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NEW JERSEY SUPREME COURT.

JONATHAN V. NICHOLS,
vs.
THE NEW JERSEY EXPRESS COMPANY.
} *In Case.*

PARKER & KEASBEY for Plaintiff, CHARLES BORCHERLING, JR., and BENJAMIN WILLIAMSON for Defendants.

STATE OF THE CASE.

This is an action in trespass on the case, for injuries to the plaintiff.

The declaration and pleadings therein are as follows:

ESSEX COUNTY, SS.

The New Jersey Express Company, the defendants in this suit, were summoned to answer Jonathan V. Nichols, the plaintiff therein, of a plea of trespass on the case, and thereupon the said plaintiff, by Parker & Keasbey, his Attorneys, complain: For that, whereas, before and at the time of committing the grievances by the said defendants, as hereinafter mentioned, the said defendants were owners of a certain wagon and of certain horses drawing the same, used and employed by them as an express wagon, in transporting merchandize from place to place, to wit: at Newark, in the county of Essex, and which said wagon and horses were, eighteen hundred and sixty-four, at Newark, aforesaid, under the care, government and direction of certain the servants of the defendants who were then and there driving the same in and upon a certain public and common street and highway in the city of Newark aforesaid, in and about the ordinary business of the said plaintiff, was then and there passing on foot upon and along the side walk of the said public and common street and highway, in and about his lawful business and employment, nevertheless the said defendants, then and there, by their said servants, so carelessly and improperly drove, governed and directed their said wagon and horses that by and through the carelessness, negligence and improper conduct of the said defendants, by their said servants in that behalf, the said wagon then and there ran upon and across the said sidewalk where the plaintiff was then and there passing as aforesaid, and struck the plaintiff with great force and violence,

and threw him, the said plaintiff, against an iron grating adjoining said sidewalk, and crushed the body of the said plaintiff between the end of said wagon and the said iron grating, and by means of the several premises aforesaid the said plaintiff was then and there greatly bruised, hurt and wounded, so that his life was despaired of, and became and was sick, sore, lame and disordered, and so remained and continued for a long space of time, to wit, hitherto, during all which time he, the said plaintiff, suffered great pain, and was hindered and prevented from performing and trans-
10 acting his lawful affairs and business by him during that time to be done and transacted; and was also, by means of the premises, forced and obliged to pay, and hath necessarily paid and expended a large sum of money, to wit, three hundred dollars, in and about the endeavoring to be healed of said wounds, occasioned as aforesaid, and hath been and is, by means of the premises, otherwise greatly injured and damnified, to wit, at Newark, aforesaid to the damage of the plaintiff ten thousand dollars, and therefore he brings his suit, &c.

20 To the foregoing declaration, the defendants, by their Attorney, Charles Borcherling, Junior, pleaded the general issue.

Issue having been joined between the parties, the cause came on to be tried, as hereafter stated, when the following bills of exception were sealed.

Afterwards, to wit, on the first day of May, eighteen hundred and sixty six, in the said Circuit Court, held at Newark, in and for the county of Essex, before the Honorable Daniel Haines,
30 Judge of the said Court, came the said Jonathan V. Nichols, by Parker & Keasbey, his Attorneys and Counsel, as the said The New Jersey Express Company, by Charles Borcherling, Junior, their Attorney, and Benjamin Williamson, their Counsel, and the Jurors of the Jury, whereof mention is within made, being called, likewise came, and after being elected. tried and sworn to try the several issues within joined, the Counsel for the said plaintiff, learned in the law, offered on his behalf to the said Jury, the evidence of the said Jonathan V. Nichols, taken in this cause, de bene esse, on the sixth day of November, eighteen hundred and
40 sixty-five, as follows, viz:

ESSEX CIRCUIT COURT.

JONATHAN V. NICHOLS,
vs.
THE NEW JERSEY EXPRESS COMPANY. } *In Case.*

To Staats S. Morris, Esquire, a Master in Chancery of New Jersey: 10

Whereas, the above action of trespass on the case hath been instituted and is now pending in the Circuit Court of the County of Essex, and Jonathan V. Nichols, the plaintiff therein, is a material witness in said action, and is about to go out of the State of New Jersey, to wit, to New Orleans in the State of Louisiana, being compelled to go there to attend to important business which cannot be postponed, and not expecting to return until after the next term of said Court; you are therefore requested to appoint such time and place as the case may require to take the deposition of such witness, and to cause notice to be given to the defendants to attend and be present at the taking thereof, and to put questions and cross-examine, if they shall think fit. 20

Dated this 30th day of October, 1865.

PARKER & KEASBEY, Att'ys of Plaintiff.

Essex County, ss. Jonathan V. Nichols, the above named plaintiff, being duly sworn, saith that the facts above stated are true.

J. V. NICHOLS.

Sworn and subscribed, this 30th day of October, 1865, before me, JOHN THATCHER, Justice of the Peace. 30

Essex County, ss. Upon consideration of the circumstances of the case, in pursuance of the above application, I do appoint the hour of ten in the forenoon, of the sixth day of November next, at my office No. 196 Broad Street, in the city of Newark, to take the examination of the said Jonathan V. Nichols, and I do direct that five days' notice thereof be given to the said defendants to attend and be present at the taking thereof, and to put questions and cross-examine, if they shall think fit. 40

Given under my hand this 30th day of October, 1865.

S. S. MORRIS, Master in Chancery.

SIR: Take notice of the taking of testimony in the above stated cause, before Staats S. Morris, Esq., 196 Broad Street, Newark, N. J., at the hour of ten in the forenoon, on the sixth day of November next, in pursuance of the above application and direction.

Yours, &c.,

PARKER & KEASBEY, Att'ys of Plaintiff.

To CHAS. BORCHERLING, ESQ., Def'ts Att'y. 50

ESSEX CIRCUIT COURT.

JONATHAN V. NICHOLS,
vs.
THE NEW JERSEY EXPRESS COMPANY.

In Case. Upon application for deposition. De bene esse.

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The deposition of Jonathan V. Nichols, a witness for the Plaintiff in the above stated cause, taken before Staats S. Morris, a Master in Chancery, at his office in the city of Newark, on Monday, the 6th day of November, 1865, pursuant to an order and notice of which the annexed is a copy. Present, A. Q. Keasbey, Esq., of Counsel with Plaintiff, and C. Borcherling, Esq., of Counsel with Defendants.

Jonathan V. Nichols being duly sworn deposeth as follows:

I am the plaintiff in this suit; I live in Orange, New Jersey;
20 I am about to leave this State to go to New Orleans, Louisiana.

1. Ques. Have you been engaged in business there? (Objected to.)

Ans. I have.

2. Ques. For what purpose are you going to New Orleans?

Ans. To carry on the timber and lumber business.

3. Ques. Can you return in time for the next court? (Objected to.)

Ans. I cannot without great injury to my business.

4. Ques. When do you leave this city?

30 Ans. I expect to leave on Saturday of this week.

5. Ques. Did you snffer a bodily injury during last year, and if so, state the time, place and circumstances of that injury fully?

Ans. About the middle of October, 1864, in Broad street, Newark, N. J., I met Charles A. Beach, and through him made an arrangement to go to New Orleans, to enter into a business engagement, (defendants Counsel here objected to this answer,) and by appointment I met him again on the 21st day of November, of the same year, to procure our passages for New Orleans. Taking my usual course, starting from my office, then at 244 Broad street,
40 we passed through Clinton street to Lawrence street, and through Lawrence street, on the west side of the same, to Market street; when near the corner of Market, in Lawrence, on the pavement, on the sidewalk, I meant to have said, I noticed a large, heavy express wagon, a two horse express wagon, then about to be backed down to the curb, as I supposed; when we came on the north side of the said wagon, our progress being stopped, I discovered a man on the wagon guiding the horses, another man standing on the south side of the wagon, on the sidewalk, directly opposite me; fearing that the wagon might be backed across over
50 the curb on the sidewalk, by the force they were then using, we

stopped to see to see what they intended to do, whilst standing, the wagon having stopped also ; I was looking the man that was on the sidewalk full in the face, when I distinctly heard him say to the driver, stop ; supposing that this was intended for us to pass on, Beach first stepped in, I immediately following ; I then discovered the wagon was coming down upon us ; then death appeared to stare me in the face, for the fear of being crushed between the wagon and an iron platform secured to the east side of the building known as the Condit & Horton factory, in my wildest efforts to extricate myself I pushed Beach to get out, saved his life, and was caught myself with the back end of the wagon across my bowels, and with great force crushed between it and the aforesaid iron platform, until the breath left my body ; I was then conveyed by some persons near, to the office in the building on said corner of Lawrence and Market streets ; from thence I was afterwards conveyed, in a very critical condition, in the horse cars, to my house in Orange, where I was confined, from the date above mentioned of my injury, until about the seventh day of January, 1865.

(The above answer, except that portion which refers to the injury, objected to by defendants' Counsel.)

6. Ques. Describe the iron platform to which you refer, and the condition of the curb in front of that platform, as you ascertained?

Ans. I was architect of that building ; had the full charge of the arrangements, both internal and external ; the iron platform spoken of was made of wrought iron, secured to the east side of Lawrence street, near the corner of Market, extending from the said building about three feet and five inches from the face of the same, covering the area, and about three feet and three inches from the top of the said pavement to the top of the iron platform, secured to the coping of the said area ; the sidewalk was reduced by this platform, so that when a wagon was backed to the curb a space of about three feet and six inches was left between the wheels and said iron platform, when goods were delivered from said platform, by a plank, one end resting upon it, the other end on the wagon ; that was the condition when I left the building ; since then the curb has been dropped about four inches, and a flat stone laid on the top to cover the gutter, the top being flush with the sidewalk, upon which wagons are backed over and against the said platform ; I did not discover the change had been made until some months after my injury.

7. Ques. Why did you not discover the change ? (Objected to.)

Ans. Because I did not think that they would be allowed the privilege to back over on the sidewalk, as there was a city ordinance against it, so that when I came to the side of the wagon I did not dream of that alteration having been made.

8. Ques. What chiefly engaged your attention as you approached ?

Ans. We were in conversation in reference to our departure and business until we had come up to the side of the wagon ; the only thing that caused us to stop was the fear that we had, seeing the

anxiety they had to get up to the curb, they would back it across.

9. Ques. What then engaged your attention?

Ans. When we saw the wagon we stopped to see what they intended to do; at that moment the wagon was still also; we also saw that the man on the sidewalk saw us approaching, and I think the man on the wagon also saw us; I was looking at the man on the wagon.

10. Ques. What was the nature of the injury done to you?

Ans. The wagon struck me upon my bowels, just under the
10 navel, crushing my back bone and hips against the upright iron work secured to the coping and top rail of said platform; my bowels were separated, a portion was driven up with great force and violence, and drove the breath right out of my mouth and nostrils; although the separation was instantaneous, my condition was truly awful; in my agony, I threw up my arms as the wagon was against me, with my face towards the horses and driver; my last word was, my God you have killed me, as the breath left my body; just as I made that expression, while in that condition, I heard the man on the walk make use of the expression, "there,
20 damn you," to the driver, "you have killed the man. (The last clause objected to.)

11. Ques. What physician did they send for?

Ans. They sent for Dr. Nichols first; he was out of town; they then procured Dr. Dodd.

12. Ques. How long was the Doctor in attendance upon you?

Ans. He accompanied me home and was in attendance on me every day for nearly three weeks of the forty-five days.

13. Ques. How long were you actually confined to your house?

Ans. With one exception, I think it was about thirty days;
30 that exception the Doctor recommended me that if possible I could be got into a carriage to take a little airing; I did so and was worse after it, having a relapse. (Doctor's recommendation objected to.)

14. Ques. How long did the effect of your injury continue?

Ans. It continued until after I returned from New Orleans, and even now I am unable to perform any laborious duties. I was so, when I left on the 7th of January, that I was unable to walk the length of my room, but through the Doctor's advice I was persuaded to take a sea voyage, and when I was aboard of the ship
40 was unable to walk any distance, until I had nearly arrived at New Orleans; I was an invalid even after I arrived, not able to walk any great distance until my return, on or about the 6th of April last; the effects of my injuries are still felt, and on the second day of August last I was attacked with a fever, my injuries giving me great pain and uneasiness.

15. Ques. What is your business or profession?

Ans. An Architect.

16. Ques. Had you been engaged in that business up to the time of your injury?

50 Ans. I had.

17. Ques. What was your average annual profits in your business? (Objected to.)

Ans. The average was about $2,500; that is the average income.

18. Ques. You were on your way to engage passage for New Orleans, at the time you were hurt, to engage in a lumber business, as you have stated. Did you suffer any loss in that business, by reason of your injury detaining you, if so what?

Ans. I was on my way to enter into a business which if I had not been injured in which I would have had the ownership of one third of the said business. worth not less than $11,000, but on account of my injury another person was placed in my position, and I was obliged to pay $11,000 for this said right and interest.

19. Ques. Are you a married man?

Ans. I am; I have five children.

20. Ques. Did you observe what name was on the express wagon?

Ans. I did not?

21. Ques. What kind of a wagon was it?

Ans. It was what they call a flat platform wagon, very large and heavy; I noticed that particularly, as I approached it.

22. Ques. Was it loaded?

Ans. It was not loaded, except one box, I think on the forward part.

23. Ques. Could you walk or help yourself after you were injured?

Ans. I fell on the walk as they took the wagon away, made an effort to move, found myself so much injured that I called for help; they came to my assistance and carried me into the office before mentioned.

24. Ques. Did you suffer pain?

Ans. My pains were intense, suffering in great agony, with very little relief under forty-eight hours; my agony was so intense that my clothes were wet upon my back with perspiration.

25. Ques. After forty-eight hours did you suffer any further pain?

Ans. I did, it was continuous for more than ten days; so much so that they were obliged to use hot fermentations to give me the least relief; my bowels were so sore that a touch would almost take my breath for a week afterwards.

26. Ques. Had you any fear of a fatal result, at any time? (Objected to.)

Ans. I had; I expected to die immediately; the Doctor told me I could not live until I could see my family; the Doctor distinctly told me that I could not survive until I could get home; it was not until I insisted on my removal that the Doctor would consent to my removal to my house; they all thought I would die in the office.

27. Ques. Were any stimulants used in taking you home?

Ans. There were; I called for some liquor; the Doctor asked

me what I was going to do with it? I told him I wanted to drink it, or I would die; he replied that if I drank any of that liquor I would die in ten minutes after drinking it; I said I would die if I didn't have it, for I was in such excruciating pain and agony I could not live without.

28. Ques. Did you continue conscious until you got home?

Ans. They gave me liquor reluctantly; they then carried me to the cars; at times unconscious, from my severe pain; so much so that I swooned and would have died in the cars, but for a lady
10 who discovered my condition and fanned me and called the Doctor's attention to me.

29. Ques. Was your wife at home when you arrived?

Ans. She was; they sent a lady in the cars, in advance, to apprise her of my being injured. (Last part of answer objected to.)

Cross-Examined, by Mr. Borcherling.

1. Ques. How long have you been an architect in this city?

Ans. For ten years and more.

20 2. Ques. What was your business before that?

Ans. I was for about ten years before that architect and builder.

3. Ques. Where does your family reside?

Ans. In Orange, New Jersey.

4. Ques. When did you build the building spoken of by you, as architect?

Ans. I have no date particularly, but think it was in the year 1854 or '5.

5. Ques. Was not this platform that you have spoken of con-
30 structed by you, or by your order and authority, as such architect, for the express purpose of receiving and delivering freight and boxes from and for Condict & Co., doing business there, from wagons and teams receiving and delivering such freight?

Ans. That was the intention.

6. Ques. Is not this platform, to your knowledge, the only place where Condict & Co., receive and deliver goods and freight from and to teams?

Ans. A large proportion is delivered in that way and received; it is not the only place.

40 7. Ques. Is it not the only place where all their heavy freight and boxes are received and delivered?

Ans. No; I have seen boxes received and delivered from the front doors of said building, on Market street.

8. Ques. Have you been at that store frequently, within the last ten years?

Ans. Yes; during the early part or previous to the war, I had occasion to be there almost every day, having charge of Mr. Condict's dwelling.

9. Ques. What time of the day was this occurrence you speak
50 of?

Ans. It lacked a few minutes of ten o'clock, in the forenoon.

10. Ques. How far is this platform spoken of from the corner of Clinton and Lawrence streets?

Ans. I think the north end of it about 130 to 40 feet, more or less; I can't tell you without measuring; I judge it to be near that.

11. Ques. What was the height of the platform of the wagon you noticed there?

Ans. I should judge about three feet, judging from the height it struck me.

12. Ques. Were not these flaggings across the gutter put there at the time of the construction of the building or immediately thereafter?

Ans. They were not put there during my engagement, nor at the completion of the building.

13. Ques. Have you ever been Alderman of the city of Newark?

Ans. I have.

14 Ques. Don't you know that the city authorities have and frequently do, at this time, grant to parties permission to use or change their buildings, contrary to existing ordinances?

Ans. They did not then, nor do I know since that they grant any such privileges.

15. Ques. Who do you mean by saying "we," in your direct examination?

Ans. Charles A. Beach and myself.

16. Ques. Was Charles A. Beach with you, going along Lawrence street, at the same time that this accident occurred?

Ans. He was.

17. Ques. Were not yourself and Charles A. Beach in haste, endeavoring to catch the train at the Market street depot, at the time?

Ans. We were on our way to the said depot to secure tickets for New York.

18. Ques. The last question repeated?

Ans. We were on our way to the depot to get tickets for New York.

19. Ques. The last question repeated?

Ans. I can say yes.

20. Ques. How near to the wagon did you and Charles A. Beach stop, before you passed between it and the platform?

Ans. Well, I should think we were about two feet from the wheels when we stopped.

21. Ques. How far was the rear end of the wagon from the outer edge of the bars of the iron grating forming that platform, when you stopped, as you stated in the last answer?

Ans. Well, I should think about three feet and five or six inches.

22. Ques. Were not the hind wheels of that wagon on the stone covering the gutter, at the time of your stopping?

Ans. I was so much absorbed with the men and the wagon that I did not see where the wheels were.

(The witness here expressed a wish to speak to his Counsel, and was objected to by Counsel of defendants. Conversation had notwithstanding.)

23. Ques. Who went past the wagon first, Charles A. Beach or yourself?

Ans. Charles A. Beach.

24. Ques. How near were you to Charles A. Beach as he passed
10 that wagon?

Ans. I was immediately behind him.

25. Ques. Close to his person?

Ans. Close as I could be.

26. Ques. Was there any person then besides Beach, passing then along that walk, at that time, going in the same way?

Ans. I did not notice any other person.

27. Ques. What do you mean by saying you saved the life of Charles A. Beach?

Ans. In my endeavor to get out I pushed Mr. Beach; if it had
20 not been for that the end of the wagon rail would have gone through him.

28. Ques. Did the rail which you refer to in your last answer strike you?

Ans. The rear end of the wagon struck me.

29. Ques. The last question repeated.

Ans. No.

30. Ques. Did not you and Mr. Beach endeavor to run past the backing wagon and the platform spoken of, and in so rushing past you were caught?

30 Ans. We did not; we waited a reasonable time, until we heard the word "stop," from the man on the walk.

31. Ques. Who was the man on the walk; do you know him?

Ans. I do not.

32. Ques. Did he appear to belong to the wagon?

Ans. He did.

33. Ques. Did not that man call out to you and Charles A. Beach, as you were endeavoring to pass behind this wagon, to stop, and warn you not to attempt its passage?

Ans. I did not think that he spoke to us.

40 34. Ques. You were deeply engaged with Mr. Beach about your business, were you not, at that time?

Ans. We were engaged in conversation until we came to the wagon.

35. Ques. How many men were there then about that wagon, when you stopped?

Ans. I think I only discovered three, one on the wagon, one on the walk, and I think one on the corner of Market street.

36. Ques. The man which you say was on the wagon, was he not sitting on the driver's box, with the reins in his hands, in the

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act of backing against this platform as you approached the wagon?

Ans. I think he was standing when I discovered him; he had the reins in his hand and was in the act of backing.

37. Ques. Who took you into the office of Condict & Horton?

Ans. There was three or four of them; one of their names was Bowlby, the others I did not know.

38. Ques. How long did you remain in that office?

Ans. I can't say how long; I think in the neighborhood of three quarters of an hour; perhaps half an hour; I can't tell you. 10

39. Ques. How much and what kind of liquor did you drink, during that time you were at that office?

Ans. It was whiskey, and I think they gave it to me three times, in a tumbler.

40. Ques. Mr. Nichols, I believe you are not in the habit of using strong drink, are you?

Ans. No, sir.

41. Ques. Who went with you from that office to Orange, if anybody? 20

Ans. Dr. Dodd and one or two others; I can't tell their names.

42. Ques. How often, after that, did Dr. Dodd visit you in reference to these injuries?

Ans. The number of times I can't tell; he was there every day for some days, and occasionally until I left home.

43. Ques. Are there any Physicians residing in Orange, and if so, have any of those Physicians attended you besides Dr. Dodd?

Ans. There are Physicians living in Orange; I think I called Dr. William Pierson twice.

44. Ques. About these same injuries? 30

Ans. On the subject of these injuries.

45. Ques. How long were you confined to your house before you first went out, after the injury spoken of?

Ans. I think it was somewhere between fourteen and fifteen days.

46. Ques. What is your age, Mr. Nichols?

Ans. I am about fifty-two years.

47. Ques. Have you, during the time you were engaged as builder, received any injury by falling, or otherwise?

Ans. I don't remember any. 40

48. Ques. Were you, on the 21st of November, 1864, actually engaged as an architect in this State?

Ans. I was.

49. Ques. When did you propose to go to New Orleans? on the 21st of November last named?

Ans. No; it was only to secure our passage on that day, expecting to sail on Wednesday or Saturday of that week.

50. Ques. Were you under any contract to go to New Orleans on that day?

Ans. No other than verbal agreement. 50

51. Ques. With whom?

Ans. With Charles A. Beach.

52. Ques. What was the contract for?

Ans. To enter into a lumber and timber business, with George Searing of New Orleans.

53. Ques. As partners?

Ans. As one third owner, for my knowledge of the business.

54. Ques. What was that business?

Ans. To manufacture timber and lumber, shingles and staves.

10 55. Ques. Had you ever been in that business before?

Ans. I have not.

56. Ques. How much capital were you to furnish towards that partnership?

Ans. None, as my knowledge of the business as architect gave me one third.

57. Ques. Was that contract consummated?

Ans. It was not.

58. Ques. Why not?

Ans. Because of my detention by this injury.

20 59. Ques. Was that the only reason?

Ans. It was.

60. Ques. Where is Charles A. Beach now?

Ans. The last I heard from him he was in New Orleans.

61. Ques. Is he in business with you now.

Ans. I left him there, engaged in business, when I came away.

62. Ques. The last question repeated?

Ans. He is sawing; attending to the business at our mill.

63. Ques. When you say at our mill, whose mill do you mean?

Ans. I mean a mill belonging to Fred. Van Wagenen, myself, 30 and two others, whose names I am not at liberty to tell, being private.

64. Ques. Is Charles A. Beach one of those parties?

Ans. He is not; he is under our employ.

65. Ques. Is the Mr. Searing you referred to one of the owners?

Ans. He has an interest called "Royalty."

66. Ques. What does the word "Royalty," in the sense here used mean?

Ans. I think it means compensation on the business performed, in the shape of a tariff; we bought the property of him for a 40 certain sum, but he wanted to obtain more by retaining a royalty on the amount of business done.

67. Ques. Is this agreement in writing, between you and those parties named?

Ans. It is legally consummated.

68 Ques. Where did Mr. Searing reside on the 21st of November, 1864, if you know?

Ans. In the city of New Orleans.

69. Ques. Had you before that 21st of November seen that Mr. Searing?

50 Ans. I had not.

70. Ques. When did Charles A. Beach leave for New Orleans, after the injury you have spoken of?

Ans. He left on the Saturday following the 21st, I think the 26th.

71. Ques. Had you ever been to New Orleans before.

Ans. I had not.

72. Ques. Had you ever been to sea before?

Ans. I had been to Charleston by sea; that time was in 1838.

73. Ques. Did not you and Mr. Beach conclude to go Louisiana for the purpose of speculating in timber land? 10

Ans. We had no such intention.

74. Ques. Didn't you and Charles A. Beach propose to start for New Orleans, about the time of the injury, for the purpose of speculating in lumber and timber in New Orleans, or in the State of Louisiana?

Ans. Our fixed purpose, when we left, was to enter into this arrangement which I speak of.

75. Ques. How much capital were you to put into the business which you have stated was worth not less than $11,000?

Ans. I had nothing to put in. 20

76. Ques. What was the nature of that business?

Ans. It was to manufacture timber, lumber, shingles and staves.

78. Ques. Who were the parties with whom you were to enter into that business, under that arrangement?

Ans. It was George Searing of New Orleans.

79. Ques. Were you in business in New Orleans, in the State of Louisiana, before the 6th of April last, and if so how long and what was the nature of the business in which you were engaged?

Ans. I had no business engagement there previous to that time, 30 my engagements having been broken by my absence, on account of my sickness.

80. Ques. Was Charles A. Beach in New Orleans when you arrived there, and was he engaged in any business, to your knowledge?

Ans. He was there when I first arived, holding the business I would have had if I had not been injured.

81. Ques. Please give the names and ages of your five children which you have spoken of?

Ans. Three of them are upwards of twenty-four years of age, 40 one is about eighteen, and the other is about five.

82. Ques. Are these children dependent upon you for support?

Ans. Two of them are; the two youngest ones.

83. Ques. Can you tell what the hot fermentations you have spoken of consisted of, which were applied to you?

Ans. I was told, after my recovery, that it consisted of hops and Indian meal.

Direct Examination resumed.

1. Ques. When you saw the man on the sidewalk, and heard 50

him say stop, to the driver, as you supposed, did you hear him say anything more, or address any words to you?

Ans. I did not; it was my impression that he was talking to the driver, and not to us.

2. Ques. You said the driver was in the act of backing as you approached, was he in the act of backing when you attempted to get through, or had he stopped?

Ans. As we attempted to pass through, the wagon was stopped; it stood still.

10 3. Ques. You said you were deeply engaged in conversation, were you so deeply engaged as not to observe the wagon until you were passing through?

Ans. No sir, for when we came up to within two or three feet of the wagon we both stopped conversation, and our whole attention, particularly mine, was directed towards the wagon and the men who had it in charge.

Cross-Examined.

1. Ques. How long have you been in business in Louisiana 20 now?

Ans. We were put in possession of the mills on the sixth of July last.

2. Ques. Where was the driver of that wagon, spoken of in your direct examination?

Ans. He was standing on the front part of the wagon, near the horses.

3. Ques. Did you see him particularly?

Ans. I did.

4. Ques. Did you see him have the reins of the horses in his 30 hands?

Ans. I did.

5. Ques. Is that Lawrence street a very narrow street?

Ans. I think it is. J. V. Nichols.

Sworn and subscribed before me, at Newark, this 6th day of November, A. D. 1865.

S. S. Morris, Master in Chancery.

I Staats S. Morris, one of the Masters in Chancery of the State of New Jersey, do hereby certify the foregoing to be the original 40 deposition of Jonathan V. Nichols, taken and reduced to writing by me, and after being taken by me was subscribed by the said witness in my presence; and that the reason of taking the said testimony is that the said witness is about to go out of the State, and cannot be present at the trial of the said case, as appears by the application made to me on the part of the plaintiff in said case, a copy of which is hereto annexed, and also the notice served on the defendants' attorney in said case, which is also annexed, and that said testimony was taken in the presence of said parties.

S. S. Morris, Master in Chancery of N. J.

50 Dated Nov. 6, 1865.

Whereupon the said defendants, by their said Counsel, object to the reading and reception of the above mentioned deposition, and the consideration of the same by the said jurors, for the reason that it does not appear on the record of said depositions that the witness then examined in this cause, as above mentioned, was sworn according to the Act of the Legislature of the State of New Jersey, entitled "An Act authorizing commissions and the taking of depositions, approved April 15, 1846, by which it is prescribed that every person deposing under said Act shall be sworn or affirmed to testify the whole truth, &c.," whereas it 10 appears, by the said record of said deposition, that "Jonathan V. Nichols, being duly sworn, deposeth as follows."

The Court thereupon overruled the said objection, and permitted the said deposition to be read to the jury, to which ruling of the Court the defendants, by their Counsel, excepted, and prayed that a bill might be sealed, and it is sealed accordingly.

DANIEL HAINES, [L. S.]

Whereupon the said defendants, by their said Counsel, did further object to the reading and reception of the above mentioned 20 deposition, and consideration of the same by the said jurors sworn as the jury in this cause, for the reason that while the cross-examination of said witness upon the direct testimony given by said witness was taken, and before the conclusion of such cross-examination by the Counsel for the defendants, the Supreme Court Commissioner, before whom the said testimony was taken, allowed a private interview and conversation between the said plaintiff then there testifying as a witness in this cause, and his said Counsel, then there present, contrary to the objection of the defendants' Counsel, then there made, to the said private interview. 30

The Court thereupon overruled the said last objection, and permitted the said deposition to be read in evidence to the jury, to which last ruling of the Court, the defendants, by their Counsel, excepted and payed that a bill might be sealed, and it is sealed accordingly.

DANIEL HAINES, [L. S.]

Whereupon the said defendants, by their said Counsel, objected to the reading and consideration, by the said jury, of the seventeenth question and answer of the direct examination of the said plaintiff, set forth in the said deposition as follows, viz: 40

Question. "What was your average annual profits in your business?" (Objected to.)

Answer. "The average was about $2500; that is the average income."

For the reason that if the said last mentioned question and answer was read in evidence to and allowed by the Court to be considered by the jury in this cause, that such consideration of the same would tend to lead the said jury to an indefinite inquiry, which would be contrary to law and the rules and practice in that behalf.

The Court thereupon overruled the said last objection of the 50

defendants. and permitted the said question and answer to be read to the said jury, for their consideration in this cause, to which last ruling of the Court, the defendants, by their said Counsel, excepted and prayed that a bill might be sealed, and it is sealed accordingly. DANIEL HAINES, [L. S.]

Whereupon the following named witnesses were called by the plaintiff, and sworn and examined to testify in this cause viz:

DR. BETHUEL L. DODD, the first witness called on part of the plaintiff, being sworn, deposed:

I am a Physician here since 1852; I know Jonathan V. Nichols, the plaintiff in this cause; I was called upon to attend him about an injury which he had received some time in 1864; I was at my office on Market street, about a block off; it was between nine and ten o'clock in the morning when I was called upon; went down to see the plaintiff, and found him in the back room of the building on the corner of Market and Lawrence street, about a block from my office; found the plaintiff lying down on a lounge or sofa; he was pale, bathed with perspiration, had difficulty in breathing, a ghastly look, quick and feeble pulse; I enquired into the case and examined him; they had administered to him before my arrival, but I don't know what; I found, on examination of his abdomen, there was an extreme tenderness about the navel; great pain on touching; I thought a little fullness; much discoloration of the skin, but no abrasure; I remained with him about an hour; he wanted to be taken home; I think I directed stimulants, which I ordered to be administered pretty freely; I consented to have him sent home; he took the horse car, and somebody asked me to go with him, which I did; there was a tendency to sink, a difficulty in breathing; he was fanned, and the windows raised to give him air; he suffered, apparently, very greatly; got him home to Orange and to bed; I formed an opinion that his condition was very critical; I cannot say whether I told him so or not; his life was in danger; I left him, I think, after being with him for an hour or two; I think I went to see him again the same evening; I heard, I think, that he got caught between the wagon and platform at Condict's store; I visited him afterwards; I think for two or three weeks; it was two weeks and, perhaps, one or two days more; saw him daily for two weeks; my book shows the number of visits I paid him; he suffered and I gave him large doses of opium and anodine, for the first two or three days, after which the extent of the bruises diminished; I kept him under large doses of anodine for about forty-eight hours, to relieve him of pain; gave him opiates; the suffering continued for some days, but the intense suffering ceased after a day or two; he continued to complain to me for six months afterwards; his situation was critical for ten days, but I regarded him less so after a few days; my anxiety was gradually diminished; I cannot say whether Nichols said let me die among my friends; I think so; he asked me repeatedly if I thought he would get well; I spoke

equivocally to him; I had great apprehension down at the store, going home, and for two or three days after; the persons present directed my attention to plaintiff's stomach, which I examined; I found symptoms of fullness and tenderness; there was a collapse, which persons struck in the stomach always have; it is about four or six months since I last advised Mr. Nichols; it was the last time he was here; it is nearly a year ago since he last called on me; I attended his family after I ceased visiting him; I cannot tell how often I have been there; I should think he would not get over it, and that there was some fear he might suffer with it always, but it cannot be said with certainty; it is difficult to say that he will suffer hereafter from those injuries; he has not paid me anything for my services; I hold him for one hundred and twenty-five dollars; no bill has ever been presented.

Being Cross-Examined, says:

The one hundred and twenty-five dollars spoken of by me cover all my visits and attendance upon Mr. Nichols and his family, since the occurrence; I cannot tell how many times I visited his family; I think I saw Mrs. Nichols two or three times since, and the child once; I was called up to Orange to visit the child for some trivial cause, but I cannot tell how many visits I paid; my charges for my attendance upon Mr. Nichols was about one hundred and fifteen dollars of the amount I have mentioned; my charges for visits and attendance amount to about one hundred and ten or fifteen dollars; I don't remember exactly how much, but that is about it; I don't think I told the plaintiff that he would die before he reached home; I don't think I ever told him so; I did not order any stimulants at Condict's store, except what was there; I think it was whiskey that was there, which I think I ordered Mr. Nichols to take, but can't tell how often it was given him; I think he drank some two or three times of it while I was there; I don't remember refusing whiskey to him, nor did I ever tell him that if he drank the whiskey he would die in ten minutes; I was with Mr. Nichols at Condict's store from half an hour to an hour; I have no knowledge as to whether any other person administered to Mr. Nichols; I can't tell whether he had drank before my arrival or not; the stimulants were there when I arrived; the stimulant was given to produce re-action; it is given for that purpose; all I know that it was whiskey that was given to Mr. Nichols is what was told me by those persons; I did not examine it; I charged Mr. Nichols from three dollars to five dollars for each ordinary visit; sometimes we charge as much in the city; it depends upon circumstances, and the nature of the disease or treatment required.

Charles A. Beach, being duly sworn, says:

I have lived here for about ten years; for about five years before the war I was engaged in the Iron railing business; since the war I have been in the saw mill business; I know the plaintiff

in this cause; was with him when he was hurt; it was in Lawrence street, by Condict & Horton's building; we were on our way to New York, going through Lawrence street towards Market street; we left Mr. Nichols' office, passing through Clinton street, and so along Lawrence street, on the west side thereof; on reaching that building, there was a truck, I believe of the defendants, backing up to the sidewalk; I was going by myself and Mr. Nichols followed; he just touched me by the arm, as if to stop a moment; I think I passed right on and he followed me; we looked
10 up a minute, thinking that the truck was about backing up; I got through, and Mr. Nichols was caught by the hind end of the truck, between it and the iron railing or platform affixed to the said building; there were two flags across the gutter, making it level with the sidewalk, to enable them to back up on the walk; I first noticed the flagging since my last return; I have been back for about six weeks; did not see the flagging or know of it at the time we were passing; I supposed, as I naturally do, that a truck backing up would strike the curb, as usual, and stop; there was a man driving the truck, on the truck, as it was backing up; he saw
20 us, I am sure; I think there was a remark made by either the driver or the man that stood near the hind wheel of the truck, exclaiming, "stop;" the truck was stopped for a moment, at the instant the man said stop, before I passed through; just the instant we passed; we supposed there was time enough to go through, and we passed along; one or the other of those men said stop, and I supposed we could go right on, thinking the curb would have stopped it, and should have done so, if it had not been for the plaintiff; I think I heard the man at the wheel say something, but can't remember positively what he said; he told the driver to
30 start up, that he had killed the man, or something to that effect, the plaintiff was then fast between the wagon and the platform, which the driver did immediately, and the plaintiff was extricated; the wagon was a two horse platform wagon, no sides to it, only rungs; there was nothing on the wagon; I think they were backing up to the platform to load; I heard, at the time, that the wagon belonged to the defendants, but I did not notice any mark on the wagon; the plaintiff was hurt in the position I have described; after the truck started up and left, he called for help; he looked pale, and said they have killed me; I think plaintiff had
40 one hand on the grating; he did not fall; he did not complain, at the time, until after he was got into the office of Condict & Horton; when the truck struck him he exclaimed they have killed me; plaintiff put his hands across his bowels; that was the way in which he particularly showed his distress; he was helped into the office, I think, by three men, and laid down on the lounge or sofa; he did not appear to have any action for a time, nor could he tell where he was hurt; faintness appeared to me to be the reason; he wanted me to get a stage and take him home to his wife, but he gave no reason why; a Doctor was sent for, who
50 came in about fifteen minutes; there was some whiskey brought

out and some of it given to him; he could not speak, couldn't say much; I was in the room about five minutes, and the Doctor then told me to go after Mr. Nichols' brother; on my return I found the Doctor and the plaintiff had left for Orange; I saw the plaintiff, I think the next day, at his house in Orange; found him sick in bed; they refused at first to let me see him, because they said they were required to keep him quiet; however, after informing the family who I was, I was allowed to see him; soon after that I went to New Orleans.

10

Being Cross-Examined, witness says:

We left the plaintiff's office between nine and ten o'clock, that morning; cannot tell how near to ten o'clock it was; the office is adjoining the Post Office; we went through Broad street as far as Clinton street, then passed down Clinton street till we came to Lawrence street; there was no obstruction on Lawrence street, between Clinton and Market streets, whereby the truck was hidden from view; the truck was near the corner of Market street in Lawrence street; there was a free and unobstructed view of the whole block, from Clinton to Market streets, but we did not observe 20 the truck until we came up to it; I think the space between the rear of the wagon and the platform, as we came up to it, was between three and four feet; we observed the wagon backing when we were ten or fifteen feet from the wagon; that was the first we saw of it; we were not in any particular hurry to get to the depot; I mean the Market street depot; we had sufficient time to reach the depot for the ten o'clock train; we left early, to give me a chance to see a man at the depot, about some business; I don't remember that we were unusually absorbed in conversation while going along Lawrence street; I saw one man on the truck; 30 that was the driver; I am sure; he appeared to be backing up; he held the reins in his hands, looking at his horses, as he was backing up; I only noticed one man at the hind part of the truck; he was standing in the street, not on the walk, close by the truck; I cannot tell you how far the bottom of the wagon extended beyond the wheels; I don't think the hind part of the wagon was three or four feet from the platform of that building; we could have passed through between the wagon and the platform with the wheels against the curb; I should think the width of the sidewalk, between the curb and that platform, is about six feet; I 40 can't tell whether it is five or six feet in width; it is not more than six feet in width; I am a manufacturer of iron railings; my judgment is as good about the width of the walk as of the intervening space I have described for us to pass through, if I took any notice of it; plaintiff and myself walked side by side along Lawrence street; I think I had the inside; we walked abreast of the wagon, I then passed ahead and got through; I don't remember why we separated on arriving at the wagon; I went ahead; I don't remember speaking to the man in the street; I can't tell whether I should know the man that stood near the rear of the 50

truck; I should know the man that drove it; the building spoken of is used by Condict & Horton as a harness manufactory; they carried that business on extensively in that building; this platform was used for the delivery of freight; the flagging is laid across the gutter to enable wagons to be backed up to the platform for the purpose of receiving or delivering freight; the wagon was in the act of backing when we first saw it; they had just made a halt; had been backing and the man said "stop;" we supposed it was to let us go through, though I would have gone through any-
10 how, but for Nichols touching my arm; we were ten feet or so off when they made the halt; on our way we had stopped at the Life Insurance Company's office; we did not start with the intention, particularly, of taking the ten o'clock train, and I expected to meet a man there; I know Stephen B. Sanders; I saw Mr. Sanders shortly after the occurrence, about some carriages which I bought, and may have stated something to him about the occurrence; I don't think that I told Mr. Sanders that we thought we had sufficient time and room to pass through, and that in attempting to pass the plaintiff got caught; I wanted to see a person by
20 the name of Slate at the depot; he was coming by the Washington train; I told him I would be at the depot with a friend; I don't know when that train passes through; I expected to meet him; I don't remember what our intentions were; we were not in a hurry; the person that I was to meet at the depot told me he would wait over one train at the depot.

Dr. Bethuel L. Dodd, being recalled, says:

The first charge I find on my book, which I have here, si in December, 1864; I don't remember the date of the first visit to
30 the plaintiff; I have only one charge against him in December; I again attended plaintiff in August, 1865; all my charges against the plaintiff amount to one hundred and eight dollars and seventy-five cents, of that amount about one hundred dollars is for my attendance upon the plaintiff personally; the other charges are for attendance upon his family; I made him seven visits in November, 1864, for which I have charged thirty-five dollars and fifty cents; one visit in December, 1864, charge five dollars; the services I have charged in January and February, 1865, were to his family; I have no charges for either of the months of March,
40 May, June or July, 1865, for services or attendance upon plaintiff; in August, 1865, he is charged for nine visits and medicines, forty-six dollars and fifty cents, in the aggregate; I find the charges against him, which I know were for him personally, eighty-seven dollars; when I saw the plaintiff in August, 1865, he told me that he had been to New Orleans; he then complained of pain in his bowels, excessive wakefulness, pain in the head, and had fever generally; he said he was in the timber business; I thought these symptoms were from the injuries.

50 Charles Baldwin, being sworn, says:

I live in Orange; I was in the horse car in which the plaintiff was; I got into the car at the corner of Broad and Market street; I saw a man lying on the seat whom I recognized as Mr. Nichols; I went up to his house; I had to pass my own house on the way, which I did in order to assist him; as I entered the car, the plaintiff spoke to me, saying, "I am glad you are here;" he continued to hold my hand until we reached his home; he complained of pain in his bowels, was restless; I discovered he was pale; there was a cold sweat on his face, about which I felt alarmed; I opened the window to give him air; he enquired whether he was most home; I administered to him; we wiped his face and fanned him; on arriving at his house, we carried him up stairs; on taking off his stockings, we found his feet cold; I left him comfortable, in about half an hour afterwards; I called there every day; did not see him daily; they wanted to keep him quiet; I did not take particular notice of the time; it was about ten o'clock, in the morning, when I was going home and entered the car; I did not see Dr. Dodd in the car.

Being Cross-Examined, says:

I live a few blocks away from where the Plaintiff lives; it was about ten o'clock, in the morning, when I entered the car on the corner of Broad and Market street; I don't know whether it was cold weather; I think Mr. Nichols went South after that, but don't remember how soon afterwards; Mr. Close and the conductor was with us; I don't know the conductor's name.

Abraham P. Meeker, being sworn, says:

I was the conductor of the horse car that took Mr. Nichols up to Orange; we took him in at the corner of Market and Lawrence street, here in Newark; I don't know who brought him in; he was carried in; he appeared pretty near dead; he looked pale, appeared without strength; I don't remember hearing him say anything; he was carried out of the car at Orange; Mr. Close was one of the persons who assisted in carrying the plaintiff.

Being Cross-Examined, says:

I think it was a year ago last fall; I don't remember the month; it was neither warm weather nor cold; it had been raining in the morning; the track was slippery that morning, in consequence of the rain; Mr. Nichols was brought into that car about ten o'clock, in the forenoon; I was the conductor of that car and had charge of it; I don't remember whether it was the car that leaves the Market street depot at 9.55 or 10 o'clock and twenty minutes, in the morning; it was either one or the other; it takes us about two minutes to reach Lawrence street, after we leave the depot; it was either a stormy morning or it had been raining.

Theodore A. Ross, being sworn, says:

I am book-keeper for J. E. Condict & Co., and was so employed in November, 1864; I remember the occasion of an express

wagon coming to the door for the purpose of receiving goods from our store, a box of hardware; I saw the person who had charge of the defendants' wagon; it was the same person who had been at our store receiving freight, in answer to orders left at the defendants' office, for that purpose; the express office is about a block above our store, on Market street; I did not see the accident; I saw them bring Mr. Nichols into the office of our store; he was pale and appeared helpless; he was groaning as if suffering great pain; he was in our office from half an hour to three quarters of
10 an hour; he may have been there an hour; he was taken in to the back office; the Doctor was sent for, after which Mr. Nichols was taken to the car of the Orange horse rail road car; the goods had not been delivered when the accident occurred; the box for which the men came, I think, stood inside of the building, and was delivered after the accident.

Being Cross-Examined says:

The box I have spoken of was about two feet one way and fourteen inches long; it contained hardware, and was the usual
20 size box in which we shipped goods of that description: the box was heavy; I noticed the wagon first as it was passing down Market street, but did not otherwise see the wagon before the accident; I saw no mark on the wagon on Lawrence street; I have left orders myself at the Express Company's office, and had seen the same person that came that morning for the box before; I think there were two persons on the wagon that I saw going down Market street; I saw that wagon turn the corner of Lawrence street; I suppose that the platform spoken of was constructed to facilitate the transaction of our business; I have been employed
30 in that building for upwards of twelve years; the platform was used for receiving goods; heavy freight was usually delivered there; for a time the entire gutter was covered over with flagging, but as the gutter was getting stopped up, all the flagging, except the two pieces which are now left, were taken up; this platform has been used considerable, since 1860, for receiving and delivery of freight; we were doing a heavy business since the war; those boxes of hardware were heavy and delivered from that platform; other wagons were backed up to that platform to receive and deliver freight; I can say that this occurred at least
40 once a day, but I have seen it done oftener; it was about nine o'clock in the morning when I saw the wagon; the box which they were to take was to go by the morning express, which leaves New York about ten o'clock; the box was to go to Cincinnati; I don't know why it was necessary to send it so early; I don't think there was more than one box on the wagon; I have frequently seen Mr. Nichols at the office in that building; he came more frequently twelve years ago than he did subsequently; since Stephen H. Condict retired from the firm the plaintiff came there but seldom, but during the time Mr. Condict's residence was being
50 altered he came frequently; he also came frequently while the

Horton home was built; I can't remember the man in charge of the wagon; I only know that man's name from the signature of the receipt which he signed in my presence; all I know about the men on that wagon being the defendants' servants, was that they drove the wagon; I can't swear positively that those men were the defendants' servants; I think the box which I saw on the wagon was on it while passing down Market street; I did not notice anything else on the wagon.

DAVID CLOSE, being sworn, says: 10

I live in Bloomfield; I saw Mr. Nichols in the horse car; I got into that car, about ten o'clock, at the corner of Broad and Orange street, in this city; it may have been a little after ten o'clock; I went home with Mr. Nichols; he appeared to be injured but I cannot tell to what extent; he complained of his bowels; I suppose he had but little strength; he was helpless; I did not observe any particulars; I helped him out of the car and in carrying him into the house; can't tell whether he could walk; he appeared weak.

Being Cross-Examined, says: 20

I did not see Mr. Nichols again until the next spring; I think I met him at Orange; I cannot tell when it was; I think three or four months afterwards.

SAMUEL C. BOWLBY, being sworn, says:

I live at Vienna, in Warren county; I am in no business at this time; I was in the express business while I was here; I know Mr. Nichols, the plaintiff; I was present when he was injured; I stood on the walk, on the north west corner of Market and Lawrence streets, at the time; I had been in the house and just came 30 out; what I first saw was they drove away from the walk and immediately turned the horses to the left quick, and back up quick; the horses were turned to the left, towards Commerce street; I thought they wanted to get on the flagging; the horses seemed to be unruly, I thought, and the driver had trouble to control the horses; Mr. Nichols and Mr. Beach came along Lawrence street; they thought they could get through as the wagon drove up; I saw the driver holding up a little, and as they came up he advanced the horses and they undertook to get through; one did, the other got caught; there was another man near the 40 wagon; it was one of the express men; the driver seemed to heed, but they were coming back too quick; he made a motion as if to stop them; I was very much excited; the whole thing was done so quick that although the man tried to stop the horses it appeared impossible; this man stood on the ground, on the upper side of the wagon from me; he was one of the express men, but I don't think I knew him; as the wagon was coming back the man hallooed don't back against the men; I was the first that had hold of Mr. Nichols and helped carry him into the building; he made a great ado and I sent for the Doctor; I did not think 50 he'd live but for a few minutes.

Being Cross-Examined, says:

The man on the truck had the lines in his hands; I saw him guide the horses; I did not notice any man speak to Mr. Beach after the occurrence; a man can stand on the wagon, behind the driver's seat, and drive; I think the driver stood on the truck behind the seat; that is frequently done.

The said Counsel for the plaintiff thereupon offered the ordinances of the city of Newark in evidence, and referred to and read in evidence to the jury the seventy-eighth section of the ordinances, relating to streets and highways in the city of Newark, in the words following, viz:

Sec. 78. No person shall push, lead, ride, draw, back or drive any horse, cart, wagon, sleigh, sled or other vehicle, over or upon any sidewalk, unless it be in crossing the same to go into a yard or lot, under the penalty of ten dollars for each and every offence.

The said plaintiff thereupon, by his said Counsel, rested his case.

Whereupon the defendants, by their said Counsel, moved the Court to grant to the defendants a non-suit against the said plaintiff in this cause, on the ground and for the reason that the plaintiff was bound to prove, not only that the injury by him sustained was caused substantially and proximately by the negligence of the defendants, but also that he, the said plaintiff, was free from negligence, and did not, by his own conduct, contribute to the injury complained of, and the plaintiff in this case having failed to make proof accordingly, the said defendants were entitled to a non-suit against the said plaintiff in this behalf.

The Court thereupon refused to grant the said motion to non-suit the plaintiff, to which last ruling of the Court the defendants, by their Counsel, excepted, and prayed that a bill might be sealed, and it is sealed accordingly.

DANIEL HAINES, [L. S.]

Whereupon the witnesses on the part and behalf of the defendants were sworn and examined, and the jury having been addressed by the Counsel for the respective parties, the Court charged the jury in reference to the plaintiff's damages in this case, as follows, viz:

"It is the province of the jury, and you have a right, not only to take into consideration the suffering to which the plaintiff was subjected at the time of the injury, but also the physical suffering, if any, to which the plaintiff may hereafter be subjected by reason of the injury then sustained."

To which portion of the said charge of the Court, the defendants, by their Counsel, excepted, and prayed that a bill might be sealed, and it is sealed accordingly.

DANIEL HAINES, [L. S.]

The jury thereupon retired for their consideration of the case, and returned into said Court with a verdict in favor of the said plaintiff against the said defendants, assessing the said plaintiff's damages in that behalf, at four thousand dollars.

SUPREME COURT.

THE NEW JERSEY EXPRESS COMPANY,
vs.
JONATHAN V. NICHOLS.
} *Opinion.*

10

1. A deposition taken *de bene esse* before a Master in Chancery of this State, who certified that the witness was duly sworn, held sufficient.

2. That the Master allowed the witness, who was the Plaintiff, during his cross examination, to answer in private with his counsel, is not such an objection as will require the court to reject the deposition.

3. In an action for damages, by loss of time, &c., occasioned by a personal injury to an architect, held that the Plaintiff as a witness might be asked what were the average profits of his business. 20

4. It is not error to refuse a nonsuit because the Plaintiff did not positively prove that the injury of which he complained was not in part occasioned by his own negligence, where the evidence is doubtful, or the inference to be drawn from the facts uncertain.

This was a writ of error to the Circuit Court of the County of Essex, and was submitted on briefs by *Borcherling* and *Williamson* for plaintiffs in Error, and by Parker and Keasbey for defendants before the CHIEF JUSTICE and justices ELMER, DALRYMPLE and BEDLE.

The opinion of the Court was delivered by ELMER, J. Upon the 30 trial of this cause, several exceptions were taken to the ruling of the Court, and these exceptions are now relied upon as reasons for reversing the Judgment.

The first exception was to the admission, as evidence, of the deposition of the Plaintiff in the Circuit Court, as a witness, taken *de bene esse*, before a Master in Chancery of this State; who certified that the witness was "duly sworn" but did not state in the words of the statute, *Nix. Dig.* 926, *No.* 13, that he was sworn to testify the whole truth. It has always been held that the statute, being in derogation of the Common Law, must be strictly pursued; but 40 here the deposition was taken by an officer acting under the Laws of this State, who certifies that the witness was duly sworn, which is equivalent to a statement that he was sworn in the legal form; to speak the truth, the whole truth, and nothing but the truth.

The second exception was for refusing to reject the deposition, on the ground that while the said witness was under cross-examination, the Master, notwithstanding the objection of the Defendant's Counsel, allowed a private interview and conversation between the said witness and his Counsel. The statement of the Master is, "The witness here expressed a wish to speak to his 50

Counsel, and was objected by Counsel of Defendant; conversation had notwithstanding." What the conversation was about does not appear, the Counsel for Defendant not having cosen to inquire as he might have done. For anything that appears, it had no connection with the question in controversy; but even if it had, however such an occurrence might have affected the credibility of the witness, it must have been a flagrant case which would have required the Court wholly to reject the deposition.

The third exception was the receiving in evidence, the Plaintiff's
10 answer, as contained in his deposition, to the question "What was the average annual profits in your business," to which he answered, "The average was about twenty-five hundred dollars." This evidence was objected to, on the ground that the same would tend to lead the Jury to an indefinite inquiry, which would be contrary to Law; but the Court permitted it to be read for the consideration of the Jury. The action was for injury done to the Plaintiff's person, by the negligence of the Defendant's servants; whereby he suffered great pain, was put to expense in being cured, and was hindered, and prevented, for a long time, from performing and
20 transacting his lawful business. What was the nature and value of the Plaintiff's business, was a material inquiry. The question was not in regard to the profits of an uncertain trade, or manufacture, but was designed, and tended to show what he was at the time of the injury, earning as an architect, and for that purpose was proper. That the rule of damages applicable to such a case, was legally stated by the Court, must be assumed, because no exception has been taken to his instructions in that respect.

The fourth and last exception relied on for reversal, was, that the Court declined to nonsuit the Plaintiff, on the ground, and for
30 the reason that he was bound to prove, not only that the injury by him sustained, was caused substantially and proximately by the negligence of the Defendants, but also that the Plaintiff was free from negligence, and did not by his own conduct, contribute to the injury complained of, which he had failed to do. There is no doubt that by the well established Law, the Plaintiff was bound to prove that the negligence of the defendants' servants was the natural and proximate cause of the injury he sustained; and generally in doing so, he necessarily shows that his own misconduct, or negligence, did not contribute in producing it; but it is not the
40 Law in this State, whatever may have been held elsewhere, that he is bound in all cases, to shew positively, that he was not himself to blame. *Durant vs. Palmer*, 5 *Dutch.* 544. When it clearly appears by the Plaintiff's evidence, that his own conduct contributed to produce the injury complained of, it is the duty of the Court to direct a nonsuit, as was held at the last term, in the case of Harper vs Erie Railway Co. But where the evidence on this point is doubtful, and the inferences to be drawn from the facts uncertain, it is the province of the Jury to decide; and the case must be plain, which will justify a reversal, for denying a nonsuit
50 and submitting the question of negligence to the Jury, *Cent. R.*

R. Co. vs. Moore, 4 *Zab.* 824. It appears by the evidence in this case, that the Plaintiff was attempting to pass along the side walk, in the City of Newark, when he was caught and badly hurt, by the wagon of the Defendants' being backed up to the side of a building adjoining to the walk, for the purpose of taking in some packages from a platform erected for that purpose. It appears also that the wagon was thus backed in in violation of the City Ordinance. The act of driving the wagon on the walk, without taking care to see that it was clear of passengers, was gross negligence on the part of the Defendants. The negligence imputed to 10 the Plaintiff was, that he attempted to pass, when he saw, or might have seen, that it was dangerous to do so. This plea might have availed the Defendants if they had had an equal right to use the side walk as they did, which was not the case ; and would not have been, even in the absence of the Ordinance. But they backed the wagon onto it at their peril, and are justly held accountable for the consequences. And besides, admitting the Defendants had a right to back up their wagon on the side walk, with proper precaution, it was by no means clear that the Plaintiff did not use every reasonable precaution on his part ; and it was therefore no error to submit 20 this question to the Jury. As to the damages which are complained of as excessive, that is not an open question upon a writ of error, in my opinion the judgment must be affirmed.

A true Copy.

CHARLES P. SMITH, Clerk.

NEW JERSEY COURT OF ERRORS AND APPEALS.

THE NEW JERSEY EXPRESS CO., *Plaintiffs*,
vs.
JONATHAN V. NICHOLS, *Respondent*.
} *In Case. Error to the Supreme Court.*

10 Afterwards, to wit, on the tenth day of July, in the year of our Lord one thousand eight hundred and sixty-seven, before the Honorable the Judges of the Court of Errors and Appeals of the State of New Jersey, at the State House in the City of Trenton, in said State, come the said The New Jersey Express Company, by Charles Borcherling, Junior, their Attorney, and say, that in the record and proceedings aforesaid, and also in giving the Judgment aforesaid, there is manifest error; in this, that the deposition taken *de bene esse* as aforesaid, were received by the Court and allowed 20 to be read to the Jurors of the Jury, at the trial of the issue in this cause, for the reason that it does not appear on the record of said depositions, that the witness then examined in this cause was sworn according to the Act of the Legislature of the State of New Jersey, entitled "An Act authorizing Commissions, and the taking of Depositions," approved April 15, 1846, by which it is prescribed that every person deposing under said Act, shall be sworn, or affirmed, to testify the whole truth, &c.; whereas it appears, by the said Record of said Deposition, that "Jonathan V. Nichols, being duly sworn, deposeth as follows."

30 And also, there is error in this, that the said deposition was received by the said Court, and permitted to be read for the consideration of the same, by the said jurors, sworn as the Jury in this cause; for the reason, that while the cross-examination of said witness, upon the direct testimony given by said witness, was taken; and before the conclusion of such cross-examination by the Counsel for the Defendants, the Supreme Court Commissioner, before whom the said testimony was taken, allowed a private interview and conversation between the said Plaintiff, then there testifying as a witness in this cause; and his said Counsel, then 40 there present, contrary to the objection of the Defendants' Counsel, then there made, to the said private interview.

And also, there is error in this, that the said Court permitted the reading and consideration by the said Jury, against the objection of the Counsel of the Defendants, of the seventeenth question, and answer of the direct examination of the said Plaintiff, set forth in the said deposition as follows, viz:

Ques. What was your average annual profits in your business? (Objected to.)

Ans. The average was about $2500; that is, the average income.

50 For the reason, that such reading of the said last mentioned

question and answer, in evidence to the said Jury, and such consideration of the same, would tend to lead the said Jury to an indefinite inquiry, and which would be contrary to law and the rules and practice in that behalf.

And also, there is error in this, that after the Plaintiff by his Counsel had rested his case, the Defendants, by their Counsel, moved the Court to grant to the Defendants a nonsuit against the said Plaintiff in this cause, on the ground, and for the reason, that the Plaintiff was bound to prove, not only that the injury by him sustained, was caused substantially and proximately by the negli- 10 gence of the Defendants; but also that he, the said Plaintiff, was free from negligence, and did not, by his own conduct, contribute to the injury complained of; and the Plaintiff in this case having failed to make proof accordingly, the said Defendants were entitled to a non suit against the said Plaintiff in this behalf; and which said motion the Court thereupon refused to grant.

And also, there is error in this, that after the witnesses on the part and behalf of the Defendants, were sworn and examined; and the Jury having been addressed by the Counsel for the respective parties, the Court charged the Jury in reference to the Plaintiff's 20 damages in this case as follows, viz:

"It is the province of the Jury, and you have a right, not only to take into consideration the suffering to which the plaintiff was subjected at the time of the injury, but also the physical suffering, if any, to which the Plaintiff may hereafter be subjected by reason of the injury then sustained." To which portion of the said charge of the Court, the Defendants by their Counsel, then there excepted.

And also, there is error in this, that the Judgment aforesaid, by the record aforesaid, appears to have been given for the said Jonathan V. Nichols, against the said The New Jersey Express 30 Company; whereas, by the Law of the Land, the said Judgment ought to have been given for the said The New Jersey Express Company, against the said Jonathan V. Nichols; and the said The New Jersey Express Company, pray that the Judgment aforesaid, for the errors aforesaid, and for other errors in the said record and proceedings being, may be reversed, annulled, and altogether holden for nought, and that they may be restored to all things which they have lost by occasion of the said Judgment, &c.

CHARLES BORCHERLING, JR.,
Attorney for, and of Counsel with Plaintiffs in Error. 40