New Jersey Court of Errors and Appeals.

JOHN G. MASON,
Defendant in Error,
vs.
ERIE RAILROAD COMPANY,
Plaintiff in Error.

In Tort

Brief for Defendant in Error.

This writ of error is brought to review a judgment of the Supreme Court. The case was one for physical injuries and was tried at the Passaic Circuit.

The defendant in error on the sixteenth day of January, 1906, boarded a train, as a passenger of the plaintiff in error at Jersey City, which was scheduled to arrive at his place of destination, River Street station, in Paterson, at about 6.15 P. M. When approaching the River Street station the brakeman on the train called out "River Street," and the train came to a stop. The train was longer than the platform of the station and the car in which the plaintiff was seated did not stop at the platform. The plaintiff alighted. There were no lights and the place was very dark. Immediately upon alighting on the side on which the station was situated he tripped and fell over a pile of rails lying parallel with the track and near the end of the ties and received the injuries for which the action was brought.

The plaintiff at the time was engaged in the grocery business with his son, George H. Mason, as a partner.

Second and Third Assignments of Error.

The second and third assignments of error relate to the testimony of George H. Mason concerning the nature, extent and decline of the business which the plaintiff below and the witness were conducting at the time of and subsequent to the injury to the plaintiff. The testimony was admitted subject to the exceptions of the counsel for the Railroad Company.

The testimony and proceedings in this branch of the case are as follows, (pp. 37-44 of case):

Direct Examination by Mr. Gourley :

Q. Are you the son of John G. Mason, the plaintiff in this case? A. Yes, sir ; I am his son.

Q. And I believe you are in the same business with him? A. Yes, sir.

Q. How long have you been in business with him? A. About six years.

Q. Partners? A. Yes, sir.

Q. Are you equal partners? A. Yes, sir.

Q. In the grocery business? A. Grocery and butcher business.

Q. Do you keep any books of account in that business? A. Not strictly accounts, because our business is mostly cash, and, being in the family, we don't deem it necessary to keep all our accounts.

Q. What books have you kept them in? A. Well, a majority of the time we would have noth-

ing but our banking book and our ledgers and day books.

Q. Your ledger and day books, what do you carry in them? A. Nothing only customers' accounts.

Q. Other than cash payments? A. Other than cash payments.

Q. Don't you keep a cash book? A. No, sir; no cash book and no stock book.

Q. Are you able to tell us what the amount received per week was in that business in which you and your father are partners during the months of November and December, 1905?

Mr. Collins—Objected to. I ask permission to cross-examine.

Cross Examination by Mr. Collins:

Q. Do you keep one of these National Cash Registers? A. No, sir.

Q. You took the money in when you sold goods? A. We always handled the cash ourselves.

Q. Didn't you keep memoranda of your cash receipts? A. Very seldom, but the majority of times we would deposit the money and just keep enough for small change.

Q. Then the deposit book will show? A. Yes, sir.

Q. Did you put all the money that you received in the business in the bank? A. No, sir; I should judge from all accounts about half of our receipts were deposited.

Q. You say you think you deposited about half what you took in? A. Yes, sir.

Q. I understood you to say that you deposited

all except about enough for change? A. That and enough for buying greens, vegetables.

Q. That is to say you bought from farmers? A. Yes, sir.

Q. Did you have receipts from those men? A. No, sir; sometimes we traded.

Q. How is it your father and you never meet to divide up? A. We always credit ourselves with equal wage; we draw a certain sum for the week.

Q. And then what you did not draw out accumulated in the business? A. Yes, sir.

Q. And did you take account of stock? A. No, sir; very seldom—when I started in business with father—

Q. How are you going to tell how much you take in in a week? A. Through our deposits and through our ordinary expenditures we could generally tell what was doing—handling the money ourselves; I should judge during the holiday months our income would be over $800.00 weekly.

Q. You are not called to answer yet—

Mr. Collins:—I ask that that be struck out.

The Court:—Strike it out.

Q. My question is how could you tell; you say by the deposits, and what else? A. Deposits and cash, and what I generally spent; I did most of the buying in the market and of the farmers.

Q. You know about how much you would spend for green truck? A. Yes, sir.

Q. And the deposits would give the rest of it? A. Yes, sir.

Mr. Collins:—I submit the question is

not competent in the absence of the deposits.

The Court:—In the case of the Erie Railroad Company adv. Bartow, the books of account kept by the plaintiff were of the most meagre kind. He was a farmer, and he also carried on the business of a basket maker, and it appeared in evidence that he kept a very crude set of books. The Supreme Court held that because this Court did did not accede to the insistment of the counsel for the defendant that the books should be produced—they held that the books should be produced. Now, I confess that was a surprise to this Court, and I am not yet prepared to acquiesce in that law; but that makes no difference; that is the law established in this state by the Supreme Court; books of account are made evidential simply because of the law merchant; and to adopt the theory that in accident cases books of account are to be admitted in evidence, just the same as they are in the case of a merchant trying to enforce his account, seems to me to be wrong; but that is the law. I should say that this is not as strong a case as the Bartow case, however. In that case there were books of account, imperfect and crude, but they were books of account kept by the plaintiff; but in this case there are no books of

account kept by the plaintiff. They had a system of cash, each partner taking out a certain amount of money, but no attempt made to keep a record of the receipts and expenditures, and the residuum went into the bank. I don't think that is the case of the principle of the Bartow case at all, and I shall admit the question and give you an exception.

Mr. Collins :—We object to it on the ground that it is not competent to prove any damages or loss of profits of the firm of which he was a member; that it is not competent to prove it by the witness' memory, when there are other more reliable sources of information, particularly the bank deposits.

To which ruling of the Court the defendant's counsel prays an exception.

Exception allowed. Let it be sealed, and it is sealed accordingly.

WILBUR A. HEISLEY, [L. S.]

Further Direct Examination by Mr. Gourley:

Q. Do you know about what your average income was in your business during the months of November and December, 1905; can you give us approximately or accurately? A. Very close to $800.00 weekly.

Mr. Collins :—Our exception goes to all of this.

The Court :—Yes.

Q. You have said, I think, in answer to a question of Judge Collins, and which was ordered struck off the record, and which referred specially to the holiday months—has that any added significance? A. I should judge perhaps $75.00 or $100.00 a week.

Q. When you said $800.00 a week, did you mean including that? A. Yes, sir.

Q. Then the average income per week during the year would be about that?

Mr. Collins :—Same objection.

The Court :—Same ruling.

Exception allowed. Let it be sealed, and it is sealed accordingly.

WILBUR A. HEISLEY, [L. S.]

J.

A. On an average we should take in $600.00 weekly.

Q. Was there any diminution in that income after your father was incapacitated?

Mr. Collins :—Objected to on the ground that it is incompetent; so many elements enter into a diminution that it is not even evidential in a case like this, a partnership of this character, carrying on a general business.

Mr. Gourley :—I withdraw the question.

Q. Can you tell us whether or not the fact of your father having been injured on January 16th caused the income of the business to increase or diminish?

Mr. Collins:—Objected to on the ground that it is not one calling for an opinion or a conclusion.

The Court:—You are simply asked whether you can tell; now you may answer yes or no; don't say how you know, but you are simply asked whether you can tell; can you tell?

A. Yes, sir.

Q. How can you tell? A. On account of being compelled to cut some of my customers off of my route business; customers who were not close and handy to get at.

Q. Did you run a route with a horse and wagon? A. Yes, sir.

Q. You could not go so far? A. No, sir; I was compelled to cut off many good customers on account of father's illness.

Q. Do you mean they would have to go elsewhere for business? A. Yes, sir; I had to tell them it was impossible for me to come there.

Direct Examination continued by Mr. Gourley:

Q. Can you tell us then whether there was a diminution or not in your income after January 16th? A. Yes, sir.

Q. Can you tell us about what the diminution was per week?

Mr. Collins:—Objected to unless we can have something more definite to guide us.

The Court:—He is asking whether he can tell; say yes or no.

Q. The weekly diminution by reason of your father being away. A. It would be impossible to tell correctly the entire amount; I know what this trade that we were compelled to leave was worth to me—they were steady trade.

Q. What loss of income or profit was there, in any way that you can compute? A. Between $60.00 and $80.00 a week income.

Q. That would be the amount of the sales? A. Yes, sir.

Q. And can you tell us whether or not the business has become normal again? A. No, sir; it has not, because some of the trade I have had to cut down to do less business.

Q. You are not doing as much business as you did? A. No, sir; because I have to attend to the business more inside now.

Q. Were you outside altogether before the injury? A. Yes, sir.

Q. Now, how is it? A. Just depends on the condition that father is in; sometimes, when he is very bad, I have to depend on the boys to do all the outside business.

The attention of the Court is called to the fact that the above testimony does not show a specific loss of profits of the business, but it does show the state of the business prior and subsequent to the injury to the plaintiff, the extent of the busi-

ness, and the decline therein consequent upon the plaintiff's enforced non-attendance, and has a direct and immediate bearing upon the question of damages to be allowed the plaintiff for his loss of time and the value of his services, and for these purposes was material and competent.

Schwartz v. North Jersey St. R. R. Co. 49 Atl. R., 676, was an action for personal injuries. The Court said "The plaintiff was a contractor, and at the time had a contract for the building of a brewery in Brooklyn. The Court received evidence of his contract to show the extent of his business. This evidence was undoubtedly competent."

In New York in the early case of Lincoln v. Saratoga, &c. R. R. Co., 23 Wend., 425, it was held that evidence of the plaintiff's business, its extent and the importance of his personal oversight therein may be shown, but that the opinion of others as to the loss was incompetent. And in Masterton v. Mount Vernon 58, N. Y., 391, it was held that the plaintiff had a right to prove the business in which he was engaged, its extent and the particular part transacted by him.

In Chile v. Brokhahus 80, N. Y., 620, which was an action for physical injuries the Court said: "If a business is entirely broken up, the amount previously done is ordinarily pertinent upon the question of the amount which might subsequently be done, and the same is true for a partial interruption of the business."

The plaintiff below did not prove the precise loss of business or profits and even if the exact amount of loss of profits of the business was susceptible of proof such evidence would not have been regarded as establishing a measure of damages, but would only be admissable to aid the jury in the exercise of their discretion in estimating the amount of compensation to be paid to the plaintiff. New Jersey Express Co. v. Nichols 4 Vr., 434 ; Logansport v. Justice 74 Ind., 386.

If the plaintiff had been engaged in no business his time and services would not have been affected by the injury, but, since he was actively engaged in business, and before the injury was devoting his whole time and attention thereto, why was not his enforced inability to supervise personally and to attend thereto an element of damage? Why was not the evidence relating to the nature, extent and decline of the business proper?

An examination of the New York authorities will disclose that damages for a loss of profits, as such, are never allowed, unless arising from the inability of the plaintiff to perform his accustomed occupation, and that if in his occupation or business he combines capital, or labor of others, he cannot recover for profits in an action for physical injuries. Masterton v. Mount Vernon, Supra, but in those cases he may recover for the loss of his time and the value of his services, and evidence of the extent, nature and decline of his business is competent. See also Joyce on Damages, section 235.

In New Jersey, in the much quoted case New Jersey Express Co. v. Nichols 4 Vroom, 434, Jus-

tice Depue said, "In actions founded on contract evidence of the loss of profits resulting from non-performance has, in some instances, been rejected as too speculative and uncertain to be made the means of arriving at compensation as the measure of damages. But in actions of tort, where the *quantum* of damages is very much within the discretion of the jury, evidence of the nature and extent of the plaintiff's business and the general rate of profits he has realized therefrom, which has been interrupted by the defendant's wrongful act, is properly received, not on the ground of its furnishing measure of damages to be adopted by the jury, but to be taken into consideration by the jury to guide them in the exercise of that discussion, which to a certain extent is always vested in the jury."

8 Am. and Eng. Encyc. of L., p. 626-7.

Under this rule the testimony was proper and material? The evidence relates to the nature and extent of the plaintiff's business and was the best proof thereof. Was not the evidence given to show "the extent of the business" and therefore allowable under the above rule and the above cited case of Schwartz v. North Jersey Str. R. R. Co.

The testimony was proper because it had a direct bearing on the plaintiff's loss of time and the value of his services.

Joyce in his work on Evidence, section 233, lays down the rule as follows :

Loss of Time.

In an action to recover damages for an injury sustained by a person engaged in business, loss of time is an element to be considered in estimating the damages as recoverable therefor ; and in order to assist the jury in arriving at a fair estimate of the compensation allowable for this element, it is proper to consider the business the plaintiff is engaged in , the nature and extent of such business, the importance of his personal oversight and superintendence in conducting it and the consequent loss from his inability to prosecute it. See also 52 L. R. A.(pp. 38-41) for an extensive review of the most important cases which support the rule laid down in Joyce.

A careful reading of the evidence admitted on the trial will disclose that it was given to show the nature and extent of the plaintiff's business, the importance of his personal oversight, and the loss from his inability to prosecute it.

The fact that the plaintiff was a partner in the business does not preclude him from recovering damages for his loss of time and services. Joyce on Damages, section 234 ; Mt. Adams &c. R. R. Co. v. Isaacs, 18 Ohio C. C., 117 ; Kendall v. Albia 73 Iowa, 241 ; Masterton v. Mount Vernon 58 N. Y., 391, 61 Pac. Rep., 414.

In the present case it is true no books were introduced, but the character of the meagre books kept by the plaintiff's firm was shown. The ledger merely contained debits for goods sold to customers on credit, and its production would not have shown the extent of the business done, and its non-production was not objected to.

The non-production of the bank or deposit book was objected to by the defendant's counsel, but had it been produced it would not have shown the amount of the receipts of the business because the witness, George H. Mason, testified that he did not deposit the whole receipts but did deposit about half of them. His evidence was the best that could be produced as to the nature, extent and decline of the business owing to the plaintiff's injury, and the production of the ledger and bank book would not have disclosed these matters. All cash purchases and all cash sales were not recorded. It is a fact that incomplete books of the business were kept, but they were satisfactory to the plaintiff and his partner, and that proper and full books of the business were not kept, cannot be taken advantage of by the defendant. The rule is that, "While damages must be reasonably certain and the burden of proving damages rests in a general sense upon the plaintiff, yet, if through no fault of his, the precise damages sustained cannot be accurately determined the wrong-doer must bear the burden of that difficulty." Sherman and Redfield on Neg., section 740.

In New Jersey Express Co. v. Nichols, the plaintiff was an architect and testified merely that his annual income was about twenty-five hundred dollars. No books were produced nor was an account of his expenses given, so far as it appears from the report of the case. The testimony was held pertinent and the verdict of the jury sustained. The testimony was allowed because it related to the extent and nature of the plaintiff's business and

showed his damages for loss of time and services.

In the recent case of Erie R. R. Co. v. Bartow, 62 Atl. R., 489, the plaintiff on the trial testified as follows. (See p. 1617 of that case):

"Q. Before the accident about how much did you make?

"*The Court:*—Do you mean down to the time of the accident?

"*Mr. McGinnis:*—(Plaintiff's counsel.) Yes.

"A. $1,000.00 a year.

"Q. How much have you made since the accident?

"A. I have not made anything. I have not been able to work." This was the complete statement about the matter.

No books were produced or accounted for. The plaintiff's business was that of a farmer and basket maker.

A verdict for the plaintiff was rendered and this was set aside by the Supreme Court. Judge Fort, who delivered the opinion of the Court, said, "Profits must be proved, they cannot be estimated by the jury without data to justify their finding. There was no proof in the cause which would justify the jury in assessing any damages to the plaintiff for loss of profits. His books were not produced nor was there given any estimate of his expenses incident to the conduct of his business or the proportion of the expenses to the gross income."

With all due respect to the Court counsel is of opinion that in view of the rule laid down in the

New Jersey Express Co. v. Nichols the above case was improperly decided. The facts and proofs in both cases are identical. Each plaintiff testified as to their annual income, neither produced books of their business nor showed the proportion of the expenses to the gross income, yet in one case the verdict was sustained and in the other set aside. The case of the Erie R. R. Co. v. Bartow was settled between the parties after an appeal was taken to the court.

This case does not lay down the rule that books of the plaintiff's business must be produced. It does lay down the rule that proof of loss must be made so that the jury may estimate the damages.

I have in my possession the state of the case in the Bartow case and also the briefs of the respective counsel. There is no New Jersey case on this point cited by either counsel except the case of East Jersey Water Co. v. Bigelow, 31 Vr., 201. This also is the only case of any kind cited in the opinion of the Supreme Court. The Bigelow case was an action for nuisance by diverting and diminishing the water in the stream to the detriment of a mill owner. It is said in this case that profits are recoverable as damages where they might have been realized and where they are capable of being estimated with a reasonable degree of certainty. For this proposition the case of New Jersey Express Co. v. Nichols, is cited. The Court, however, there held that the plaintiff could recover damages for the loss of his personal services and that to what extent he had sustained pecuniary injury must depend upon the nature and extent of his business and that the jury would not be in condition to reach any correct conclusion on that sub-

ject unless they had before them some evidence of the value of the services to himself, 4 Vr., 437-438.

I do not think the Bartow case will finally settle the law on this subject. But whether it does or not the case in hand is distinguishable from it. Bartow did not show ~~whether he had any~~ books of account ~~or not~~. Mason ~~did~~ had none. Bartow furnished no explanation why he lost the amount stated. Mason has shown this by the testimony of several witnesses who say that the business diminished in volume because of the non-attendance of the plaintiff. His son, the other partner, was engaged mainly in obtaining and filling orders for groceries outside the store. This lucrative trade had to be given up (p. 43). He attributes the diminution in their weekly income between $60 and $80 a week. Can it be contended that this precise statement is not as was said in the Nichols case some evidence to go to the jury of the value of the services of the plaintiff. Suppose two plaintiffs, A and B, who receive personal injuries of the same character, bring suit to recover damages. In the case of A it appears by a simple statement that at the time of the injury he had an income of ten thousand dollars a year. In the case of B it appears that he had an income of one thousand dollars a year. Would it be said that the verdict for A, which was substantially in excess of that of B, would not be a perfectly legal and proper allowance for the difference in their income? There was no specific request to charge as to the measure of damages. An exception was asked for on this point (p. 124). The language of the Court *inter alia* was as follows: "Common experience tells us that business depends on cir-

cumstances, and if you allow anything for damages by way of loss of profits, you ought to be satisfied from the evidence that there is something tangible to go by, but I confess I cannot see anything myself," (p. 117). The plaintiff below might complain of these remarks but it is not seen how they have injured the defendant below.

Fourth Assignment.

This assignment relates to the failure of the Judge to non-suit. The case was a clear one for the jury and it was a question for them exclusively to consider whether there was an invitation to alight, what significance there was in calling out the name of the station and having the train immediately stop at a place which was dark and where there were steel rails piled up alongside the track and over which the plaintiff fell. There are two counts in the declaration. The chief distinction between them is that in the first count among other things that the defendant below maintained an open walk along their track, while in the second count nothing is said about the foot-path. The counsel for the defendant below did not note this distinction.

Fifth to Eighth Assignments Inclusive.

The evidence offered by the defendant below was properly overruled and disallowed by the trial court because incompetent and irrelevant. The length of other or similar station platforms was immaterial and in no manner relieved the railroad company from its obligation to provide a safe and proper place for the plaintiff to alight from the

train and like egress to the street, nor did the length of time other trains usually stopped at the station, where the plaintiff alighted, mentioned in the eighth error, have any bearing on the plaintiff's cause of action.

Ninth Assignment.

This is the same as the fifth assignment and the Court very properly refused to direct a verdict for the defendant company. A case to go to the jury had been made out by the plaintiff.

Tenth Assignment.

The trial Judge very properly refused to charge the jury as requested because the injury was not caused by negligently obstructing the street or station customarily used by passengers, but was caused by the improper stoppage of the train before it had fully arrived at the station, the calling out of the station by the brakeman and the falling of the plaintiff over the rails lying alongside the track when he alighted in the dark from the train at an improper place.

Eleventh to Fourteenth Assignments Inclusive.

These are alleged errors because the trial Judge refused to charge the jury in the language requested by the defendant's counsel. The Judge, as a reading of the charge will disclose, substantially and accurately stated the law, in his own language, on these matters, and refused to change his charge thereon.

Fifteenth Error and Seventeenth Assignment.

The trial Judge very properly left it to the jury to say whether or not the calling out of the name of the station, "River Street station," by the brakeman was an invitation to the passengers to alight. This was purely a question of fact and therefore proper to go to the jury. The calling out of the station and the stoppage of the train simultaneously or immediately before or after is regarded by all railroad travellers as an announcement that the train has arrived at the station named and the passengers may alight.

Sixteenth Assignment.

The Judge made no error in this particular part of his charge and laid down the well know rule relating to railroads requiring them to provide a reasonably safe place for passengers to alight. D. L. & W. R. R. Co., vs. Troutwein 23 Vr., 169. Falk 2 N. Y., S. &. W. R. R. Co., 27 Vr., 380. The judgement should be affirmed.

Respectfully submitted,

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New Jersey Court of Errors and Appeals.

JOHN G. MASON, Defendant in Error, vs. ERIE RAILROAD COMPANY, Plaintiff in Error.	On Error to Supreme Court.

BRIEF OF COLLINS & CORBIN ON BEHALF OF ERIE RAILROAD COMPANY, PLAINTIFF IN ERROR.

The defendant in error (plaintiff below) recovered a verdict against the plaintiff in error (defendant below) for personal injuries alleged to have been sustained by him near the station known as River Street, in the City of Paterson, about six o'clock in the evening, on January 16, 1906. The plaintiff was a passenger from Jersey City to River Street on a train of the defendant railroad company. At River Street station the railroad tracks run nearly north and south; the station building is on the right hand or easterly side of the west (or north) bound track. The highway known as River Street crosses the railroad tracks at an angle, the station building being located in the acute angle to the north of the street and east of the tracks, a short distance from the crossing. The station platform extends in a southerly direction as far as the crossing, the platform being on the

same level as the street and the crossing planks so that passengers can alight not only on the station platform proper, but also directly on the street. The distance from the north end of the station platform to the south side of River street is four hundred and twenty feet, the length of the station platform proper being about two hundred and twenty feet. The train on which plaintiff was riding had eight passenger cars; when it stopped at River Street station the engine was opposite the north end of the platform; plaintiff was in the second car from the last (p. 25, line 1); when the train was approaching the station, he says that the brakeman walked forward through the car and called out "River Street;" thereupon plaintiff walked to the rear platform of car in which he was riding; he stepped down on the east or station side, cautiously and slowly, as it appeared it was very dark and he noticed he was taking "a very long step" (p. 26, line 25), and then he started to walk across a little ditch alongside of the track, took one or two steps and tripped over something and says that for the moment he was rendered unconscious; then he got up and on looking back saw that there was a pile of rails lying in the ditch at the place where he had fallen.

There are two counts in the declaration: The first count charges that on the easterly side of the right of way there was an open space, path or walk which, with the consent of defendant and under its direction, was used by passengers leaving the rear coaches of defendant's trains, and by reason thereof it became the duty of the defendant to use care around such station and said open space, path or walk "where it invited and directed passengers to leave its said cars"; the breach alleged is that the defendant failed to provide a reasonably safe means of egress from its grounds and negligently piled up certain rails in said open space, path or walk, and rendered the same extremely dangerous for passengers invited to leave its trains at the place, to pass along the same to the public street and continued said dangers without

notice or warning to notify persons leaving its trains at its invitation, that the same was dangerous. It is then alleged that the plaintiff was invited to leave the train, and he thereupon did so and fell over the rails while proceeding to walk along said open space, path or walk (pp. 5, 6).

The second count charges that the train in which the plaintiff was riding as a passenger did not, "owing to the length of the train, reach the platform of the station"; that the station was announced and plaintiff thereupon believing that the car had stopped at a proper place for him to leave the car, alighted therefrom and proceeded on foot to leave the property of the defendant "by the only means provided by the defendant for such purposes from where said car or coach had stopped, and gained a public street or highway"; that before reaching the street, and while upon defendant's grounds, and by reason of defendant's negligence "in failing to provide a platform or other reasonably safe or convenient means of leaving its said property" at the place where the car stopped, and by reason of defendant's negligence in failing to provide any light where the car stopped, and in negligently piling rails on its property, the plaintiff struck against the rails and was thereby tripped and thrown to the ground (pp. 8, 9).

The plaintiff did not prove any custom on the part of passengers to alight at or near the place where he was injured and did not prove any invitation on the part of the defendant for him to alight at that point other than the mere announcement of the station by the brakeman. Motions for non-suit and direction of verdict were made and denied, and the jury found a verdict in favor of the plaintiff and assessed the damages at the sum of three thousand dollars. From the judgment entered thereon the defendant has sued out this writ of error.

I.

There was no legal duty on the part of the defendant to maintain in safe condition for the use of passengers the place where plaintiff was injured.

The northerly end of the pile of rails over which the plaintiff stumbled was forty-six feet from the southerly side of the crossing at River street (p. 95, line 25; also see mark placed by witness Joyce on map). There was a ditch about two feet deep running alongside of the track, and the rails were set just on top of the ditch (p. 95, line 10). The photographs make it clear that this place was obviously not intended for the use of passengers; it was forty-six feet from the nearest point of River street and over two hundred feet from the station platform.

The duty of the railroad company is performed by providing a reasonably safe platform; it is not bound to keep the vicinity of its tracks, some distance from the platform, free from obstructions (*Walthers v. Chicago, &c., R. Co., 72 Ill. App., 354*).

The only ground on which a duty might be imposed upon the railroad company to have this space in good condition for the use of passengers would be because passengers were accustomed to alight at that point, and such custom had continued long enough to charge the railroad with notice of its existence. The first count in the declaration in the case is based upon the theory that passengers were invited to leave its trains at the place in question. It is not claimed that there was any express invitation or direction, and the only way such invitation could be implied would be by a custom, notice of which was chargeable to the company. *But there was no proof whatever of any custom on the part of passengers to alight at this place.* So far as the evidence shows, the plaintiff is the only passenger who ever tried to get off a train at that point.

The duty of the railroad to keep safe an unusual place for alighting depends solely upon the existence of a custom on the part of passengers to alight at such place. The principle is thus stated :

> "If *by custom* the carrier recognizes a proper place for getting on board or alighting, which is not the usual place specially provided for that purpose, the duty to provide safe approaches exists, although it may not be necessary to provide the same means for approaches that would be required at the usual place" (6 Cyc., p. 606).

If there was no such custom, plaintiff's case must depend upon an invitation to alight at that place. Persons who enter or leave a train at a place not intended for getting on board or alighting, and without any invitation or direction to do so, cannot recover for injuries resulting from the insecurity of such place.

Central R. Co. vs. Thompson, 76 Ga., 770.
MacDonald vs. Chicago, &c., R. Co., 26 Iowa, 124.
Gunderman vs. Missouri, &c., R. Co., 58 Mo. Ap., 370.
Murch vs. Concord R. Co., 29 N. H., 9.

In the case of *St. Louis, &c., R. Co. vs. McCallough, 45 S. W., 324* (*Texas*), it was held that the plaintiff was not entitled to recover in the absence of proof to show that the custom of assisting passengers to alight was "so well known and acquiesced in that it may reasonably be presumed to have been an ingredient imported into the contract by the parties."

The leading case in this State is *D. L. & W. R. R. Co. vs. Trautwein, 23 Vr., 169.* In that case the facts showed that by *sufferance* and *use* the passageway where the plaintiff was injured had obtained such an appearance of a passageway passengers were invited to use, that it might be fairly concluded it was a means of entrance and egress supplied by the company for such purposes (p. 176). This is very differ-

ent from the case in hand, where the place of the accident was a mere ditch over two hundred feet from the station platform and nearly fifty feet from the nearest street.

Likewise in the case of *D. L. & W. R. R. vs. Perret, 31 Vr., 589,* the defendant railroad was held liable because the plaintiff was *invited* to alight at a dangerous place by a servant of the company.

Plaintiff did not attempt to prove any custom from which an invitation to alight in the ditch might be implied, and on this ground the motion for non-suit should have been granted.

But looking at the case from the most favorable point of view for plaintiff, we submit that the defendant was at least entitled to have its fifth request charged. This was intended to direct the attention of the jury to the claim of defendant that it was not bound to keep the space safe for use by passengers in the absence of proof of custom of passengers to alight there (p. 121, lines 10-20). We claim that this was a fair statement of the law, and that the refusal to charge, as requested, was error.

II.

It was error for the trial Judge to refuse to charge defendant's first and second requests.

These will be found on page 120 of Case. They directed the attention of the trial Judge to defendant's claim that proof of invitation to alight at the place where the plaintiff alighted, or proof of a custom (chargeable to defendant) to alight at that place was essential in order to justify the jury in finding a verdict for the plaintiff. The trial Judge refused to

charge either of these requests. We submit that they fairly stated the only grounds upon which the plaintiff was entitled to recover, if he could recover at all. Instead of charging these requests, the trial Judge laid stress upon the claim made by the plaintiff that the announcement of the station by the brakeman amounted to an invitation to the plaintiff to alight. Thus he stated :

> " In order to decide in his favor, you must be
> " satisfied from all the circumstances of the case
> " disclosed by the evidence, that this plaintiff had
> " the right as a reasonable and prudent man, to
> " consider that the calling out by brakeman
> " ' River Street Station ' was an invitation for
> " him, as well as other passengers, to alight at
> " that place " (p. 113, lines 30–35).

The trial Judge then discusses this point at some length and concluded this part of the charge in these words :

> " I am going to leave that to you to say, to
> " determine whether or not you think, as a matter
> " of fact, his conduct was reasonable ; whether he
> " acted in a reasonable, a prudent and a careful
> " manner, and whether he had the right to assume
> " that the announcement of the station was a
> " request for him to alight at that particular
> " place."
>
> (p. 116, lines 30–35).

Under Point III. we discuss the question as to whether or not this part of the charge was legally correct, but the point at present is that even if it was correct, nevertheless, the case did not turn *solely* on that question. The announcement of the station was a mere incident to the stopping of the train, and the important legal question on which the jury should have been charged, was whether or not there was any proof

of invitation for passengers to alight at the place where plaintiff was injured ; or if there was no proof of any express invitation, then whether or not there was proof of a custom to alight at that place, and that the defendant knew of such custom and was, therefore, bound to anticipate that passengers in the exercise of reasonable care might attempt to leave the train at that place.

III.

The announcement of the name of the station by the brakeman was not an invitation to the plaintiff to alight from the rear end of the car in which he was riding.

The plaintiff said that when the train was approaching the station, the brakeman called out "River Street," and thereupon he went out on the *back* platform (p. 14, lines 10–20). The brakeman was going *forward* through the car (p. 24, line 28). Under this evidence, the trial Judge left it to the jury to say whether this act of the brakeman was an invitation to alight at the place where the accident happened (p. 114, lines 10–20). We submit that the mere announcement of the station is not an invitation to get off at any point where the train happens to stop. Suppose the train stopped before it arrived at the station, as it might well do in case of an accident ; could it be said that because the brakeman had announced the station, that therefore the passenger would be justified in assuming that he could leave the train in safety no matter how far from the station it might have stopped. There was no crowd on the train and no occasion to hurry. The plaintiff was familiar with the station

grounds; he had got off at the same station before on several occasions, sometimes in the day time, and knew that the platform in front of the station extended only as far as River Street (p. 23, lines 1-20).

The passenger may be entitled to notice that the train is approaching the station (6 Cyc., p. 587).

But the mere announcement of the station is not an invitation to alight (*Smith vs. Georgia Pacific R. Co., 88 Ala., 538, 7 South., 119, 7 L. R. A., 323*). This opinion cites several cases and deduces from them the following principle:

> "When the name of the station is called, and
> "soon thereafter the train is brought to a stand-
> "still, a passenger may reasonably conclude that
> "it has stopped at the station and endeavor to get
> "off, *unless* the circumstances and indications are
> "such as to render manifest that the train has not
> "reached the proper and usual landing place."

The announcement of the station is "neither a guaranty nor an intimation" that it is safe to leave the cars (*Gunzales vs. N. Y., &c., R. R., 33 N. Y. Super. Ct. (1 Jones & S.), 57.*)

The announcement is certainly not an invitation to passengers to alight at any point where the train happens to stop, and still less to alight at the rear end of the car when the brakeman is walking toward the front end with a lantern. In the present case the evidence shows that if plaintiff had gone out the front end of the car in which he was riding, he would have alighted safely on the highway. He was in second car from the last (p. 25, line 1); the rails over which he stumbled were 46 feet from the south side of River street (p. 95, line 25); the two rear cars were at the south of the street. This would bring the front of the second car on the edge of River street (p. 108). Had the plaintiff followed the brakeman and alighted from the front of the car, the accident would not have happened.

We submit that it was error to permit the jury to find negligence on the part of the defendant, merely because the brakeman announced the station and shortly thereafter the train stopped. The attention of the trial Judge was specifically called to this point by defendant's third request to charge (p. 120, line 30). This was refused, and therein also we submit there was error.

IV.

The plaintiff should have been non-suited because the evidence showed contributory negligence on his part.

Plaintiff admits that he had been at the station before several times, both in the day time and at night time, and knew that the platform did not extend any further than River street (p. 23, lines 10–20). He also admits that there were lights at the station and that there were no lights at the place where he tried to get off (p. 24, lines 1–15). The fact that he knew that the car was not opposite the station platform is also shown by his admission that he found it was a very long step as he was about to get off (p. 26, lines 25–35). On this point the Court charged the jury that if it is apparent to the passenger that the place is a place of danger, and if with that knowledge he steps off into the place of danger, even if he does it at the invitation of the defendant, he is guilty of contributory negligence (p. 114, line 35, to p. 115, line 5). We agree with this statement of the law, but we submit that under plaintiff's own evidence there was no question of fact for the jury to consider. It appeared beyond any question that plaintiff knew the train had not arrived

at the station and that he was getting off in a dark and dangerous place.

In the case of *Chicago, &c., R. R. Co. vs. Harrison, 100 Ill. App., 211*, the plaintiff's intestate was killed while alighting from a train and proceeding along a route on which he had not been invited, and where the railroad had no reason to expect him to be, and the Court said that such a person was not in the exercise of ordinary care for his personal safety.

In *Louisville, &c., R. Co. vs. Keith, 58 S. W., 468 (Kentucky)*, the train went beyond the station platform before stopping; a passenger instead of requiring the conductor to bring the train to the platform, chose to alight where it was standing. Held that the passenger took the risk of injury and could not complain that the place was not suitable for alighting.

In the case of *Davis vs. Kansas City, &c., R. Co., 86 S. W., 995 (Ark.)*, it was held that if the circumstances and indications make it manifest that the proper and usual stopping place has not been reached, a passenger has no right to endeavor to get off, even if the name of the station has been called.

In *Siner vs. Great Western R. Co., L. R., 4 Ex., 117*, it was held that one who attempts to leave a railroad car, knowing that it is not opposite the platform, does so at his own risk. In that case the plaintiff was a passenger on an excursion train which was too long for the platform, and the car in which he was riding overshot it.

In the case in hand, the fact is undisputed that the plaintiff knew that his car had not come to the usual place of alighting. If he undertook to get off on a dark night, under these circumstances, he did so at his own risk. This is further discussed under Point V.

V.

It was error for the trial Judge to refuse to charge defendant's fourth request.

This request reads as follows:

> " If the plaintiff knew the location of River Street station and its platform and knew that he was alighting neither at a place provided by the defendant for the purpose, nor on a public street, he assumed the risk of attempting to depart from the place where he alighted " (p. 121).

The trial Judge refused to charge this request. We think such refusal was error. It appeared from the plaintiff's own testimony that he was familiar with the station and its platform. He admits that he knew the train was not at the station when he started to get off (p. 23, lines 30–40). He knew this, because it was a long step and there were no lights (pp. 24, 26).

It has been decided that if a passenger elects to alight from a car at a place where there is no platform, when by passing through the car in front of him he could alight with safety from the platform, and he is injured by so alighting, he is guilty of negligence and cannot recover. *Eckard vs. Railroad Co., 70 Iowa, 353.* In the case in hand the passenger elected to get off at a place where there was no platform and where he knew there was no platform. If, therefore, he voluntarily got off at this place, which was not provided by the defendant for the purpose of alighting and was not a public street, we submit that as a matter of law he assumed the risk of attempting to depart from that place and the trial Judge should have so charged.

VI.

It was error to refuse to admit evidence offered by the defendant to prove that the station platform in question was the customary and proper length.

The second count of the declaration is based on the theory that the car in which the plaintiff was riding did not reach the platform on account of the train being so long (p. 8, line 12). It was an eight car train; each car was sixty to seventy feet long (pp. 106, 107). The train stopped so that the engine was at the north end of the station platform (p. 107, line 20). The engine with its tender is about sixty feet long (p. 111, line 30). The distance from the north, or westerly, end of the station platform to the extreme south, or easterly, side of River street is four hundred and twenty feet. When the train stopped, the two rear cars were east, or south, of River street. The northerly end of the pile of rails was forty-six feet from the southerly side of River street (p. 95, line 25). If the two rear cars were on the southerly side of River street when the train stopped, the rear platform of the second car (in which plaintiff was riding) was about sixty feet from River street and the front platform would be directly on the edge of River street, so that if the plaintiff had walked out of the front end of the car, he would not have alighted in a ditch but in a safe place on the street, which was on a level with the station platform.

In order to meet the claim made by the plaintiff that he had a right to get off at the rear end of the car, the defendant offered to show that the station platform was the usual length at suburban stations similar to River street. The offer was, to prove that this was the usual length of platform, not only on the Erie Railroad, but other railroad companies. This offer was overruled. No ground of objection was stated and we are at a loss to understand on what theory the trial

Judge conceived that the objection should have been sustained. One of the most important issues in the case was whether the station platform was long enough, and we submit that the legal duty of the defendant with respect to the length of the platform must depend upon the common practice of railroad companies. It is obviously impossible in all cases to have a platform long enough to allow all of the cars to stop opposite it, and especially is this true in small suburban stations like River street.

Under the authorities it was clearly error to refuse to admit this evidence. Thus in the case of *Sturgis vs. Detroit, &c., R. Co., 72 Mich., 619*, it was held that " the full duty " of the railroad as to ingress and egress of passengers is fulfilled by providing " reasonable facilities " for that purpose. It is apparent that the question of what is reasonable facilities must depend, to considerable extent, upon the length of the platform.

In the case of *Walthers vs. Chicago, &c., R. R. Co., 72 Ill. App., 354*, it was held that if the Company has provided a " reasonably safe platform near its depot," the fact that there is a pile of cinders beside the track, " some distance from the platform," is the cause of injuries sustained by plaintiff in attempting to board the train while it is in motion, does not render the Company liable. Under the ruling in this case we submit that the question of whether a platform is reasonably safe depends to a large extent upon its length ; and the legal duty of the Company, with respect to the construction of a platform, must be measured by the general custom in like cases.

The duty of the Railroad Company with respect to platforms has also been passed on in this State. In the case of *Dotson vs. E. R. R. Co., 39 Vr., 679, 684*, this Court said : " A railroad company is only required to build platforms of sufficient dimensions to accommodate passengers getting on and off at the station." In that same case it was further held that evidence might be offered to show that the con-

struction of the platform did or did not conform to the usual mode of construction adopted by well regulated railroads (p. 686).

In *Traphagen vs. Erie R. R., 64 Atl., 1072*, this Court held with respect to car steps, that there is no breach of duty on the part of the railroad if the method of construction adopted is in common use and approved by experience.

VII.

It was error to refuse to admit evidence offered by the defendant that on the occasion of the accident the train stopped the usual length of time.

The defendant offered to prove that the train stopped the usual length of time at the station. Objection was made without any reason being stated therefor, and the objection was sustained.

The legal duty of the company is to stop its trains for a reasonable length of time in order to allow passengers in the exercise of due diligence to get off without danger (*Toledo, &c., R. Co. vs. Baddeley, 54 Ill., 19; So. R. R. vs. Kendick, 40 Miss., 374; Chicago, &c., R. Co. vs. Wimmer, 4 L. R. A. (N. S.), 140, 84 Pac., 378 (Kans.); and cases cited in the report of this last case in L. R. A.* Also see *6 Cyc., p. 587*). We submit that the question of whether the train stopped the usual length of time has an important, if not vital, bearing upon the question of whether the time allowed was reasonable. Thus, in the present case, the defendant claimed that the plaintiff should have walked forward through the car until he got to a place where he could alight with safety; but this claim, of course,

would not be of any importance unless it was shown that the train stopped long enough to allow the passengers time to walk forward.

We, therefore, submit that it was error to overrule the offer to show that at the time of the accident the train stopped the usual length of time.

VIII.

The trial Judge erred in charging the jury that it was the duty of the defendant to provide a reasonably safe place for its passengers to alight from its train.

The trial Judge stated to the jury :

> " It undoubtedly is the *duty* under the law * * * to provide a reasonably safe place for its passengers to alight from its train. There is no question about that."

And again :

> " It *must* provide a reasonably safe place for its passengers to alight from its cars " (pp. 113, 114).

This was error because it made the company an insurer of the passenger's safety. That this is not the legal duty of a railroad company has been decided in several cases. In *New Jersey Traction Company vs. Gardner, 29 Vr., 176,* the trial Judge charged the jury in the following language :

> " My charge to you is that if the request was " made of the driver to stop the car at First Street, " and in seeming obedience to such request, the

" driver did slow up the car in such a manner
" as to induce the plaintiff to believe that the car
" was to be held in check for him to alight, and
" he acted in accordance with such invitation,
" then the defendant was bound to so control the
" speed of the car as to insure this safety. This
" was a duty imposed on the defendant. Failure
" to perform it—proof of failure to perform it—is
" proof of negligence."

The Court of Errors and Appeals said that this charge was legally injurious to the defendant " in that it increased its duty from that of reasonable caution under circumstances imposing at best one of the lower degrees of care to the highest degree known to law, viz., that of an insurer " (p. 177).

In *Dotson vs. Erie R. R., 39 Vr., 679, 684,* the Court of Errors and Appeals laid down the rule as to station platforms in the following language:

" A railroad company is under a duty to exer-
" cise *ordinary and reasonable* care to so con-
" struct and maintain station buildings, platforms
" and approaches that they shall be safe for use
" by passengers."

In *Falk vs. N. Y. S. & W. R. R., 27 Vr., 380,* there was a demurrer to a declaration which averred that it was the duty of the defendant to furnish the plaintiff " safe ingress and egress from its cars." The Court said: " The averment that it was the duty of the defendant to furnish ' safe ingress and egress from its cars ' is certainly indefinite and very broad as a statement of duty. That averment, in its literal signification, would render the defendant an insurer of the passengers' safety in alighting from its cars. It might be said that, as stated, it is an undertaking for the passengers' safety in this respect at all hazards, but I think that it may be so interpreted as to cover and include that duty which the defendant did owe to the

plaintiff as a passenger, *to use reasonable care and precaution to provide him with means for alighting with safety from its cars.*"

The duty of a railroad is to use reasonable care to keep its premises safe for the use of passengers *(Exton vs. Central R. R., 33 Vr., 7, 13).*

In *Kelly vs. Manhattan R. Co., 112 N. Y., 443,* the plaintiff's intestate was injured by slipping on the steps leading from the elevated railroad track to the street. The steps were very slippery on account of a storm of snow and hail. No ashes or sawdust had been spread upon them to prevent people from slipping. It was held error for the trial Judge to charge the jury that it was the legal duty of the defendant to use "all human care, caution and skill to make the ingress and egress from its station safe." The Court says (p. 450):

> "The rule in relation to the liability of rail-
> "road corporations for injuries sustained by pas-
> "sengers under such circumstances as this case
> "develops, differs from that which obtains in the
> "case of an injury to a passenger while he is be-
> "ing carried over the road of the corporation and
> "where the injury occurs from a defect in the
> "road-bed or machinery, or in the construction of
> "the cars, or where it results from a defect in any
> "of the appliances such as would be likely to
> "occasion great danger and loss of life to those
> "traveling on the road. The rule in the latter
> "case requires from the carrier of passengers the
> "exercise of the utmost care, so far as human
> "skill and foresight can go, for the reason that a
> "neglect of duty in such a case is likely to result
> "in great bodily harm and sometimes death to
> "those who are compelled to use that means of
> "conveyance. As the result of the least negli-
> "gence may be of so fatal a nature, the duty of
> "vigilance on the part of the carrier requires the
> "exercise of that amount of care and skill in

" order to prevent accident (Hegeman v. Western
" R. R. Co., 13 N. Y., 9). But in the approaches
" to the cars, such as platforms, halls, stairways
" and the like, a less degree of care is required,
" and for the reason that the consequences of a
" neglect of the highest skill and care which
" human foresight can attain to are naturally of a
" much less serious nature. The rule in such
" cases is that the carrier is bound simply to
" exercise ordinary care in view of the dangers to
" to be apprehended."

The same rule was also applied in the case of *Laflin vs. B. & S. R. R. Co., 106 N. Y., 136.* In that case a passenger was injured in stepping from a car to the platform by falling between it and the car step. The distance between the platform and the car was eleven inches. The lower step of the car was eight inches below the top of the platform and one foot seven inches distant therefrom. The second step was about four inches below the platform and two feet two inches therefrom. Plaintiff stepped from second step without looking to see the station platform. Prior to the accident no one had been injured or had suffered any inconvenience on account of the distance between the platform and the cars. There was no complaint that the platform was out of order or improperly constructed. Held, that refusal to direct a verdict for defendant was error. At page 139 the Court says: " The company was not bound so to construct its platform as to make accidents to passengers using the same impossible, or to use the highest degree of diligence to make it safe, convenient and useful. It was bound simply to exercise ordinary care in view of the dangers attending its use, to make it reasonably adequate for the purpose to which it was devoted."

Recent cases in New Jersey to the same effect are: *Traphagen vs. Erie R. R., 64 Atl., 1072,* and *Fitch vs. Central R. R., 64 Atl., 992.* The latter case expressly approves *Kelly vs. Manhattan R. R. Co., supra.*

Under the foregoing decisions there is no escape from the conclusion that the charge was erroneous and injurious to the defendant. If the trial Judge had said that it was the duty of the railroad to use reasonable care to provide its passengers with a safe means of leaving the cars, that would have been in accord with the decisions. But to say that it was undoubtedly the duty of the company under the law to provide a reasonably safe place to alight, and to say that the company *must* provide such a place, is equivalent to saying that the company insures the safety of its passengers with respect to the means and opportunity of alighting. Nothing appears later in the charge which in any way modifies this statement; it was laid down as the controlling principle for the guidance of the jury in determining whether the defendant had failed to perform its legal duty.

IX.

The trial Judge erred in permitting the jury to allow the plaintiff anything for damages by way of loss of profits.

The plaintiff was in the grocery business in partnership with his son. The partnership had continued about six years (p. 22, line 28; p. 37, lines 35–40).

Plaintiff's attorney asked the plaintiff if there was any diminution of the income of the store during plaintiff's illness. Objection was made, both because the business was carried on by the plaintiff with a partner and also on the ground that it was not the best method of proof (p. 27, lines 10–30). The question was thereupon withdrawn (p. 28, line 8), and it was shown that books of account were kept. These books were at the store at the time of the trial (p. 28, lines 10–20).

Plaintiff said that his son looked after that part of the business (p. 28, line 35). The son was then called as a witness and testified that they did not consider it necessary to keep *all* the accounts, but most of the time they did have a bank book and ledgers and day books. Customers' accounts were kept in the ledgers and day books. No cash book or stock book was kept (p. 38, lines 1–20). Thereupon plaintiff's attorney, without offering to produce the books, asked the witness what amount per week was received in the partnership business. Objection was duly made and leave given the defendant to cross-examine. From cross-examination it appeared that the deposit book would show about half of the receipts, except some small change (p. 38, line 30, to p. 39, line 10). The witness and plaintiff drew " a certain sum " by the week for wages, but there was no evidence to show the amount thus drawn. It further appeared that the witness estimated the amount that he took in per week by reference to the deposits and the amount of cash on hand, and what he generally spent in buying in the market and of farmers (p. 39, lines 30–40). After discussion, the Court admitted the question as to the amount received per week and exception was duly allowed and error assigned (p. 41). The witness thereupon stated that the average *income* during the months of November and December 1905, was close to $800 per week (p. 41, lines 20–30). Afterward he said that the average was about $600 (p. 42, line 15). He further said that on account of the injury to his father, some of the customers had to be cut off as they were not close enough to the route (p. 43, lines 1–10). It will be observed that he does not say what customers or how many were thus cut off or what profit, if any, was derived from their customers. It might well be that these customers were not profitable because of the very fact that they lived so far away. The witness finally admitted that it would be impossible to tell correctly the entire amount of the weekly diminution caused by the absence of his father (p. 43, line 30).

He was then asked what loss of income or profit was there in any way he could compute, and he replied " between $60 and $80 a week *income.*" It will be observed that he does not say how he makes the computation, and he limits his answer to income and says nothing about profit. By income, the witness meant the amount of sales (p. 43, line 40). He further stated that the business did not again become normal because he had to cut " some of the trade." Again it will be observed that he does not say how much of the trade was cut, nor whether or not it was profitable. One half of the stock of the business was purchased in New York and paid for by check (p. 50, line 35). None of the checks or bank books were produced.

In his charge to the jury the trial Judge referred to the claim made for loss of profits, and said :

> " If you allow him anything for damages by way of loss of profits, you ought to be satisfied from the evidence that there is something to go by, but I confess I cannot see anything myself " (p. 117, lines 35–40).

Again, he said :

> " The plaintiff claims there was a loss of profit, and the burden of proof is upon him to prove what that loss was " (p. 118, lines 1–5).

Exception was taken to this part of the charge on the ground that the Court should have charged distinctly that the jury must not find any damages for loss of profit (p. 124, line 10).

We submit that under the evidence in this case it was clear error for the trial Judge to permit the jury to find any damages by way of loss of profits. There was no proof whatever in the case to show that the business was in fact profitable. Still less was there any proof as to the amount of profit. The only proof on the subject was that

the receipts amounted to $600 to $800 per week. This testimony, we think, was objectionable because it was obviously merely an estimate of the witness and he did not produce books which were admittedly kept by the partnership. But the evidence, even if admissible, only goes so far as to show that the receipts averaged a certain sum. There is no presumption that the grocery business is profitable. No attempt was made to show that this business ever produced any profits to the plaintiff. To be sure, it was stated that the parties drew "a certain sum" per week for wages; but there is no proof of the sum that they thus drew. For all that appeared they might have drawn this sum out of the capital of the business rather than the profits.

The case of *Bartow vs. Erie R. R. Co., 62 Atl., 489* (N. J. Supreme Ct., Nov., 1905) holds that although loss of profits in business are recoverable when they can be estimated with reasonable certainty, yet where the proof furnishes no data from which the jury may find with reasonable certainty the amount of the profits, it is error for the Court to submit this element of damages to the jury. This case was strikingly similar to the case in hand in that the only testimony given on the subject was the statement of the amount of the receipts of the plaintiff per annum in his business—that is, of the gross amount of his business. "The books were not produced, nor was there given by him any estimate of the expenses incident to the conduct of his business nor of the proportion of the expenses to the gross income." The Court said:

> "Profits must be proved. They can not be estimated without data to justify their finding. *East Jersey Water Co. vs. Bigelow, 60 N. J. L., 201; 38 Atl., 631.*"

The case is very different from those cases in which it has been said that the loss of the plaintiff's earning power forms a proper element of damage; thus, if the

plaintiff was earning a salary or receiving a certain amount of wages, he has a right to show how much he has lost because of the injury sustained by the accident. But in the present case the jury were permitted to find damages for the plaintiff for loss of profits of a commercial business. We submit in the first place that such profits cannot be considered for the reason that they are too indefinite and uncertain and incapable of exact measurement; and in the second place that even if such element of damages could properly be considered by the jury, the plaintiff's evidence utterly failed to give any sufficient data by which such damages could be fixed.

The general rule as to recovery of profits, as laid down in 13 Cyc., p. 50, is as follows:

"Where the profits claimed are merely speculative or remote, and not capable of being correctly ascertained under the recognized rules of evidence, they have been invariably denied by the courts, whether such profits are claimed in actions *ex delicto* or whether they are claimed in actions *ex contractu*."

We do not quarrel with the rule that it is competent to show the amount of the business previously done and the diminution in sales as compared with other periods (8 Am. & Eng. Encyc. of Law, p. 626); but we claim that in the present case there is no fair basis of comparison and nothing to show what was the fair amount of the profit from the plaintiff's business before the accident. Such proof may be difficult in a case where no complete books are kept, but the carelessness of the plaintiff in business matters ought not to be charged up against the defendant.

The case of *New Jersey Express Co. vs. Nichols, 4 Vr., 434*, is no authority for the plaintiff. That case was an action for damages for personal injuries received by the plaintiff. He was an architect, and evidence was allowed to show the nature and extent of his business and the general rate of profit realized therefrom. This is a very different case from the present. Any professional man probably

would have the right to show what his business was and what his profit was therefrom in estimating his damages; and in fact, there would be no other way to get at the amount of damages. But that was very different from a commercial enterprise, such as the plaintiff was conducting, and which was not dependent to any great extent upon his personal ability, but was subject to the usual vicissitudes of business life. Furthermore, in the present case no data was supplied by the plaintiff from which it would be possible to form any reasonable estimate of the amount of his net profits. The evidence was at best nothing more than a guess or a supposition.

In the case of *East Jersey Water Co. vs. Bigelow, 31 Vr., 201*, the Court of Errors and Appeals decided, in effect, that there must be proof of actual loss suffered in order to entitle the plaintiff to recover substantial damages for loss of profits.

In *Masterton vs. Mount Vernon, 58 N. Y., 381*, the New York Court of Appeals decided that in an action to recover damages for personal injuries by which the plaintiff is prevented from transacting his accustomed business, proof of past profits is incompetent where the business is of such nature that the profits are uncertain. In that case the plaintiff was engaged in the tea importing business and in the buying and selling of teas, and he claimed by cause of his injury he could not purchase teas and there was a falling off in the business of the firm. The Court decided that the trial Judge erred in overruling the defendant's objection to the following question :

> "About what had been your profit year by year in that business ?"

The Court distinguished other cases in which proof of profits was admitted, in the following language :

> "In none of these cases is any intimation given that proof may be given as to the uncertain

> future profits of commercial business, or that the amount of past profits derived therefrom may be shown, to enable the jury to conjecture what the future might probably be. These profits depend upon too many contingencies and are altogether too uncertain to furnish any safe guide in fixing the amount of damages " (p. 396).

The Court further says, that if the plaintiff has received a fixed compensation for his services, or his earnings can be shown with reasonable certainty, then the proof is competent.

The Court distinguishes the case of *Lincoln vs. Saratoga, etc., R. Co., 21 Wend., 425*, where it was held that the plaintiff might show that he was engaged in the dry-goods business, and the extent of such business. In this latter case, however, it was held incompetent to offer in evidence the opinions of witnesses as to the amount of the loss caused by the plaintiff's absence from his business on account of the injury and there was no attempt to prove past profits.

In the case of *Bierbach vs. Goodyear Co., 54 Wis., 208*, plaintiff sued for personal injuries which prevented him from giving personal attention to the business which he had previously carried on. His business was the manufacture and sale of patent medicines. Held error to admit proof of the average profits of his business while he carried it on as a basis for estimating his damages, such a basis being of too uncertain and speculative character. The Court says :

> " We conclude that it was error to permit the plaintiff to give testimony of the value of his business when he carried it on. In view of the large damages awarded by the jury, it is fair to presume that such testimony materially enhanced damages. It is clear that it may have done so, hence the error is material and fatal to the judgment."

A somewhat similar case is *Blair vs. Milwaukee R. Co., 20 Wis., 260*. Plaintiff sued to recover damages

for personal injuries. He was a member of a mercantile firm. Held that the plaintiff could not ask his partner as a witness for him to testify what was the amount of damages for the firm for a specified time, by reason of plaintiff's absence because of these injuries.

It may be argued by the plaintiff's counsel that inasmuch as the plaintiff had an established business he had a right to show the average profits from time to time. Perhaps this is true in general, but the plaintiff must make it reasonably certain, by competent proof, what the amount of his actual loss was. Thus, in the case of *Central Coal and Coke Co. vs. Hartman, 111 Fed., 906*, suit was brought against the company for damages which the plaintiff said the defendants had inflicted upon his business by a combination in violation of the Sherman Act. The United States Circuit Court of Appeals for the Eighth Circuit lays down the rule in the following language:

> "The general rule is that the anticipated profits of a commercial business are too remote, speculative and dependent upon changing circumstances to warrant a judgment for their loss. There is an exception to this rule that the loss of profits from the interruption of an established business may be recovered where the plaintiff makes it reasonably certain, by competent proof, what the amount of his actual loss was."

The plaintiff testified that his business had been diminished; that he lost the sale of a certain number of carloads of coal per month, on which he made a certain profit, but he could not tell what the volume of his business was before or after the acts complained of, and that he had no books or papers which would show this fact. He produced no evidence of the expenses or income of the business before or after the acts complained of. It was held that the evidence was insufficient to sustain a verdict for damages for

the loss of anticipated profits. The Court further says:

> "The actual damages which will sustain a judgment must be established, not by conjectures or unwarranted estimates of witnesses, but by facts from which their existence is logically and legally inferable. The speculations, guesses, estimates of witnesses form no better basis of recovery than the speculations of the jury themselves. Facts must be proved, data must be given, which form a rational basis for a reasonably correct estimate of the nature of the legal injury and of the amount of the damages which resulted from it before a judgment of recovery can be lawfully rendered. These are fundamental principles of the law of damages" (p. 98).

In the case of *Goodhart vs. Penn. R. Co., 35 Atl., 191, 177 Pa., 1*, the Court calls attention to the distinction between recovery of damages for loss of earnings and for loss of profits, and says:

> "The profits of the business with which one is connected cannot, therefore, be made use of as a measure of his earning power. Such evidence may tend to show the possession of business qualities, but it does not fix their value. Its admission for that purpose was error."

In the case of *Wallace vs. Penn. R. Co., 45 Atl., 685, 195 Pa., 127*, it was held that evidence that after the keeper of a boarding house was able to resume her business after personal injuries sustained by her, her house was not as well filled as before, is not enough to give to the jury on the question of loss of earning capacity, when neither the cause of the falling off of the business, nor its effects on profits is shown.

In the case of *Wright vs. Mulvaney, 78 Wis., 79*, it was held that damages could not be given for the loss

of prospective profits because of an injury to a fishing net, the Court saying :

> " The jury could have no sufficient basis for ascertaining such prospective profits. At best the assessment therefor must rest largely on conjecture."

In the case of *Priestley vs. McLeon, 2 F. & F., 288,* action of tort was brought for a railroad accident, and evidence was offered to show that the plaintiff intended to enter into certain contracts, but was prevented, by his injuries, from so doing, and thus lost the profits of the contract. The Court says :

> " I should have no doubt about this matter had the plaintiff already made a contract with Mr. B., but you cannot recover damages for loss alleged to have been sustained from possible contingencies. Supposing a lady to have been injured and disfigured in a railroad accident, she could not say that she ought to recover damages because she was prevented from going to a ball at which she might have met a rich husband."

The rule is thus stated in a recent publication of recognized authority :

> " Expected profits are in their nature contingent
> " upon many changing circumstances, uncertain
> " and remote at best. They can be recovered only
> " when they are made reasonably certain by the
> " proof of actual facts with present data for a
> " rational estimate of their amount, and when this
> " amount is made to appear they may be re-
> " coverable as damages. The mere speculations
> " and conjectures of witnesses who know no facts
> " upon which a reasonably accurate estimate can
> " be made form no better basis for a judgment
> " than the conjectures of a jury without facts.
> " Where the profits claimed are merely specula-

" tive or remote and not capable of being correctly
" ascertained under the recognized rules of evi-
" dence, they have been invariably denied by the
" courts, whether such profits are claimed in
" actions *ex delicto* or whether they are claimed in
" actions *ex contractu*."
13 Cyc., 49, 50.

We repeat that in the present case there is no evidence whatever, not even a guess of the plaintiff, nor any of his witnesses as to what the actual profits of his business were either before or after the accident. The testimony is limited to the income or receipts. The slight diminution in the receipts of the business after the accident might be due to any one of a dozen causes, such as competition of other stores or failure of plaintiff to sell first class groceries.

The judgment should be reversed and a new trial ordered.

COLLINS & CORBIN,
Attorneys of Plaintiff in Error.

GILBERT COLLINS,
GEORGE S. HOBART,
Of Counsel.

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WRIT OF ERROR.

(RETURNABLE DEC. 3, 1906.)

STATE OF NEW JERSEY, ss.

The State of New Jersey to the Chief Justice and other Justices of our Supreme Court of Judicature,

GREETING:

For as much as in the record and proceedings and also in the giving of judgment in a certain plaint which was in our said Supreme Court of Judicature before you between John G. Mason, plaintiff, and Erie Railroad Company, defendant, in an action of tort, manifest error hath intervened, to the great damage of the said defendant as it is said; we being willing that the error, if any there be, should in due manner be corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you you that if judgment be thereupon given and affirmed, that you distinctly and openly send under your seal the record and proceedings aforesaid, with all things touching the same, to our Justices of our Court of Errors and Appeals in the last resort in all causes, at Trenton, on the third day of December, nineteen hundred and six, together with this writ, that the record and proceedings aforesaid being inspected we may cause to be further done thereupon for correcting that error what of right and according to law ought to be done.

WITNESS, William J. Magie, Esquire, our Chancellor and President Judge of the said Court of Errors and Appeals, at Trenton aforesaid, the fourteenth day of November, nineteen hundred and six.

COLLINS & CORBIN,
Attorneys.

S. D. DICKINSON,
Clerk.

RETURN.

The answer of the Justices of the Supreme Court of the State of New Jersey within named, the record and proceedings whereof mention is within made, with all things touching and concerning the same, we do certify to the Court of Errors and Appeals of said State in a certain schedule to this writ annexed, as within we are are commanded.

WM. S. GUMMERE, [L. S.]
C. J.

DECLARATION AND PLEA.

PASSAIC COUNTY, ss.

New Jersey Supreme Court, of the tenth day of September, A. D. nineteen hundred and six.

Erie Railroad Company, the defendant in this suit, was summoned to answer unto John G. Mason, the plaintiff therein, in an action of tort, and thereupon the plaintiff, by William B. Gourley, his attorney, complains for that whereas the said defendant, which then was and still is a corporation recognized by the laws of the State of New Jersey, was, before and at the time of the committing of the grievances and injuries hereinafter mentioned, in possession of and using and operating a line of steam railroad, as a common carrier of persons and freight, between Jersey City, in the County of Hudson, and the City of Paterson, in the County of Passaic, and of the right of way, roadbed, cars, coaches, engines, stations, tracks and all other property and machinery and apparatus necessarily appurtenant to the said railroad and its operation; and the plaintiff avers that on the sixteenth day of

January, in the year nineteen hundred and six, at Jersey City, in the County of Hudson aforesaid, the said defendant received the plaintiff as a passenger upon one of the cars or coaches in the possession of and operated, controlled, used and managed by the said defendant, for hire and reward then and there paid by the plaintiff to the officers, managers, agents and servants of the said defendant, to be then and there carried and transported upon and over the railroad of the said defendant to the River Street station of the said defendant, which station was then and there a regular place where the defendant stopped its trains to take on and let off passengers; and the plaintiff avers that it was then and there the duty of the said defendant to carry and transport the plaintiff as aforesaid without any negligence, imprudence or carelessness on the part of the said defendant, its managers, agents, servants and employees, and free from injuries and damages caused by such negligence, carelessness or wrongful conduct, and to provide the plaintiff with a reasonably safe and convenient means of egress from its said cars or coaches when the same reached the plaintiff's destination as aforesaid, and from the station and grounds of the said defendant.

And the plaintiff further avers that on the easterly side of the right of way of the said defendant's said railroad in the city of Paterson aforesaid, running southerly from where a common public street or highway known as River street, upon which said street or highway on the westerly side thereof the said River Street station of the said defendant abuts, and extending from the easterly rail of the north bound track of said defendant's said railroad over which the trains and cars of the defendant approaching and passing said station

from Jersey City aforesaid pass, to the easterly line of the said right of way of the said defendant there is an open space, path or walk, along and over which a person could pass in reaching said River street, and which said open space, path or, walk by and with the consent of the said defendant and under its direction was used by persons leaving the rear cars or coaches of the trains of the said defendant when the forward cars or coaches of its said trains had reached and were stopped at said station for passengers to alight therefrom and enter thereon, by reason whereof it was then aud there the duty of the said defendant to have so conducted itself in and about the operating and conducting of its said railroad and business incidental thereto, as well as in and about the handling, moving, placing, stacking and piling up of certain railroad ties, tracks, rails, beams and timber belonging to the said defendant in a careful and prudent manner around its said station in the city of Paterson aforesaid, and grounds and said open space, path or walk along its right of way as aforesaid, where it invited and directed passengers to leave its said cars and coaches.

Yet the said defendant, well knowing the premises and disregarding its duty in this behalf, through its managers, servants, agents and employees, did wrongfully, negligently, carelessly and improperly fail to provide a reasonably safe and convenient means of egress from its grouuds and property at the place aforesaid for persons carried and transported over its said railroad, and did wrongfully, negligently, carelessly and improperly handle, place, stack and pile up in and about said open space, path or walk along the right of way of its said railroad aforesaid, near said station at River street, in the city of Paterson aforesaid, and did carelessly, neg-

ligently, wrongfully and improperly render the said open space, path or walk along said right of way and grounds of said defendant at the place aforesaid extremely dangerous and hazardous for passengers invited to leave the trains of the defendant at said place, to pass along the same to the aforesaid public street or highway, and the said defendant did then and there negligently, carelessly, wrongfully and improperly permit, allow and cause to be continued the said dangers, risks and hazards thereon as aforesaid without any light, signal, notice, caution or warning to notify and warn persons leaving its trains at its invitation at said place and using said open space, path or walk in reaching the public street or highway aforesaid, that the same was then and there dangerous.

And the plaintiff further avers that when the forward coaches or cars of the train on which the plaintiff was being carried and transported as aforesaid had reached and stopped at the said River street station of the defendant, in the city of Paterson aforesaid, the plaintiff, who was riding in the second from the last car or coach of said train, was notified by the then servant and employee of the defendant that said train had reached said River Street station and invited to leave said train; and the said plaintiff, believing said car or coach in which he was riding as aforesaid had reached said station and that it was safe for him to get out, alighted therefrom, and while proceeding to walk along said open space, path or walk, extending from the tracks of the said defendant's said railroad to the easterly line of the right of way of the said defendant as aforesaid, and upon the grounds and property of the defendant, to the said public street or highway known as River street as aforesaid, said open space, path or walk being the only

means provided by the defendant of leaving its said property and grounds, on the day and year last aforesaid, to wit, on the sixteenth day of January, nineteen hundred and six, at about the hour of six o'clock in the evening, while it was dark, and without any negligence or fault on his part, was by means of the premises and in consequence of such negligence, carelessness and misconduct of the said defendant and its servants, agents and employees in that respect as aforesaid then and there tripped and forcibly thrown down by certain of the aforesaid railroad ties, tracks, rails, beams and timber of the defendant, whereby and by means of the premises the plaintiff was thereby seriously and permanently injured about his head, arms, body, hips, legs and feet; that his kidneys were wrenched, bruised, disordered and permanently diseased; that the tendons in his legs were strained, wrenched and permanently injured so that the plaintiff will be unable to walk and use his legs as theretofore; that the plaintiff was thereby also greatly bruised, hurt, wounded; disordered and diseased, and became and was sick, sore, lame, disordered and diseased for a long time, to wit, from thence hitherto, and will so continue in the future; that the plaintiff by reason of the premises was confined to his bed for a period of ten weeks, and confined to his home for a period of five months, and that the plaintiff by reason of the premises was hindered, delayed and prevented from attending to his lawful affairs and business by him to be done and transacted for a long space of time, to wit, from thence hitherto, and in the future will be so prevented, hindered and delayed from attending to the same; and by means of the premises has lost and been prevented from making divers great gains and profits which he otherwise would have made, and in the future will be deprived of and prevented

from making divers great profits and gains; and also by reason of the premises the plaintiff was forced and obliged to pay, expend and lay out divers sums of money, to wit, one thousand dollars in and about endeavoring to be cured and healed of his said wounds, hurts, bruises, lameness, diseases and disorders, and in the future will be obliged to expend similar large sums of money for such purposes; that the plaintiff has not as yet been cured of his said injuries, bruises, hurts, wounds, soreness, lameness, diseases and disorders received as aforesaid, and that his said injuries, wounds, hurts, soreness, lameness, diseases and disorders so occasioned as aforesaid are incurable, and by reason of the premises the plaintiff has undergone and in the future will undergo great pain and suffering, to wit, at Paterson, in the County of Passaic.

And also for that whereas the said defendant, heretofore, to wit, on the sixteenth day of January, in the year nineteen hundred and six, was operating another steam railroad between Jersey City, in the County of Hudson, and the city of Paterson, in the County of Passaic, for the carriage of passengers and freight, and on the day and year last aforesaid, at Jersey City aforesaid, received the plaintiff upon one of its passengers trains then being run upon the said railroad, in a car attached to said train, and undertook and agreed to transport the plaintiff from the station of the said railroad company in the said city of Jersey City to the station on said railroad known as River street, in the city of Paterson, in the County of Passaic, for a certain hire and reward to the defendant in that behalf for the transportation of the plaintiff on said train and car; and the plaintiff avers that said train consisted of an engine and a large number of passenger coaches or cars thereto attached, and that the coach

or car in which the plaintiff was carried was the second from the last coach or car of said train; and the plaintiff avers that on the day and year last aforesaid, to wit, on the sixteenth day of January, in the year nineteen hundred and six, at about six o'clock in the evening when said train reached and had stopped at said River street station, in the city of Paterson aforesaid, for the plaintiff and other passengers to alight therefrom, the coach or car in which the plaintiff had been riding as aforesaid did not, owing to the length of said train, reach the platform of said station; that the plaintiff upon the stoppage of said train at said station as aforesaid and the announcement thereof by the then servant of said defendant, and believing that the coach or car in which he was riding had stopped at a proper and reasonably safe place for him to leave said car or coach and the grounds and property of the said defendant, thereupon alighted from said train and proceeded on foot to leave the property of said defendant by the only means provided by the defendant for such purposes from where said car or coach had stopped, and gain the public street or highway upon which the said station of the defendant abuts, to wit, River street; that before reaching said street and while upon the land and grounds used and occupied by the said defendant, as aforesaid, without any fault or negligence or carelessness on his part whatever, and by reason of the negligence of the said defendant in failing to provide a platform or other reasonably safe and convenient means of leaving its said property and grounds at the place where said car or coach in which said plaintiff had been carried as aforesaid had stopped, and by reason of the negligence, fault and carelessness on the part of the said defendant, its servants, agents and employees in failing to provide any light at the place where the coach or car

aforesaid had stopped, and by reason of the de fendant, its servants, agents and employees having wrongfully, negligently, carelessly and improperly placed, stacked, and piled up, and by reason of the defendant, its servants, agents and employees, having wrongfully, negligently, carelessly and improperly permitted and allowed others to place, stack and pile up upon its said property and grounds certain railroad ties, tracks, rails, beams and timber which on account of the then darkness and the want of light as aforesaid, were invisible, and by reason of the negligence and carelessness of the said defendant, its servants, agents and employees, in failing to provide any light, signal, notice, warning or caution of said obstruction, the plaintiff then and there struck against said railroad ties, tracks, rails, beams and timber and was tripped and thereby violently and forcibly thrown to the ground, by reason whereof the plaintiff was thereby seriously injured and permanently injured about his head, arms, body, hips, legs and feet; that his kidneys were wrenched, bruised, strained, disordered and permanently diseased, and that his stomach was seriously affected; that the tendons in his legs were strained, wrenched and permanently injured so that the plaintiff will be unable to walk as theretofore; that the plaintiff was thereby also greatly bruised, hurt, wounded, disordered and diseased and became and was sick, sore, lame, disordered and diseased for a long time, to wit, from thence hitherto, and will so continue in the future; that the plaintiff's nervous was severely shocked and by reason of the premises the plaintiff was confined to his bed for a period of ten weeks, and confined to his home for a period of five months, and that the plaintiff by reason of the premises was hindered, prevented and delayed from attending to his lawful affairs and business by him to be done

and transacted for a long space of time, to wit, from thence hitherto, and in the future will be so prevented, hindered and delayed from attending to the same; and by reason thereof has lost, has been deprived of and in the future will lose and be deprived of divers great gains and profits; and also by reason of the premises the plaintiff was forced and obliged to pay, expend and lay out divers sums of money, to wit, one thousand dollars, in in and about endeavoring to be cured and healed of his said wounds, hurts, bruises, lameness, diseases and disorders, and in the future will be obliged to expend similar large sums of money for such purposes; that the plaintiff has not as yet been cured of his said injuries, bruises, hurts, wounds, soreness, lameness, diseases and disorders received as aforesaid, and that his said injuries, wounds, hurts, soreness, lameness, diseases and disorders so occasioned as aforesaid are incurable, and by reason of the premises the plaintiff has undergone and in the future will undergo great pain and suffering, to wit, at Paterson, in the County of Passaic aforesaid, to the plaintiff's damage twenty thousand dollars, and therefore he brings his suit, etc.

And the said defendant Erie Railroad Company, by Collins & Corbin, its attorneys, comes and defends the wrong and injury, when, &c., and says that it is not guilty of the said supposed trespasses above laid to its charge, or any or either of them, or any part thereof, in manner and form as the said plaintiff hath above thereof complained against it. And of this said defendant puts itself upon the country, &c.

JUDGMENT.

Therefore let a jury thereupon come before our Chief Justice or some other Justice of the Supreme Court of the State of New Jersey, at a Circuit Court to be holden at Paterson, in and for the County of Passaic, on the fourth Tuesday of September, in the year of our Lord one thousand nine hundred and six, by whom, etc., and the same day is given to the parties aforesaid there, etc.

And now, at this day, to wit, the seventh day of November, A. D. nineteen hundred and six, before our said Supreme Court at Trenton comes the said plaintiff, by his attorney aforesaid, and the Justice before whom, etc., having first sent hither his record had before him in these words, to wit:

Afterwards, the issue joined in this case was referred by Honorable Mahlon Pitney, Justice of the Supreme Court holding the Passaic Circuit, to Honorable Wilbur A. Heisley, Judge of the Passaic Circuit Court, for trial; and thereafter, to wit, on the eighteenth day of October, in the year one thousand nine hundred and six, at the Circuit Court holden at Paterson, in and for the said County of Passaic, before his Honor Wilbur A. Heisley, holding said Circuit Court in the absence of a Justice of the Supreme Court, according to the form of the statute in such case made and provided, comes as well the within named plaintiff as the within named defendant by their respective attorneys within mentioned; and the jurors of the jury, whereof mention is within made, being summoned, also come, who, to speak the truth of the matters within contained, being chosen, tried and sworn, upon their oath say that the defendant is guilty in manner and form as the plaintiff hath within complained against it, and they assess the damages of the said plaintiff on occasion thereof, over and above his costs and

charges by him about his suit in this behalf expended, to the sum of three thousand dollars, and for those costs and charges to the sum of six cents.

Therefore it is considered that the said plaintiff do recover against the said defendant his said damages by the jury in form aforesaid to three thousand dollars, and also forty-four dollars and forty-one cents for his costs and charges aforesaid, by the Court now here adjudged to the said plaintiff and with his assent, which said damages, costs and charges in the whole amount to three thousand and forty-four dollars and forty-one cents.

Judgment signed this seventh day of November, A. D. nineteen hundred and six.

W. S. GUMMERE,
C. J.

New Jersey Supreme Court.

(Referred to Passaic Circuit Court.)

JOHN G. MASON,
Plaintiff,

vs.

ERIE RAILROAD COMPANY,
Defendant.

} *In Tort.*

Transcript of testimony taken before Hon. WILBUR A. HEISLEY, and a jury, October 18, 1906.

APPEARANCES:

WILLIAM B. GOURLEY, Esq., for the Plaintiff.

COLLINS & CORBIN, by Hon. GILBERT COLLINS, and Mr. GEORGE S. HOBART, for the Defendant.

Mr. Gourley opens the case for the plaintiff.

JOHN G. MASON, sworn for the plaintiff.

Direct examination by Mr. Gourley.

Q. What is your business? A. Grocer and butcher.

Q. Where have you had your place of business? A. 226 Fifth avenue, corner of East Sixteenth street; this is the tenth year that I have been there.

Q. Were you on the Erie Railroad on the 16th day of January last? A. Yes, sir.

Q. What train did you come on? A. The train that arrives at Riverside about 6.15 P. M.

Q. Where did you come from? A. New York, and then took the train at Jersey City.

Q. Where did you desire to get off? A. At River street station, Paterson.

Q. Tell us in your own way what warning, if any, was given to you? A. There was no warning whatever; we were approaching the River street station when the brakesman called out, "River street," and that was the place where I wanted to alight, and I got out on the back platform; I got out onto the back platform of the car I was riding in, and as I alighted—it was very dark, and I was very cautious for fear I should trip over something, and I was tripped immediately over something that I don't know what, and for the moment I was rendered unconscious; I got up, and looked back, and I saw there was a pile of rails lying there.

Q. Could you tell after you had fallen what kind of pavement or earth was there? A. There was just the plain earth where I stood on, but I could not tell what other kind of earth there was, because it was too dark.

Q. Where, in reference to the River street crossing, were you, when you got off? A. I was east of River street.

Q. When did you learn that? A. I learned that when I was going up River street, when I was going to River street—I learned that when I was going to River street—in walking to River street I found I was east of River street.

Q. What have you to say about lights? A. There were no lights at all; it was very dark.

Q. How were these rails lying? A. I could not tell exactly how they were lying; I just saw there

was a pile of rails there, and I started for home as soon as I could.

Q. How were you able to see the rails? A. The brakesman was two cars ahead, and he came with his lantern towards where I was, and he asked if I was hurt, and I said, "Yes, very badly," and I looked to see what had tripped me, and I saw the rails from the lantern.

Q. How far was that from the line of River street? A. I should judge about 200 feet, possibly more or less; I could not state positively.

Q. Was that before you came to River street, or had you passed River street? A. Before I came to River street.

Q. Where is the station of the railroad at that crossing? A. It is on the west of River street.

Q. West of River street or east?—which side is it on? A. On the other side.

Q. Which side did you get off in reference to the station? A. On the station side.

Q. Which side of River street is the station on? A. On the north side.

Q. How far from the station do you live? A. half a mile from the station, I should judge.

Q. At that time? A. Yes, sir.

Q. How did you get home? A. I got on the trolley, and went home on the trolley.

Q. Were you able to move yourself? A. Yes, sir; I moved myself and got on the car.

Q. When did you next go back there. A. Why, it was in April; it was after I had been to Atlantic City, then I went back there again.

Q. Ishow you a photograph of what purports to be a crossing, and ask you whether you can identify that as the crossing where you alighted? A. Yes, sir; that is the spot right there.

MR. GOURLEY—The witness puts his finger on the spot beyond the semaphore.

MR. COLLINS—Please show us where he points.

MR. GOURLEY—Here (indicating).

Q. Will you put a pencil mark just about where you think you fell—put a pencil mark on that photograph. A. Yes, sir (Witness marks the photograph X).

MR. GOURLEY—It is admitted that the photograph was taken October 1, 1906.

Q. Then, I understand you to say you got home yourself; now, tell us what was the result? A. When I arrived home I was very sore, and very nervous; I was all shaken up and my legs were very bad; I could scarcely use them; I went home limping; I had a laceration on the right leg just below the knee cap, and the back part of the leg, the muscles were very painful, and my back on the right side, in the region of the right kidney was very painful also, and my wife called my son down, and he rubbed liniment on my limbs and on my back and fixed me up, and put me to bed; I spent a very restless night, and the next day I got up in the morning and went in the store, but I just hobbled around and sat down, and in the afternoon I stayed out of the store all the afternoon in my home, lying down, and the next morning I did about the same thing; on Saturday morning—I went in on Saturday, went into the store—I went in about half past eight, or nine o'clock, and I stayed there until about one o'clock, when I collapsed entirely and had to be assisted in the house, and from that I

stayed in the house four weeks straight without going out of doors; stayed in the house and in bed, and after that, one day, I felt slightly better, and I went into the store, but had to be assisted into the house again. I was in about an hour and had to be assisted back again into the house, and there I remained, and was not outside the house until I went to Atlantic City; I went to Atlantic City under the order of my physician; he said that if I could get there it would relieve me; that was about the 13th of March that I went to Atlantic City; I went there to take hot salt baths and have massage treatment on my legs, to see if that would relieve me.

Q. How long did you remain there? A. Two weeks; then I returned, and occasionally went in the store, but was in the house most of the time until along in May. In May I went back to Atlantic City for the same treatment that I had had before and for rest; I stopped there three weeks; then I came back, and I have been in the store and hobbling around ever since; sometimes I am in the store two or three hours at a time, and sometimes not as long as that, but I always have to have a chair on which to sit down, and I go about with a cane; I cannot climb a ladder, and I cannot stoop down to measure vegetables, and there are many things I cannot do; I cannot even run my automobile, because I cannot use the brake; I cannot use my legs at all, except to get around with the assistance of a cane.

Q. Both legs? A. Yes, sir.

Q. One worse than the other? A. No, sir; they are both about the same.

Q. What size is your store? A. $57\frac{1}{2}$x$24\frac{1}{2}$.

Q. What do you say as to whether or not the shelving runs around the store, and whether you had to move about through that whole distance to

do your business? A. I cannot get to the shelving.

Q. How is the store arranged? A. In shelving; the store is a fourteen-foot store in height.

Q. Haven't you shelving around your store? A. Yes, sir.

Q. What is on the shelves? A. Canned goods and pickles, and such things as are used in a grocery store—canned goods, pickles, jams and farina, tapioca.

Q. Have you been able to move around to get these things for your customers? A. No, sir; I have to have someone to stoop down for me and to climb the ladder—I have to get the different ones who work in the store; they have to do that for me.

Q. Before this accident whom had you employed in the store? A. I had one besides my own family—one young man.

Q. Is he still with you? A. Yes, sir.

Q. What is his name? A. Harry Hollowell.

Q. After the accident what did you have to do? A. I had to hire another man extra, and one extra for Saturdays.

Q. What did you have to pay the extra man? A. $5 a week.

Q. And the Saturday man, what did you pay him? A. He was only a boy and I paid him fifty cents.

Q. Did any members of your family help. A. My daughter-in-law had to come in the store.

Q. Did any others help you? A. My daughter-in-law had to come in constantly.

Q. Did you have to pay her? A. Yes, sir; a dollar a day.

Q. How long did that continue? A. That continued about seven weeks in all, and ever since on Friday and Saturday she has to help me.

Q. Does she do it now? A. Yes, sir.

Q. You still have the store? A. Yes, sir.

Q. The same place? A. Yes, sir.

Q. Tell us about your general health—whether or not it affected your general health? A. My general health has been affected ever since I was hurt; I don't know what it is to have a good night's sleep, because when I take my elastic stockings off at night and lie down I have so much pain; the shin bone and the ankle bone they are so sore that I cannot lay on a feather bed without hurting me; not without it hurting me, and I have to change places all the time in bed, and I often lie until one or two o'clock in the morning, and then have to get out of bed; and I have a couch in my room which I go and lie on then for the remainder of the night, to try to get relief, and that thing has been going on ever since I was hurt; and on Sunday night it was half-past one when I got out of bed and went to lie on the couch; I had to strap a shawl around me to try to get sleep.

Q. When did you begin to wear elastic stockings? A. About the 12th of March I think it was; about that time; a day or two before I went to Atlantic City.

Q. Have you used them ever since? A. Yes, sir; I use them at the present time.

Q. Did they help you? A. Yes, sir, I wear them for support; I could not get about without them.

Q. You wear them on one leg or both? A. Both legs.

Q. What length are the stockings. A. Up to the knee.

Q. How long was it before you were to do any business? A. Before I done any business was around in June, when I came back from Atlantic City the second time; before I could attend to any business, and then only part of it.

Q. Your inability to sleep, do you know what

that is due to? A. That is due to pain from my legs and from my side; the shin bone and the ankle and the muscles, the tendons that run through the calf of the leg, both legs, and then the pain in my side, that is located right here, on the right side (indicating).

Q. How frequently does that pain come? A, I have it all the time; I have it at the present moment; I have it all the time.

Q. Do you mean at the side? A. Yes, sir; I have it all the time, and my legs pain me all the time; I have pain all the time in my legs and sides.

Q. Is there any condition that tends to increase it? A. Yes, sir; if I knock my shoulder or knock my body anywhere it increases the pain in the side.

Q. Does the pain diminish under certain conditions? A. It is very bad when I lie down also.

Q. Which pain? A. The pain in the side; sometimes I have to get something under it to get pressure there to hold it; to get a little relief.

Q. It is more or less severe than the pain in the legs? A. It is more severe than the pain in the legs at the present time; the pain in the legs are more severe if I go around very much.

Q. How has your sleep been lately as compared with shortly after the accident; do you sleep better now? A. Yes, sir; I sleep better now; right after the accident I slept very little; I tossed in bed for over four weeks.

Q. Is it as acute now as it was three or four months ago?

Q. No, sir; it has got to a certain stage now, and seems to stay there; when I am on my legs, then it pains me; if I get off my legs and rest, then I have less pain.

Q. The days you remain in the house resting are you then in less pain? A. Yes, sir.

Q. Have you tried any place to rest—going anywhere to rest? A. I was to Atlantic City to rest.

Q. Were you resting there? A. Most of the time—that strengthened the legs some; the pain was very severe all the time I was there, and when I took massage treatment it seemed to make the cords of the legs very sore; I took massage treatment only at Atlantic City.

Q. What physician has been attending you? A. Dr. Vreeland, our family physician.

Q. How frequently has he been to see you since the accident? A. He has not been to see me since I came from Atlantic City the last time; I went to his office.

Q. How frequently did he visit you at your house after the accident? A. He visited me twenty-four successive days, and then every other day for a length of time; I don't remember how long.

Q. After that you went to his office? A. Yes, sir.

Q. Are you visiting him now? A. Yes, sir.

Q. How frequently do you have to see him? A. Every week.

Q. Does he prescribe for you? A. Yes, sir.

Q. Are you taking any medicines? A. Yes, sir.

Q. How long have you been taking medicines? A. Ever since I was hurt.

Q. Do you have to take these medicines every day? A. Every day.

Q. How frequently a day? A. Most every hour; every hour or every two hours some time.

Q. Going on all this time? A. Yes, sir.

Q. Has it been lessened? A. No, sir; it has kept about the same quantity all the time.

Cross-examination by Mr. Collins.

Q. How old are you? A. Fifty.

Q. How long have you lived in Paterson? A. Thirty-eight years.

Q. Where do you live? A. I live on Temple street; I have kept store there for ten years, and I have lived on Temple Street Hill and I have lived at Park avenue.

Q. How near have you lived to River street station? A. Do you mean before the accident?

Q. Yes; I don't mean immediately before. A. I lived about a mile; perhaps not a mile.

Q. And at the time of the accident about half a mile? A. Yes, sir.

Q. That is the nearest you have lived to it? A. Yes, sir.

Q. Where your house is, the store was in the same building? A. Yes, sir; at the time of the accident I was living in the house next to the store, not in the store.

Q. Now you live in the store? A. Yes, sir.

Q. You speak of being a grocer; I notice on the letters that you wrote to the company after the accident that it is J. G. Mason & Son; is that right? A. Yes, sir.

Q. It is a firm then? A. Yes, sir.

Q. And you said that some member of your family used to help you before the accident, and you said a daughter-in-law helped you afterwards and did something; now, what members of your family helped you in the store before the accident? A. My son.

Q. Your partner, isn't he? A. Yes, sir.

Q. And the daughter-in-law you spoke about is his wife, is she? A. Yes, sir.

Q. She had not been in the habit of coming to help in the store before the accident? A. No, sir.

Q. Nor any other members of your family? A. No, sir.

Q. You go to New York in your business? A. Yes, sir; most every week.

Q. And you occasionally take the River street station? A. Yes, sir.

Q. So that you took it in the daytime? A. No, sir; mostly at night, coming home.

Q. You got off at the River street station coming home at night? A. Yes, sir.

Q. How often have you done that? A. Perhaps four or five times a year, perhaps; that is all.

Q. How often had you taken the train at River street to go into New York? A. Not very often—just occasionally.

Q. And in the day time? A. Yes, sir.

Q. You know the situation at River street, that is to say, that the platform in front of the station only extended down as far as River street? A. Yes, sir.

Q. And that the place below River street towards Jersey City was in the condition shown in that photograph? A. I did not know exactly the condition because I did not take particular notice of the condition.

Q. You said when you got out you did it very cautiously so that you would not trip? A. Yes, sir.

Q. Then, you must have known you were not getting down on a platform? A. When I got down off the train and I saw the position I was in, and it was very dark, and that made me very cautious before I started to walk, and as soon as I started to walk I tripped over.

Q. Then you anticipated there might be something that you might trip over. A. Because it was so dark.

Q. Then you knew there was nowhere to alihgt? A. I found that out before I tripped.

Q. You found it was a long step to get down? A. I started to get down and I could not see the distance of the step.

Q. The lights were alight in the station? A. But they did not throw light there where I was.

Q. But the station was down below? A. I was not looking at the station; I was getting off the train.

Q. But you saw afterwards when you walked towards it that there was a station there? A. I saw there was a station there.

Q. Did you say that a brakeman called out "River street?" A. Yes, sir.

Q. And it is a fact? A. Yes, sir.

Q. He was not on your car? A. He was in the car that I was riding on.

Q. When he called out "River street?" A. Yes, sir.

Q. Do you say that when you got up or were about getting up he came with a lantern from two cars ahead? A. He was walking through the car when he called out.

Q. So when this brakeman called out he was going forward through the car? A. Yes, sir.

Q. Did any one else get off besides you? A. I did not see anyone.

Q. Didn't they go through the cars ahead? A. There was only one or two passengers on the car, and I think they remained on the car, to the best of my knowledge; I did not see any one going forward except the brakeman.

Q. The car was reasonably full when it left Jersey City? A. Yes, sir.

Q. Paterson comes first? A. Yes, sir.

Q. Before you come to River street? A. Yes, sir.

Q. Which car were you in? A. The second from the last.

Q. Which leg did you hit? A. I struck with both—I must have tripped with both.

Q. I say which one did you strike? A. I must have struck both of them—the right leg was lacerated; the other one was not.

Q. And not bruised? A. It showed a slight bruise.

Q. You sent this letter to the company on the 17th of January, didn't you (showing witness a letter). A. Yes, sir.

Q. And in this you say that there was some rails lying by the sides of the track which tripped you and hurt your leg badly, the wound being on the shin bone "Cannot tell you at present how serious it may prove" that is what the situation was then.

Marked Exhibit D 1 for identification.

Q. Did that wound on the right leg heal? A. Yes, sir, it has healed.

Q. When? A. Sometime afterwards, I don't know just exactly how long—I think it took about two weeks to heal.

Q. You say you have pain in your side, will you please indicate where? A. Right here on the right side (indicating).

Q. Just above the hip? A. Yes, sir.

Q. And it was the right leg that had the wound? A. Yes, sir.

Q. When did you begin to wear the elastic stockings? A. About the twelfth of March.

Q. Did you put those on by a physician's advice or on your own idea? A. By the physician's advice.

Q. You still wear them? A. Yes, sir.

Q. When you got down and stood on the ground which way did you start to walk—at right angles to the train? A. I started to walk parallel with the train to get out of the way of the tracks; I wanted to walk right straight away from the track.

Q. That would be at right angles, then? A. I did not walk in the same direction as the track—

Q. There was no sidewalk there? A. I did not know that at the time.

Q. What did you walk across? A. I fell across; I did not walk until after I had fallen.

Q. What did you start to walk across—this photograph shows a little ditch alongside of the track—you started to walk across that? A. Yes, sir; I started to walk there to go this way to go right straight across here. That is the way I started to walk across towards Ashley & Bailey's Mills.

Q. How many steps had you taken before you tripped? A. Not over one or two.

Q. Did you step down cautiously? A. Yes, sir.

Q. And slowly? A. Yes, sir.

Q. You must have noticed that you were taking a very long step? A. Yes, sir.

Q. How long? A. I could not say positively, but I found it was a very long step when I got off the train; and when I stepped down I found I was in a very queer place, and I tried to get to a clearing, to the sidewalk, as soon as possible, and it was very dark, and as soon as I stepped down I fell, and for the moment I was unconscious.

Q. The car had lights in it? A. Yes, sir.

Q And they had glass windows? A. Yes, sir.

Q. So that some light would come from the car itself? A. Yes, sir.

Q. And there were no brakemen or trainmen at

the junction of those two cars where you got out? A. No, sir.

Q. You got out at the rear end of the next to the last car? A. Yes, sir.

Q. And there were no trainmen there? A. No, sir.

Q. Either in the car or on the ground? A. No, sir.

Re-direct examination by Mr. Gourley.

Q. I omitted to ask you whether there was any diminution of the income of the store during your illness? A. Yes, sir.

MR. COLLINS—Objected to as incompetent; this is a partnership; it is not only objectionable on the ground of the fact that it is a business that he carries on with a partner, but also on the ground that it is not the best method of proof; you cannot ask him to give an estimate or an opinion as to whether there has been any diminution; that is a matter of absolute, accurate possibility of ascertaining.

THE COURT—Is there anything which indicates that there is a better method of proof than his statement? I don't recall that there is any evidence that there were any accounts kept.

MR. COLLINS—I don't understand that it is essential that it should appear affirmatively in the case that there is no better method—I mean that there is some other method; it has to appear by them that there is no other method. He is a man carrying on a business; he is supposed as a business man to know some-

thing about it, and it is their duty to prove the situation, and there is no legal presumption that there is no way to ascertain what his profits were.

MR. GOURLEY—The question is withdrawn and the answer will be struck out.

Q. Did you keep any book of account in your partnership before your injury? A. We used to.

Q. Immediately before—six months or a year? A. Yes, sir; about a year before.

Q. Where are they? A. I could not say now. My son handles those things.

Q. Are they at the store? A. I believe they are at the store.

Q. Can you tell anything about the income of the business before the accident?

MR. COLLINS—Objected to as incompetent and not the best proof.

MR. GOURLEY—On this feature of the case, sir, I don't suppose it is necessary to bring the day book and the ledger.

THE COURT—In the case of Bartow vs. The Erie Railroad Company, the Supreme Court held that where there were books of account they must be produced—it was in an accident case.

Q. What books of account had you? A. My son looked after that part of the business—I could not tell you.

Q. He will know? A. Yes, sir.

MR. GOURLEY—Is there any question about the defendant having operated the train on that day?

MR. COLLINS—No; we admit that.

Q. Did the lights from the train throw any light on the ground? A. No, sir—it was very dark when I got off.

Re-cross examination by Mr. Collins.

Q. You were in darkness as soon as you left the car door? A. Apparent darkness.

Q. As soon as you left the door, and going down the steps, it was dark there? A. Yes, sir.

MRS. EMILY MASON, sworn in behalf of the plaintiff, testifies as follows:

Direct examination by Mr. Gourley.

Q. Are you the wife of the plaintiff? A. Yes, sir.

Q. The wife of John G. Mason? A. Yes, sir.

Q. Do you remember the evening of January last, your husband coming home from New York? A. Yes, sir.

Q. I refer especially to the 16th day of January? A. Yes, sir.

Q. Was anything wrong with him on that night? A. Yes, sir; he came in and he appeared to be very pale and he trembled dreadfully, and walked with a limp, and when he came in I said, "Why, what is the matter?"

MR. COLLINS—You cannot tell the conversation, Mrs. Mason.

Q. Tell us how he appeared? A. He appeared to be hurt.

Q. What evidence was there of that, Mrs. Mason, and what did you do to relieve him? A. He limped and was all of a tremble, and looked very pale; and I called my son down from upstairs: I was living

on the first floor, and my son was living on the third floor, and we had a speaking tube and I merely called him down—asked him to come down and bathe his father, and he came down and found his father in the condition that I have stated, and he bathed his limbs and his back and assisted him to bed.

Q. What was the matter with the limbs that they required bathing? A. They pained him so.

Q. Which leg did you bathe? A. Both legs, but the right leg below the knee cap had a cut.

Q. Were there any marks upon the leg other than that? A. No more than that they were swollen and out of shape in the back of the leg—the muscles in the back of the leg—his leg did not look the right shape that it had before.

Q. Did your son bathe any other part of his body? A. Yes, sir; across the back.

Q. How did he appear; did he appear to be in normal condition or otherwise? A. He seemed to be very sick and refused anything to eat.

Q. What did you do with him after that? A. After that I got my husband to bed, and I slept with him during the night and he was very restless all night and complained of so much pain.

Q. How long did he remain in the house? A. He remained in the house until the next morning, and then after a great effort, he got up, but before he got up I bathed his knees and then he got up and with assistance went into the store for a while; and every day he did that until Saturday afternoon about one o'clock when he collapsed, and my son and his wife and the young man who works in the store, had to bring him in—come out of the store into my house—both being on one floor, one building being next to the other, so that he only had about four steps to come—I mean he had only four steps to climb up.

Q. What day of the week was that? A. On Saturday following the accident—it was the 20th. The next morning it was still worse; after he collapsed; after that he had a high fever all night long, and seemed to be so seriously sick that I was determined, without him saying so, that I would have the doctor to him, and Sunday morning we sent for the doctor early, and he came then and came every day for twenty-four visits; he came every day until he had made twenty-four visits, and then after that he came every other day.

Q. For what length of time? A. About half the length of time—about twelve visits—every other day.

Q. Then after that where did he go? A. Then, after that, he doctored with the doctor, and the doctor advised him that he must go away.

Q. During these visits of the doctor to the house was your husband in bed? A. Yes, sir.

Q. For how long? A. When the doctor attended him every day; he was in bed then all the time; after he started to attend him every other day he would lie on the couch sometimes, and sometimes in the bed; and before that, previous to that, when the doctor was coming every day, he would only get out of bed while I changed the linen on his bed; then it was only with great pain.

Q. How long was it that he remained in bed except for getting up for a change of linen? A. Twenty-four days.

Q. And after that, how long was he in the house before attending to his business—trying to attend to his business; when did he go back into the store again? A. When the doctor started to come to see him every other day—after he came to see him—after he came to see him every other day, then one day my husband got so anxious about his business that he said he must go in the store for a few min-

utes to see how things were going on; he was always worrying about his business; and so he went in one day; and the day he went in the store the gentleman from the rilroad came to see him while he was in there.

Q. While he was in the store? A. Yes, sir; he was only in there a short time when the gentleman came in.

Q. How long did he remain in there that day? A. About an hour.

Q. How long was it after that before he went back in the store again? A. Well, right after that we went away to Atlantic City.

Q. How long did you stay there? A. Two weeks.

Q. Why did you go to Atlantic City? A. Because the doctor thought if he got entirely away from his business, and rested his limbs, and took the hot salt water baths and the massage, that it might help him, and we stayed at Atlantic City two weeks; we went there in March.

Q. What treatment did he take while there? A. He took this massage treatment and the salt water baths, and the massage treatment along with it.

Q. Then, when you came back, was your husband able to carry on his business? A. He was very slightly improved; he would go in sometimes and stay an hour sometimes; a little over an hour; and nothing more than three hours in the day; and he would have to come in and lie down; and he would suffer great pain for just being on his feet that little; and he kept on that way until he collapsed, almost ready to go to bed again; and the doctor ordered him to go to Atlantic City again, which he did; and he took the treatment again; that time he went for three weeks; that was in the latter

part of May that he went to Atlantic City the second time; we thought it might improve him.

Q. Were you advised or not to go? A. Yes, sir; the doctor advised him to get away from his business and get off his feet and take the treatment.

Q. What treatment did he undergo while he was in Atlantic City on the second visit? A. The same as the first—the hot salt water baths and then the massage treatment.

Q. Was any other doctor consulted? A. He was there and very sick and he had to consult another doctor.

Q. What doctor was that? A. I don't know the name of the doctor; my husband has his name.

Q. What was he consulted for? A. He was consulted because my husband had pain in some part of his body and the bowels, and the doctor said it was the nerves; the doctor told me that.

Q. Then, after the three weeks, you returned to Paterson again? A. Yes, sir.

Q. Was your husband able to do any business then? A. Very little.

Q. What did he do? A. He was able to go in and sit on the stool and advise others what to do, and occasionally he would cut a little bit of meat.

Q. I notice he is carrying a cane to-day. A. He has carried that ever since we went to Atlantic City; I mean ever since he got out of bed; when he was in bed he had his legs in splints, and when he got out of bed he took to wearing elastic stockings, and with the assistance of a cane and the elastic stockings he could manage to limp around.

Q. Does he wear the elastic stockings now? A. Yes, sir.

Q. Has he them on to-day? A. Yes, sir.

Q. Has he used them ever since that time that he first put them on up to the present time? A. He only takes them off to sleep at night, and he is very

particular to put them just where he can lay his hands on them the first thing when he gets up in the morning, for if he takes two or three steps without them he is in great pain.

Q. How about his sleep? A. He sleeps very poorly.

Q. How about his appetite? A. That is very varied, and at times he does not eat very good at all.

Q. Can you tell us what his general health was before this accident? A. Yes, sir; he was a very active man.

Q. What about his ability to sleep? A. He always slept well.

Q. Did he ever complain of any pain? A. No, sir; he never complained of pain; he always worked very hard and slept very sound.

Q. Has he been at the store daily since this last visit in May? A. Some days he has not; some days he has been very sick; I think it was only two weeks ago that he has had to remain upstairs one or two days.

Q. Have you seen him climb ladders in the store since the time of the accident? A. No, sir.

Q. Have you a ladder in the store? A. Yes, sir.

Q. Who climbs the ladder to get the things from the shelves? A. Whoever is in always climbs for him; if his son is in he will do it, and if not, the clerks, or any one—even my daughter-in-law will do that.

Cross-examination by Mr. Collins.

Q. How high is the ceiling of the store? A. That I cannot tell you; my husband can tell you.

Q. A great many of the things he can reach without climbing a ladder? A. We have bins for putting flour and different things in, and above that we have very large tea caddies; that brings the

shelves very high; it is impossible for any one to reach even the first shelf unless they are very tall, so it is necessary always to get on the first round of the ladder.

Q. Is this a movable ladder? A. No, sir, it is not one of those that goes on a roller—this is not; this is the old fashioned ordinary ladder.

Q. You take it around with you to any particular place? A. Yes, sir.

Q. The things on the first shelf above the caddies can be reached—they can be taken off? A. Unless a person is tall they cannot.

Q. Your husband can reach them? A. I don't think he can; I could not reach them.

Q. No, you are very short, but your husband is taller than you; isn't he five foot ten? A. I don't know.

Q. Well, Mrs. Mason, I suppose they keep the things on the highest shelves that are the last needed —for nobody wants to keep getting up a ladder all the time. A. We have such a large stock that we have to keep a great many things up at the top.

Q. You arrange to have the things the highest that you need the least. A. Some goods can be kept better up there; it is much hotter up towards the ceiling; we have so much canned goods on the shelves and cereals.

Q. So your husband was in good health before the accident, you say; he was subject at times to rheumatism, wasn't he? A. No, sir, it is me that has the rheumatism.

Q. He had rheumatism also? A. No, sir.

Q. He had sick spells at times? A. Once in a while in the summer he may have a touch of malaria.

Q. He had for some years, didn't he? A. For a number of years he has had it, but not to amount to anything; we had to go away on account of it but he never neglected his business on account of it.

Q. He had to lay off a little once in a while? A. Not for more than a day.

Q. Did you ever go to Atlantic City before this accident? A. No, sir.

Q. Did he go away anywhere else? A. No, sir.

Q. Has he ever tried to go a day or more without the elastic stockings, to see how to get along without them? A. No, sir; he has not, because it gives him so much pain.

Re-direct examination by Mr. Gourley.

Q. Do you know anything about the expenses of the Atlantic City visits. A. My husband has the receipt for both our board bills there, and the massage treatment, if you wish those.

Q. Do you know what they were; do you know about these bills being paid? A. I know they were paid, yes, sir.

Q. They are all receipted. I show you these bills marked Atlantic City 3/27, is that the third month, March? A. Yes, sir.

Q. "To board $8.00—$16.00" whose board is that? A. My husband's board.

Q. The whole bill is $16.00? A. Yes, sir.

Q. 3/20 Atlantic City, $16.00 to board at $8.00, $16.00; whose is that? A. My husband's.

By Mr. Collins.

Q. Your own, too? A. Yes, sir; I had to go along with him to assist him.

Further re-direct.

Q. Twelfth of June, three weeks, $16 00, $48.00; is that paid? A. Yes, sir; that is receipted.

Q. Is that for your husband's board and your own at Atlantic City? A. Yes, sir.

Q. A. W. Bailey, M. D., Atlantic City, June 5,

bill for $2.00; what is that for? A. That is the doctor that he went to; he went to his office.

Q. Is that paid? A. Yes, sir.

Q. That was the doctor you referred to whose name you did not know, Dr. Bailey? A. Yes, sir.

Q. March 14, bill received from Mr. F. Mason, $15.00, for one course of massage, signed by somebody; did he take that treatment? A. Yes, sir.

Q. That is the bill for that? A. Yes, sir.

Q. Received from John G. Mason, $20.00, five massages, dated June 6th, 1906, was that for your husband? A. Yes, sir.

Q. These board bills, I understand, are half yours? A. Yes, sir.

Q. The medical and massage treatment are all your husband's? A. Yes, sir.

Re-cross examination by Mr. Collins.

Q. Did you take some treatment down there, too, for your rheumatism? A. I took some salt baths, but I bought my own tickets separate, and I received no receipts for those.

Q. You took no massage? A. No, sir.

GEORGE H. MASON, sworn in behalf of the plaintiff, testifies as follows:

Direct examination by Mr. Gourley.

Q. Are you the son of John G. Mason, the plaintiff in this case? A. Yes, sir, I am his son.

Q. And I believe you are in the same business with him? A. Yes, sir.

Q. How long have you been in business with him? A. About six years.

Q. Partners? A. Yes, sir.

Q. Are you equal partners? A. Yes, sir.

Q. In the grocery business? A. Grocery and butcher business.

Q. Do you keep any books of account in that business? A. Not strictly accounts, because our business is mostly cash, and, being in the family, we don't deem it necessary to keep all our accounts.

Q. What books have you kept them in? A. Well, a majority of the time we would have nothing but our banking book and our ledgers and day books.

Q. Your ledger and day books, what do you carry in them? A. Nothing only customers' accounts.

Q. Other than cash payments? A. Other than cash payments.

Q. Don't you keep a cash book? A. No, sir; no cash book and no stock book.

Q. Are you able to tell us what the amount received per week was in that business in which you and your father are partners during the months of November and December, 1905?

MR. COLLINS—Objected to. I ask permission to cross-examine.

Cross-examination by Mr. Collins.

Q. Do you keep one of these National Cash Registers? A. No, sir.

Q. You took the money in when you sold goods? A. We always handled the cash ourselves.

Q. Didn't you keep memoranda of your cash receipts? A. Very seldom, but the majority of times we would deposit the money and just keep enough for small change.

Q. Then the deposit book will show? A. Yes, sir.

Q. Did you put all the money that you received in the business in the bank? A. No, sir; I should

judge from all accounts about half of our receipts were deposited.

Q. You say you think you deposited about half what you took in? A. Yes, sir.

Q. I understood you to say that you deposited all except about enough for change? A. That and enough for buying greens, vegetables.

Q. That is to say you bought from farmers? A. Yes, sir.

Q. Did you have receipts from those men? A. No, sir; sometimes we traded.

Q. How is it your father and you never meet to divide up? A. We always credit ourselves with equal wage; we draw a certain sum for the week.

Q. And then what you did not draw out accumulated in the business? A. Yes, sir.

Q. And did you take account of stock? A. No, sir; very seldom—when I started in business with father—

Q. How are you going to tell how much you take in in a week? A. Through our deposits and through our ordinary expenditures we could generally tell what was doing—handling the money ourselves; I should judge during the holiday months our income would be over $800.00 weekly.

Q. You are not called to answer yet—

MR. COLLINS—I ask that that be struck out.

THE COURT—Strike it out.

Q. My question is how could you tell; you say by the deposits, and what else? A. Deposits and cash, and what I generally spent; I did most of the buying in the market and of the farmers.

Q. You know about how much you would spend for green truck? A. Yes, sir.

Q. And the deposits would give the rest of it? A. Yes, sir.

MR. COLLINS—I submit the question is not competent in the absence of the deposits.

THE COURT—In the case of the Erie Railroad Company adv. Bartow, the books of account kept by the plaintiff were of the most meagre kind. He was a farmer, and he also carried on the business of a basket maker, and it appeared in evidence that he kept a very crude set of books. The Supreme Court held that because this Court did not accede to the insistment of the counsel for the defendant that the books should be produced—they held that the books should be produced. Now, I confess that was a surprise to this Court, and I am not yet prepared to acquiesce in that law; but that makes no difference; that is the law established in this State by the Supreme Court; books of account are made evidential simply because of the law merchant; and to adopt the theory that in accident cases books of account are to be admitted in evidence, just the same as they are in the case of a merchant trying to enforce his account, seems to me to be wrong; but that is the law. I should say that this is not as strong a case as the Bartow case, however. In that case there were books of account, imperfect and crude, but they were books of account kept by the plaintiff; but in this case there are no books of account kept by the plaintiff. They had a system of cash, each partner taking out a certain amount of money, but no attempt made to keep a record of the

receipts and expenditures, and the residuum went into the bank. I don't think that is the case of the principle of the Bartow case at all, and I shall admit the question and give you an exception.

MR. COLLINS—We object to it on the ground that it is not competent to prove any damages or loss of profits of the firm of which he was a member; that it is not competent to prove it by the witness' memory, when there are other more reliable sources of information, particularly the bank deposits.

To which ruling of the Court the defendant's counsel prays an exception.

Exception allowed. Let it be sealed, and it is sealed accordingly.

WILBUR S. HEISLEY, [L. S.]
J.

Further direct examination by Mr. Gourley.

Q. Do you know about what your average income was in your business during the months of November and December, 1905; can you give us approximately or accurately? A. Very close to $800.00 weekly.

MR. COLLINS—Our exception goes to all of this.

THE COURT—Yes.

Q. You have said, I think, in answer to a question of Judge Collins, and which was ordered struck off the record, and which referred specially to the holiday months—has that any added significance? A. I should judge perhaps $75.00 or $100.00 a week.

Q. When you said $800.00 a week, did you mean including that? A. Yes, sir.

Q. Then the average income per week during the year would be about that?

MR. COLLINS—Same objection.

THE COURT—Same ruling.

Exception allowed. Let it be sealed, and it is sealed accordingly.

WILBUR A. HEISLEY, [L. S.]
J.

A. On an average we should take in $600.00 weekly.

Q. Was there any diminution in that income after your father was incapacitated?

MR. COLLINS—Objected to on the ground that it is incompetent; so many elements enter into a diminution that it is not even evidential in a case like this, a partnership of this character, carrying on a general business.

MR. GOURLEY—I withdraw the question.

Q. Can you tell us whether or not the fact of your father having been injured on January 16th caused the income of the business to increase or diminish?

MR. COLLINS—Objected to on the ground that it is not one calling for an opinion or a conclusion.

THE COURT—You are simply asked whether you can tell; now you may answer yes or no; don't say how you know, but you are simply asked whether you can tell; can you tell?

A. Yes, sir.

Q. How can you tell? A. On account of being compelled to cut some of my customers off of my route business; customers who were not close and handy to get at.

Q. Did you run a route with a horse and wagon? A. Yes, sir.

Q. You could not go so far? A. No, sir; I was compelled to cut off many good customers on account of father's illness.

Q. Do you mean they would have to go elsewhere for business? A. Yes, sir; I had to tell them it was impossible for me to come there.

Direct examination continued by Mr. Gourley.

Q. Can you tell us then whether there was a diminution or not in your income after January 16th? A. Yes, sir.

Q. Can you tell us about what the diminution was per week?

MR. COLLINS—Objected to unless we can have something more definite to guide us.

THE COURT—He is asking whether he can tell; say yes or no.

Q. The weekly diminution by reason of your father being away. A. It would be impossible to tell correctly the entire amount; I know what this trade that we were compelled to leave was worth to me—they were steady trade.

Q. What loss of income or profit was there, in any way that you can compute? A. Between $60.00 and $80.00 a week income.

Q. That would be the amount of the sales? A. Yes, sir.

Q. And can you tell us whether or not the business has become normal again? A. No, sir; it has not, because some of the trade I have had to cut down to do less business.

Q. You are not doing as much business as you did? A. No, sir; because I have to attend to the business more inside now.

Q. Were you outside altogether before the injury? A. Yes, sir.

Q. Now, how is it? A. Just depends on the condition that father is in; sometimes, when he is very bad, I have to depend on the boys to do all the outside business.

Q. When did you learn about your father's accident? A. Soon after his arrival home on the 16th of January.

Q. What time? A. About a quarter of eight—between seven-thirty and eight.

Q. What did you do? A. I was called down, and we stripped him and applied remedies for his limbs and back, and put him to bed for the night, and I left him and went to my home again.

Q. Did you do anything the next morning? A. The next morning I was compelled to see to business.

Q. Well, was your father in business the next day? A. He did not turn in to business until very late, and then he was not able to do anything, and then he had to go back to the house.

Q. How long was he at the store the next day? A. Not over two hours, I should think.

Q. What day of the week was the 16th? A. Tuesday.

Q. Do you think he was two hours at the store on Wednesday following the accident? A. It might have been less.

Q. Did you visit him at the house that day? A. Yes, sir.

Q. He lived then in the adjoining house on the first floor? A. Yes, sir.

Q. What steps, if any, were there to pass? A. There were two small steps and three small steps going to his home.

Q. Five small steps altogether? A. Yes, sir.

Q. Did you see him at the house that Wednesday evening? A. Yes, sir; he was in bed on Wednesday evening.

Q. On Thursday what occurred? A. He was in the store a very short time; he came there towards noon time for perhaps an hour or two.

Q. Very well, now as to the following day? A. On Friday he gradually grew worse, and Saturday he was very poorly, and Saturday we had to take him in the house.

Q. On Saturday? A. Yes, sir.

Q. Who had to take him in? A. My wife and myself, and the young man in the store.

Q. You had to help him in? A. Yes, sir.

Q. What was the matter with him? A. He was weak and nervous, and his limbs bothered him so.

Q. Where? A. The right and left limb and the back.

Q. I see he is using a cane, now; how long has he used that? A. Ever since he came out of bed.

Q. Did he ever use a cane before the accident? A. No, sir.

Q. Now, then, on Saturday you and the others took him in the house; did he come out again? A. Sometime in the following week he was in the store a short time, for an hour or more.

Q. With that exception was he in the house for any length of time? A. He was in the house for, I should judge, three or four weeks.

Q. How long was he in bed? A. He was in bed, I guess, over four weeks.

Q. Well, now, did you help to give him any relief in any way yourself? A. Only on the first day or two, that was all; after that I was compelled to do what I could for the business, and look after that part; my time was entirely taken up.

Q. How long was he in the house after he got up from bed; did he then go in the store very much after rising from the bed? A. No, sir; he did not; he went away on the orders of his physician.

Q. Took his Atlantic City trip? A. Yes, sir.

Q. And he was away two weeks? A. Yes, sir; that was in March.

By Mr. Collins.

Q. He was away how long? A. Two weeks.

Further direct.

Q. Did he go in the morning? A. Yes, sir.

Q. When he came back until the next visit, how did he pass away his time? A. He was in the house most of the time; he came around occasionally in the office and did a little writing, or what light work he could for me, while I would go out and do what business I possibly could.

Q. Did he help you in the store? A. Very little.

Q. Did you ever see him stoop to lift anything from the floor? A. No, sir; he has to call me or the boy or whoever is around.

Q. Could he go up to the shelves? A. No, sir.

Q. How many shelves have you in the store? A. Nine.

Q. How many could a man of your father's size touch? A. On one side he could not touch any without climbing, and on the other side he might touch three.

Q. He could conveniently touch not over three shelves? A That is right.

Q. These upper shelves, are they for use? A. Yes, sir.

Q. What did you keep on them? A. Canned goods and cereals.

Q. Are they frequently used? A. Very frequently used.

Q. Who climbs the ladder now? A. Myself and wife and the boys.

Q. He does not? A. No; sir, it is impossible for him to climb a ladder.

Q. Whom had you in the store before the accident? A. One young man named Harry Hallowell.

Q. Yes, no one else? A. No, sir.

Q. And since the accident whom have you had? A. A man and one young lad on Saturdays.

Q. The extra man is paid what? A. Eight dollars.

Q. Does your wife help you? A. Yes, sir; she has been compelled to help ever since he was taken sick in bed, and during the time he was away.

Q. Now, your father went away again, I understand. A. Yes, sir.

Q. Is your wife paid by the firm? A. Yes, sir; one dollar a day.

Q. I believe your father went away again? A. Yes, sir; he went to Atlantic City and was there three weeks.

Q. And came back, and what was his condition then? A. Slightly improved.

Q. How was that improvement noticed? A. He was not so nervous, and his appetite was better; he was more contented, but his limbs bothered him.

Q. Was he of more benefit to you in the store? A. No, sir.

Q. What time did he put in at the store after his visit to Atlantic City in May? A. Four or five hours a day—perhaps a short time in the morning,

and have to rest a while, and then he would come in the store a little later in the day.

Q. What time has he been spending in the store for the last month? A. Not over four or five hours.

Q. He said something about having purchased a runabout, or a gasoline runabout; can he operate that? A. No, sir; I have to take him wherever he goes; it is impossible for him to run the car on account of his limbs.

Q. You mean with his hands or feet? A. Yes, sir, on account of the brakes and low gears.

Q. Do you know anything about your father's inability to sleep since the accident happened? A. I know he has been up early in the morning.

Q. He lives with you now? A. Yes, sir.

Q. You live over the store? A. Yes, sir.

Q. When did he change? A. Last April.

Q. How did your father get up and down the stairs? A. He has to have assistance, and it takes him a long time to get up.

Q. Do you know something then about his sleeping? A. Yes, sir; he is very restless; I have heard him up a great many nights.

Q. Was any of this impairment of health at all observable before the accident? A. No, sir.

Q. Did you at any time go down to this place where this accident is said to have occurred? A. Yes, sir.

Q. When did you go? A. The following morning.

Q. What time? A. About ten o'clock in the morning.

Q. Where did you go? A. I went between River and Warren streets, where he described to me that he had got off the train.

Q. I show you this photograph; I think you have seen this before? A. Yes, sir.

Q. Can you tell us whether you saw that ground there on along the Erie Railroad track between Warren and River streets? A. Yes, sir; I saw some rails lying.

Q. Where were these rails lying? A. They were lying between the rock and the dock pit.

MR. COLLINS—He is pointing to the cross that Mr. Mason made; the first witness.

Q. What rails were there? A. Quite a good many old rails; I presume they had been discarded.

Q. You mean iron rails, steel rails? A. Yes, sir.

Q. How many were lying there? A A dozen or fifteen.

Q. And how were they arranged, just tell the jury? A. The rails were scattered, some lying towards the railroad and some towards the embankment; there is a slight embankment there.

Q. How far did the furthest extend towards the embankment.

MR. COLLINS—The embankment is quite close.

Q. In other words, the end of the rails reached the embankment; about how many altogether were there? A. Over a dozen.

Q. How long were they? A. I should judge about fourteen or fifteen feet, some of them shorter, perhaps.

Q. Did you see them before that at any time? A. I had not noticed them particularly.

Q. How long did they remain there, do you know? A. A week or ten days after.

Cross-examination by Mr. Collins

Q. Speaking generally, the pile of rails was lengthwise, to the track—speaking generally this

pile of rails that lay there, they ran lengthwise to the track? A. No, sir; they were scattered across the embankment—projecting towards the ties of the railroad.

Q. They were not a little pile? A. No, sir.

Q. But taking it as a whole, the quantity of rails that were there was placed lengthwise to the rail-
10 road? A. No, sir; not the majority.

Q. Some of them were and some of them were placed crosswise on top of one another? A. Yes, sir.

A. I suppose your father did not care to climb the ladder much any time before he was hurt? A. Yes, sir; he did.

Q. What is his height? A. 5 feet 10 inches.

Q. He could go up the ladder but he would prefer that a boy should go, wouldn't he—before the
20 accident? A. No, sir; he would go up just as quick as the next one.

Q. You keep a bank account, you say? A. Yes, sir.

Q. And you draw checks against it? A. Yes, sir.

Q. What do you draw checks for? A. For supplies out of town.

Q. Sometimes for the purchases over the counter, too, don't you? A. Very seldom; we mostly use
30 checks for sending by mail.

Q. What proportion of your purchases does the firm make in New York from wholesale dealers as compared with what you buy at the store and pay cash; what proportion do you buy in New York or elsewhere and pay for by check? What proportion of your stock do you buy in New York and elsewhere including meats, &c., and pay by check; what porportion? A. About half the amount.

Q. You mean half of your business is in vege-

40

tables? A. Vegetables and provisions of that description.

Q. Provisions of what description? A Hams and bolognas.

Q. How do you buy those? A. From wagons.

HARRY HOLLOWELL, sworn.

Direct examination by Mr. Gourley.

Q. Harry, do you work for Mr. Mason, the plaintiff in this case? A. Yes, sir.

Q. How long have you worked for him? A. About eighteen or nineteen months.

Q. Do you remember last January Mr. Mason received some injury? A. Yes, sir.

Q. When did you see him in the store, do you remember? A. The next day.

Q. How long did he stay in there then? A. He stayed in about an hour.

Q. How about the following day or two? A. Well, he would come down and stay sometimes an hour, and sometimes less.

Q. What happened on Saturday? A. On Saturday he could not do anything.

Q. Why not? A. Because it pained him so.

Q. Well, what did they do with him on Saturday? A. Helped him into the house.

Q. Did you help? A. Yes, sir.

Q. When did you see him after that? A. I don't know; it might have been a week.

Q. Before he was back in the store again? A. Yes, sir.

Q. How long was he in the store that time? A. About an hour.

Q. Then what became of him? A. He went back in the house.

Q. When did he appear again? A. I did not see him again for about four weeks.

Q. Then how long did you see him? A. He was there about three-quarters of an hour.

Q. That was before he went away? A. Yes, sir.

Q. Do you remember when he came back again after he had been away? A. Yes, sir.

Q. Did he do any work in the store after that? A. No, sir.

Q. Did he go away again? A. Yes, sir.

Q. Did he do any work in the store after his second visit? A. Well, a little.

Q. What was he able to do? A. Cut a little meat.

Q. Anything else? A. No, sir.

Q. Did you see him stoop down on the floor to lift up anything? A. No, sir.

Q. Did you see him get up on the ladder? A. No, sir.

Q. I suppose somebody went up the ladder? A. Yes, sir.

Q. Who did that? A. George, or George's wife, or somebody else.

Q. Were you down at Warren and River street some time after this accident? A. Yes, sir.

Q. When did you go there? A. The night after.

Q. The following night? A. Yes, sir.

Q. Well, what did you see there in reference to the track there? A. Some rails.

Q. What kind of rails? A. Locomotive rails.

Q. Where were they? A. Between Warren street and River street.

Q. Which side of the track? A. The right side.

Q. How near to the track? A. Some were close up and some were a little bit away.

Q. What number was there, Harry? A. There was over a dozen.

Q. How were they lying? A. Some going from the embankment to the track, and some along the track, and some across one another.

Q. Did you see that place again after that next night? A. No, sir; not to take any notice of it.

Q. How did you come to go there that next night? A. I was on my way to the show.

Q. Did you know then about Mr. Mason being injured? A. Yes, sir.

Q. Had you heard where it was? A. Yes, sir.

Q. Well, did you pass by this place on your way from the house to the theatre? A. Yes, sir.

Q. Was that on your way or out of your way? A. On my way.

Q. How long has Mr. Mason used this stick that that he has now? A. Ever since he has been hurt.

Q. Did he use it before that time? A. No, sir.

Q. Was he able to go up and down this ladder in the store before the accident? A. Yes, sir.

Q. Was he able to stoop down and lift anything before the accident? A. Yes, sir.

Cross-examination by Mr. Hobart.

Q. What street did you go along to go to this show? A. River street.

Q. Did you leave the street to walk down the track to where these rails were—you could just see them? A. No, sir; I walked along the edge of the track to Warren street.

Q. How long were these rails? What is the length of the rails—how long is one of the rails, for instance? A. I could not say how many feet.

Q. You heard what George said,—14 or 15 feet? A. It must have been about that.

DR. VREELAND, sworn in behalf of plaintiff.

Direct examination by Mr. Gourley.

Q. Are you a practicing physician of this county? A. Yes, sir.

Q. And I think you are the family physician of Mr. Mason?

Q. Are you the family physician Mr. Mason? A. Yes, sir.

Q. How long have you known him? A. I have known him a great while, but I have been his family physician for about a year, that is, lately; I was his family physician some time ago, but then he broke with me, and now I have been his family physician for about a year; I have treated the family; I have not treated him until this.

Q. Were you called in to see him in January last? A. Sunday morning, January 21, I was called.

Q. Where did you find him, what condition was he in? A. I called at the house and found him at the house, and he complained of pain and bruising of his legs; I examined his legs and found a lacerated wound in the front part of his leg below the knee, and I found bruises and he complained of the posterior parts of both legs, he said they were bruised; but at that time I paid more attention to the wound; it was a badly lacerated and contused wound on the right leg.

Q. Where on the leg was that? A. That was about the upper third, over the shin bone or tibia.

Q. Were there any marks on the left leg? A. I did not observe any marks on the left leg.

Q. Did you examine any other parts of the body? A. Yes, sir; I examined his whole body, but I simply concluded that he had been wrenched, or had been strained and there were no external marks as far as I could see.

Q. Did you prescribe for him, Doctor; what treatment did you give him? A. He complained some of the disturbance of the stomach, and I gave him him some medicine and treated his limbs surgically, and I visited him again the next day, and

right along; I must have visited him every day for about the balance of January and February; and then, of course, as he began to improve, I skipped days and did not go often.

Q. Well, just tell us as minutely as you can what change, if any, he underwent while you were visiting him daily? A. As the wound began to get better he began to complain more and more of the calves of his leg, and this pain would be so severe that he could not stand, he could not lie in bed comfortably, and finally, on examination, I found it was very sensitive along certain nerves, to the touch, not to the superficial touch, but to a deep touch; I then splintered him and bandaged him for the relief of the bone; it gave him a great deal of relief.

MR. COLLINS—You are still speaking of the legs.

A. Yes, sir.

Q. (Further direct.) How long were the legs in splints? A. His legs were in splints, I should judge, all through January and February; and then, of course, after he took the splints off I ordered him to get elastic stockings to replace the splints for a support to the muscles.

Q. Was that done? A. It was done later; I advised him to get these elastic stockings, but all the time I was coming and putting splints on his legs and bandaging it, and when he got an opportunity, after he got his legs measured, he got the elastic stocking—I mean the elastic stocking to put on after the splints were taken off.

Q. What seemed to be wrong with the leg from your examination? A. In the first place there was a lacerated wound and a contused wound in the front part of the right leg, and I concluded the posterior part of the legs were bruised and sore and

produced cramps like, or contraction of the muscles, and I concluded that he had been strained more than hit, and it had produced a straining of the muscles, and had been reflected to the nerves; the nerves had been acted upon and produced a neuritis or inflammation of the nerves.

Q. When would you expect the neuritis to subside? A. Neuritis may subside after a time, or it may get worse instead of better; this improved, and then his condition produced a neurasthenia.

Q. Did you give him any advise as to going away? A. I advised him when I found the neuritis was very much improved; I advised him to go away and break up his business, or leave his business at least, and go away and get a change for the purpose of relieving the nervous reaction which this accident brought about.

Q. Did you name the place where to go? A. I advised him to go to Atlantic City.

Q. Why? A. In the first place there is a decided change of air—salt air—besides he could get massage, which I recommended; and although his wife had given him a little massage at the house, I wanted him to get better treatment, and I advised him to go down there and also to get complete rest.

Q. Did you see him again after he returned? A. I saw him after he returned; I saw him off and on, and I told him and impressed on his mind all the time that I did not think he would ever get well unless he cleared out of his business; broke up his business and took a rest for an extended period of time.

Q. Was the second visit taken under your advise or not? A. I don't remember.

Q. When did you stop visiting his house? A. I cannot say the exact date.

Q. Is he still visiting you? A. Occasionally he

comes to see me now; he is under my treatment now.

Q. How frequently has he called to see you during the last two or three months? A. I suppose on an average once or twice a week.

Q. What treatment, if any, is he under now? A. He is under medicinal treatment; I am prescribing medicines for his nervous condition.

Q. Have you prescribed medicines for him since you were called in on January 20th? A. Yes, sir.

Q. Has he taken those medicines from that time on? A. I presume so; I have prescribed for him.

Q. And is now, so far as you know? A. Yes, sir.

Q. You may state, Doctor, from what you have observed, of the progress of the disease or the improvement—is he now in a better condition than he was? A. Yes, sir; he is in a better condition in one way, but he is in a neurasthenic condition, and he will have to give up his business and rest in order to be improved.

Q. What has neurasthenia to do with his condition? A. A neurasthenic patient has pains, and of course they are relieved by external aid.

Q. What is your judgment as to the progress of the ailment and the probability of his future recovery? A. I think he ought to get well with rest.

Q. Is there anything that you would specially recommend as a physician for his improvement? A. I advise, most of all, a giving up of his business and resting; that is, recreation aside from his business.

Q. For what period of time? A. Well, I cannot say; maybe three months, and maybe six months, and maybe a year; I cannot tell anything about that.

Q. And go where? A. It is immaterial where he

goes, so long as he gives up his business and can rest without the troubles of his business.

Q. Do I understand then that this neurasthenic condition can be cured by complete rest? A. By having less work; more in the form of recreation.

Q. And if he takes that he can then discard these elastic stockings that he has got on? A. I should think so.

Q. And it will not be painful for him to put his foot on the pavement, and he could throw away his stick? A. Yes, sir.

Q. You mean to say if he changed his occupation, and if he took this of six months, three months to a year, would that have that result in your judgment? A. In my judgment, I should think it would relieve him; make him well.

Q. Can he now take off the elastic stockings without discomfort; could he do without them? A. No, sir; I don't think he can.

Q. What aid are they to him? A. They are his supports to the muscles, and it relieves the dwelling of the mind upon his ailments, which is a neurasthenic condition.

Q. What evidence is there now of neuritis; has the neuritis gone? A. That has gone.

Q. How long did that last? A. I should judge it lasted somewhere about a week or ten days before he went the first time to Atlantic City; that was along in March.

Q. Do you, as a physician, expect to find, in cases of this kind, a traumatic case; would a physician expect to find any permanent results? A. We expect to find, but we don't always get them.

Q. Your notion is that under these circumstances that he would entirely recover? A. Yes, sir.

Q. Something was said about the pain in the back? A. He had pains in the back, pains across

the kidneys, and complained a great deal of urination and not being able to retain his urine at night, and I examined the urine, and I found simply a very bad sprain, and perhaps the shock of the accident had acted upon the kidneys, and they were unloading themselves, but with urosis simply; we find that often in convalescing after sickness.

Q. Can you tell us what is the cause of the pain across the kidneys—muscular or what? A. No, sir; I simply attributed it purely to the accident and partly to the shock afterwards.

Q. I understand that he says that the pain has not lessened in degree; that it is still acute and he was suffering from it when he was on the witness stand? A. I have already said that he is a neurasthenic patient at present.

Q. You think, then, that this is a symptom of that disease? A. Yes, sir.

Q. Will that disappear? A. As he gets better that will all disappear.

Q. What do you say about the probability of a period of rest, taking into consideration the fact that he says he is still suffering this now, in October, and the injury happened in January? A. He has not taken rest enough; he has not gone according to my orders; he says he has not been able to do so.

Q. He has not been away? A. He has not rested up.

Q. Has he failed in any other way to follow your instructions? A. No, sir.

Q. Are you able to tell us your bill for attendance during this time? A. No, sir; I am not.

Q. Can you tell us with some accuracy? A. Somewhere about $200.

Cross-examination by Mr. Collins.

Q. If he had gone away and stayed, instead of

two weeks, a sufficiently long time, he would have been well now, wouldn't he? A. If he could have been away from the anxiety of his business.

Q. His principal worry is his worry about his business, isn't it? A. I don't know.

Q. You don't know of anything else? A. I think the effects of the accident would produce enough trouble to produce a worry.

Q. But, if he would go away and take rest and recreation—if he had gone away and had not worried about the business, he would probably have been well now? A. It is more than likely.

Q. The neuritis has disappeared, and it disappeared before March? A. Some time in March.

Q. Neuritis is the inflammation of the nerve itself? A. Yes, sir.

Q. Whereas neurasthenia is a weakness of the nerves? A. Yes, sir; I think it is this way as I reason it out at the time, that in trying to maintain his equilibrium that he strained the muscles, and the nerves have got the brunt of it.

Q. That passed away, and so the trouble with his kidneys passed away; you say his kidneys had to unload when a thing of that kind happens? A. Of course, he complained of his kidney trouble right straight along, and he has done so to this day.

Q. But the symptoms that you speak of indicating that the kidneys have too great a load, they have disappeared—it is now only the neurasthenic result, as I understand you, that makes him have that pain in that region? A. Yes, sir.

Q. What medicines do you give him? A. I give him homeopathic medicines; they vary according to symptoms; we don't treat diseases as diseases; we don't treat them as a whole; we treat them as symptomical; I may have a hundred drugs for one disease.

Q. Well, now, tell me this: what do doctors

mean by objective symptoms? A. What we see.

Q. What can be perceived by the senses?

Q. What is meant by doctors by the term "subjective?" A. That is what the patient tells me.

Q. So the doctors in treating patients have to deal with what the patient says, as well as what they can themselves discover? A. Yes, sir.

Q. Now, are there any objective symptoms apparent in Mr. Mason's body of disease, except little scratches on his legs? A. As he sits there?

Q. No; you were present when Dr. Denner examined him last Tuesday? A. Yes, sir.

Q. And you participated in that examination? A. Well, I witnessed it.

Q. Well, now, were there any objective symptoms of disease beyond the scar? A. I should say simply except the neuranthenic condition.

Q. That is not objective? A. No, sir; it is objective from what we see about the patient's movements.

Q. What objective symptoms is there of neurasthenia in Mr. Mason? A. What objective symptom—why, when he moves about; when he moves about he walks with a stiff gait, sort of flat footed; he cannot rise on his toes, and walks with his cane.

Q. Flat foot is not a symptom of neurasthenia, is it? A. No, sir; not especially.

Q. The walking of a man is under his own control? A. Yes, sir.

Q. You saw him on the witness stand? A. Yes, sir.

Q. Did you see any evidence of neurasthenia in him when he was testifying, you saw him testify? A. He seemed to be clear enough except his walking and coming up to the witness stand.

Q. He had no nervousness in giving his testimony and answering questions, did he? A. Not specially.

Q. Perfectly clear and lucid, wasn't he? A. Well, I don't know; I did not get one-third of what he said, because I was busy in another section.

Q. The jury, of course, can judge of that; but there was nothing perceptible in his demeanor or conduct on the witness stand, that would indicate to you if you had come in here as a doctor and observed him, that he was neurasthenic? A. It is not what we see in a patient, but what we hear told by the patients themselves that we form our diagnosis of neurasthenic patients.

Q. It comes to this, that there are no neurasthenic symptoms in Mr. Mason—those symptoms could result from other causes than neurasthenia? A. Certainly.

Q. And there is nothing which you can point to as typical of neurasthenia—that the rest of uscan see— A. Not that you can see; no, sir.

Q. You did not claim at Dr. Denner's examination that the patient was neurasthenic, did you? A. I did not claim anything, I did not say anything.

Q. He walked? A. Certainly.

Q. Without his cane—in the presence of Dr. Denner? A. Resting his hand on the table as he walked.

Q. He walked without his stockings? A. Yes, sir.

Q. How are those stockings—loose or tight? A. They were not very tight over another stocking.

Q. They would not give any special support, would they, if they are not tight? A. I did not think they would give a great deal.

Q. Were they loose? A. I did not say they were loose, I said they were not specially tight; they did not seem to be loose from the way he pulled them off.

Q. To be of any value for support they would

have to be tight, wouldn't they? A. They have to be snug, not necessarily tight; they are not tight, I said snug, so that they give a firm regular support—no compression of the blood vessels so as to impede the circulation.

Q. These were not snug in that sense, they were loose? A. I should think over the other stockings they were snug.

Q. You said a little while ago that he had probably kept them on because they had a good effect on his mind, to have them there, that he would not be thinking about his trouble; you said that? A. I think I did.

Q. And the benefit of the stocking to him would be largely imaginary? A. I am talking about a neurasthenic patient—I am not controverting that he is a neurasthenic patient.

Q. But you have not put him through the test of neurasthenia, have you? A. I have put him through enough tests from a subjective point, not an objective point.

Q. Any objective tests? A. Yes, sir.

Q. If he has neurasthenia it is a mild form of it, isn't it? A. I am not able to judge of that; no physician alive can judge of nervous troubles as to whether they are limited, or whether they are unlimited.

Q. But you can form your judgment between mild and severe cases? A. It is a mild form.

DR. MCGINNIS, sworn.

Direct examination by Mr. Gourley.

Q. You are a practicing physician of this county? A. Yes, sir; I have practiced in this county thirty-three years, and I am one of the chief surgeons of the General Hospital of this city.

Q. Were you called on to examine the plaintiff? A. He came to my office.

Q. What is that you have there? A. Notes of the case made at the time I examined Mr. Mason; he had been referred to me.

Q. Where did he visit you? A. At my office.

Q. Did you see him after that? A. Yes, sir, I saw him two or three times after that—three times altogether.

Q. State what examination you made? A. I got the history of the case.

Q. When was this? A. April 12th I got the history of the case and made an examination, and found on the right leg there was a scar two inches long, extending obliquely from the front of the leg to the outside; I found that the left leg was somewhat larger than the right, and there was evidence of a periostitis, as the shin bone had roughened. I found that the muscles, the calves of both legs, were hyper-sensitive; in fact, all over the leg it was hyper-sensitive.

Q. How was that ascertained? A. By pressure, by touch; I found that there was some evidence of a neuritis—that is, on pressure along the course of the nerves of the leg he manifested great pain; in testing him for walking he walked with a great deal of difficulty; I measured the left leg and found there was a slight enlargement; I think that was all.

Q. What purpose did he come to you for? A. For treatment, I suppose.

Q. What did you do? A. Prescribed for him and found he had a pair of elastic stockings on; I prescribed for him and suggested that he have rest and massage and not to do any work, and to do everything he could to improve the condition of his legs.

Q. How was that improvement to be made? A.

By rest and massage and by bathing—by treatment, in other words.

Q. When did you see him again? A. I saw him, I think, three times, just about that period—he returned to me—he said he was going to Atlantic City; that he had been down there once, and I advised him to go; I suggested at first that he have a masseuse to massage him in town, but he said he was going to Atlantic City for that purpose, and I endorsed his action, and I saw him after his return; I saw him October 3d, and then he came in to speak to me, that he was going to have a suit.

Q. That was in October? A. Yes, sir.

Q. Did you see him after that? A. Yes, sir; I saw him on Tuesday—last Tuesday.

Q. During these latter visits in October—latter few visits—did you examine him? A. Yes, sir; October 15 I examined him.

Q. State what the result of that examination was? A. I found he was feeling better than in April; I found he had the beginning of a neurasthenic condition when I saw him first on April 12th, and I found on October 3d that he was feeling better, but still complained of trouble in his legs, his stomach, his eyes and his back.

Q. This trouble in the back—did you make any examination to ascertain what that was? A. Yes, sir; I thought that was muscular; I could not make out that he had any kidney—

Q. Did he say he was suffering from pain in the back? A. He manifested pain upon pressure and on bending.

Q. Did you learn at that time whether the pain was continuous? A. Yes, sir; he told me it was continuous, and on October 3d I found that his neurasthenic symptoms he had acquired a few more than he had in April, and that his condition was more exaggerated.

Q. When? A. October 3d.

Q. How do you account for the exaggerated condition in October, several months after April—six months after April? A. These cases are progressive unless they are placed in a condition to remove them; they are apt to get worse unless they are treated by rest and proper treatment, the relief of anxiety from business cares and personal affairs, etc.

Q. A change has taken place in Mr. Mason between this October visit and the April visit. A. He is more nervous than he was.

Q. How is that noticeable? A. His pulse is not quite as good as it was when I saw him in April; the symptoms he manifests are not objective except that the legs are very sensitive still upon pressure and handling.

Q. Had he his stockings on when you examined him? A. He came there with a pair of elastic stockings on, but I took them off.

Q. To what did you ascribe his inability to move about, impediment in locomotion? A. The only explanation I could find was the neurasthenic condition which keeps up the pain in his legs.

Q. What is the condition of the nerves? A. The nerve is not so tender, and the localized pain that he had upon pressure upon the nerve is not there now.

Q. The pain on pressure? A. Yes.

Q. He states he is suffering some pain now, when he was on the witness stand, not only on the legs but in the back? A. My observation of that pain in his back when I saw him was that it was a muscular pain.

Q. And to-day, what significance has that, Doctor, in forming your judgment as to the case, in view of the fact that this accident occurred in

January? A. I think that his nervous condition is worse than when I saw him on April 12th.

Q. If the nervous condition was worse than in April would you expect to find his ability to walk better or worse? A. About the same, if there is local swelling or soreness; of course, when that passed away, under rest and treatment, why then he could walk better, but his symptoms, most of them, are neurasthenic.

Q. Is there any difference between traumatic neurasthenia and other forms of the disease? A. Yes, sir; by "traumatic" I mean an accident neurasthenia arising from an accident; you look for different symptoms in that case.

Q. What is the ordinary case of neurasthenia? A. General nervous exhaustion.

Q. His inability to mount a small stepladder, what is that due to? A. To the pain that he suffers upon certain motion.

Q. Taking into consideration a man of his age and weight, and also taking into consideration the statement that he fell over some steel rails, dropped and fell, and received the injuries that you saw, would you expect to find any sprain or wrenching of the muscles? A. I believe from the conditions as I found them that his legs were badly injured at that time; I don't mean that there were fractures or dislocations, but there must have been a pretty bad wrench.

Q. What about the probability for the future, Doctor? A. Well, I think that Mr. Mason, what he needs is rest and relief from anxiety and trouble and treatment; that is, anything to improve his general health; his stockings he will have to wear, whether his neurasthenia gets better or not.

Q. Why? A. I think the veins of his legs are enlarged, and that he will have to support them;

at any rate, I think it will be better for him to do so.

Q. What period of rest would you say, taking into consideration the examination that you have made in his condition, and the fact that it is not ten months since the injury? A. Well, with a rest of six months or a year, he may get better.

Q. Where would you say that rest should be taken? A. Some environment that would be in harmony with his own mental condition; where he would like to go himself.

Q. Do you think under such circumstances he could discard the stick at the end of that period? A. Yes, sir.

Q. Would he then have the ability to walk? A. I think so; I cannot find any objective explanation otherwise than that.

Q. There is nothing, I suppose, by which you could predict with any certainty what the result would be? A. Not positively; only from experience I think he should recover.

Cross-examination by Mr. Collins.

Q. Really, the only trouble you see in him now is nervousness? A. Yes, sir; nervous condition.

Q. You speak of the necessity of wearing elastic stockings because the veins are somewhat enlarged; is that what we speak of when we use the term "varicose veins?" A. He has not exactly varicose veins; he has had an inflammatory condition of his leg which has continued for some time, and wherever you have that the veins are usually engorged, and for a man of his age they usually remain somewhat large afterwards.

Q. His left leg was not injured? A. I believe it was injured; the history that he gave us was that the right leg was cut.

Q. He did not claim to have hit the left leg? A. He claimed to have struck on both legs.

Q. You heard Dr. Vreeland's testimony? A. Yes, sir.

Q. He testified that he was called in at once, and there was nothing visible on the left leg? A. I didn't hear that.

Q. If there was not anything at all visible, you would not assume that he had hit that leg? A. How could I?

Q. And you say that the left leg was a little larger than the other? A. Yes, sir.

Q. Was the right leg atrophied? A. No, sir; a good sized leg.

Q. Then the difference in the size of the legs might be entirely—what is the difference now in the size of the legs? A. I have not made any measurement since that time; since the time that I made them originally.

Q. Didn't you observe Dr. Denner make measurements last Tuesday? A. Yes, sir.

Q. What difference did he find? A. I don't think he said.

Q. Didn't you observe? A. I saw him measure, but I didn't see the results.

Q. There is nothing particularly indicative in the left leg being somewhat larger than the right of anything wrong, is there? A. No, sir; it is just a condition of strength.

Q. And I understood you to say that there are no objective symptoms from which you can determine his condition? A. The only objective symptom is the walk; that is the only objective symptom.

Q. There is no paralysis of the muscles? A. No, sir.

Q. Why shouldn't he walk—he could walk, couldn't he? A. He knows better than I do.

Q. It is entirely what he says to you, then? A. Entirely so.

Q. And as far as you can detect there is no trouble with his locomotion? A. Oh, yes, there is.

Q. You can see how he walks, but I mean, you can detect no cause for trouble? A. No, sir.

Q. If he had gone away earlier and taken this rest, it is hardly likely there would have been any progress in the nervousness, is it? A. You mean if he had gotten better?

Q. If he had gone away and taken what treatment you think he should have taken, and had given himself up to what you say he should have, there would have been no progression of his nervous condition; that is reasonably probable, is it not? A. I could not say.

Q. He probably would have been well? A. Whatever injuries he had to his legs from the accident would have undoubtedly been well; whether this nervous condition which is so influenced by the mind, whether that would have been any better, I don't know.

Q. But that would have been your prognosis; that is what you thought at the time? A. I thought that was the proper thing to do, but the fact of his going away does not absolutely insure his getting better; it places him in the most favorable condition to get better.

Q. He is in a more favorable condition now than he was in April? A. Yes, sir.

Q. But you can only judge of that by what he tells you? A. Yes, sir.

Q. You don't know what medicines he has been taking? A. No, sir.

Q. So you cannot tell whether the treatment that he has been having is what was best for him or not; you don't know what he has had given to him? A.

I have perfect faith in Dr. Vreeland's doing what was right.

Re-direct examination by Mr. Gourley.

Q. What was your bill? A. I only saw him three times; I think I charged him $6 for my visits; the other day I did not charge him anything yet, and for the visit down with Dr. Denner I have not rendered a bill for.

Q. Altogether how much would the bill be? A. You mean with my presence here to-day and everything?

MR. COLLINS—No, that is not allowable.

A. Six dollars is the bill.

Re-cross examination by Mr. Collins.

Q. You never did prescribe for him? A. Yes, sir; I did.

Q. Anything more than to advise him to go away? A. Yes, sir; I prescribed for him; to get his secretions in good condition; at the time I saw him his urine was a little high colored, and I thought perhaps there might be a rheumatic condition about it; there was no evidence of it but his urine was high colored.

Q. Then this impediment in his locomotion might be rheumatic? A. I prescribed as I just stated.

Q. As a matter of fact his difficulty in locomotion might be rheumatic even now? A. I don't think so; it has continued on from the time of the accident until now; it may be complicated now by rheumatism; it would make his trouble worse.

By Mr. Gourley.

Q. But you have no knowledge of rheumatism? A. No, sir.

MR. GOURLEY—I offer the photograph in evidence.

Marked Exhibit P 1.

MR. GOURLEY—Mr. Mason, the plaintiff, is admitted to have been a passenger.

MR. COLLINS—Yes; we admit that.

PLAINTIFF RESTS.

Adjourned until two o'clock.

AFTER RECESS.

MOTION TO NON-SUIT.

MR. COLLINS—We move to non-suit in this case on the ground that the proofs failed to support the declaration.

Second—That no negligence has been proved against the defendant or attributable to the defendant.

Third—That the danger, if any, was obvious, and known to the plaintiff.

Fourth—That there was no invitation to alight at that place, and no duty cast upon the defendant with reference to any passenger who should alight there.

Fifth—That the plaintiff was guilty of contributory negligence, contributing to the injury.

(Continuing argument.)

THE COURT—The motion is denied.

To which ruling of the Court the defendant's counsel prays an exception.

Exception allowed; let it be sealed, and it is sealed accordingly.

WILBUR A. HEISLEY, [L. S.]
J.

Mr. Collins opens in behalf of the defendant.

CHARLES C. MARTIN, sworn in behalf of the defendant, testified as follows:

Direct examination by Mr. Collins.

Q. What is your occupation? A. I am a civil engineer, in the employ of the Erie Railroad Company.

Q. I call your attention to the map on the easel, did you make that map from actual observation of the place it is intended to show? A. Yes, sir; I made the survey there.

Q. You made it when? A. On the fourth of October.

Q. Does it correctly show what was there, leaving out those two piles of rails? A. Yes, sir.

Q. With that exception it is exact of what stood there at the time you made the map? A. Yes, sir.

Q. Does it show the station and platform and surroundings as they existed in January last, as well? A. Yes, sir; no changes have been made since.

Q. The map is drawn to a scale? A. Yes, sir.

Cross-examination by Mr. Gourley.

Q. How did you come to put those rails on there? A. I inquired from the foreman the position of the rails; the rails were to be used in building a crossing, and they had been used some time previous to October, and they had to be moved for that reason, I believe.

Q. That was information that was given to you? A. Yes, sir.

MR. GOURLEY—I ask to have that struck out.

WITNESS—I went to get the location of where this man was supposed to get off, and I inquired from the foreman where the rails were.

Q. You never saw any rails there? A. No, sir.

Q. And there were no rails there when you made the map? A. No, sir.

Q. You said something about a platform, what platform is there on River street? A. Which platform do you mean?

Q. On the easterly side of River street, what platform is there on the station there? A. Will you show me on the map where you mean?

Q. I mean the crossing here? A. It is not built as a platform.

Q. It is simply the planking for the crossing? A. Yes, sir.

Q. The platform, then, ends nearer the crossing gate as shown on this map? A. That street is the same elevation there as the platform.

Q. I didn't ask you that; does the platform end at about at the crossing gate? A. Yes, sir; the dirt platform does.

Q. Is that a dirt platform? A. Screenings—stone screenings.

Q. Tnat is so all the way in front of the buildings? A. Yes, sir.

Q. Beyond that is simply the planking of the— A. Yes, sir.

Q. In other words, this was on the other side of the street, the plank there; and the crossing is the

same on either side of the railroad at River street? A. Yes, sir.

Q. Now, is that your figure in that photograph? A. I don't think I could distinguish anyone there.

Q. What is the width of this road here, whatever it is called, east of the track, to Ashley and Bailey's property line. A. Do you want me to scale it?

Q. Yes. A It is about 33 feet.

Q. You have marked it on the map Erie Railroad Company property? A. I mean that is their property to the back to that fence line.

Q. That is what? A. 33 feet from this earth; the outside earth.

Q. Is there a foot-path along there that people walk on parallel with the track, and parallel with the Ashley and Bailey property line? A. No, sir.

Q. I call your attention to this photograph here and call your attention to what appears to be a defined foot-path, is that so; refreshing your recollection by the photograph, what have you to say; is there a foot-path there? A. People probably crossed that lot.

Q. I mean from Warren street to River street do people pass back and forth along there? A. What do you call a foot-path?

Q. What have you in your mind? A. I would not call it one.

Q. Do people pass up and down there? A. Well, probably they do.

Q. It is open; persons can if they desire; there is no obstruction; that is so, isn't it? A. Yes, sir.

Q. Were there not persons passing up and down there the day that you were there with your map? A. Yes, sir; but there is no path there.

Q. What is the indentation, if any, where the ties are; in other words, how high is the tie—now, this point where you crossed is marked on the photograph above the ground?

MR. COLLINS—Above the ground that the tie rests in.

MR. GOURLEY—Yes.

WITNESS—The thickness of the tie probably —the height of it—a little more.

Q. Did you make any observations to know how high the embankment is, opposite the tie? A. Well, no, sir; we made simply a ground plan; we made no profile.

Q. Do you know whether there is an incline up from this hollow near the end of the tie? A. Enough to form a ditch to carry the water over.

Re-direct examination by Mr. Collins.

Q. What is there in the roadway on River street adjoining these plants; Macadam or gravel or what? A. I think it is vitrified brick.

Q. Is that or not on the same elevation as the platform of screenings to the north of it? A. Yes, sir; it is.

Q. That elevation is what with respect to the top of the rails? A. It is level with the top of the rails.

Q. Just indicate to the jury; come here, please, to the map (witness goes to the map); what you mean is that where I now point, C; is that in River street? A. Yes, sir; there are two streets there, they come together, River and Putnam, and that is in continuation of that screenings.

MR. COLLINS—(Speaking to jury) Mr. Gourley says the platform ends there, but the witness says it is all the same level.

Q. Will you give the distance from the north end of the platform to the south side of River street? A. 420 feet.

Q. What is there at the extreme north here where the platform ends? A. There is a ditch; an embankment.

Q. How high? A. It is quite a hill.

Q. Could the platform go any further to the north than it is? A. No, sir; there is a hill starts right in here close to the ditch and goes up here; there is quite an incline that meets there.

Q. The platform begins there at that point that you speak of? A. Yes, sir.

Q. Will you give the length of the station building? A. What do you mean by the building; the building itself?

Q. Yes, I mean that. A. 37 feet.

Q. What is the length of the structure with its appurtenances; the whole thing forming the station itself? A. You mean the roof?

Q. The whole thing that is part of the structure, even though it may be projecting roofs? A. 47 feet.

Q. That is the building itself—what is the building itself? A. 47 feet.

Q. The building itself is 47 feet? A. Yes, sir.

Q. Well, from this point north of the word "screenings," on the east of the tracks to River street, is how far from this point (indicating) to the east of River street? A. 245 feet.

Q. This screening platform around the building, on the east of the tracks, ends where it does because of the embankment you speak of? A. Yes, sir.

Cross-examination by Mr. Gourley.

Q. In answer to the question that it is 420 feet you measured on this map from the extreme northerly side of the map, down across River street until the point marked "Main track," your 420 feet were within these two points? A. Yes, sir.

Q. Very well, now do you say there is any platform—what is this distance here to Main street? A. About 200 feet.

Q. Then it would be 220 feet from the word "west" here to this point where you have begun your measurement? A. Yes, sir.

Q. Now then, this lower part that you put on is simply the crossing; the plank crossing for a public road? A. Yes, sir.

Q. And at the lower point, of course, it is an acute angle, where it crosses your track, isn't it—this plank walk? A. Yes, sir.

Q. Now, about this photograph; didn't you make a measurement of the height of this embankment here above that hollow, pointing specially to the photograph in evidence where the cross is; didn't you, at the time the photographer was down there taking this photograph, take the measurement of the height of that embankment where that cross is? A. Well, I may have; I took quite a number of measurements.

Q. Why cannot you give us that height then, if you took the measurement on that day; you made it, didn't you; why did you make the measurement first; why did you go to that particular point and make that measurement there showing how high the incline was from that point from the hollow; why did you do that at that point? A. Why, to get the depth of the ditch.

Q. Well, what is the depth of the ditch? A. From where?

Q. From the top of the embankment. A. Well, we will have to take that from something permanent—we don't know what the embankment is.

Q. Answer my question; did you take a measurement on that day from the slope of that embankment to the hollow? A. Yes, sir.

Q. Now, what is it? A. I am not prepared to

say, because we are submitting a ground plan, and that does not show on the ground plan.

Q. Did you make any measurements that day? A. Yes, sir.

Q. Did you put down anything in your book about it? A. Yes, sir.

Q. Where is it? A I have not the book with me.

Q. I am informed you were seen to make that measurement; now, I want to know why you cannot tell us, if you made it? A. I will tell you—because I made this survey on the 4th of October; that other one was some day previous, probably two weeks before that, and we are not submitting the survey that was made that day.

Q. I am not asking you that; I want to know whether you made such a measurement, and, if so, what is the depth of the ditch? A. I don't know.

Q. Have you any memorandum showing it? A. Not here.

Q. It is true you made it? A. Yes, sir.

Q. Well, now, isn't it true that you have some notion of what that measurement was? A. I probably took two or three hundred measurements; I could not remember all of them.

Q. Do you mean to say you cannot tell us now from recollection just what that measurement was? A. I would not tell you from memory.

Q. Have you anything in your memory indicating what it was? A. No, sir.

Q. Now, then, you did take some measurements from the top of the earth also, didn't you, to the ditch? A. Yes, sir.

Q. What was that? A. I am not prepared to say, because this is a ground plan.

By Mr. Collins.

Q. You say you did, a few days previously, take

some measurements? A. We used a profile to show the bricks in the ground—I am simply showing the outlines of the ditch on the ground plan.

By Mr. Gourley.

Q. You made them, but you don't remember what they were? A. That is right.

Q. I show you a photograph, and ask you if you can recognize yourself in that photograph? A. Yes, sir.

Q. Which figure is you—the gentleman putting some notes down? A. Yes, sir.

Q. Were you not at that time putting the notes down of the measurements of this ditch? A. I don't think you should expect me to remember two or three hundred measurements.

Q. (Question read). A. If I had measured the ditch I should make the notations as I made them, but I would not walk away over there to do it; I would forget them before I got that far.

EDWARD F. DENNER, sworn.

Direct examination by Mr. Collins.

Q. You are a practicing physician and surgeon in Paterson? A. Yes, sir.

Q. Of how many years' standing? A. About eleven years.

Q. And of what institution are you a graduate? A. Physicians and Surgeons, New York City.

Q. And you have given considerable attention, in your practice, to conditions resulting from accidents—physical injuries? A. In the last eight or nine years, yes, sir.

Q. Were you called upon at the request of the defendant to examine the plaintiff in this case? A. Yes, sir.

Q. When did you do so? A. I saw him on two

different occasions—the first time about the end of January, about two weeks or ten days after the accident.

Q. What did you find? A. I found that he had had a laceration of the right tibia, or the front part of the shin bone of the right leg.

Q. Did he call your attention to any other injury than that? A. There were no other injuries; he called my attention to pains, and he said he had a pain in his side, a pain in his back, but that was the only injury that showed itself, that laceration of the shin bone.

Q. Was there any abnormal condition discoverable in the back or in the other leg? A. The back of the leg seemed to be perfectly normal; there seemed to be no bruises or contusions on the back of the leg.

Q. Was there anything discoverable in the side or back? A. No, sir.

Q. When did you next examine him? A. I saw him on the 16th of April.

Q. State to the jury the condition then existing? A. This laceration had healed; there was a scar over the site of injury, and that was all that I found.

Q. Did you find anything else the matter with him? A. No, sir.

Q. Did you examine him thoroughly. A. I did.

Q. Anything else the matter with him? A. No, sir.

Q. When did you next examine him? A. Last Tuesday.

Q. Was Dr. McGinnis there? A. Yes, sir; and Dr. Vreeland.

Q. What examination did you then make? A. I asked him as to his different complaints, and he told me; he told me that the leg was stiff; I ex-

amined the injured leg and the scar was still present, and he said that he could not walk very well; I could not find any particular stiffness of the muscles or tendons, except that he said he could not walk, and when I asked him to walk he did so with seeming difficulty, without the use of a cane.

Q. Did he have any other support? A. Only as he passed the table; he turned around to go back to the starting point, and he was able to walk without the cane; as he went by the table he raised his hand.

Q. After he left the table? A. He went to his seat without anything.

Q. How many steps did he take after that? A. After he left the table—not more than three.

Q. You say he walked with some stiffness? A. I don't know whether it was a stiffness; he seemed to have a difficulty in locomotion.

Q. You found nothing the matter with the muscles of the leg? A. No, sir.

Q. Did you measure the two legs? A. Yes, sir; the measurements were exactly equal on both sides with the exception of the left ankle, and the measurements on the left side was about one-eighth of an inch larger than on the right side.

Q. At the ankle? A. Yes, sir.

Q. Did you find anything the matter with either of the legs? A. There was no pathological condition disclosed then outside the scar.

Q. Did you find anything the matter with the back or sides? A. No, sir; I did not examine his back carefully; he only complained of pain over his kidneys, and there were no contusions evident, so I did not examine his back at that time.

Q. Was any complaint or information given to you, or any claim of neurasthenia by the doctors or anyone? A. No, sir.

MR. GOURLEY—Is that proper?

WITNESS—If I may explain—in going out on the street I was speaking to Dr. McGinnis about the case—

MR. GOURLEY—I object.

WITNESS—That is the only time I said anything, and I don't want to state that here, because I don't think it is professional.

MR. COLLINS—We do not object.

MR. GOURLEY—I don't object.

WITNESS—If you want me to state it I will state it.

MR. GOURLEY—I don't want you to do anything at all. We will also state what you said about the case if you do.

MR. COLLINS—The purpose is this, without any information to lead him to look for neurasthenia, it may be said, it might be argued, that he did not look particularly for neurasthenia, and if there was no information given to him—

THE COURT—He was supposed to be looking for everything.

MR. COLLINS—I don't care whether it is stated or not; it is just as Mr. Gourley wishes.

MR. GOURLEY—I don't care.

By Mr. Collins.

Q. Doctor, are there tests by which it may be perceived objectively whether the plaintiff is neurasthenic or not? A. Yes, sir; I think there are some tests that can show you to a certain extent

whether the patient is neurasthenic, but I should think the patient would have to be decidedly neurasthenic to show those conditions; a very mild condition might not show it at all.

Q. Do you see any reason why Mr. Mason should not get entirely well? A. None whatever.

Q. And in how long a time? A. That is indefinite; I would not want to put myself down as stating any given time, but he ought to get well in from three to six months at the most.

Q. Depending somewhat on the treatment? A. Depending entirely on the care and attention that he gets.

Q. What do you regard his condition is now? A. I regard his condition as fairly good.

Q. Did you notice the elastic stocking he wears? A. Yes, sir.

Q. Were they loose or snug? A. They were loose.

Q. In that condition would they afford him any support? A. Well, if they were put on for support I don't see how a loose stocking can give any support; naturally that defeats its own ends.

Q. What treatment do you think his legs should receive? A. It is a hard question to answer; I never questioned what kind of treatment he was getting except salt water baths and massage and medicinal treatment, but what medicinal treatment he received I don't know.

Q. What I would like to know is which would be better for him to have, moderate exercise or elastic stockings? A. He ought to have continued with regular exercise; that would be the proper thing.

Q. Do you see any reason why, if he had it, his legs should not become entirely normal? A. There is no pathological condition there that I can discover; none of the other doctors either could dis-

cover it, so I see no reason why he should not get well.

Q. You don't find anything the matter with his legs then? A. Nothing outside of that scar.

Q. What is your diagnosis of this case? A. I would say more from the fact that the man has had the attention of intelligent physicians; not so much from what he has disclosed to me, that he is suffering from a very mild neurasthenic condition.

Q. That opinion depends on the information you have received from other doctors? A. Mostly—there is one little thing that I did not notice—in taking the measurements I accidently rubbed the anterior surface of the leg with my cuff, and he seemed to jump in a nervous way; that was the only thing that I could really say by which he disclosed any nervousness at all. The other symptoms were symptoms that he detailed to me, namely, loss of appetite and insomnia and all such symptoms that I could not tell anything about.

Q. No objective symptoms whatever? A. That is about the only thing.

Cross-examination by Mr. Gourley.

Q. When you went there first two weeks after the accident, you were then in the employ of the railroad company? A. Yes, sir.

Q. A member of its medical staff? A. I have been for the last eight years.

Q. It maintains a medical staff? A. I think they do from here to Buffalo.

Q And you visited him the next time because the defendant desired the information? A. On the 16th of April.

Q. Give us the date of the two visits? A. My first visit was made, I believe, on the 29th or 30th of January; that was about a week after Dr. Vreeland first saw him, and the accident took place on

the 15th. I don't think Dr. Vreeland saw him until six or seven days after the accident, and I saw him one week after Dr. Vreeland had seen him; that makes it about the 30th of January, and the next time was the 16th of April of this year; and the next time was last Tuesday.

Q. Did you ask him to walk on the second visit in April? A. Yes, sir; I did.

Q. Did you ask him to walk on this last visit, this month? A. I did.

Q. Where was that last examination made? A. In his home.

Q. Who were present? A. Dr. McGinnis, Dr. Vreeland, Mr. Mason and his wife.

Q. What was the size of the room? A. Ordinary living room, about 14 by 15.

Q. Was there an open space? A. Open space on the sides—a few chairs around.

Q. How many steps do you say he took? A. Four. He walked from his chair where he sat in one end of the room to the other end of the room, and then back again; I think there was a mantel there where he turned.

Q. Did he have a hold of anything? A. Only that table in passing; he walked stiffly, and then sort of supported himself on that table as he passed by.

Q. The movement without the cane was a sort of shuffle? A. No, sir; he really lifted the foot from the floor, but it was a stiff motion.

Q. A labored walk? A. Yes, sir.

Q. Your impression was that it could not be continued for a long time? A. The way the man walked I would not think he could walk half a block.

Q. Did you notice the heels on his shoes. A. He did not have any heels on his shoes at all; he had

socks on; he had his shoes off; I think he was barefooted.

Q. Did he put his shoes on at all? A. I went away before he put them on again; I believe he told me he had on rubber heels on my second visit; I am under the impression that he wore rubber heels.

Q. You examined him, you say, but not thoroughly? A. I did examine him thoroughly.

Q. You did examine him thoroughly? A. Yes, sir.

Q. How thoroughly was it? A. Thorough enough to find out that there was not very much the matter with him.

Q. Now, let us see, did you examine the reflexes —in succession? A. There was no claim made that he had lost a lot of reflexes.

Q. You only examined him along the lines that somebody made suggestions to you? A. I questioned him as to his symptoms.

Q. But did you do that? A. No, sir; I examined him as carefully as I could, to ascertain his present condition.

Q. Would not that have been the best test to ascertain whether there was anything wrong with his spinal cord? A. There was no question of the spinal cord being involved at all.

Q. What is the cause of this limp and halt? A. The man may have a pain in his back; that is the only thing I can attribute this walk to, or he may be simulating it, or he might have some slight rheumatic trouble of the muscular structures of the back or he might have pain which prevents him from walking; the pain being brought on by contraction of these muscles of locomotion.

Q. What would cause that contraction of muscles? A. When a man starts to walk he has to contract muscles.

Q. But normally there is not much pain attending it? A. If the man is well the act of locomotion gives no pain.

Q. If it gives pain what is the primary cause of the trouble? A. There might be a thousand different causes—you mean generally?

Q. Confining yourself to the facts of this case, that this man was, before this act, apparently well, and able to move about and attend to his business, and you found these conditions, I am taking for granted that he has pain when he walks? A. It might be due—

Q. Taking for granted that he has pain and has met with this accident? A. It may be due to a laceration of muscular structures; laceration of muscular tissue; might be due to laceration of tendons; might be due to rheumatic conditions; it might be due to neuritis; it might be due to stretching of the nerves, or be due to pressure on the nerves from surrounding inflammatory conditions; it might be due to nerve inflammation, from some toxic condition, that is, poisoning, or it might be due to any articular condition; I don't believe there are any of them present in him though.

Q. How many of these cases would show. A. They would all show except a neurasthenic condition.

Q. Now, let us take neuritis. A. Neuritis is not a neurasthenic condition.

Q. Did he have neuritis? A. Not to my knowledge; when I saw him he never had.

Q. We will assume that he had neuritis? A. At what time; because neuritis is not a lasting condition?

Q. The doctor described that he had it for about eight days, following the accident? A. Well, take it for even that time, he had the neuritis for eight days, do you expect to find in a patient having

neuritis some change in the nerves subsequently? A. You cannot get down to examine it.

Q. Would you expect to find a change in the nerves? A. You would find it certainly; you always find it.

Q. Isn't that a result of neuritis? A. A change.

Q. Isn't there—A. Neuritis means an inflammation of the nerve, and that is accompanied by certain pathological conditions.

Q. After that, inflammation subsides, isn't there at times a change in the nerve long afterwards? A. Not if the man recovers.

Q. If he does not recover, is not that an explanation of his condition? A. But this man has recovered; it was claimed he recovered in eight days.

Q. Why may not the inflammation of the nerve subside and leave conditions there which take a long time to recover from? A. Yes, sir.

Q. In various patients there would be various symptoms; isn't that true? A. He might have one symptom, but he would have many more. I would positively say there was no neuritis there.

Q. Take him as he stands right here now? A. He has no neuritis as he stands there; I will swear to that.

Q. Now, if you assume that he had it after the accident, would you expect to find any case of change of nerve; such as to leave conditions affecting his walk or movement? A. I don't understand what you mean; the question is, has this man recovered now from neuritis or not; after the man should recover he has no symptoms; after neuritis the recovery is generally total; and they have no symptoms. If this struggle in walking is due to the neuritis it is generally due to a paralytic condicondition.

Q. The question is whether he has recovered or not? A. He has recovered; it is claimed by his

physician that he has recovered from neuritis; either he gets well or he does not get well.

Q. After a man has neuritis may not the nerve be affected after the inflammation has gone; after inflammation goes down, and that is all neuritis is? A. Yes, sir.

Q. After it has gone it leaves no effects behind it; is it a probable thing that there are other consequences left? A. Very seldom; I don't know that I have ever seen any.

Q. Now, then, if you take a case where he had neuritis, and you find the man ten months afterwards as this man is, what explanation would you give? A. I should say that he was suffering from a mildly neurasthenic condition, if he is suffering, there is no reason why he cannot walk, because there is no evident pathological condition present by which I can tell that that man cannot walk.

Q. In other words, you know no more about it than one of the men on the jury? A. I know there is no pathological condition there.

Q. All you mean by pathological is that you look at him and see only a scar on his leg? A. Oh, no; there is no atrophy there; there is no contraction of the muscles or tendons.

Q. Did you find this leg corrugated; roughened? A. There was a roughness of the anterior surface of the tibia, but that man had that before the accident.

Q. What impression had the stocking made after it was taken off; what impression had it made on the leg? A. I did not see any impression of the stocking.

Q. You did not? A. No, sir.

Q. Now, I say, any examination you made, you found nothing except the scar on the leg when you first examined him, but that scar has disappeared

now? A. No; the scar is there, but the laceration has disappeared.

Q. Beyond that there is nothing else? A. No, sir.

Q. So that you have to take his word for the fact that he cannot walk; is that it? A. Practically; yes, sir.

Q. If he has not simulated, Doctor, what is wrong with him? A. I said, if he is not simulating, he is suffering from a mildly neurasthenic condition, and ought to get well.

Q. If a man has this complaint ten months after the accident, is that mildly neurasthenic? A. If he was very badly neurasthenic he would show an entirely different train of symptoms, which would show themselves objectively.

Q. What is wrong, assuming he cannot walk, as he says he cannot, except as he has illustrated here with a stick; what is wrong with his bodily formation? A. Nothing at all; his bodily formation is good; if it is a neurasthenic condition, it is a condition which arises secondarily to some condition of the body.

Q. Was anything wrong with the muscles there? A. None that I can detect.

Q. Well, none that you can detect; can you say there is nothing wrong with the muscles there? A. Well, from what I observed, I can say no.

Q. May there not be rupture of the muscles without your observing it? A. No, sir.

Q. Mr. Mason's statement is that he cannot walk, and that he has pain in both legs at the present minute, and a pain in his back? A. He may have.

Q. That that has been persistent and continuous, if I may say so since the accident; have you any explanation to make of that? A. The only explanation I can give is that it is a neurasthenic

condition if he has pain there; you cannot see anything objectively that will show the man has pain.

Q. In conditions like this you can furnish us with no evidence upon it? A. Not as regards pains.

By Mr. Collins.

Q. Lots of people wear rubber heels? A. Yes, sir; "common sense" shoes have them.

By Mr. Gourley.

Q. Doctor, how was his condition in October as compared with April; for example, is he better? A. Do you mean the day before yesterday as compared with last April? Well, I think he is a good deal better than he was then, because he has been going up and down the stairs, and walking around the store, and at that time he could not get around very well at all, and his general appearance is good; his general appearance is not bad.

WILLIAM F. CONE, sworn in behalf of the defendant.

Direct examination by Mr. Collins.

Q. You are a photographer? A. Yes, sir.

Q. And at the request of the railroad company you took the two photographs I now show you? A. Yes, sir.

Q. When? A. On July 31, 1906.

Q. You labeled them as to what they were? A. Yes, sir.

Q. Just state what they are. A. One made at 11 A. M. was made at River street crossing, Paterson, N. J.; it was a general view looking west, from the centre of the westbound track; at Warren street from the centre of the westbound track;

the height of the lens from the ground was five feet.

Marked Exhibit D 2.

WITNESS—The second view on River street crossing, Paterson; that was made at 12 M.; the camera was placed at a point on the sidewalk 100 feet west from the centre of River street crossing; the height of the camera was five feet.

NO CROSS-EXAMINATION.

MR. COLLINS—The map should be offered, and that will be marked Exhibit D 4.

THE COURT—Subject to the exception that the rails on it are not to be taken as a part of the map, simply as an indication as to where the rails were.

CHRISTOPHER JOYCE, sworn in behalf of the defendant.

Direct examination by Mr. Hobart.

Q. You are the supervisor of the Erie Railroad Company? A. Yes, sir.

Q. Over what? A. Supervision of No. 1.

Q. Beginning and ending where? A. Beginning at the county road and ending at Ramapo, New York.

Q. That includes the part of the main line which passes through the River street station? A. Yes, sir.

Q. How long have you been supervisor? A. About ten years on this.

Q. Did you see any rails piled anywhere along the easterly side of the westbound track between River and Warren streets, in Paterson, prior to this accident? A. There were two piles of rails be-

tween Warren street and River street on what we call the north side of the track, taking the railroad running east and west.

Q. That would be on the righthand side as you go west? A. On the righthand side as you go west; yes, sir.

Q. The same side on which the station is? A. Yes, sir.

Q. Do you know what those rails were there for? A. They were rails that were left for repairing the crossing; we were making what we call a Baltimore crossing.

MR. GOURLEY—I move to strike the answer out.

THE COURT—Let it stand; I don't see how it is relevant, but it is in.

Q. Where can you indicate on the map in detail where these rails were located—on the blueprint that has been marked Exhibit D 4; which do you understand is the eastbound track (pointing to the map)? A. The righthand side going towards New York.

Q. Do you see the station? A. Yes, sir.

Q. The westbound track is the nearest one to the station? A. Yes.

Q. Now, where were the piles? A. There was one pile just east of River street, and the other just west of Warren street; there was a pile each side of this signal; the pile marked semaphore on the plan.

Q. How many rails were there in the pile located to the west of the semaphore nearest the station? A. There were four.

Q. How were they piled? A. They laid parallel with the track, and the face of each rail was laid

close together; that is, the rails were laid alongside of one another.

Q. How were the rails placed with reference to the ditch running alongside of the west-bound track? A. They were just set on top of the ditch; from the bottom of the ditch to the top of the bank it is two feet; the ditch was about two feet deep, and the bank on the back side of the ditch was sloped about a foot and a half to a foot, and instead of laying the rails on the top of the plank they were just laid on the slope of the bank.

Q. It is marked on the map rail 5, with four white lines directly under it; does that correctly represent the position and location of those four rails?

MR. GOURLEY—Objected to.

THE COURT—Objection sustained.

Q. Put a mark on the map with a pencil, indicating where these rails were piled; mark it with a pencil? A. Those rails—the end of those rails—were piled 46 feet, east of River street crossing.

MR. HOBART—Mark that end with a pencil.

MR. GOURLEY—Isn't that near enough?

THE COURT—I should think so.

Q. Which end of the rail is 46 feet from River street.

MR. HOBART—Please mark it.

(Witness marks the place with an X.)

By Mr. Hobart.

Q. Do you know how long those rails have been there before the accident? A. We stopped making repairs there about on the 5th of December.

Q. Last December? A. 1905.

Q. Did you see these rails any time shortly after this accident? A. Yes, sir; I saw them three or four days after the accident.

Q. How were they piled when you then saw them? A. They were piled about the same as is shown on the map.

Q. Were they the same as they were before the accident? A. Yes, sir.

Q. What is the length of the rails? A. They were all thirties and two twenty-sixes; there were ten rails—two twenty-sixes and eight thirties.

Q. Do you mean 30-foot rails? A. Each rail 30 feet long; the pile next to River street crossing was four 30-foot rails.

Adjourned until Friday, October 19, 1906, at ten o'clock.

SECOND DAY.

Met pursuant to adjournment.

Appearances as before noted.

(Same witness resumes the witness stand.)

Direct examination by Mr. Hobart (continued).

Q. In the course of your duties as supervisor have you had occasion to notice the length of the station platforms of the defendant company in the State of New Jersey? A. Yes, sir.

Q. In your section?

MR. GOURLEY—I object to the question.

MR. HOBART—We propose to show by this and other witnesses that this platform, which appears from the evidence to be

about 400 feet long, was about the average and usual length of the platform at a station of this kind, with a view to meet any claim that the platform was not long enough to accommodate the train on which the plaintiff was riding.

THE COURT—The objection is sustained.

To which ruling of the Court the defendant's counsel prays an exception.

Exception allowed; let it be sealed, and it is sealed accordingly.

WILBUR A. HEISLEY, [L. S.]
J.

MR. HOBART—In order to make that perfectly clear we propose to show by witnesses from other railroad companies, as well as by this witness, that the customary and proper railroad practice at suburban stations of the general character of River street station is to have a platform of about the length of the platform in question in this suit. We have witnesses from other railroad companies to that effect.

MR. GOURLEY—Objected to.

THE COURT—The objection is sustained.

To which ruling of the Court defendant's counsel prays an exception.

Exception allowed; let it be sealed, and it is sealed accordingly.

WILBUR A. HEISLEY. [L. S.]
J.

Cross-examination by Mr. Gourley.

Q. When did you last see these rails at the place in question? A. Before the accident?

Q. When did you see them last before the accident? A. Probably the day before the accident, and every day from the 5th of December up until the accident.

Q. When was the accident? A. It was in January.

Q. Do you remember the date? A. No, sir; I do not; about the 15th or 16th.

Q. Do you remember how long after it was said to have happened that you heard it? A. I went to the place of the accident, three or four days after the accident and looked the rails over.

Q. What was your duty as supervisor of this division? A. To maintain tracks and platforms.

Q. Do you actually lay the rails? A. The rails are laid under my supervision.

Q. You don't actually lay them? A. I personally take charge of laying them at times, and direct how they should be laid.

Q. How many gangs of men are there whose duty it is to take up and put down rails between Jersey City and Ramapo, between the County Road and Ramapo, the division of which you have supervision? A. I don't understand the question yet.

Q. Have you more than one set of men, groups of men, who put down rails on that division? A. I have thirteen gangs of men maintaining tracks, maintaining the rails on the tracks; when there are rails to be laid as renewed, I have special gangs that do that work.

Q. You have thirteen gangs on this division maintaining rails? A. Yes, sir.

Q. When instructed to take up the rails and remove them from the tracks and put down new ones? A. When it was necessary to do so.

Q. I say, when they are instructed to do it, that is their duty? A. Each man has a specified territory to maintain.

Q. And there are thirteen specified territories in this division? A. Yes, sir.

Q. Is that right? A. Correct.

Q. Very well, now, when it is necessary and they get instructed, these rails are taken up and new rails put down? A. Yes, sir; when it is necessary.

Q. You will not do it otherwise, I hope? A. The way you put the question one would think they were to be changed every day—that is the way you put the question.

Q. I said whenever it was necessary to change to change them? A. I said, when it was necessary to change them we did so; each one of the section foremen maintained a section.

Q. Well, as supervisor you don't tell them where to put the rails that they take off? A. I do.

Q. You actually then go about and instruct these thirteen track foremen in these subdivisions of your division where to put the old rails? A. I instruct them in their work in general.

Q. Did you do that? A. Yes, sir.

Q. Did you on this day in December, when those rails were taken up, actually point out the place where to put them, the old rails? A. I don't understand the question.

Q. Did you point out in December the spot opposite Ashley & Bailey's mill where to put these rails? A. I instructed the work train.

Q. Did you tell them to put them there? A. I told them to unload those rails between Warren street and River street.

Q. That was the general instruction given? A. That was the instruction I gave them.

Q. To whom did you give that? A. To the foreman of the work train; James McGuire was the foreman and conductor at that time.

Q. Is he working for the road now? A. Yes, sir.

Q. Is he here? A. No, sir.

Q. Did you tell them which side of the road to put them on? A. I told them to unload them between Warren street and River street.

Q. Did you tell them? A. I told them to unload them between Warren street and River street on the north side of the track.

Q. You say now on the north side of the track, why didn't you tell me that before? A. You didn't ask me that, not about the side of the track.

Q. Did you tell them to put them in one or in two places? A. I told the work people to unload—

Q. I am speaking of the instructions you gave the man immediately under you, the track foreman? A. The work train foreman unloaded them.

Q. McGuire then—did you give him instruction to make two piles? A. McGuire did not pile them.

Q. Did you give McGuire the instruction to pile them twice? A. I instructed McGuire to unload them between Ashley & Bailey's mill on the north side of the track.

Q. Did you tell him to put them in two piles? A. I told you that he unloaded them.

Q. Answer me yes or no; did you tell them to put them in two piles? A. I did not tell them to pile them at all, because he did not pile them, they were piled by the section foreman.

Q. How do you know that they were piled by the track foreman? A. I sent him there to pile them.

Q. Specially to pile those rails? A. Yes, sir.

Q. Did you tell him to pile the new ones? A. They were all old ones.

Q. Where had they been taken from? A. They had been removed from other parts of the track; from different parts of the division.

Q. Where had you seen them before they went

there? A. They were taken from a point between Waldwick and Ramsey's.

Q. How many miles is it from Waldwick to Ramsey's? A. About three miles.

Q. Had you seen them? A. Seen what.

Q. Had you seen them there when they were taken up that division and sent down? A. Of course, I had them removed from the main track and new rails put in their place.

Q. You seem to be doing it all—did you actually remove them? A. I am the supervisor and they work according to my directions.

Q. I have no doubt that you are the supervisor; I don't know whether you will continue to be or not, but I wish you would answer my questions. You say you saw this on the day or two days before the accident—the rails? A. I did.

Q. What day do you remember of the week? A. I don't know of any particular day of the week, but I passed there every day mostly.

Q. Did you go down in a hand-car? A. Sometimes I walked, and other times I ride on the hind end of a train.

Q. In reference to those times—Iwant you to remember what you actually can recall—whether you looked to see whether those rails were there or not? A. I don't understand you.

Q. Did you actually look to see if those rails were there a few days before the accident? A. I went by there and saw the rails there.

Q. Did you go by this whole division and see rails piled up quite frequently along the whole road A. Yes, sir.

Q. It is not uncommon for the Erie Railroad Company, on your division, to have rails piled up here and there? A. We keep rails piled in different parts of the road.

Q. Do you say you can recall other places along

your division to-day where there are some rails piled? A. I think I can.

Q. And the exact number of rails in each pile? A. I won't say that, but I have a record that shows where the exact number of rails are.

Q. Of course, but you could not attempt to say where those particular rails are, or how many there might be in a pile? A. I could tell the number of feet.

Q. Will you mark on this map 46 feet from this point; mark 46 feet west of that point on this map for me. A. I have nothing to scale it with.

Q. You scaled it last night I understand and put a cross there—I am putting another one, one to give me 46 feet west of that point on this map.

MR. COLLINS—The witness asks to see the scale on the map.

Q. You scaled this map last night 46 feet?

MR. COLLINS—We object to the question.

Q. Did you measure 46 feet on this map last night? A. I marked the part of the rails that was 46 feet from the end of the crossing.

Q. Did you mark 46 feet on the map from a point; did you mark last night and put your pencil at 46 feet from the semaphore last night? A. No, sir; I did not talk about the semaphore.

Q. From what point did you mark the 46 feet? A. I marked 46 feet from the east end of River street crossing.

Q. Very well, how did you reach the 46 feet from the east end of River street crossing last night and you cannot do it this morning? A. Because when measuring the rails I got that distance from where they were piled.

Q. Which rails? A. Those marks shown on the map.

Q. How do you know it is 46 feet if you have not scaled? A. I did not measure it on the map; I do not know exactly the distance on that map, but I do know that what I have said is so; I put it there because the rails were 46 feet from the end of the crossing; I marked it on the map.

Q. You did not mark 46 feet from the end of the crossing and then put the mark there? A. I put the mark on the end of the rails which was supposed to be 46 feet from the end of the crossing.

Q. After all this conversation will you mark 46 feet anywhere on this map for me from any point at all; take 46 feet from this cross that I put on the map, measure 46 feet there and mark it there with this pencil.

Re-direct examination by Mr. Hobart.

Q. How do you know the rails were 46 feet from the end of the crossing? A. Because I measured from the end of the crossing to the rails.

Q. When? A. When they were there.

Re-cross examination by Mr. Gourley.

Q. How do you know that the rails there are 46 feet? A. Well, you asked me a question and I told you that the rails were 46 feet from the east and the crossing, then you told me to make a mark, and I made the mark.

JOHN GETTY, sworn in behalf of the defendants.

Direct examination by Mr. Hobart.

Q. You are the section foreman? A. I was section foreman in December, 1905, and January, 1906.

Q. Does your section take in that part of the road which passes River street? A. Yes, sir.

Q. Do you remember piling some rails on the north side of the track? A. Yes, sir.

Q. Now, do you recall where they were piled with reference to—take the semaphore signal between Warren and River streets? A. There were two at least—one each side of the semaphore.

Q. Do you remember when they were piled in that place? A. Yes, sir; they were piled the week before the accident.

Q. When was the accident? A. It was in January; I don't remember the date.

Q. Your attention was called to the accident? A. Yes, sir.

Q. You heard of it? A. Yes, sir.

Q. Will you state how the rails were piled, whether lengthwise with the track or in some other way? A. It was alongside the track, parallel with it.

Q. Do you happen to recall how many rails there were in each pile? A. Four in one and six in the other.

Q. In which pile was the four? A. The one next to River street, east of the River street crossing.

Q. How were they piled with reference to the ditch; how close to the ditch? A. It was 8 feet away from the track.

Q. When you speak of the track, what do you mean? A. I mean outside of the ditch.

Q. When you speak of the track do you have reference to the rails or to the ties, or what? A. No, sir; from the rails.

Q. 8 feet from the rail? A. From the rail.

Q. How do you fix the distance? A. Well, I measured; I piled them up 8 feet away from the rail.

Q. Do you remember when it was you made the measurements? A. Yes, sir.

Q. When? A. It was in January.

Q. Before or after the accident? A. About a week before.

Q. How did you happen to make the measurements. A. Well, when I piled them up.

Q. How were the rails piled as to whether they were one on top of the other? A. No, sir; one alongside of the other.

Q. All resting on the ground? A. Yes, sir.

Cross-examination by Mr. Gourley.

Q. 8 feet away from the rail would take them up on top of the embankment? A. No, sir; it would be on the slope of the bank.

Q. Which slope? A. The slope from the ditch—the ditch, from the bank to the track; it is a slope of 2 feet.

By the Court.

Q. You mean the slope on the side of the ditch towards—you mean the slope on the side of the ditch towards the track, or on the side of the ditch away from the track?

By Mr. Gourley.

Q. Look at that photograph which I show you and tell me whether you recognize the ground there—this is Warren street here, this is the edge of the extreme right, on the extreme right lower side of the photograph the edge there is the sidewalk at Warren street; now, this is River street up here; this is the gas tank and that is the River street station, and there is the Smith Company; that is the River street station. The rails are said to be about where that cross is; what have you to say about it? Where that cross has been marked was

one pile of rails; the other pile you say was here; now, look on that photograph and point out on it—A. I cannot understand it.

Q. I don't want to confuse you; when did you put them there? A. I piled them up the week before the accident; that was in January.

Q. I thought you were working there in December? A. Not me.

Q. It was in January that you say you piled them up? A. Yes, sir.

Q. Do you remember what time? A. No, sir; I cannot remember the date.

Q. When did you take them away? A. Four or five days after the accident.

Re-direct examination by Mr. Hobart.

Q. When you took them away four or five days after the accident how were the rails piled at that time? A. The same as they were before the accident.

By Mr. Gourley.

Q. Had you put them back again; had anybody worked at the rails; had anyone put the rails back so far as you know? A. No, sir.

Mr. P. F. Boughner, sworn on behalf of the defendant.

Direct-examination by Mr. Hobart.

Q. I believe you were the conductor of the train arriving at River street, Paterson, shortly after six o'clock on the night of this accident? A. Yes, sir; I believe I was.

Q. Your train number was what? A. No. 63.

Q. How many cars did you have on the train? A. Eight cars.

Q. And do you know about what is the average

length of a passenger car such as you had on the train that night? A. 60 to 70 feet.

Q. You mean from bumper to bumper? A. Yes, sir.

Q. And about what is the length of the tender of the engine? A. I don't know; some of those tenders are longer than others. A. Where did the train stop with reference to the station platform? A. At the head end of it; it stopped right at the station; the engine stopped right at the west end of the station.

Q. What do you mean by the "west end of the station?" Is there any object that you can refer to to fix the place? A. The station building—the platform runs a little beyond the building.

Q. Where did the engine stop with reference to the station platform running to the west end of the building? A. It stopped at the west end of the platform.

Q. How many men were in your crew on that train? A. I had three and myself besides the engineer and fireman.

Q. You had three and yourself besides the engineer and fireman; who were the other three, how do you describe them? A. The baggage-master, the ticket collector, and the brakeman.

Q. Do you remember how long the trains stop? A. I don't; I have no record of anything.

Q. What is the usual stop?

MR. GOURLEY—Objected to.

MR. HOBART—I think with reference to the care of passengers, and the management of the train, with reference to the entire conduct of the railroad business, it is competent to prove the usual stop of the train. We propose to prove by this and other witnesses that on the occasion of

the accident the train stopped the usual length of time at this particular station.

MR. GOURLEY—We object.

THE COURT—Objection sustained.

To which ruling of the Court the defendant's counsel prays an exception.

Exception allowed; let it be sealed, and it is sealed accordingly.

WILBUR A. HEISLEY, [L. S.]
J.

Q. I suppose your estimate as to the length of each car is only general? A. Yes, sir; that is general; some cars are longer than others; some are seventy, some sixty-five, some sixty; they would average from sixty to sixty-five feet.

Q. You mean the length of the car? A. Yes, sir.

Q. Now, on this night, you knew nothing about this accident, did you? A. No, sir.

Q. When did you next hear of it? A. Two or three days afterwards.

Q. How can you remember stopping particularly at River Street station as to where your engine was on that night particularly; are you only giving your general notion? A. It was our general stop; I did not answer the question "particularly;" I meant that we stopped there every night at about the same spot.

Q. That is just your practice you are speaking about, then? A. Yes, sir.

Q. Eight cars would bring the last car away east of Warren street, if your engine stopped where you say it did? A. It would bring it about—six cars would stop on River street and the other two cars would lean over River street.

Q. It would be 140 feet east of River street—the end of the car would be? A. Yes, sir.

No Cross-examination.

Manning F. Conklin, sworn in behalf of defendant.

Direct examination by Mr. Hobart.

Q. Were you the baggageman on this train on the night of the accident? A. Yes, sir.

Q. Did you hear of the accident afterwards? A. Yes, sir.

Q. Where did your train usually stop at River Street station? A. At the end of the platform.

Mr. Gourley—Objected to.

The Court—Too late.

Mr. Gourley—Will your Honor grant me an exception?

The Court—You were too late in objecting.

No Cross-examination.

Thomas Dagion, sworn in behalf of the defendant.

Direct examination by Mr. Hobart.

Q. You were the engineer on this train on the night of the accident? A. Yes, sir.

Q. You did not know of the accident at the time, I understand? A. No, sir.

Q. When was your attention called to it? A. I heard some of the men talking about it a couple of days afterward—trainmen.

Q. What is that? A. I heard some of the men talking about it a couple of days afterwards—trainmen.

Q. Do you know where your engine stopped on the night of the accident with reference to the platform? A. No, sir; I don't know, but as a general thing—

MR. GOURLEY—Objected to.

THE COURT—The question is susceptible to yes or no.

MR. COLLINS—I think he ought to be allowed to finish his answer.

MR. GOURLEY—The answer is clearly not responsive.

MR. HOBART—That is for us to object to.

MR. COLLINS—As I understand the ruling on that question, if examining counsel asks a question and the answer is not responsive, that is the privilege of the examining counsel to object to; the only objection that the other side can have is that it is illegal evidence and that they may have by motion to strike it out, but I never have heard that counsel could break in on an answer; I do not say that the Court cannot.

(After further argument.)

THE COURT—Let him finish the answer.

To which ruling of the Court the plaintiff's cousel prays an exception.

Exception allowed; let it be sealed, and it is sealed accordingly.

J.

A. As a general thing I stopped the head end of the head car on the end of the wall, west of the station.

Q. Which end of the wall? A. The west end of the station.

Cross-examination by Mr. Gourley.

Q. If you did that, and had eight cars on that night, then the last two cars would not have reached River street? A. No, sir.

MR. COLLINS—What you mean is that there would be two cars east of River street?

A. Yes, sir.

THE COURT—That is what Mr. Gourley means.

MR. COLLINS—I thought he was going to claim that if he had stopped at the right place the whole train would have been clear of the street.

By Mr. Hobart.

Q. How long is your engine and tender? A. I don't know exactly.

Q. Tell us as near as you can? A. It must be sixty feet.

THE COURT—The tender and engine?

A. Yes, sir.

By Mr. Gourley.

Q. Is that all it is? A. Yes, sir; the tender and engine.

MR. COLLINS—We offer in evidence letter marked Exhibit D 1 for identification, which reads as follows:

It is a letter from the plaintiff to the railroad company (reading exhibit).

DEFENDANT RESTS.

PLAINTIFF RESTS.

Motion to Direct a Verdict for Defendant.

MR. COLLINS—We move to direct a verdict in favor of the defendant on the several grounds mentioned in the motion to non-suit, with the additional elements that have now been introduced in the testimony of the defence.

THE COURT—The motion is denied.

To which ruling of the Court the defendant prays an exception.

Exception allowed; let it be sealed, and it is sealed accordingly.

WILBUR A. HEISLEY, [L. S.]
J.

CHARGE TO THE JURY.

HEISLEY, J.

On the 16th of January last this plaintiff was riding in the next to the last car of a train of eight cars of this defendant, coming from Jersey City to Paterson. There seems to be no dispute but that when the train pulled into the station called River street station, the brakeman passed through the car in which the plaintiff was sitting, and called out "River street." There is no dispute that this car as well as another car was not at the station, but on the contrary was on the other side of River street, the train being so long that it reached over River street. The plaintiff says that he understood that he was to alight there—that was River street station—his destination. And that he at once arose, went to the door, out on the platform, and proceeded very cautiously, I think he said—to alight; that he got upon the ground, there being no platform there, and then he undertook to walk across, not along, but across the tracks, to get on other property; and in the course of his travel he stumbled over four rails of the defendant, steel rails, left upon the ground; the fall resulting in injury to him which formed the basis of his claim.

Now, gentlemen, the mere fact that the station was not the length of the entire train, would not justify a verdict for this plaintiff; in order to decide in his favor you must be satisfied from all the circumstances of the case disclosed by the evidence that this plaintiff had the right as a reasonable and prudent man to consider, that the calling out by brakeman "River street station" was an invitation for him as well as other passengers to alight at that place. It undoubtedly is the duty, under the law, of this defendant, as well as all railroads, to provide a reasonably safe place for its passengers to alight

from its train. There is no question about that. It has no right to put a person off its train even for the non-payment of fare, in a dangerous place, for instance on a high trestle, or anything of that kind; it must provide a reasonably safe place for its passengers to alight from its cars.

Now, in this case it is said that there was no invitation—said by the defendant—for this plaintiff to alight at this particular place; it says that the mere calling out, the announcement of the station by a brakeman on this train was not an invitation to alight at that place, but that it was simply the apprising of the plaintiff and other passengers that the car had reached the station—that the train at least had reached the station, and that he was then under the duty of seeing that he alighted at some safe place; for instance, that he should have gone through the cars, or that he should have followed the brakeman or something of that character; and whether this is an invitation is largely a question of fact, and it may be said, and I do say, as a matter of law, that a passenger when he really has an invitation, when the language or conduct of the employee of the company is such as to lead a reasonably prudent man to understand it to be an invitation to alight, he has the right to assume, under certain limitations, that the place where he is to alight has been made reasonably safe by the defendant.

If you are asked to step off of a car, invited to step off of a car, and it is dark, and you cannot see, you have the right, if it is really an invitation, to assume that the place is a reasonably safe place to alight, even although it be dark, subject, however, always to this fact, that if it is apparent to the passenger, easily made apparent by his looking, that the place is a place of danger; if, with that

knowledge in his mind he steps off into a place of danger, a place which was known to be a place of danger, or unsafe, even if he does it at the invitation of the defendant, he is guilty of what the law calls contributory negligence.

Now, the defendant in this case says that the plaintiff was guilty of contributory negligence; it does not deny that he was injured, and injured practically in the manner in which he says he was, but says that he was guilty of contributory negligence because he was not a stranger in that locality; he had been to this station a number of times; he had used it in going to and from New York City, and that he was aware when he reached the platform of the car of the fact that the car was not yet at the station, and he knew that he had to step out a long step, because he says that; and consequently that he was charged with knowledge of the true situation of affairs.

Whether one is guilty of contributory negligence often is a question of fact; sometimes it is so clearly demonstrated that it becomes a matter of law for the determination of the Court.

Now, in this case, if you believe this plaintiff could see these rails on the ground of the company, and if, by the exercise of ordinary care—if a prudent and reasonable man would have seen them, would have detected them, and he could have avoided falling over them, he should have avoided them, and in the absence of such reasonable care he would be guilty of contributory negligence.

Whether that condition prevailed or not is for you to determine. You should consider whether the place was lighted— he says it was a dark place. He knew it was a long step, apparently so from his evidence, but he says he proceeded cautiously; he did not get injured by stepping from the car; he

got injured by stumbling over something which he says was in his way when he tried to get from the place on the railroad bed where he had alighted from the car. Was he guilty of negligence in that act?

The company says this was not an invitation; whether it was or not is for you to determine. Ordinarily it is an invitation—certainly it is an invitation in law for a passenger to alight when the car is right up by the platform, and it is for you to say whether or not this man was justified in concluding that this was not simply an invitation to alight but an invitation to alight at the particular place where he did alight. Suppose he had not alighted; what should he have done? Would a reasonably prudent man have followed the brakeman through the car? If it was not a reasonably safe place should the brakeman have called out simply "River Street station," or should he have announced to the passengers the fact that it was not a place for alighting, and that they should proceed through other cars, or was it such a situation as would suggest to him, or to a prudent and reasonable man, that notwithstanding the fact that the station was announced, that it was not a safe or reasonable place for him to alight? I am going to leave that to you to say, to determine whether or not you think, as a matter of fact, his conduct was reasonable; whether there was an invitation to alight at that place; whether he acted in a reasonable, a prudent and a careful manner, and whether he had the right to assume that the announcement of the station was a request for him to alight at that particular place. Suppose you find that it was, and that he was injured, and that he was not guilty of contributory negligence; in that event, of course, the defendant must pay the damages; but, on the other

hand, if he was guilty of contributory negligence, if this was not to be understood by a reasonable person as a request to alight, and at that particular place, in the dark, without any platform, all of which he knew, why, of course, in that event, the verdict should be for the defendant.

Now, assuming for the sake of illustration, and in order to charge you as to the law on damages, that you find for the plaintiff, the defendant must pay this man whatever is a reasonable and fair sum for his pain and suffering. As has been stated by counsel during the summing up, it is a very hard thing to calculate and to measure in dollars and cents, but that is the only way provided by law for compensating people in such cases. He is entitled to recover any reasonable expenses which he may have incurred for physicians' services and for the services of others in waiting and attending upon him, and for medicines and bandages and anything which he reasonably got for the purpose of being healed of his injuries. There has been a claim made here for damages for loss of business profits, but the evidence is so meagre as to that; there has been evidence as to what the receipts of the partnership of which he was a member had been, and of how much they lessened after this accident; but that does not establish the profit or the loss; some businesses are conducted at a profit, and others at a loss; there is no presumption of law that a business is profitable. Common experience tells us that it depends on circumstances, and if you allow him anything for damages by way of loss of profits, you ought to be satisfied from the evidence that there is something tangible to go by, but I confess I cannot see anything myself. You are not here to guess. He and his son carried on this business for seven years. We are not here to take

people's money from them upon guess or conjecture; the plaintiff claims there was a loss of profits, and the burden of proof is upon him to prove what that loss of profit was.

When a person is injured in this way it is his duty to use all reasonable means to diminish the extent of his injury. He cannot, when his arm is broken for instance, simply sit by and say, "Oh, well, you have broken my arm, and although these physicians say I ought to have it set, I am not going to do it; I am going to let the arm grow up crooked, and you will have to pay for it; he is obliged to use reasonable means to cure his injury.

Now, they say he did not follow the advice of his physician. A man is not always obliged to adopt the advice of his physician—we have to place ourselves in his place—but any reasonable thing that a physician tells us to do, we ought to do, under such circumstances as these; and the assertion of the defendant is that if this plaintiff had done what he had been told to do by his physician he would be well, or much further advanced along the road to recovery than he is to-day. If that is so, and if he acted in an unreasonable manner in not following out their instructions, of course, the defendant should not pay for that part of this injury.

It is for you to say whether he did act in a reasonable manner. Now, what is the extent of his injuries? Suppose you say this company did wrong that is for you to say; suppose you say: "Why, this is a pretty careless piece of business and the public has to be protected, and you say, even if it did not hurt this man much, yet we will make them pay for it; that would be entirely wrong, because no officer of this company would want this plaintiff hurt, and if the plaintiff was hurt by reason of the carelessness of the brakeman, conductor or engi-

neer, whoever it might be, there is no rule of law which allows you to make the corporation pay punishment damages. All he would be entitled to recover, would be damages which would compensate him for his suffering and losses and his expenses.

There are cases where juries are permitted to impose punishment damages, but not in a case of this kind, and if you impose damages, they must not be punishment damages, but what are the extent of this man's injuries. You have heard the testimony of the physician, and I think they all agree that there are no apparent signs or indications of injuries—perhaps I have stated that a little broadly but I mean by that he limps; he drags his foot, and they say that they cannot discover any real cause for it, but they have to rely upon his statement, or almost entirely upon his statement that he cannot use his limbs; but physicians say, "We don't see why he cannot, but it does appear that he is afflicted; there is no doubt about that; that in some way he is still suffering from this trouble. If that is so, he should be allowed for that if you find that he is entitled to anything; and if it continues on throughout his life of course his damages would be quite large, but he will soon recover from it; it is an entirely different proposition; and so, in awarding damages, in case you do award damages (but bear in mind that the court does not intimate that you should award damages), you should, in fixing the amount to award him, bear in mind, and determine as carefully as you can how much, probably, if at all, will he suffer from these injuries.

REQUESTS TO CHARGE.

THE COURT—I decline to charge except as I have charged.

MR. COLLINS—We except to your refusal to charge; we specially except to your refusal to charge the several requests, except as you have charged.

1. Under the declaration in this cause there can be no recovery by the plaintiff unless the defendant or its servants negligently obstructed a path to the street or station customarily used by passengers.

Exception allowed. Let it be sealed, and it is sealed accordingly.

WILBUR A. HEISLEY, [L. S.]
J.

2. Without proof of invitation to passengers to alight from the train at the place where the plaintiff alighted therefrom, or proof of a custom to alight there, with knowledge of which custom defendant is found to be chargeable, there can be no recovery by the plaintiff in this cause.

Exception allowed. Let it be sealed, and it is sealed accordingly.

WILBUR A. HEISLEY, [L. S.]
J.

3. The announcement of the name of the station by the brakeman, as he passed through the car wherein the plaintiff was seated, was not an invitation to the plaintiff to alight from the rear end of that car.

Exception allowed. Let it be sealed, and it is sealed accordingly.

WILBUR A. HEISLEY, [L. S.]
J.

4. If the plaintiff knew the location of River street station and its platform, and knew that he was alighting neither at a place provided by the defendant for the purpose nor on a public street, he assumed the risk of attempting to depart from the place where he alighted.

Exception allowed. Let it be sealed, and it is sealed accordingly.

WILBUR A. HEISLEY, [L. S.]
J.

5. There being no proof that it was customary for passengers to alight from trains at the place where the plaintiff attempted to alight, to wit, at the open space between River street and Warren street on the station side of the tracks, the defendant was not bound to keep such space safe for use by passengers.

Exception allowed. Let it be sealed, and it is sealed accordingly.

WILBUR A. HEISLEY, [L. S.]
J.

6. The mere fact that the platform of the River street station was not as long as the train on which plaintiff was riding will not justify a finding that the defendant was negligent.

Exception allowed. Let it be sealed, and it is sealed accordingly.

WILBUR A. HEISLEY, [L. S.]
J.

1. (Mr. Hobart). We also ask for an exception to that part of the charge which was to the effect that the jury might consider the calling out of the station as an invitation to alight; the charge, I think, begins with the words, "The jury must be satisfied that the plaintiff had a right to consider

the calling out as an invitation," which part of the charge reads as follows:

"In order to decide in his favor you must be satified from all the circumstances of the case disclosed by the evidence that this plaintiff had the right, as a reasonable and prudent man to consider that the calling out by the brakeman, 'River Street Station,' was an invitation for him, as well as other passengers, to alight at that place."

Exception allowed. Let it be sealed, and it is sealed accordingly.

WILBUR A. HEISLEY, [L. S.]
J.

2. We also except to that part of the charge which was to the effect that it was the duty of the company to provide a reasonably safe place to alight, and that the company must provide a reasonably safe place for that purpose, which part of the charge reads as follows:

"It undoubtedly is the duty, under the law, of this defendant, as well as all railroads, to provide a reasonably safe place for its passengers to alight from its train. There is no question about that. It has no right to put a person off of its train even for the non-payment of fare, in a dangerous place, for instance on a high trestle, or anything of that kind; it must provide a reasonably safe place for its passengers to alight from its cars."

Exception allowed. Let it be sealed, and it is sealed accordingly.

WILBUR A. HEISLEY, [L. S.]
J.

3. We also except to that part of the charge which left to the jury the question whether the calling out of the station, followed by the stopping of

the train, amounted to an invitation to the plaintiff to alight at the place where he did alight; which part of the charge reads as follows:

"The company says this was not invitation; whether it was or not is for you to determine. Ordinarily, it is an invitation—certainly it is an invitation in law for a passenger to alight when the car is right up by the platform, and it is for you to say whether or not this man was justified in concluding that this was not simply an invitation to alight, but an invitation to alight at the particular place where he did alight. Suppose he had not alighted; what should he have done; would a reasonably prudent man followed the brakeman through the car? If it was not a reasonably safe place should the brakeman have called out simply "River Street Station," or should he have announced to the passengers the fact that it was not a place for alighting, and that they should proceed through other cars, or was it such a situation as would suggest to him, or to a prudent and reasonable man, that notwithstanding the fact that the station was announced, that it was not a safe or reasonable place for him to alight? I am going to leave that to you to say, to determine whether or not you think as a matter of fact, his conduct was reasonable; whether there was an invitation to alight at that place; whether he acted in a reasonable, a prudent and careful manner, and whether he had the right to assume that the announcement of the station, was a request for him to alight at that particular place."

Exception allowed. Let it be sealed, and it is sealed accordingly.

WILBUR A. HEISLEY, [L. S.]

J.

4. We also except to that part of the charge

allowing the jury to find any damages for a loss of profits; it is that part beginning with the words "If you allow anything for damages by way of profits."

MR. GOURLEY—That, I understand distinctly, was not charged.

MR. COLLINS—The Court did not refuse to allow the jury to find any damages for that; our point is that the Court should have charged distinctly that they must not. This part of the charge reads as follows:

"There has been a claim made here for damages for loss of business profits, but the evidence is exceedingly meagre as to that; there has been evidence as to what the receipts of the partnership of which he was a member, had been, and of how much they had lessened after this accident, but that does not establish the profit or the loss; some businesses are conducted at a profit, and others at a loss; there is no presumption of law that a business is profitable. Common experience tells us that it depends on circumstances, and if you allow anything for damages by way of loss of profits, you ought to be satisfied from the evidence that there is something tangible to go by, but I confess I cannot see anything myself. You are not here to guess. He and his son carried on business for seven years. We are not here to take people's money from them upon guess or conjecture; the plaintiff claims there was a loss of profits, and the burden of proof is upon him the prove what the loss of profit was."

Exception allowed. Let it be sealed, and it is sealed accordingly.

WILBUR A. HEISLEY, [L. S.]
J.

ASSIGNMENT OF ERRORS.

Afterwards, that is to say, on the third day of December, nineteen hundred and six, in the Court of Errors and Appeals in the last resort in all causes, of the State of New Jersey, comes the said Erie Railroad Company, by Collins and Corbin, its attorneys, and says that in the record and proceedings aforesaid, and also in the matters recited and contained in the said bill of exceptions, and also in the giving of verdict and judgment aforesaid, there is manifest error, to wit:

1. That at the trial of the cause at the Passaic Circuit Court, the Judge who tried the cause admitted illegal evidence offered by the plaintiff, John G. Mason, to which evidence the defendant duly objected and by which it was injured.

2. That at the said trial one George H. Mason, a witness for the plaintiff, was asked by the plaintiff's counsel the following question: "Are you able to tell us what the amount received, per week, was in that business in which you and your father are partners, during the months of November and December, 1905?" to which the defendant duly objected; and thereupon, with the permission of the Judge who tried said cause, said witness was cross-examined by defendant's counsel, and it was shown that certain books were kept by said witness and the plaintiff, and that said books would indicate, in part, the amount received in said business. And the following question was thereupon asked said witness by plaintiff's counsel: "Do you know about what your average income was in your business during the months of November and December, 1905; can you give us approximately or accurately?" to which the defendant objected and the question was admitted, to the injury of the defendant.

3. That at the said trial George H. Mason, a witness for the plaintiff, was asked by the plaintiff's counsel the following question: "Then the average income, per week, during the year would be about what?" to which the defendant objected and the question was admitted, to the injury of the defendant.

4. That the Judge who tried the cause refused to non-suit the said John G. Mason, when thereunto moved on behalf of the said Erie Railroad Company, whereas by the law of the land a non-suit should have been ordered for one or more of the following reasons alleged in behalf of the said motion, to wit:

(a). Because the proofs failed to support the declaration.

(b). Because no negligence was proved against the defendant or attributable to the defendant.

(c). Because the danger, if any, was obvious and known to the plaintiff.

(d). Because there was no invitation to the plaintiff to alight from the train at the place where he did alight, and no duty was cast upon the defendant in reference to any passenger who should alight there.

(e). Because the plaintiff was guilty of negligence, which contributed to his injury.

5. That at the said trial the Judge who tried the cause overruled legal evidence offered by the defendant, Erie Railroad Company, and thereby the defendant was injured.

6. That at the said trial one Christopher Joyce, a witness for the defendant, was asked by defendant's counsel the following question: "In the course of your duties as supervisor have you had occasion

to notice the length of the station platforms of the defendant company in the State of Jersey?" to which said witness answered: "Yes, sir," and thereupon said witness was asked the following question: "In your section?" to which question the plaintiff's counsel objected, and thereupon the defendant, by its counsel, offered to show by said witness and other witnesses that the platform at River Street Station, Paterson, near which the accident of which the plaintiff complained happened, was about the average and usual length of a platform of a station of that kind, for the purpose of meeting the claim that said platform was not long enough to accommodate the train on which the plaintiff was riding, and thereupon the Judge who tried the cause sustained the objection made by plaintiff's counsel and overruled said question and said offer of proof, to the injury of the defendant.

7. That at the said trial the defendant, by its counsel, offered to show by said witness, Christopher Joyce, and also by witnesses from other railroad companies, that the customary and proper railroad practice at suburban stations of the general character of said River Street station was to have a platform of about the length of the platform in question in this suit; and thereupon, on the objection made by plaintiff's counsel, the Judge who tried the cause overruled said offer of proof and sustained said objection, by which ruling the defendant was injured.

8. That at the said trial one P. L. Boughner, a witness for the defendant, was asked by defendant's counsel the following question: "What is the usual stop?" (referring to the usual stop of trains at said River Street Station), to which question the plaintiff's counsel objected; and thereupon the defendant, by its counsel, offered to prove the usual

stop of the train, and further offered to prove by said witness and other witnesses that on the occasion of the accident of which the plaintiff complained the train on which the plaintiff was riding stopped the usual length of time at said station, to which offer the plaintiff's counsel objected; and thereupon the Judge who tried the cause sustained the objection made by plaintiff's counsel and overruled said question and said offer of proof, to the injury of the defendant.

9. That the Judge who tried the cause refused to direct a verdict in favor of the defendant Erie Railroad Company when thereunto moved on behalf of said Erie Railroad Company, whereas by the law of the land a verdict should have been directed in favor of the said Erie Railroad Company for one or more of the following reasons alleged in behalf of said motion, to wit:

(a). Because the proofs failed to support the declaration.

(b). Because no negligence was proved against the defendant or attributable to the defendant.

(c). Because the danger, if any, was obvious and known to plaintiff.

(d). Because there was no invitation to the plaintiff to alight from the train at the place where he did alight, and no duty was cast upon the defendant in reference to any passenger who should alight there.

(e). Because the plaintiff was guilty of negligence which contributed to his injury.

10. That at the said trial the Judge who tried the cause was requested by the defendant's counsel to charge the jury as follows: "Under the declaration in this cause there can be no recovery by the plaintiff unless the defendant or its servants negli-

gently obstructed the street or station customarily used by passengers." Said Judge refused so to charge, which refusal was illegal and to the injury of the defendant.

11. That at the said trial the Judge who tried the cause was requested by defendant's counsel to charge the jury as follows: "Without proof of invitation to passengers to alight from the train at the place where the plaintiff alighted therefrom, or proof of a custom to alight there with knowledge of which custom defendant is found to be chargeable, there can be no recovery by the plaintiff in this cause." Said Judge refused so to charge, which refusal was illegal and to the injury of the defendant.

12. That at the said trial the Judge who tried the cause was requested by defendant's counsel to charge the jury as follows: "The announcement of the station by the brakeman, as he passed through the car wherein the plaintiff was seated was not an invitation to the plaintiff to alight from the rear end of that car." Said Judge refused so to charge, which refusal was illegal and to the injury of the defendant.

13. That at the said trial the Judge who tried the cause was requested by defendant's counsel to charge the jury as follows: "If the plaintiff knew the location of River Street station and its platforms, and knew that he was alighting neither at a place provided by the defendant for the purpose nor on a public street, he assumed the risk of attempting to depart from the place where he alighted." Said Judge refused so to charge, which refusal was illegal and to the injury of the defendant.

14. That at the said trial the Judge who tried the cause was requested by defendant's counsel to charge the jury as follows: "There being no proof that it

was customary for passengers to alight from trains at the place where the plaintiff attempted to alight, to wit, at the open space between River street and Warren street on the station side of the tracks, the defendant was not bound to keep such space safe for use for the passengers." Said Judge refused so to charge, which refusal was illegal and to the injury of the defendant.

15. That at the said trial the Judge in charging the jury permitted the jury to consider the calling out of the station as an invitation to the plaintiff to alight, which part of the charge reads as follows: "In order to decide in his favor you must be satisfied from all the circumstances of the case disclosed by the evidence that this plaintiff had the right as a reasonable and prudent man to consider, that the calling out by the brakeman "River Street station" was an invitation for him as well as other passengers to alight at that place;" which charge was illegal and to the injury of the defendant.

16. That at the said trial the Judge in charging the jury charged them that it was the duty of the company to provide a reasonably safe place to alight and that the company must provide a reasonably safe place for that purpose, which part of the charge reads as follows: "It undoubtedly is the duty, under the law, of this defendant, as well as all railroads, to provide a reasonably safe place for its passengers to alight from its train. There is no question about that. It has no right to put a person off of its train even for the non-payment of fare, in a dangerous place, for instance on a high trestle, or anything of that kind; it must provide a reasonably safe place for its passengers to alight from its cars.". Which charge was illegal and to the injury of the defendant.

17. That at the said trial the Judge in charging the jury permitted the jury to consider whether the calling out of the station, followed by the stopping of the train, amounted to an invitation to the plaintiff to alight at the place where he did alight; which part of the charge reads as follows: "The company says this was not an invitation; whether it was or not is for you to determine. Ordinarily it is an invitation—certainly it is an invitation in law for a passenger to alight when the car is right up by the platform, and it is for you to say whether or not this man was justified in concluding that this was not simply an invitation to alight, but an invitation to alight at the particular place where he did alight. Suppose he had not alighted; what should have been done; would a reasonably prudent man have followed the brakeman through the car? If it was not a reasonably safe place should the brakeman have called out simply 'River Street,' or should he have announced to the passengers the fact that it was not a place for alighting, and that they should proceed through other cars, or was it such a situation as would suggest to him, or to a prudent and reasonable man, that notwithstanding the fact that the station was announced, that it was not a safe or reasonable place for him to alight? I am going to leave that to you to say, to determine whether or not you think as a matter of fact, his conduct was reasonable; whether there was an invitation to alight at that place; whether he acted in a reasonable, a prudent and careful manner, and whether he had the right to assume that the announcement of the station was a request for him to alight at that particular place." Which charge was illegal and to the injury of the defendant.

18. That at the said trial the Judge in charging

the jury permitted the jury to find damages for loss of profits in the plaintiff's business, whereas under the evidence the Court should have charged that the jury must not allow damages for such loss of profits; which part of this charge reads as follows:

"There has been a claim made here for damages for loss of business profits, but the evidence is exceedingly meagre as to that; there has been evidence as to what the receipts of the partnership of which he was a member had been, and of how much they had lessened after the accident, but that does not establish the profit or the loss; some businesses are conducted at a profit and others at a loss; there is no presumption of law that a business is profitable. Common experience tells us that it depends on circumstances, and if you allow him anything for damages by way of loss of profits, you ought to be satisfied from the evidence that there is something tangible to go by, but I confess I cannot see anything myself. You are not here to guess. He and his son carried on this business for seven years. We are not here to take people's money from them upon guess or conjecture; the plaintiff claims there was a loss of profits, and the burden of proof is upon him to prove what that loss of profits was."

Which charge was illegal and to the injury of the defendant.

19. That the verdict of the jury in said cause was contrary to law.

20. That the judgment in said cause was given in favor of said John G. Mason and against said Erie Railroad Company, whereas by law it should have been given against the said John G. Mason and in favor of the said Erie Railroad Company.

Whereas the said plaintiff in error, Erie Railroad Company, prays that the judgment aforesaid, by reason of the errors aforesaid, may be reversed, annulled and for nothing holden, and that it may be restored to all things which it has lost by reason of said judgment.

COLLINS & CORBIN,
Attorneys for Plaintiff in Error.