragraph 2: "That on said day the plaintiff, Isaac Miller, went to the wharf of the defendant company at Burlington with a wagon to receive a consignment of fruit shipped to him by boat of the defendant company on that day; said consignment was to be delivered from the boat Springfield by defendant on its wharf. As plaintiff was passing over said wharf returning from the end of said wharf, where he had gone to see if the boat was approaching, in order to prepare his wagon to receive the shipment, he was precipitated through an opening left in the passageway by the absence of a plank, until caught by his clothing." 30

The Court: The amendment is allowed.

Mr. Archer: I would like to have my objection noted to the allowance of the amendment at this stage of the case, so that my rights may be preserved.

(It was stipulated by counsel that the boat arrived at the dock about eight o'clock.)

CHARGE OF THE COURT.

Gentlemen, it is unnecessary, I trust, for me to caution you against allowing anything to influence your judgment in this case except the sworn testimony. You are not to be influenced by either sympathy or prejudice. The fact that the plaintiff is a poor man and the defendant is a corporation ought not to be matters which should ever
10 enter into the mind of intelligent citizens who are required to perform jury duty. The law must be administered impartially and justly to all parties concerned, without regard to their circumstances.

The plaintiff is a huckster by occupation and he carries on business in Burlington and the neighboring towns. On February 13th last he received a bill of lading from the defendant, which is engaged in the carrying of passengers and freight from Philadelphia to Burlington and other points on the Delaware River. On the night
20 of February 13th the plaintiff was expecting a consignment of fruit which was being carried from Philadelphia to Burlington in one of the boats of the defendant, and the boat was to land at the wharf of the defendant in Burlington. The contention of the plaintiff is that he went down to the wharf of the defendant company with a horse and wagon for the purpose of carting away this consignment of fruit after getting possession of it, and that he walked out to the end of the wharf, that is, the river end of the wharf, and while he was there he saw
30 his fruit being carried from the boat into a warehouse which was on the wharf and then he started back from the river end of the wharf to get his horse and wagon and drive it up to the platform or land end of the wharf, where he expected to receive the consignment of fruit and where he actually did receive it; but while he was going from the river end of the wharf back to the land end of the wharf he fell in an unguarded hole which was in the wharf of the defendant company. It is said that

the hole was unguarded, and there was no light to indicate that it was there.

Now the first question which will occur to you in the examination of the evidence is whether the plaintiff was properly upon that wharf. I mean properly at the place where he fell in the unguarded hole. That is the first question. Had he any right to be there? Was he there by invitation or was he there as a mere licensee? If he was there by invitation, either express or implied, he had a right to be there and the company owed him some duty, 10 undoubtedly. The Company could not invite him on its wharf and then leave an unguarded hole for him to fall into without being required to respond in damages in case of an injury to him. But if he was there as a mere licensee there was no wrongful neglect of duty on part of defendant.

There is a dispute between these parties which you should consider very thoroughly. Plaintiff says he had been in the habit of going to the end of the wharf to see that his fruit would be transferred from the boat to the warehouse and then in order to get it at once and keep it from freezing in the wintertime he would go to the end of the warehouse and have it delivered to him and put in his wagon and he would cart it home. You have that version. Now if that is the correct version of the facts then there was an invitation. 20

But the defendant says that is not the correct version of the facts. The defendant says that the place where consignees of freight carried by the boats of the company were required to go and receive their freight was on the platform at the land end of the wharf, and that the freight was delivered from the warehouse to the consignee; that was the place provided by the company, and was the only place. If that is so that is the end of this case. Besides, there is testimony that the man in charge of the wharf said on this particular night that he cautioned the plaintiff about going near where the crane 30

was. He testified further that where there was a wagon-load of fruit to be taken from the boat a way had been provided, a passageway out from the end of the wharf to the boat, and where the wagon could be loaded; that is, when there was a wagonload of stuff.

07 If it had been the custom of the plaintiff to go where he was that night in seeing about his consigned fruit in the way that he was looking after it and he fell in an unguarded hole, an unlighted hole, after exercising due
10 and reasonable care upon his own part, then the defendant company would be liable, providing the plaintiff received any injury. Of course you have got to settle the question whether or not the plaintiff was entitled by invitation, either express or implied, to be where he was on the wharf. Then you are required to inquire from the evidence whether the defendant company exercised its
20 full duty towards the plaintiff, whether it should have protected the hole in some way.

If you resolve these questions against the defendant you are then to ascertain whether the plaintiff himself was not guilty of contributory negligence in not seeing the hole. There is proof that it was a moonlight night. One witness said she saw the hole at a distance of fifteen or twenty feet away. Now before the plaintiff can recover, even if you find that he was there by invitation,
30 either express or implied, you must be satisfied from all the proof that he was not guilty of contributory negligence. He should have acted in the light of all the circumstances with due and reasonable care. If he could have seen the hole he should have avoided it, of course. And if you believe that the plaintiff was injured through his own negligence and the negligence of the defendant, too, that is to say, their joint negligence, the plaintiff cannot recover in the case. There can only be a recovery when the defendant has been wholly to blame. Any contribution of negligence on the part of the plaintiff makes it impossible for the plaintiff to recover. The law

imposes liability only where the evidence shows that the defendant has been wholly to blame.

I think I have pointed out the dispute between the plaintiff and defendant as to whether the plaintiff was entitled to be on the wharf where he says he was at the time when he fell in the hole. Now you approach another question. Was the plaintiff injured at all by falling in the hole? If he was, how was he injured and to what extent was he injured? Does the proof show you in what way he was injured? The tendency of the proof, as I gather it, is that prior to the 13th of February last and on the 13th of February last, the plaintiff was a victim of tuberculosis; that he is now a victim of tuberculosis. There is no proof in the case that there was any physical injury, any discoverable injury. When I say discoverable injury I mean any injury that could be seen by his physicians' vision. His contention is, though, that while he had this disease he was nevertheless able to transact his business; that after he fell in the hole he commenced to spit blood and was for some time incapacitated and had to require his son to come and help him in the prosecution of his business. So that I take it that the position of the plaintiff is that at the time he was injured he had this disease that the doctors have described as tuberculosis; that since the injury this tubercular condition has progressed; that he has not been able to work since the 13th of February as he was before, although there is some proof in the case that he has worked about the same way. The witnesses have said they saw him peddling and saw him working about, one in Florence and some in Burlington, and I think a witness in Bristol said he saw him working about the same as he had worked before.

It appears that on March 5th he was struck in the face at Florence by somebody, some Italian that he had some words with about some fruit that this Italian had taken from his wagon. He was struck one or two blows. One

witness said, I think, that the plaintiff said that he was struck so hard that he fell to the ground. You may take that into consideration, because that may have tended to magnify or to increase the progress of the tubercular disease.

If you find that the plaintiff's physical condition was weakened by the fall, if you resolve all the other facts that I have mentioned against the defendant, you will have to ascertain then how much was it weakened; in all
10 probability how long could a man fifty-five years of age, as this man says he was, be likely to live in his condition of health. How much was he hurt? How much was he disabled, if he was disabled at all? How much has he lost, if he has lost anything at all? How much will he be likely to lose by reason of the negligence of the defendant? These are all matters, you see, which require very intelligent consideration; not matters that you can guess at in a haphazard way, but matters which require
20 close, careful, intelligent consideration. That is what a jury is for, to look into, analyze and do as near as possible unto every person those things that ought to be done to make the administration of justice effective and respectable.

If you resolve all the questions submitted to you in favor of the plaintiff, he is entitled to recover damages for any medical attention that his condition required as the result of his injury; he is entitled to damages for any disability that he has sustained; he is entitled to recover
30 damages for any pain and suffering that he has sustained; he is entitled to recover damages for any medical services that he might be required to sustain or any pain or suffering that he may be required to undergo and for any disability that he may endure in the future by reason of any injury that is the approximate result of the accident on the night of the 13th of February last.

These are requests which I have been asked by the defendant to charge you, gentlemen:

1. The duty of a wharf owner to keep the wharf in a safe condition is to a person who is properly on the wharf and who is in the exercise of proper care and diligence.

I charge you that that is the law. A person must be there properly, of course, and the person must exercise due and reasonable care. You have got to exercise care yourself, because the law of self-preservation is the first law of nature, and if you yourself are careless you cannot expect to hold anybody else blamable when you have been blamable. 10

2. If you find that plaintiff was warned to keep away from the crane under which the alleged accident occurred, it would be contributing negligence for him to go under it thereafter, and he cannot recover.

I so charge you.

3. If you find that plaintiff was negligent in passing at night under the crane or in not seeing the hole, when he did so pass, he cannot recover. 20

I decline to charge you any differently in regard to that matter than I have already charged you.

4. Plaintiff was not a passenger. Unless his business (as a consignee of freight) called him out on the wharf, so that he became a person who, in the eyes of the law, was invited upon the wharf, he cannot recover, for the company was under no duty to him to keep that portion of the wharf in good condition. In determining whether the plaintiff's business required him to go out on the wharf you should consider his explanation that he went out to see if his goods were carried into the warehouse, having in mind that all other witnesses say that the boat was not in at the time of the accident. 30

Well, I think I have charged you as fully as is necessary on that question.

5. If the company provided a safe passageway for passengers and vehicles over its wharf, and if the plaintiff knew this to be so, it was negligence on his part for him to pass through the space occupied by the crane, and he cannot recover.

I think that is a fair statement of the situation. Where a company provides a safe place and another place is adopted by persons using the property they must take the risk, because the company was not required to provide more than one place.

Number 7 I have been asked to charge you. You will observe that there was proof in the case that at six o'clock there was no hole in that wharf; that something occurred after six o'clock, between six o'clock and the time when the boat arrived, by which that hole was created, and not by any act of this defendant company. Now, the defendant would not be responsible if a stranger went there and caused that hole; the defendant would not be responsible. The defendant is only responsible for its own acts. But it would be responsible if it saw a hole there and did not act at once and protect it in some way. But if a hole was suddenly created, without the knowledge of the defendant and by some unauthorized person, then the defendant would not be liable.

30

Mr. Archer: The defendant excepts to the refusal of the Court to charge the third, fourth and sixth requests respectively.

(Which exception is hereby allowed and sealed accordingly.)

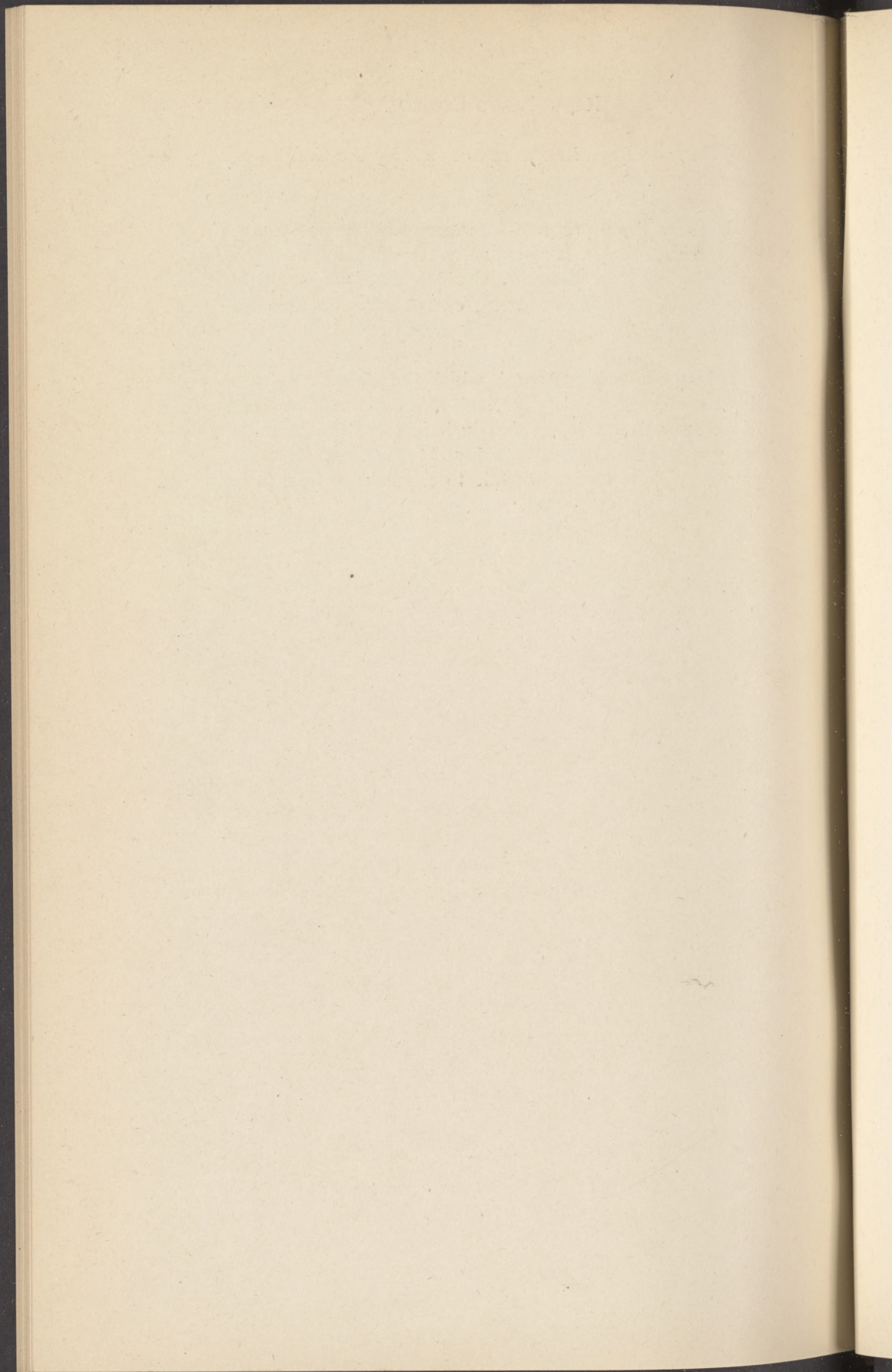
(The requests which were not read by the Court were as follows) :

6. There is no proof of loss due to lessening of earning capacity, payment of expenses for medicine or physicians, except one dollar; no other damages could be awarded, if any are awarded, except for pain and suffering.

7. If the opening through which the plaintiff fell was made by the removal of a plank without the knowledge of defendant's employes shortly before the accident, the company would not be liable for damages in this action, provided it was not reasonable to expect such hole to be discovered in the interval.

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30



NEW JERSEY COURT OF ERRORS AND APPEALS.

ISAAC MILLER,
Plaintiff-Respondent,
vs.
DELAWARE RIVER TRANSPORTA-
TION COMPANY,
Defendant-Appellant.

} ACTION AT LAW.

BRIEF OF DEFENDANT-APPELLANT.

I.

STATEMENT OF THE CASE.

The judgment appealed from was rendered in an action in the Supreme Court (Burlington county) for damages alleged, by the plaintiff below, to have been sustained by him, by reason of his having fallen through an opening in the flooring of the wharf owned by the defendant company at Burlington, N. J.

The plaintiff was the consignee of fruit shipped to him from Philadelphia to Burlington on a steamboat of the defendant company on the day of the alleged accident, February 13, 1913, and went to the wharf of the

defendant company to receive the fruit consigned with a horse and wagon.

In his complaint the plaintiff alleged:

“As plaintiff was backing his wagon up to the platform a portion of the flooring of said wharf broke precipitating plaintiff through an opening until caught by his clothing.”

(State of the Case, p. 4, line 35.)

The proofs at the trial in no way substantiated this allegation, but during the argument of counsel for the defendant the plaintiff was permitted to amend this allegation so as to read:

“As plaintiff was passing over said wharf returning from the end of said wharf, where he had gone to see if the boat was approaching, in order to prepare his wagon to receive the shipment, he was precipitated through an opening left in the passageway by the absence of a plank until caught by his clothing.”

(State of the Case, p. 135, line 29.)

The proofs did not altogether accord with this amended statement, but showed, in substance, as follows:

The plaintiff arrived with his horse and wagon at the land end of the wharf some little time before the boat, on which his fruit was being shipped, arrived. It was then dark.

On the right side of the wharf was a freight house with a platform at the land end, at which platform the plaintiff expected to have his freight delivered to him. Immediately to the left of the freight house was a struc-

ture known as a crane, being an open structure consisting of a heavy cross beam extending from the side of the freight house a distance of about eight feet and supported upon heavy wooden posts. From the middle of this cross beam hung a heavy iron chain extending to the flooring of the wharf, the whole being a device for loading and unloading wagons carrying articles of great weight. Beyond the crane and further to the left was an open stretch of flooring of the width of fifteen or twenty feet, used as a passageway for both vehicles and foot passengers.

The plaintiff left his horse and wagon on the street nearby the platform and walked out toward the end of the wharf, evidently to ascertain whether the boat had landed. All of the witnesses for the plaintiff testified that at that time the boat was approaching, but still some distance out in the river. The plaintiff, however, said that the boat had landed and that after seeing the fruit carried from the boat into the freight house, for which purpose he had gone out on the wharf, he started back to get his horse and wagon for the purpose of loading the fruit at the platform located at the land end of the freight house, but while thus returning fell through a hole immediately under the crane.

The hole was due to the removal of a plank, without the knowledge of the agents of the company, some time within two hours prior to the accident.

The plaintiff was fifty-five years old and was a huckster. He was awarded \$1,000 damages. There was no proof as to his earning capacity either before or subsequent to the alleged accident. He was suffering with tuberculosis at the time and claimed that this disease was

given fresh impetus by reason of the bruises received in the fall.

The questions involved are, first, as to whether the plaintiff had been impliedly invited by the defendant to walk over that portion of the wharf where the accident occurred, so as to fix liability upon the defendant upon the happening of the accident; and second, as to whether the plaintiff is entitled to recover damages for disability due to the accident, in the absence of all proofs as to his earning capacity both before and after the accident.

II.

GROUNDS OF APPEAL.

The appellant relies upon the following grounds of appeal:

1. That the Trial Court erred in refusing to direct a verdict in favor of the defendant at the close of the case. (Ground specified as No. 2, page 2, of the State of the Case.)

2. The Court erred in charging as follows:

“If it had been the custom of the plaintiff to go where he was that night in seeing about his consigned fruit in the way that he was looking after it and he fell in an unguarded hole, an unlighted hole, after exercising due and reasonable care upon his own part, then the defendant company would be liable, providing the plaintiff received an injury.”

(State of the Case, p. 138, line 5.)

(Ground specified as No. 7, on page 2 of the State of the Case.)

3. The Court erred in charging: (State of the Case, page 137, line 15.)

“There is a dispute between these parties which you should consider very thoroughly. Plaintiff says he had been in the habit of going to the end of the wharf to see that his fruit would be transferred from the boat to the warehouse, and then in order to get it at once and keep it from freezing in the winter time he would go to the end of the warehouse and have it delivered to him and put in his wagon and he would cart it home. You have that version. Now, if that is the correct version of the facts, then there was an invitation.”

(Ground specified as No. 9, on page 3 of the State of the Case.)

4. The Court erred in refusing to charge the defendant's sixth request to charge. (Page 143 of the State of the Case.)

“There is no proof of loss due to lessening of earning capacity, payment of expenses for medicine or physicians, except one dollar; no other damages could be awarded, if any are awarded, except for pain and suffering.”

(Ground specified as No. 5, on page 2 of the State of the Case.)

III.

ARGUMENT.

1. The Court erred in refusing to direct a verdict in favor of the defendant.

According to the plaintiff's own testimony, he left his horse and wagon on the street and walked out on the wharf to “see his stuff.” (P. 14, line 15; p. 15, line 28.)

Apparently he was anxious lest it should freeze in the cold weather unless transferred promptly from the boat to the freight house (pp. 22-23), but he was used to getting his fruit from the platform of the freight house (p. 21, line 29; p. 24, line 28; p. 31, line 34), and on this particular occasion, plaintiff testified, he expected to get the fruit delivered to him on the platform. (P. 36, line 5, also line 30.)

Plaintiff's statement to the effect that the boat had come in so that he could see his fruit at the time when he walked out on the wharf is contradicted by all of his own witnesses. (P. 62, line 35; p. 69, line 20; p. 75, line 30.)

There may be some doubt as to the precise object of the plaintiff in leaving his horse and wagon and walking out toward the river end of the wharf. According to his own complaint, amended after all of the testimony was in, "he had gone to see if the boat was approaching, in order to prepare his wagon to receive the shipment."

It is true that plaintiff testified that on some occasions he drove out on the wharf itself, to the river end, to receive fruit direct from the boat (p. 32, line 3). Apparently these were occasions when a full wagon load of fruit was being delivered (p. 101, line 31). However, on *this* evening, the plaintiff did not take his horse and wagon out on the driveway, but left them on the street, knowing that the fruit was to be delivered from the platform of the freight house.

When he abandoned his horse and wagon, he walked under the crane, located as previously described, at the side of the freight house, (pp. 111-112 of the State of the Case) instead of walking out the passageway of fifteen feet in width, to the left of the crane, provided for

foot passengers as well as vehicles by the defendant company.

It further appears from the plaintiff's own testimony that he was in the habit of going to this wharf two or three times a week to get fruit consigned to him (p. 24, line 28); that he would invariably get the fruit from the platform of the warehouse (p. 24, line 32; p. 25, line 2); that he would go both by day and by night for this purpose (p. 22, line 30); but that he never before attempted to pass under the crane, for in answer to the question as to why he did not see the hole, he said (p. 22, line 18), "I no was in this place never. I go right in the back and take my fruit in the wagon." Apparently on this particular night he went out on the wharf by way of the passageway and came back under the crane (p. 26, line 22), falling in at or near the spot where the hanging chain touched the platform under the crane. (P. 28, line 13.)

Our contention is that upon this showing the defendant was entitled to an order non-suiting the plaintiff, and was also entitled at the close of the case to the direction of a verdict in its favor.

The New Jersey Reports contain many many cases which lay down the principles relating to "implied invitation."

See *Phillips vs. Library Company*, 26 *Vroom*, 307; *Furey vs. N. Y. C. & H. R. R. Co.*, 38 *Vroom*, 270; *Ryerson vs. Bathgate*, 38 *Vroom*, 337; *Ackley vs. W. J. & S. S. Ry. Co.*, 47 *Vroom*, 741.

The adopted definition of invitation is in these words:

"The gist of the liability consists in the fact that the person injured did not act merely for his own

convenience and pleasure and from motives to which no act or sign of the owner or occupant contributed, but that he entered the premises because he was led to believe that they were intended to be used by visitors or passengers and that such use was not only acquiesced in by the owner or person in possession and control of the premises, but that it was in accordance with the intention and design with which the way or place was adapted and prepared or allowed to be used." (67 L., 274.)

Again:

"Such liability is imposed upon the owner or occupier of land only when he has done something which justifies one who enters upon the land and makes use of it, or something upon it, in believing that he intended such use to be made; and he who makes such use can claim the relation only when he is justified by the acts or conduct of the owner or occupier in believing that such use was intended." (67 L., 275.)

Again:

"The owner's liability for the condition of the premises is only co-extensive with his invitation. And it is incumbent upon the plaintiff to show not only that her entry upon the premises was by invitation of the owner, but also that at the time the injury was received she was in that part of the premises into which she was invited to enter, and was using them in a manner authorized by the invitation, whether expressed or implied." (67 L., 338-339.)

Applying these principles to the circumstances of the case at bar, it is contended that the testimony shows:

(a) That when the plaintiff abandoned his horse and wagon and went out upon the wharf, he acted "merely for his own convenience and pleasure and from motives to which no act or sign of the owner contributed."

There was no necessity for the plaintiff to go out upon the wharf, as he distinctly understood that his fruit was to be delivered to him on the platform of the freight house at the land end of the wharf.

(b) It is difficult to see how it could possibly be held that the plaintiff was invited upon the wharf at all on this occasion, in view of his knowledge as to the place of delivery of the freight, but if any invitation existed to him to go out upon the wharf, it was an invitation to go with his horse and wagon, through the driveway provided by the defendant company for that purpose. This he did not attempt to do.

(c) Again, even though it should be held that the plaintiff had an invitation to go out upon the wharf on foot, on this occasion, he had no invitation to pass under the crane. "At the time the injury was received" he was not "in that part of the premises into which he was invited to enter," if "the owner's liability for the condition of the premises is only co-extensive with his invitation."

It seems clear that the defendant company incurred no liability for injuries received by a fall immediately under the crane, from the centre of which hung the huge iron chain, indicating that it was not intended as a passageway either for passengers or vehicles, especially where it appears that a 15-foot passageway was provided.

See *Abbott vs. D., L. & W. R. R.*, 65 N. J. L., 310.

It is also our contention that the defendant's motion for a direction of a verdict in its favor should have been granted, even though the defendant be held to be under a duty toward the plaintiff as an invited person, to use reasonable care with respect to him, while on the wharf. The only proof in the case with regard to the removal of the plank from its proper position in the flooring of the wharf was that given by defendant's witness Britton. He was the agent of the defendant company, in charge of the wharf at Burlington (p. 99, line 28). He says that at six o'clock, after dark, the plank was in position under the crane; that it was an eight-inch plank and that there was no hole in the floor wider than two inches. (P. 104, line 35, to p. 105, line 10). The witness further stated (p. 105, line 10) that he did not know how the plank got taken out of its position, but that he immediately replaced it, upon being informed, after the accident, that the hole existed.

In dealing with the defendant's seventh request to charge (p. 143), the Trial Court (p. 142) said:

"Now, the defendant would not be responsible if a stranger went there and caused that hole; the defendant would not be responsible. The defendant is only responsible for its own acts. But it would be responsible if it saw a hole there and did not act at once and protect it in some way. But if the hole was suddenly created, without the knowledge of the defendant and by some unauthorized person, then the defendant would not be liable."

In view of the absence of all testimony in the case tending to show that the defendant had any notice that this plank had been removed, and in view of the short time elapsing, after dark, between its removal and

the accident, it is submitted that the defendant was not shown to have been guilty of any negligence, and that for this reason also a verdict should have been directed in its favor. The defendant's duty to an invited person was "to exercise ordinary care to render the premises reasonably safe," and there was no evidence whatever that the defendant had not exercised such ordinary care in this case.

Compare also *Proud vs. P. & R. R. Co.*, 64 N. J. L., 702, in which it is held that a railroad company is not bound to keep up a continuous inspection or to know at each moment the condition of every part of the train.

2. The Court erred in charging, as above quoted, that "if it had been the custom of the plaintiff to go where he was that night in seeing about his consigned fruit in the way that he was looking after it * * * then the defendant would be liable." (P. 138, line 5.)

In the first place, there was no testimony whatever that it had been the custom of the plaintiff to go "where he was that night in seeing about his fruit"; on the contrary, as previously stated, the plaintiff himself said that he was never in the place before. (P. 22, line 18.) But even if it had been his custom to go "where he was that night," in the absence of all proof that the defendant company knew of such custom on his part, no implied invitation could be possibly inferred. In the case of *Phillips vs. Library Company*, *supra*, the Court says:

"The case turns upon the question whether the path taken by the plaintiff has, by its accustomed use, with the knowledge of the defendants, become a way which, by its use and appearance, indicated a way that persons * * * were 'invited' to use."

See also *Nolen vs. Bridgeton & Millville Traction Company*, 45 *Vroom*, 559, 562, in which the Court says:

“There was also evidence from which it might possibly have been inferred that Nolen used this road on this occasion with the knowledge of and at the request of the defendant company.”

The charge, as delivered, would clearly lead the jury to believe that the implied invitation to the plaintiff to walk under this crane should be found to exist if it was the plaintiff's custom to walk there, although he did so without the knowledge or assent of the defendant company. We contend that this was an erroneous charge and constitutes reversible error.

3. The Court also, we contend, committed error in charging that if it had been the habit of the plaintiff to go to the end of the wharf to see about his fruit and then to go to the end of the warehouse to receive it, an “invitation” should be legally inferred. This charge is erroneous for the same reason. It ignores the necessity of proving that this habit of the plaintiff was known to and acquiesced in by the defendant company.

4. The Court erred in refusing to charge the defendant's sixth request, page 143.

The request was that the Court should charge that there could be no other damages recovered than those awarded for pain and suffering and for medical expenses, in the absence of all proof of loss due to the lessening of earning capacity.

Plaintiff offered no proof whatever as to what he earned before or after the accident, and the Court not only refused the sixth request to charge, as above indi-

cated, but did charge (p. 140, line 28, line 34) that the plaintiff could recover "for any disability that he sustained" and "for any disability that he may endure in the future by reason of any injury," etc. Under these conditions the jury was instructed that it might award damages due to disability to work without any proof on the subject to guide them. It is our contention that the Court thereby committed error. See *13 Cyc.*, page 137; *New Jersey Express Company vs. Nichols*, 33 *N. J. L.*, 434, 437-8; *East Jersey Water Company vs. Bigelow*, 60 *N. J. L.*, 201, from which it appears that there must be testimony offered from which the jury in its discretion can estimate and measure the damage sustained.

It is respectfully submitted that the judgment of the Court below should be reversed.

GREY & ARCHER,
Attorneys for Appellant.



NEW JERSEY
COURT OF ERRORS AND APPEALS.

ISAAC MILLER,
Plaintiff-Respondent,
vs.
DELAWARE RIVER TRANSPORTATION
COMPANY,
Defendant-Appellant.

ACTION AT LAW.

BRIEF OF PLAINTIFF-RESPONDENT

A.

STATEMENT OF THE CASE

This appeal is taken from a judgment of the Supreme Court, in a cause tried at the Burlington County Circuit before Carrow, J., and a jury. The plaintiff is a Russian by birth and but imperfectly understood and spoke the English language. He was a fruit dealer at Burlington, New Jersey, when the cause of action arose, and had been accustomed to have his fruits shipped to him via the boats operated by the defendant on the Delaware River, and to receive them at the wharf maintained by defendant company at Burlington. He was injured, on the evening of February 13th, 1913, by being precipitated through an opening made by the absence of a plank in defendant's wharf. This wharf extended from the land

out into the river: on one side thereof, extending from the land end to within a few feet of the river end, was a freight house. Running along one side thereof, from the street to the landing stage, was a double width driveway, unobstructed except that at about midway of the freight house there were three upright posts dividing it into two roadways; these posts supported the ends of beams extending over one driveway and from the side of the building, and the structure thus formed was used to support an endless chain when desired to unload heavy freight from wagons. - The boats carried passengers, and vehicles and pedestrians used this portion of the wharf in going to and fro from the landing stage. On the evening in question the river was filled with ice and the "Springfield" late, arriving at or about 8.30. The plaintiff had a shipment of fruit on this boat and went with a wagon to receive it. He left the wagon on the land and went to the landing stage to see if the boat was arriving; it was in fact nearing the wharf and, after speaking a moment with a person there, he turned to go to his wagon, walking along the driveway nearest the building. As he passed between the building and the three posts supporting the overhead beams he stepped into a hole made by the absence of a plank and was injured. It was semi-dark, there being sufficient moon to cast shadows. There was no light on the wharf except within the office, at the front of the freight building, and no light nearer than the street light, a considerable distance away. These facts all appeared and were uncontradicted.

B.

ARGUMENT

I.

As to the first and second grounds of appeal: the refusal to non-suit and to direct a verdict in favor of the defendant.

The accident happened at about 8.30 in the evening on a night when it was so cold that the ice in the river had delayed the boat. This was unquestioned (pages 12, 23, 39, from line one to line eight). Plaintiff was the consignee of a shipment by that boat and so there by invitation (page 13). His fruits were perishable, and he had been accustomed to back his wagon out to end of wharf upon occasions to receive same directly from the boat; this was admitted (pages 32, 35, 37, 101 and 102). Plaintiff's case further indicated that such was his invariable custom when there was danger of the fruit spoiling or freezing through storing when same came in the evening, or in cold weather (pages 22, 23, 28, 32, 35, 37, 81, 82, 83, 84, 85, 86). He left his wagon at the land end and went to the river end to see if boat was about to dock, *thence to return to back his wagon out on wharf to receive his fruit* (pages 13, 14, 15, 22, 23, 24, 28, 29, 35). This testimony raised a pure question of fact for the jury as to the existence of these conditions, and as to whether same implied an invitation to plaintiff to be on defendant's wharf.

Further, it was urged that such invitation did not extend to that portion of wharf where hole was and plaintiff was injured. It was undisputed that one entire side of the wharf was open for passage of passengers and vehicles, and that the only obstructions thereto were the

three upright posts which were in line and only served to naturally divide the space into two driveways instead of one. Defendant admitted that the very space where it is said plaintiff should not have gone is a driveway (page 104, line 12). There were no obstructions in this driveway to warn not to use it and no lights near enough to make visible a possible danger (page 15, lines 34, etc.; pages 42, 67, line 40; pages 70, 76, lines 10, etc.) It was evidently the natural course between the land and the river end, for others on that night involuntarily attempted to take it, and, had they not been women naturally fearful of shadows, probably would have been injured (page 40, lines 21, 23, 60). These facts being in evidence it also became a fact for the jury to determine as to whether the implied invitation extended to that portion of the wharf.

One of the leading cases in this State on the question here raised, and one where the facts are quite similar is that of *Phillips vs. Library Co.*, 55 N. J. L. 307.

This case indicates the distinctions to be observed, clearly defines the legal rules and indicates the proper course in the present case at page 315:

“The proof necessary to sustain an action of this aspect must be found in the circumstances of the particular case. In such cases, if there be evidence tending to show inducement or invitation, it becomes a question of fact for the jury whether the conditions exist under which a legal duty is imposed upon the owner of the premises to exercise care for the plaintiff’s safety.

“Granting that it appears that a plaintiff’s entry upon premises was by the invitation of the owner, a question may also arise, whether, at the time the injury was received, the plaintiff was in that part of the premises into which he was invited to enter.”

Under the rules laid down in this decision, considering the fact that there was evidence that the plaintiff had been accustomed both to go upon the wharf in person, and with his wagon, to receive shipments of fruit, that he had invariably gone to the river end of the wharf in winter and when his fruit arrived in the evenings; that this was such a night and such weather; that such was his intention; that there was no obstruction to the use of the passageway maintained, where the hole upon this evening existed; that the hanging chain suggested as having swung there was not observed by plaintiff or any of the four other witnesses who noticed that passageway on that evening; that there were no warnings or lights maintained to indicate possible dangers; that plaintiff was using passageway at a time when it was open for passengers, the boat being about to dock; the Court properly left to the jury the determination of the questions involved as facts, and properly refused the motion for non-suit and direction of verdict.

2.

Although the Court refused to charge the third request of defendant in the form submitted, the Court did properly charge the law there involved, and so committed no error.

3.

The Court did not refuse to charge the fourth request of defendant, but repeated the same and then said, "I think I have charged you as fully as necessary on that question." An examination of his charge shows that he did in fact clearly and properly state the law on the matter involved in such request.

The defendant insists that the company incurs no liability for injuries for a fall under the overhead beams, claiming that a chain was suspended in the centre thereof and that this indicated that that passageway was not to be used either for passengers or vehicles. The presence of this chain on the evening of the accident, was denied by the plaintiff and the four other persons who were there (pages 26, 42, 64, 65, 71 and 76), and it became a question of fact for the jury to determine whether or not it in fact was there at that time. And the fact that there was another passageway which would have proven safe, certainly cannot preclude a recovery, if an invitation existed as to the passageway used, and the determination of the existence of circumstances creating such an invitation was for the jury to determine.

See *Phillips vs. Library Co.*, 55 N. J. L. 307, etc.

The defendant also attempts to make much of the fact that one of its employes declared that he had inspected the wharf two hours previous to the accident, and that the plank was then in place, and insists that a verdict should have been directed in its favor because it was not affirmatively shown that the plank was removed by defendant, or its absence known to it. There certainly had been no inspection of the wharf for a full two hours prior to the time it was to be used by passengers arriving and departing from the boat "Springfield," then about to dock (pages 104 and 105), and plaintiff was there at a time when passengers and consignees of freight were supposed to use the same,—that is when a boat was arriving. The facts that there had been no inspection for two hours prior to the time it was supposed to be used, that there were no lights to indicate possible dangers in the passage-

ways, and no warnings placed to guard against the use of the passageway nearest to the freight building, were all for the consideration and determination of the jury, and it was solely their province to say whether or not, through these circumstances, the defendant failed in the duty it owed to plaintiff.

5.

Exception is also taken by the defendant to the manner in which the trial Court charged with respect to its seventh request. It is insisted that no negligence of the defendant was shown and that a verdict should have been directed instead of the charge made (page 142), which is excepted to.

This contention overlooks the fact that their employe in charge of the wharf testified that no examination of the wharf had been made for at least a period of two hours prior to the time it was supposed to be used by passengers and consignees of freight. An adoption of the defendant's view in this regard would also require the elimination of the considerable testimony demonstrating an absence of sufficient light on the wharf and sufficient warnings. Also it was for the jury to determine whether or not defendant's witness had in fact made the examination of which he testified. And under the rule laid down in the Library Company case, the jury was properly permitted to determine, from the surrounding circumstances, whether or not defendant in fact failed in the duty it owed plaintiff.

6.

The defendant also excepts to that part of the Court's charge where he says :

"If it had been the custom of the plaintiff to go where he was that night, in seeing about his consigned fruit, in the way that he was looking after it, and he fell in an unguarded hole and unlighted hole, after exercising due and reasonable care on his own part, then defendant company would be liable, provided the plaintiff received any injury."

In the first place, the defendant fails to include the entire thought of the Court as outlined in the paragraph of which the above sentence was a part. The words used indicate that the thought to follow is connected with the one which has preceded, viz. :

"Of course, you have got to settle the question whether or not the plaintiff was entitled by invitation, either expressed or implied, to be where he was on the wharf. Then you are required to inquire, upon the evidence, whether the defendant company exercised its full duty towards the plaintiff, whether it should have protected the hole in some way."

The Court was correct in referring to the custom of plaintiff to go on the wharf because, although plaintiff said (page 22, line 18) that on the evening in question he had never been through the place where he was injured, yet the evidence hereinabove referred to shows many instances of his having gone on the wharf with his wagon to receive his fruit, under circumstances similar to those surrounding the accident, and it was a proper question for the jury to determine whether the company should have taken cognizance of his use of the wharf from his previous visits there to receive fruit. And the charge, taken in its entirety, could not be construed to indicate that the jury was to believe that the implied invitation

to the plaintiff to use the passageway nearest the freight building should be found to exist alone from the fact that it was plaintiff's custom to walk there.

The Court, in the last two paragraphs on page 137 of printed book, particularly cautions the jury to consider the question of this custom and an implied invitation, and the whole charge taken together clearly indicates to the jury the rule as adopted in the Library Company case and other decisions. Actual knowledge of this custom of the plaintiff to go to the end of the wharf to receive his fruits was admitted (pages 101 and 102).

7.

As to the Court's refusal to charge defendant's sixth request (page 143) the defendant alleges that reversible error was committed by the trial Court when it refused to charge the sixth request. That request was as follows:

"There is no proof of loss due to lessening of earning capacity, payment of expenses for medicine or physicians, except one dollar; no other damages could be awarded, if any are awarded, except for pain and suffering."

The Court did charge (page 140):

"If you resolve all the questions submitted to you in favor of the plaintiff, he is entitled to recover damages for any medical attention that his condition required as the result of his injury; he is entitled to damages for any disability that he has sustained; he is entitled to recover damages for any pain and suffering that he has sustained; he is entitled to recover damages for any medical services that he might be required to sustain or any pain or suffering that he may be required to un-

dergo and for any disability that he may endure in the future by reason of any injury that is the approximate result of the accident on the night of the 13th of February last."

There was no proof in dollars and cents as to the earning capacity of plaintiff before and after the accident. There was, however, proof by his own testimony, and that of his family, that after the accident and by reason thereof, he had been in a physical condition which unfitted him for performing labor requiring the exertion of strength, such as had been a part of his work prior to the injury. There was also proof that he was compelled to call his son to his assistance from New York, using him to deliver fruits while he drove the wagon. This made one more person for whom it was necessary to provide in his household,—an additional expense.

The defendant here suggests a rule which would preclude a recovery of damages in a case such as this, except where there is positive, direct proof of the amount and extent of the pecuniary loss. Black, in his work on Law and Practice in Accident Cases, 1900, paragraph 228, states the rule:

"The damages include everything of which the plaintiff has been deprived as a proximate and natural consequence of the injury. They are not, generally speaking, susceptible of a strictly mathematical calculation.

"When the elements of damages are not capable of precise proof, in some cases, it is said that doubts are to be resolved in favor of the injured person. When a plaintiff alleges that his person has been injured and proves the allegation, the law implies damages. He may recover such as necessarily and immediately flow from the injury, which are called general damages, under a general

allegation that damages were sustained. *Direct proof of any specific, pecuniary loss is not indispensable to a recovery.*" (*Fishers vs. Jansen*, 128 Ill. 549.)

In New Jersey the rule has ever been, in actions of tort, that the *quantum* of damages is within the discretion of the jury, and, evidence of the nature and extent of plaintiff's business, his profits therefrom, and the loss thereto, through his injury, is received, not on the ground of its furnishing a measure of damages to be binding on the jury, but to be taken into consideration to guide them in the exercise of *that discretion, which, to a certain extent, is always vested in them.*

New Jersey Express Co. vs. Nichols, 33 N. J. Law, 434-437.

In 1886, in the Essex Circuit Court, there was a case which was reported in 9th N. J. L. J. 229, where "there was no evidence of the plaintiff's employment or income," and yet a seven thousand dollar verdict was reduced to four thousand dollars, and that amount allowed.

This was the case of *Colgan vs. P. R. R. Co.*

Subsequent decisions have been in accord.

Therefore, it is respectfully submitted that the trial Court committed no reversible error, and that this judgment should be affirmed.

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Respondent.*

