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Complaint.

(Filed January 15, 1925.)

Plaintiff, residing at Bloomfield, Essex County, N. J., says:

1. That the defendant is and was at the times hereinafter mentioned a foreign corporation.

2. That the defendant, on the twelfth day of February, 1923, was a common carrier of passengers between Arlington, Hudson County, N. J., and Bloomfield, Essex County, N. J., and owned, operated, managed and controlled a certain double track railroad in and through the Town of Bloomfield, and maintained a railroad station at or near Walnut Street in said town.

3. On said date plaintiff was a passenger traveling in the westerly direction on cars owned, operated, managed or controlled by said company, having boarded said cars at Arlington, Hudson County, N. J., and was entitled to safe conduct from said Arlington to the company's station at Bloomfield aforesaid.

4. The car or conveyance in which the plaintiff was riding from Arlington to Bloomfield, as aforesaid, having been carried beyond the platform maintained by the defendant along the westbound tracks of the defendant, the plaintiff with other passengers got off said car or conveyance on the side of the car or conveyance toward the station of the defendant. The eastbound tracks of the defendant intervene between the car from which the plaintiff had alighted and the station of the defendant.

5. As plaintiff stepped off the bottom of said car or conveyance and let go of the handrail, plaintiff was struck and seriously and permanently injured by an eastbound train owned, operated, managed or controlled by the said defendant traveling at a high and excessive rate of speed and without giving any warning whatsoever of the approach of said eastbound train by ringing the bell, sounding the whistle or otherwise.

6. Plaintiff's injuries were caused by the carelessness, recklessness and negligence of the defendant, its agents, servant or employees.

7. The defendant was negligent in that it ran a train without notice and at a high rate of speed between the depot and the standing train, which was discharging passengers and from which the plaintiff was alighting. It was the duty of the defendant to see that the eastbound tracks might be crossed in safety by the plaintiff and other passengers leaving the standing train on the westbound tracks. The defendant was negligent in failing to give a warning by ringing the bell, sounding the whistle or otherwise of the approach of the train on the eastbound tracks while the plaintiff and other persons were rightfully alighting from the standing train on the westbound tracks and crossing the eastbound tracks which intervened between the standing train on the westbound tracks and the depot. The defendant was negligent in that the defendant did not provide a safe place in which the plaintiff might alight; and the said defendant was also negligent in that the defendant did not provide the plaintiff with safe conduct to the company's station, as was lawfully required of said defendant by virtue of his contract as a passenger at the time and place aforesaid. The de-

fendant was also negligent in that the train which struck the plaintiff was permitted to approach the station while passengers were being discharged from the standing train on the westbound track in violation of the rules issued by the said defendant to its employees and in violation of a legal duty which the said defendant owed to the plaintiff, and defendant was also negligent in that no warning of the approach of said train was given. The said defendant was also negligent in that the said defendant did not provide a safe way for passengers, of which the plaintiff was one, to go to the defendant's station from the train on which the plaintiff was a passenger. The defendant was negligent in that it failed to provide a platform of sufficient length for the train and in failing to maintain a fence between the westbound and eastbound tracks of the defendant, and the defendant was negligent in permitting the doors of the cars which extended beyond the end of the platform to be kept open, thereby inviting passengers to alight from said cars at an unsafe place.

The defendant's negligence also consisted in this: That it was then and there the duty of the defendant to use the greatest care which a reasonably prudent man under the circumstances would have used to provide plaintiff with a safe and proper platform or other place where plaintiff might safely alight and might safely cross the intervening track to the station of the defendant, and to provide its said platform and the right of way of the said defendant with railings, enclosures and other guards or means of protection to prevent plaintiff from being struck or otherwise injured by the trains running in an opposite direction upon the tracks operated by the said defendant, and to warn plaintiff of the danger of being struck or otherwise injured by said trains while he was still a passenger

on the property of the said defendant, and to avoid and refrain from inviting or permitting plaintiff to leave the car in which he was riding until after the passage of the train on the eastbound track which caused the injuries to plaintiff and to avoid and refrain from causing or permitting any of its trains to pass along said eastbound tracks at a high and excessive rate of speed or otherwise while the plaintiff and other passengers were being discharged from the standing train on the westbound track.

8. The defendant carelessly, recklessly and negligently disregarded its duty in each of the particulars herein set forth, and by reason of the premises, and of the carelessness, recklessness and negligence of the defendant the plaintiff became and was sick, sore, lame and disordered, and so remained and continued for a long space of time, to wit, from thence hitherto, during all of which time the said plaintiff suffered and underwent great pain and suffering and was hindered and prevented from transacting and attending to his necessary and lawful affairs by him during all that time to be performed and transacted, and lost and was deprived of divers gains, profits and advantages which he might and otherwise would have derived and acquired. Plaintiff's hip was broken and he was seriously and permanently injured in mind and body and was forced and obliged to lay out and expend divers large sums of money, and will in the future be obliged to lay out and expend large sums of money in and about endeavoring to have his said injuries cured and alleviated.

9. Plaintiff demands as damages against the defendant the sum of Fifteen Thousand ($15,000) Dollars.

JAMES P. MYLOD,
Attorney for Plaintiff.

Answer.

(Filed January 30, 1928.)

The answer of the defendant, Erie Railroad Company, a corporation organized and existing under and by virtue of the laws of the State of New York and having its principal office in the City of New York, in the State of New York, and being duly authorized to transact business in the State of New Jersey, to the complaint of the plaintiff filed herein alleges that:

First Defense.

1. Defendant admits the allegations of paragraph 1 of said complaint.

2. Defendant admits the allegations of paragraph 2 of said complaint. Defendant further alleges that it maintained at said "Bloomfield" station, near Walnut Street, Bloomfield, New Jersey, a station platform adjacent to the eastbound track for the use of passengers alighting from and boarding eastbound trains, and a station platform adjacent to the westbound track for such use of passengers from or for westbound trains.

3. Defendant denies each and all the allegations of paragraph 3 of said complaint.

4. Defendant denies each and all the allegations of paragraph 4 of said complaint.

5. Defendant denies each and all the allegations of paragraph 5 of said complaint.

6. Defendant denies each and all the allegations of paragraph 6 of said complaint.

7. Defendant denies each and all the allegations of paragraph 7 of said complaint.

Defendant further alleges that said plaintiff was not lawfully upon the tracks of said defendant, but was a trespasser thereon.

8. Defendant denies each and all the allegations of paragraph 8 of said complaint.

9. Defendant denies each and all the allegations of paragraph 9 of said complaint.

SECOND DEFENSE.

1. Defendant alleges that said plaintiff was guilty of contributory negligence.

PARKER, EMERY & VAN RIPER,
Attorneys of Defendant.

Reply.

(Filed February 3, 1925.)

The plaintiff, in reply to the answers of the defendant filed herein, says:

I. Plaintiff denies that he was in any way guilty of contributory negligence or in any way contributed to the injury which he sustained, as is alleged in the second defense set up in the answer filed by the defendant herein.

JAMES P. MYLOD,
Attorney for Plaintiff.

Consent and Rule for Substitution.

(Filed August 8, 1925.)

Upon the consent hereinafter noted of Messrs. Parker, Emery & Van Riper, attorneys of record of the defendant,

ORDERED that Messrs. Hobart & Minard be and they hereby are substituted as attorneys of record in the place and stead of Messrs. Parker, Emery & Van Riper as attorneys for said defendant.

Rule entered this 8th day of August, 1925, on motion of

HOBART & MINARD (Signature)
HOBART & MINARD,
Attorneys of Defendant.

Consent is hereby given to the making and entering of the above rule.

PARKER, EMERY & VAN RIPER (Signature)
PARKER, EMERY & VAN RIPER,
Attorneys for Defendant.

August 4, 1925.

Amended Answer.

(Filed September 9, 1925.)

The defendant, Erie Railroad Company, a corporation of the State of New York, having its principal office in New Jersey, at the foot of Pavonia Avenue, Jersey City, Hudson County, for its amended answer says that:

First Defense.

1. It admits paragraph 1.

2. Defendant admits the allegations of paragraph 2 of said complaint. Defendant further alleges that it maintained at said "Bloomfield" station, near Walnut Street, Bloomfield, New Jersey, a station platform adjacent to the eastbound track for the use of passengers alighting from and boarding east bound trains, and a station platform adjacent to the westbound track for such use of passengers from or for westbound trains.

3. It denies paragraph 3.
4. It denies paragraph 4.
5. It denies paragraph 5.
6. It denies paragraph 6.
7. It denies paragraph 7.
8. It denies paragraph 8.
9. It denies paragraph 9.

Second Defense.

The alleged accident, as set forth in the complaint, was due to contributory negligence on the part of the plaintiff.

Third Defense.

The alleged accident, as set forth in the complaint, was due to contributory negligence on the

part of the plaintiff in that he failed to exercise reasonable care for his own safety.

FOURTH DEFENSE.

The alleged accident, as set forth in the complaint, was due to contributory negligence on the part of the plaintiff in that he failed to heed the warnings which were given to him of the approach of the train by which it is alleged he was struck.

FIFTH DEFENSE.

The alleged accident, as set forth in the complaint, was due to contributory negligence on the part of the plaintiff in that he did not look or listen or otherwise inform himself of the approach of the train by which it is alleged he was struck.

SIXTH DEFENSE.

At the time of the accident, as alleged in the complaint, the plaintiff was a trespasser upon the property of the Erie Railroad Company, and as such, the only duty owing to him was to refrain from wilful or wanton injury. There was no such injury in this case.

SEVENTH DEFENSE.

At the time of the accident, as alleged in the complaint, the plaintiff was a mere licensee upon the property of the Erie Railroad Company, and as such, the only duty owing to him was to refrain from wilful or wanton injury. There was no such injury in this case.

EIGHTH DEFENSE.

1. At the time of the accident, as alleged in the complaint, the plaintiff, who was not then connected with or employed upon the railroad of the defendant, was walking along the tracks of the railroad owned and operated by the defendant at a place where the same were not laid upon a public highway, in violation of Section 55 of an Act entitled "An Act Concerning Railroads (Revision of 1903)."

2. The plaintiff was injured by an engine while so walking on said railroad when he was not crossing said railroad at a lawful, public or private crossing.

3. By reason of the premises, the plaintiff is deemed to have contributed to the injury alleged to have been sustained and cannot recover thereof from the defendant.

HOBART & MINARD,
Attorneys for Defendant.

Reply to Amended Answer.

(Filed August 29, 1925.)

Plaintiff denies the Second, Third, Fourth, Fifth, Sixth, Seventh and Eighth Defenses set up in the Amended Answer filed by the defendant herein.

JAMES P. MYLOD,
Attorney for Plaintiff.

Rule to Show Cause.

(Filed February 16, 1926.)

On due application of the defendant:

It is on this 15th day of February, 1926, ORDERED, that the plaintiff show cause before this Court on the 6th day of March, 1926, at ten o'clock in the forenoon why the verdict rendered in his favor on February 11, 1926, against the defendant should not be set aside and a new trial ordered:

And it is further Ordered, that pending the determination of this rule, the issuing of execution be, and the same hereby is stayed:

And it is further Ordered, that the defendant's exceptions noted upon the record be, and the same hereby are, expressly reserved.

WM. A. SMITH,
Judge.

Entered this day of , 1926,
on motion of

HOBART & MINARD,
Attorneys of Defendant.

Service of a copy of the above rule is admitted this 15th day of March, 1926.

JAMES P. MYLOD,
Atty. for Pltf.

Order Dismissing Rule.

(Filed April 22, 1926.)

A Rule to Show Cause having been entered in this Cause on the Fifteenth day of February, 1926, and the cause having been argued by James P. Mylod, of counsel, for the plaintiff, and Hobart & Minard, of counsel for the defendant, and the Court having considered the same and finding no cause for making the rule absolute:

It is thereupon on this 22nd day of April, 1926, on motion of James P. Mylod, Ordered, that the said Rule to Show Cause be and the same is hereby dismissed with costs.

WM. A. SMITH,
Judge.

Notice and Grounds of Appeal (First Trial).

(Filed September 17, 1926.)

To James P. Mylod, Esq., Attorney of Plaintiff.

Take Notice that the defendant appeals to the New Jersey Supreme Court from the whole of the judgment entered in this cause on the following grounds:

1. The trial court erroneously refused to grant defendant's motion for nonsuit whereas said motion should have been granted for one or more of the following reasons:

(a) The defendant had provided for its passengers a safe and proper platform upon which they might alight from the train.

(b) The plaintiff adopted a method for alighting from the train other than that provided by the company and ceased to be a passenger.

(c) At the time of the collision plaintiff was a trespasser and there was no duty owing to him by the defendant other than to refrain from wilful or wanton injury.

(d) Contributory negligence on the part of the plaintiff appears as a matter of law in that the plaintiff alighted from the defendants' train between the east and westbound track on the canal bridge, a long distance from the defendant's station.

2. The trial court erroneously refused to grant defendant's motion for direction of verdict in its favor whereas said motion should have been granted for one or more of the following reasons:

(a) The defendant had provided for its passengers a safe and proper platform upon which they might alight from the train.

(b) The plaintiff adopted a method for alighting from the train other than that provided by the company, and ceased to be a passenger.

(c) At the time of the collision plaintiff was a trespasser and there was no duty owing to him by the defendant other than to refrain from wilful or wanton injury.

(d) Contributory negligence on the part of the plaintiff appears as a matter of law in that the plaintiff alighted from the defendant's train between the east and westbound track on the canal bridge, a long distance from the defendant's station and did not look for the train and stepped directly in front thereof; and in that on the plaintiff's own testimony he could have seen from the place where he alighted from the train to the defendant's station.

(e) At the time and place the plaintiff left the defendant's train he was not a passenger of the defendant.

(f) At the time and place the plaintiff left the defendant's train the plaintiff knew that it was not possible to leave the train by the platform on the forward part of the coach in which he had been riding.

(g) At the time and place the plaintiff left the defendant's train he knew that the station platform upon which he could safely alight was at the right side of the train and to the rear and there was nothing to prevent the plaintiff from looking through the coach in which he had been riding and alighting on the said platform.

(h) It appears in the case that there was posted at the place where the plaintiff alighted from the train a warning sign reading "Danger. All persons are forbidden to go upon this railroad bridge."

(i) At the time of the accident the plaintiff was a trespasser on the defendant's property and there was no evidence of wilful or wanton injury.

(j) There was no question of fact for the jury as to whether or not the plaintiff was invited to leave the train at the point where he in fact left.

(k) There was no question of fact for the jury as to whether at the point where the train stopped it was a proper place for the plaintiff to alight.

(l) There was no question of fact for the jury as to whether or not the plaintiff was a passenger at the time and place where he alighted from the train.

3. The trial court erroneously instructed the jury as follows:

"The railroad was obliged to provide a safe way for a passenger to get from the train to the station, and if this duty was neglected, so that the plaintiff was injured and the defendant's negligence was the proximate cause of the accident the defendant is responsible in damage to the plaintiff, provided that the plaintiff was not guilty of contributory negligence, about which I will speak later."

4. The trial court erroneously instructed the jury as follows:

"The relationship of passenger and carrier is not terminated when the passenger steps off the train. The company must provide a safe place for the passenger to get off."

5. The trial court erroneously instructed the jury as follows:

"The defendant contends it provided a safe place to leave the train, that is the right hand side of the train to the station. It is a question of fact whether or not the circumstances of this case are such as to induce a passenger to believe that it was a safe place for him to alight at the place and in the way the plaintiff said he did. The company provided a platform on the right and contends that the rear end was available to the plaintiff to use to get to the west bound platform.

HOBART & MINARD,
Attorneys of Defendant.

Opinion (First Trial).

NEW JERSEY SUPREME COURT.

#97 October Term, 1926.

MICHAEL KINDER,
Defendant-Appellant,

vs.

ERIE RAILROAD COMPANY,
Plaintiff-Respondent.

Submitted October 15, 1926. Decided , 1927.
On Appeal from Essex Circuit Court.
For the appellant: Hobart & Minard.
For the respondent: James P. Mylod.
Before Justices Kalisch, Katzenbach and Lloyd.

The opinion of the court was delivered by LLOYD, J.

This is an appeal from a judgment of $4,000 entered against the Erie Railroad Company in the Essex County Circuit Court. The action was for injuries to the plaintiff, Michael Kinder, caused by his being struck by a locomotive of the defendant company. The accident happened in this way: The plaintiff was a passenger in the forward coach of a westbound eight car train on the evening of February 12, 1923, at Bloomfield. The railroad is a double track system extending generally in an east and west direction through Bloomfield from a street known as Walnut Street, curving slightly to the north as it runs west. The station building and waiting room are on the south side of the tracks about one hundred and thirty feet west of Walnut Street. On either side of the right of way there is a platform, the one on the north side extending from Walnut Street to a point within seventy feet of a canal bridge; the bridge itself being five hun-

dred feet west of Walnut Street. The plaintiff's evidence established that when the train on which he was riding stopped, the engine was on this bridge and the forward part of the car in which he was riding was also on the bridge; that he got out of the left-hand side following two other passengers who had preceded him, one of whom opened the door. Before getting off he observed that the bridge abutments were too close to permit him to get out on the right side. Stepping out on the left he landed on the wooden flooring of the bridge and between the east and west bound tracks. He had taken but two steps when he was struck by a train going east. It further appeared that there was no trainman at the front end of the car, but that there was a trainman at the rear who called out the station and opened the door at that end. The accident happened about five P. M. and the plaintiff said that it was a smoky evening, not dark, nor yet light, but he could see the station quite a distance away.

His own testimony showed that he was familiar with the entire situation; that he was a regular rider on the road and train, and knew that the platform provided for passengers leaving the train was on the right; that there was none on the left, but that the eastbound track was there with loose stone between it and that of the westbound track. He knew that there was no trainman at the front door.

In this state of the proofs defendant's counsel moved for a nonsuit and later for a direction of a verdict for the defendant.

We think it was error to refuse these motions. The company had provided a safe and proper place for the plaintiff to alight, and had provided a trainman to assist passengers in thus alighting. It had not opened the front door, nor had it au-

thorized others to do so. The plaintiff, knowing the facts, chose of his own volition and without invitation to leave the train by a dangerous exit, and in so doing assumed the risk of the dangers thereby incurred. We discover in the facts no duty of the railroad to the plaintiff which had been violated. For the unauthorized opening of the forward door it was not responsible. This might be done at any time by one sufficiently familiar with its mechanism. A trainman at the rear had called the station, but this did not imply an invitation to alight on the wrong side of the train and by an unopened door. The plaintiff knew that the right hand rear door was opened, but used the left hand front door as he stated because of the number of passengers passing out at the rear end and he feared that the train might start before he got off. Presumably the company had employed an adequate train crew in compliance with the requirements of the act of 1922, page 665, and was not obliged to provide a trainman at each end of every car. To hold such an obligation to exist would transcend that which the legislature has impliedly declared sufficient and make railroad travel a costly luxury. In the above it is difficult to discover anything further the company could have done to protect its passengers.

Other grounds of appeal refer to portions of the judge's charge. One of these is to that portion of the charge which reads as follows:

"The railroad was obliged to provide a safe way for a passenger to get from the train to the station and, if this duty was neglected, so that the plaintiff was injured and the defendant's negligence was the proximate cause of the accident, the defendant is responsible in damages to the plaintiff, provided that the plaintiff was not guilty of

contributory negligence, about which I will speak later.

The relationship of passenger and carrier is not terminated when the passenger steps off the train. The company must provide a safe place for the passenger to get off."

This instruction was erroneous (doubtless given by inadvertence), and its harmful effect is manifest. The company was not bound to provide a safe way to get from the train to the station, nor was it bound to provide a safe place for the passenger to get off. As was said by the Court of Errors and Appeals in Mason v. Erie R. R. Co., 75 N. J. L. 521, "It is the duty of a railroad company to use *reasonable care* to provide a safe place for its passengers to alight."

The instruction made the company an insurer of safe conditions, and as applied to the present case if the facts presented a jury question, could well be understood as requiring that there should have been a safe way along the road bed from the place where the plaintiff alighted to the station to which he said he was going.

It is urged by the respondent that conceding the erroneous instruction appellant was not injured thereby, as the trial judge in other portions of his charge laid down the correct rule when he defined reasonable care as applied to the present case to be such as a reasonable person exercises in view of all the circumstances presented to him. While even this definition is in doubtful accord with the rule laid down by our cases, in that a reasonable person is not necessarily either a reasonably or ordinarily prudent person (Pesin v. Jugovish, 85 N. J. L. 259), it was given to the jury without a withdrawal of the precise duty previously imposed on the company, and hence left the jury to determine for itself which of the two standards it would accept. Collins v. Central R. R. Co., 90 N. J. L. 593.

The judgment is reversed.

Trial Record.

ESSEX COUNTY CIRCUIT COURT.

Wednesday, October 24, 1928.

MICHAEL KINDER, Plaintiff, vs. ERIE RAILROAD COMPANY, Defendants.	Action at Law.

Before HON. NELSON Y. DUNGAN, J., and a jury.

For the plaintiff appears JAMES P. MYLOD.

For the defendants appear HOBART & MINARD (by JOHN E. SELSER).

(A jury is called and sworn.)
(Mr. Mylod opens for the plaintiff.)
(Mr. Selser opens for the defendant.)

ARTHUR DEMOTT, sworn in behalf of the plaintiff.

Direct examination by Mr. Mylod.

Q. You are employed by the Erie Railroad, Mr. Demott? A. Yes, sir.

Q. You are employed as an engineer? A. Yes, sir.

Q. And you have been so employed by the Erie Railroad for how many years? A. Since 1906.

Q. And you operate on the Greenwood Lake Division principally? A. Yes; all the time.

Q. All the time? A. Yes, sir.

Q. Has the Erie Railroad Company any rules regarding the operation of trains on the road? A. Oh, yes.

Q. Are these rules printed? A. Yes.

Q. You have printed rules, have you, Mr. Demott? A. Yes, sir.

Q. Have you a copy of the printed rules with you? A. No, sir.

Q. Were the same printed rules in force during the month of February, 1923, as are in force now? A. I guess they are.

Q. Weren't there any rules during the month of February, 1923, prohibiting an engineer operating a passenger train from taking the train past the signal or the semaphore on coming to a stop at a station?

Objected to on the ground that the printed rules are the best evidence.

Objection sustained.

(Discussion.)

The Court: It is admitted that the printed rule of the Erie Railroad is that——

Mr. Selser: That an engineer shall not operate his train past a semaphore which is in the red or danger position against the movement of that particular train so far beyond not to be in a position to continuously observe the semaphore in operation when the semaphore is against the movement.

By Mr. Selser.

Q. That is correct, isn't it, Mr. Engineer? A. Yes.

By Mr. Mylod.

Q. Do you know, Mr. Demott, whether or not it is counter to the rules of the company for an engineer to run a train into a station while a passenger train is discharging passengers at that same station?

Objected to on the ground, first, that the printed rule is the best evidence; second, on the ground that the question should be with reference to this particular station.

Objection sustained.

Mr. Mylod: That is all.

Mr. Selser: No questions.

TRACY COLE, sworn in behalf of the plaintiff.

Direct examination by Mr. Mylod.

Q. You are an employee of the Erie Railroad, Mr. Cole? A. Yes, sir.

Q. You have been employed by that company for how many years? A. Since 1890.

Q. Your title is supervisor? A. It was at that time.

Q. What is it now? A. I am not working at the present time. I am on a sick leave.

Q. But during February, 1923, you were a supervisor? A. I was.

By the Court.

Q. What does that mean? Track supervisor? A. Station supervisor.

Q. What was your territory? A. New York Division and the Greenwood Lake Division.

By Mr. Mylod.

Q. As station supervisor did you know the required number of men to make a crew on certain trains?

Objected to.

By the Court.

Q. Well, I suppose you knew that from the statute of the State or the book of rules? A. Well, that is not my duty. It doesn't come within the province of my position.

Q. Then you mean by that you didn't know? A. I will say that I don't know.

The Court: He says he doesn't know.

By Mr. Mylod.

Q. You don't know how many men are required or were required during February, 1923, to man, say, any trains?

Objected to on the grounds first, that it is not within the issues; second, that it is not properly proven.

(Discussion.)

Mr. Selser: May I just ask a couple of questions?

By Mr. Selser.

Q. Mr. Cole, as assistant supervisor you have nothing to do with the making up of trains in Jersey City? A. Positively not.

Q. That was taken care of by the superintendent's office? A. Yes.

Q. At that time that was Mr. J. M. Condon, superintendent of the system, wasn't it? A. Yes.

JOHN H. HEFFERNAN, sworn in behalf of the plaintiff.

Direct examination by Mr. Mylod.

Q. Mr. Heffernan, you were conductor on the train which left Arlington at 5.01 or thereabouts on the afternoon of February 12, 1923? A. Yes, sir.

Q. What were the names of the members of the crew on that train? A. One was J. J. Donnelly, baggage master; Smith Daly, ticket collector; T. F. Whalen, brakeman; and myself.

Q. There were no other members of the crew except yourself and the three men that you have named? A. That is all.

Cross-examination by Mr. Selser.

Q. Of course, there was the engineer and fireman? A. Well, he is the engine crew.

By Mr. Mylod.

Q. You don't count them as part of the crew, do you? A. Not the train crew.

By Mr. Selser.

Q. Now, you were regularly the conductor upon that train, were you not? A. Yes.

Q. And that was regularly your crew? A. Yes.

By the Court.

Q. Suppose you tell us just what the situation of each one of these members of the crew was on that train. I suppose Donnelly's place was in the baggage car? A. Yes, rear of the train; on the rear of his car, five-car train.

Q. What were his duties? What did he do there? A. He was there to receive and discharge baggage, express and company mail.

Q. Anything else? A. United States mail.

Q. Anything else? A. No, that is all.

Q. He didn't have anything to do with collecting tickets? A. No. He announced stations in addition to that, in the smoking car.

Q. This was a combination car then, wasn't it? A. Yes.

By Mr. Selser.

Q. Was or was not he supplied with brake sticks for use in braking trains in the event that hand braking was necessary? A. We don't use a brake stick.

Q. Well, he was there for that purpose if hand brakes were necessary? A. His duty was also to protect the rear of the train in case it stopped, by flag.

By the Court.

Q. That means he went back with a flag or lantern? A. Yes.

Q. Now, take Daly next. What was his job on the train and where was his station? A. Daly was located between the smoking car, that is, the combined car, combined baggage and smoker car, and fourth coach, rear end of the fourth coach.

Q. What were his duties? A. His duty was to collect tickets in the two rear cars and announce stations and assist people off and on at his platform.

Q. Take Whalen. A. Whalen was between the first and second car of the train from the engine. His duties were to announce stations and assist passengers off and on.

Q. Your station and duties. A. I was located between the third and fourth cars. At that station my duty was to collect tickets in the three head cars, announce stations and assist passengers off and on, and start the train when I got the signal from the other members of the crew that they were ready to go.

Q. How many cars were on this train? A. Five cars.

(Discussion.)

Q. I just want to ask Mr. Heffernan one other question which I do not think will be objectionable. I understoood you to say that your duty was to collect tickets in the first three cars, is that right? A. Yes.

Q. That is there were more than three cars upon the train, whose duty was it to collect the tickets in the other cars? A. Collector S. Daly, Smith Daly, the rear collector.

MICHAEL KINDER, plaintiff, sworn in his own behalf.

Direct examination by Mr. Mylod.

Q. Where do you live, Mr. Kinder? A. 48 Myrtle Avenue, Bloomfield.

Q. How long have you lived in Bloomfield? A. Twenty-one years.

Q. How old are you? A. Forty-one.

Q. Are you married? A. Yes, sir, got six children.

Q. Where did you work during the month of February, 1923? A. Arlington, Dupont.

Q. In what factory? A. Dupont.

By the Court.

Q. The Dupont factory? A. Yes.

By Mr. Mylod.

Q. How did you travel, Mr. Kinder, back and forth from your home in Bloomfield to Arlington where you worked? A. On the Erie train.

Q. Did you have a monthly ticket? A. Fifty-trip.

Q. You had a fifty-trip ticket. Did you come to Bloomfield on the Erie on the night of February 12th, 1923? A. Yes, sir.

Q. Where did you get on the trains that night? A. Arlington.

Q. Do you know approximately what time the train left Arlington? A. About 5.01.

By the Court.

Q. Was that a regular time of leaving, or did it actually leave at that time that night? A. Late at that time.

Q. Was that the leaving time? Was that the time at that time for it to leave, 5.01? A. Yes.

Q. That night did it leave on time? A. Just like that, 5.01, maybe 5.02; I couldn't tell.

By Mr. Selser.

Q. Was that the train that you usually took home from your work? A. No.

Q. What train did you usually come home on? A. 4.49.

New Jersey State Library

Q. Why didn't you take the 4.49 that night? A. It was a holiday that time, Lincoln's Birthday.

Q. What did Lincoln's Birthday have to do with you in taking your regular train? A. Take off that train. No run that on holidays.

Q. And then you took the next train, did you? A. Yes, sir.

Q. Was that train any different as to its size from the train that you had usually taken? A. It is twice bigger. That is express.

Q. What do you mean when you say it is twice bigger? A. More cars.

Q. There were more cars on the train which you usually took or on this holiday train, which? A. No, on this; on this other train.

By the Court:

Q. You say the other train. We do not know which you mean. Is the 4.49 the long train or the 5.01 the long train? A. Short train, 4.49; 5.01; 5.02; that is longer train.

By Mr. Mylod.

Q. Do you recall the train coming into Bloomfield? A. Yes.

Q. What did you do when the train came into Bloomfield? A. I got up from my seat, stood up, I went to get out on the right side.

Q. When you got up from your seat where were you then? A. I got up. I got out on the platform of the car.

Q. How did you get out on to the platform of the car? Through the rear door or the front door or how? A. Front door.

Q. Did anybody go out before you? A. Yes.

New Jersey State Library

By the Court.

Q. You have not told us which car you were in. A. Front car.

By Mr. Mylod.

Q. Which car were you riding in? A. Front car.

Q. When you went out to the front door you got on to the platform of the car. What was in front of you? A. This coal engine, engine, coal bin was used for engines.

Q. What did you do after you got out on the platform? A. I turned to go just like I always go on the right side, and I see big iron wall on bridge.

By the Court.

Q. You saw what? A. Big iron wall on bridge. Bridge was up there.

By Mr. Mylod.

Q. A big iron wall on the bridge? A. Yes.

Q. Was the car up on a bridge? A. Yes, sir.

Q. Do you know what bridge that was? A. Yes, it was canal bridge.

Q. And in addition to seeing the iron wall of the bridge did you see anything else on the right side of the car? A. Is got big hole was up between canal.

Q. Where was this big hole with reference to the step? A. Just right by steps and the water. You can see water out there.

Q. How deep would you say that hole was down? A. About 20 feet, something like that; I don't know.

Q. What did you do then when you saw what was on the right-hand side; what did you do? A. I turned back on platform.

Q. You came back on the platform; then what did you do? A. I see two or three fellows get off before me. I just go on steps; I get off.

Q. On which side did you get off then? A. On the left.

Q. What did you step off on to, if you know? A. Is got big planks over the platform in the middle bridge.

Q. Did you step on this platform in the middle of the bridge? A. Yes.

Q. What was the platform made out of that you stepped on? A. For wood for planks.

Q. What did you do after you stepped down on these wooden planks on the left-hand side of the train? A. Just turned going in the station; then he hit me.

By the Court.

Q. How is that? A. When I just get off, step on that planks, I turned to go down to station.

Q. Right or left? A. Left.

By Mr. Mylod.

Q. As you turned to go down to the station, now, what happened to you? A. At that time another engine hit me. I don't remember after that.

Q. Do you know the direction from which the engine came that hit you? A. Yes, from Montclair.

Q. Did it hit you in front or hit you in back? A. Hit on the side; I don't remember; and broke my leg and broke head. I don't know when he hit me.

Q. What do you remember after being hit with the engine coming from Montclear? What is the next thing that you remember? A. Well, I just know what the fellows told me. I don't see that engine at all. I didn't see that engine at all.

Q. After you were struck and knocked down what is the next thing that you remember after that? A. I remember when I was in the hospital, night time in the hospital.

Q. You remember it was night time in the hospital; is that what you said? A. Yes.

Q. How long did you remain in the hospital? A. Seven weeks.

Q. Then after that where did you go? A. I stayed home.

Q. And when you were discharged from the hospital did you use crutches? A. Yes.

Q. How long did you go on crutches? A. Three months I walked on two crutches, three months and a half, something like that.

Q. Did you go back to the hospital for treatment? A. Yes, sir.

Q. How long did the treatment at the hospital continue? A. Thirteen months.

Q. What hospital? A. Mountainside Hospital.

Q. How long were you at the hospital? A. Five months and a half.

Q. And after five months and a half did you go back to work? A. Yes.

Q. Where did you go? A. Arlington, Dupont, the same place.

Q. What wages were you receiving at the time that you were hurt? A. $18, $17, I make.

By the Court.

Q. You mean a day? A. No, a week.

By Mr. Mylod.

Q. What were your wages before you got hurt, before the accident? A. From $35 to $40. I worked piece work.

Q. When you went back after the accident how much did you get? A. Sixteen or seventeen dollars; like that, that is all I got.

Q. What kind of work were you doing before you were injured? A. I was working on saw.

By the Court.

Q. A saw? A. Yes, cut celluloid boards.

By Mr. Mylod.

Q. What kind of work did you do after you went back? A. Give me sit-down job, just like pick up some stock.

Q. They gave you what kind of jobs? A. A sit-down job, counting stock.

Q. How long did you stay there after you went back, after this accident? A. Two weeks.

Q. Why didn't you stay there longer? A. Got hit on my leg; doctor told me to stop work, stay home.

Q. Then how long did you stay home after trying to work for two weeks? A. Three or four weeks I stay home.

Q. Then did you go to work? A. Yes.

Q. Where did you go to work then? A. Rubber mill.

Q. What kind of work did you have in the rubber mill? A. Working on press.

Q. Was that a stand-up job as you call it? A. Sit down.

Q. What wages did you receive there? A. $4 a day.

Q. In the rubber mill in Bloomfield? A. Yes.

Q. How long did you remain in the rubber mill? A. Nine months, eight or nine months.

Q. How did you come to leave the rubber mill? How did your employment end in the rubber mill? A. Well, he shut down, no work, closed down.

Q. The rubber mill closed down? A. No work no more.

Q. What were you receiving in the rubber mill? How much a week? A. $22 a week, five days and a half.

Q. Then where did you go to work after the rubber mill shut down? A. Go down to Dupont again.

Q. How long did you work in Duponts then the third time? A. Six or seven weeks I worked.

Q. What wages did you receive in Dupont's when you went back to work? A. Same thing, $18, $16, just like that. I no work full time; always go to hospitals, too.

Q. Were you going to the hospital during that time? A. Yes.

Q. Would you have to leave your work to go to the hospital? A. Yes.

Q. And after leaving Dupont the third time where did you go to work? A. Paper mill.

Q. In Bloomfield? A. Yes.

Q. What kind of work were you doing in Dupont's the last time you were there? A. Same job, pick up, counting stock, stuff for making brushes, something like that.

Q. Did you tell us how long you were out of work and you didn't do any work at all from the time you were injured? A. Five months and a half.

By the Court.

Q. Why didn't you go back before that? A. I can't. I walk on crutches.

Q. You were walking on crutches. I thought you said you walked on crutches for three and a half months. A. After one cane and one crutch, I walk for a year; I don't remember; nearly a year I walking.

By Mr. Mylod.

Q. Had you ever been up on the railroad bridge before the night that this accident occurred, the canal bridge? A. No.

Q. Had the train ever gone beyond the station platform during the time that you were riding on the Erie, until that night?

Mr. Selser: You mean this particular train?

Mr. Mylod: The train on which he rode.

Mr. Selser: The train on which he rode?

Mr. Mylod: I will repeat the question.

Q. Did the train on which you came up from Arlington ever go up on the bridge before this night in question?

Mr. Selser: Do you mean this particular train? The 5.01, or the 4.49, the one he customarily took?

The Court: The train on which he rode.

A. I never see before.

Q. You were never carried up on the bridge before? A. No.

Q. Was it bright or was it dark at the time this train got to Bloomfield? A. A little dark.

Q. Was the snow on the ground or was it clear? A. A little bit snow, a little snow.

By the Court.

Q. Do you know what time that train was due at Bloomfield? A. 5.17 or 5.18, like that.

By Mr. Mylod.

Q. How many went out through the front door on this train, if you know, or this particular car, before you went out? A. Three I see.

Q. Does your leg still trouble you? A. Yes, sir.

Q. Where does it trouble you? A. Right here in my hip. I break when I——

Mr. Selser: Indicating the left hip.

Q. How does it affect you? How does the injury affect you now? A. When I walk all the time noise. This jump every time jump.

Q. Do you know what causes that noise?

Objected to as being a medical conclusion.

The Court: He may answer yes or no.

Q. Does it pain you where you hear that noise? A. I hear anywhere, I can hear.

Q. Does your hip pain you? A. Yes.

Q. When does it pain? A. Right here (indicating).

Q. Not where. When does it pain you now? A. Here (indicating).

The Court: Indicating the thigh.

Q. I am asking you when. When does it pain you? A. Well, a little bit walk far. I walk a little bit, I go upstairs, it starts pain.

Q. What do you call "walk far"? A. My leg gets tired because weight all the time put on. Got sore, whole leg.

Q. Does it pain you at any particular time of the day? A. No. Just I walking, something like that.

Q. When you walk or when you work hard? A. Yes.

Q. Does the weather affect it any, wet weather or dry weather? Does that have any affect? A. Oh, yes, sometimes damp weather, some rain or something like that, it starts.

Q. It hurts worse in damp weather than in dry weather? A. Yes, when I get wet.

Cross-examination by Mr. Selser.

Q. You had never ridden on the 5.01 before, had you? A. No.

Q. So you don't know how that train was customarily made up, do you? Do you understand the question? Maybe those words aren't the kind you are used to. You don't know how many coaches they usually have in the 5.01? A. I don't count how many coaches in long trains.

Q. But every other day when you took the 4.49; that was a little shorter than the 5.01 train? A. Yes, about four coaches on the other train.

Q. On the 4.49? A. Yes.

Q. And the 5.01 is a bigger train? A. Bigger, yes.

Q. Now, Mr. Kinder, when you got up to this station in Bloomfield, the place where you were getting off the train, you were able to see all right, weren't you? A. Was a little bit dark, people, crowds were in the car.

Q. It wasn't so dark that you couldn't see, was it? A. I went in the side. The people in front of me stand up.

Q. If people were standing in front of you, then you couldn't see through them? A. No.

Q. But the darkness wasn't so great as to prevent one from seeing? A. A little bit dark, fog, just like smoke.

Q. How far would you say you could see? A. I couldn't tell how far.

Q. Did you see the station building? A. No, when I got struck I ain't see at all.

Q. Of course, after you were struck you were unconscious? A. Yes, sir. Just I go I see.

Q. You did see the water 20 feet down in the hole? A. When I look straight.

Q. Underneath the bridge? A. Yes, when I look straight.

Q. Did you see the girders of the bridge in front of you? A. Yes.

Q. And when you started to get off on the left side you saw the bridge down there by the steps of the coach, didn't you? A. Yes.

Q. And you knew it was the bridge, didn't you? A. Well, I see it was bridge. When I get on the other side I see the bridge.

Q. It was the bridge that was shown in this picture, wasn't it? A. Yes.

Q. That is there all right, isn't it? A. Yes, that is the same bridge.

Mr. Selser: Perhaps we can admit the pictures now. Do you want to admit them as your exhibits?

The Court: They may go in as your exhibits if Judge Mylod consents to it.

Mr. Mylod: I will be glad to have them go in as your exhibits. I really do not see the point of difference it makes.

The Court: If you are willing they should go in as your exhibits, they will be so admitted.

(The photographs referred to are received in evidence and marked Exhibits P-1 and P-2.)

By Mr. Selser.

Q. This picture, referring to Exhibit P-1, is the one which you just said showed the bridge under which you undertook to get off the train. A. Yes.

Q. And that picture shows the same bridge but a little closer—the camera is a little closer to it, isn't it? That is up toward Montclair, looking down toward the station? A. Yes, that is going towards Newark.

Q. Referring to Exhibit P-2. Now, you had gotten off at this station almost every day. A. That station?

Q. Yes. A. Yes.

Q. And you knew that the canal bridge was just a few feet beyond the platform, didn't you? A. No, I see the bridge all the time when I got off; every day I can see the bridge.

Q. Along the right-hand side of the train, a train which is going in a westerly direction, the train upon which you were riding when the accident occurred—along the right-hand side of that train there was a platform for passengers, wasn't there? A. Yes.

Q. And that platform ran up to a point how close to the bridge? A. That platform go close to bridge.

Q. It goes close to the bridge? A. Goes close to bridge.

Q. Now, on the left-hand side of your train what was there between the sets of tracks or sets of rails? A. On the station? Nothing.

Q. Between that track, the track upon which your train was standing, and the next track, what was in there? A. Platform on the bridge.

Q. But down by the station what was there? A. That is only stones.

Q. Just rough, loose stones? A. Yes.

Q. Ordinarily when you got off the 4.49 you would get off on the right-hand side, down to the platform? A. Yes.

Q. When your train came into the station you say you got up and walked to the front door of the first coach? A. Yes.

Q. And then you started to get off on the right-hand side the way you always got off? A. Yes.

Q. When you stepped out on to the platform you saw the girders of that bridge there? A. Yes.

Q. You knew then, didn't you, just where you were? A. Yes.

Q. And you knew that the platform was down back of you, didn't you, the station platform? A. Yes.

Q. On the right-hand side of your train? A. Yes.

Q. Why didn't you, Mr. Kinder, walk through the coach to the back down of the coach and get off on the platform? A. Full of people; can't get out. Already full car. Before I go, train moves. I no get out. Too late then; train moves.

Q. Did this train move before you got off? A. No.

Q. When you got out and looked over to the right-hand side and saw the girders of the bridge, then you came back to the door of the coach, did you? A. Yes.

Q. Did you look back to see how many people were getting off? A. Full of people just the same.

Q. A lot of people? A. Yes.

Q. Were they still in the coach near the door? A. Yes, sir.

Q. Could you see them getting off the steps when you were outside on the platform? A. I see from front left side, three fellows get off.

Q. I mean on the back of the coach. A. I don't looking.

Q. You only know that there were persons standing in the coach going out of that back door, don't you? A. Yes.

Q. And you didn't go through the coach to get off with them because there were so many persons there; is that right? A. Yes, sir.

Q. Well, before that train came to a stop did one of the railroad men come in and open the back door of the coach? A. No, I don't see.

Q. You didn't see him? A. No.

Q. Did you hear any railroad man call out from the back door of the coach the name of the station? A. No, I don't see back somewhere, but that is when it is full of people. I don't see that. Maybe he is back somewhere calling, but he no call in that car.

Q. You didn't pay any attention to him calling? A. No.

Q. You did not see any trainman at all then, did you? A. No, sir.

Q. Where are you working now? A. Paper mill.

Q. In Bloomfield? A. Yes, Diamond Mill Paper Company.

Q. What kind of a job did you have there? A. Paper-making mill.

Q. Paper-making? A. Yes, sir.

Q. What did you have to do as a paper maker? A. I got set machine and everything, and helpers do all work.

Q. You run a machine with your foot? A. No, running electrical and everything.

Q. How do you shut it off? Do you shut it off with your foot or do you shut it off with a machine? A. That is a big machine. That is 150 foot long machine, that big machine.

Q. How many feet? A. 150 feet machine long; that has got electric, everything.

Q. How much did you make a week running that? A. $35.

Q. That is as much as you made in Dupont's before you were hurt, isn't it? A. Yes, Dupont's make more sometimes piece work.

Q. You don't work piece work at the paper mill? A. No.

Q. Just $35 every week? A. Yes.

Q. When your machine breaks down you don't stop working, do you? I mean, you don't stop working out there at the paper mill? A. Maybe.

The Court: I wonder if it would be helpful to know the time of sundown on that date according to the World Almanac. Would you both like to have that in in this case?

Mr. Selser: I would be willing to agree that that is correct.

The Court: The sunset on February 12, 1923, according to the World Almanac, was 5.30 P. M.

By Mr. Selser.

Q. This train got into the station, I think you said, at 5.17. A. Something like that; after five; five maybe seventeen or eighteen.

Q. It wasn't 5.30, was it? A. I couldn't tell. I don't know; I couldn't tell.

Q. Your judgment is 5.17 or 5.18? A. Yes; I just think like that.

Q. Now, these three men that got off before you, Mr. Kinder, did you see where they went? A. They run right straight.

Q. They went straight up towards Montclair? A. I see two went straight. The other I didn't see; just got out off the door; I don't know which way.

Q. Did they run? A. When they got out I don't see already.

Q. When they got out they went towards Montclair? A. I didn't see that time.

Q. Which way did they start, down toward the station, toward Bloomfield, or up toward Montclair? A. When they got out I just see like straight. I see my step. When I see from door go out three fellows, which way them fellows gone, I don't see at all, which way gone.

By the Court.

Q. Those three men that got out before you did, did they also go to the right-hand door? Did those three men that went out ahead of you go to the right-hand door first? A. No. One man, he started go back and started to go back on the right side.

Q. So that there was two of you that went to the door on the right side? A. Yes.

Q. But on the left side three men got off ahead of you? A. Yes.

Q. And then you followed them? A. Yes.

By Mr. Selser.

Q. Well, two of those three were the two who went to the right first, weren't they? A. Left, no right.

The Court: He said one and himself.

A Juror: I would like to ask a question. There is no right-hand door; there is a right-hand exit, isn't there? A center door in front of the coach, and there is a platform immediately in front of that and then steps?

The Court: They do not have vestibule doors on these trains?

Mr. Selser: No.

The Court: That is the Erie.

By the Court.

Q. You mean the steps, the right-hand steps? A. Yes.

The Court: You evidently know that road better than I.

A Juror: I do not use it.

By Mr. Selser.

Q. None of these men who got off in front of you were railroad trainmen? They didn't have uniforms on, did they? A. No, working men.

Redirect examination by Mr. Mylod.

Q. What did you mean when you said in talking of whether it was light or dark, when you used the word "smoky"? A. Just like smoke, fog.

Q. What is the other word that you used? A. Fog, what do you call.

Q. Do you mean fog? A. Fog, yes.

Q. Is that the kind of night it was? A. Yes.

Q. When Mr. Selser asked you about when you came up the steps on the right-hand side of the coach where you couldn't get off, he asked you what you did, and you said you looked in the car, I be-

lieve, and there were lots of people in the car. Do you mean there were people standing up in the car? A. Yes, sir.

Q. Now, do you know what they were doing in the car, whether they were trying to get out the back or just standing there? A. Standing up.

Q. Was the car crowded and people standing in the aisle from the time it left Arlington? A. Yes.

Q. And when it pulled into Bloomfield, were there passengers in the car who couldn't get seats? A. Yes.

Q. When you came back up the steps on the right-hand side of the car and before you went down the steps on the left-hand side, were there people still standing in the aisle? A. Yes.

Q. Between you and the rear door? A. Yes, sir.

Q. In this paper-making work, you are now a paper maker? A. Yes, sir.

Q. How long have you worked in the paper mill in Bloomfield? A. Altogether?

Q. Altogether. A. About nineteen years.

Q. Did you work there before you went to Dupont's? A. Yes.

Q. Do you have to stand up at this job operating this paper-making machine? A. Must sit down.

Q. You must sit down? A. Yes.

Q. Mr. Selser asked you about turning the machine on and turning it off. How is the machine turned on and off? A. That is electric, electric motor.

By the Court.

Q. You turn it off and on? Do you do that? A. No, helper does it. It has only a handle like that, like trolley car.

By Mr. Mylod.

Q. Just like a trolley car? A. Yes.

Q. Is there any heavy lifting to be done by you in that work? A. No.

Q. Just what does your work of paper-making consist of? A. I know what to go, what sizes go; making cigarette paper, making that copy paper, making this paper, all of them regular size, regular weights, or short stock.

Q. Was it heavy work like operating the saw down at Dupont's? A. Yes; got to stand up all the time.

Q. Where? A. In Dupont's.

Q. You don't have to stand up on this job? A. No.

Q. How long have you been getting $35 a week at this job? When did you begin to get $35 a week? A. Nearly two years.

Q. Now, about two years? A. Yes.

Q. What were you doing before you got this job that paid you $35 a week? A. I no pay $35.

Q. Before that what jobs did you get? A. Before that helper, before I was sick.

Q. After you were sick when you first went to the paper mill after the rubber factory shut down and closed up, you worked in Dupont's for two or three weeks? A. Yes.

Q. Then you came back and went to work in the paper mill? A. Yes.

Q. How much did you make then when you went to the paper mill at first? A. Maybe two weeks I work, and this is lighter; give me machine.

Q. When you started there how much wages did you receive? A. $28.

Q. You received $28? A. Yes.

Q. And now you receive $35? A. Yes.

Q. How long did you work for $28? A. Six or seven weeks; a couple of months; I couldn't tell that.

Q. Then you became a paper maker? A. Yes.

Q. Mr. Kinder, how many hours, if you know, do you work in the paper mill now? How many hours a day? A. Twelve hours.

Q. Is that night work or day work? A. Some in day and some in night, two shifts.

Q. How many hours a day did you work in Dupont's when you were making $35 or $40 a week? How many hours a day? A. Eight hours.

WALTER KOROCY, sworn in behalf of plaintiff.

Direct examination by Mr. Mylod.

Q. Where do you live, Mr. Korocy? A. Bloomfield.

Q. Where do you work? A. Arlington, Dupont.

Q. You work in Dupont's factory over in Arlington, don't you? A. Yes.

Q. How long have you worked in Dupont's? A. I working now fourteen years.

Q. In Arlington all that time? A. All that time in Arlington.

Q. How have you been traveling back and forth from Arlington to Bloomfield? A. I go all the time by the Erie.

Q. Do you recall the train on which you came home from Arlington on the night of Lincoln's Birthday in 1923? A. Well, we got that time train.

Q. About what time does the train leave Arlington? A. Arlington it leaves about between 5.01 and 5.02.

Q. Was that the train you always came home on? A. All the time we came up on 5.01 or 5.02.

Q. That is your regular train? A. That is our regular train.

Q. You didn't come on an earlier train? A. No, I didn't.

By the Court.

Q. What was the time of the train? A. About 5.01 or 5.02.

Q. Bloomfield? A. In Bloomfield, it leave about around 5.20, 5.15.

Q. Leave where at 5.15? A. From Bloomfield come up 5.15.

Q. What time did your regular train get to Bloomfield? A. Regular train 5.01 and 5.02.

Q. Got to Bloomfield at that time? A. In Bloomfield, you mean from Arlington?

Q. Yes. A. About 5.15, 5.18.

Q. Then this was your regular train? A. Regular train.

By Mr. Mylod.

Q. What train did you come home on the night before this accident occurred? About what time did that train leave Arlington? A. Well, every day it is come 5.01, 5.02, from Arlington.

Q. Did you notice any difference in this train with reference to its size on this night in question, from other nights? A. This one is longer train.

By the Court.

Q. Longer than what? A. When it comes 4.49, 4.59 I think that it comes, it comes express. That is longer, and 5.01 and 5.02 week days' time, not holidays, is shorter.

A Juror: Your Honor, may I have brought out whether this grade in Bloomfield is ascending or descending?

The Court: Can that be admitted which way it is?

Mr. Mylod: Yes, I think it is a little up-grade at that station.

The Court: That is to the west?

Mr. Mylod: Going west.

Mr. Selser: I really do not know the fact, gentlemen.

The Court: Maybe the engineer knows.

Mr. Selser: Yes, he would know. Mr. Engineer, what is the fact? You were going west; how was that grade there?

(Discussion.)

Mr. Mylod: A little up-grade at Bloomfield.

Mr. Selser: A little up-grade, not very much, he says.

DAVID C. THOMPSON sworn in behalf of the plaintiffs.

Direct examination by Mr. Mylod.

Q. Where is your office, doctor? A. Bloomfield, New Jersey.

Mr. Selser: The qualifications are admitted.

Q. How long have you been practicing medicine in Bloomfield? A. Fifteen years.

Q. Do you know Michael Kinder? A. Yes.

Q. Did you treat him in the Mountainside Hospital? A. Yes.

Q. Are you on the staff of the Mountainside Hospital? A. Yes.

Q. Have you seen him since he was in the hospital? A. Yes.

Q. You have examined him? A. Yes.

Q. Will you tell us what he was suffering from and what his condition is now, and what is the probability of his injuries being permanent? A. His injuries consist of—if I may?

Mr. Selser: Refer to your records, doctor. That is all right.

The Court: Do not use medical terms, doctor. Just use terms that we can all of us understand. If it is a fractured femur, say it was a broken thigh bone. That illustrates what I mean. Then we will all understand.

The Witness: He had contusions of the left shoulder and forearm.

By the Court.

Q. You have started right in. If you mean bruises don't say contusions. A. I thought that all knew what contusions were.

Q. You are starting right in now, doctor. You say "contusions." Do you mean bruised? A. He had a bruise of the left shoulder and forearm and a bruise of the left hip and thigh; also the left leg, and a fracture of the left side of the pelvis, a complete breaking through of the left side of the pelvis; the two—gosh, I am stuck.

Q. Can't you read your own writing? A. Yes, but I can't explain it just in the way I am afraid you wanted it.

Q. Suppose you illustrate on yourself just where it was. A. The pelvis is made up of a set of bones which are wedged together with a keystone in the back; and the pelvic bone on his left side, which consists of a big wing bone and two legs or rami running down from it, one being above and one being beneath, to join in the center to form the arch which makes the pelvis. It was fractured 2 inches from the central line both through the lower leg, the lower ramus or arm, and the upper arm of that pelvic bone; also fractured in the pelvic bone, the portion which contains the socket for the hip joint.

Q. There were two breaks? A. There were three breaks.

Q. All on the left side? A. All on the left side.

By Mr. Mylod.

Q. Are the breaks permanent, doctor? Is his injury a permanent injury? A. When I saw him last week he had a soft rubbing over his left hip bone, which unquestionably is permanent.

Q. He walks with a limp, doctor. Is that limp a direct result of the accident? A. Yes.

Q. Will that limp continue, in your opinion? A. Yes.

Q. He complains of pain in that portion of his body when he walks long or works hard. Is it your opinion that that limp probably comes from that injury? A. Yes.

Cross-examination by Mr. Selser.

Q. The rami, as you described it, is the cruller, sometimes referred to as the cruller support? A. Cruller?

Q. Yes. Haven't you described it that way? Some physicians do. At any rate, that has healed? A. Yes.

Q. There is good bony union? A. Yes, very good.

Q. Strong union? A. Very good.

Q. And the other fracture has healed so that there is good bony union? A. Yes.

By the Court.

Q. As to all the fractures? A. They are all well healed.

By Mr. Selser.

Q. The bruises of course cleared up as bruises normally do? A. Yes.

Redirect examination by Mr. Mylod.

Q. You had the benefit of X-ray pictures in making your diagnosis in this case? A. Yes.

Mr. Mylod: May I ask counsel, then, if he will produce the printed rules now without having a process server?

Mr. Selser: I will have them here, yes.

(Adjourned to Thursday, October 25, 1928, at 10 o'clock A. M.)

SECOND DAY.

Thursday, October 25, 1928.

(Continued pursuant to adjournment.)
(Present, counsel as before stated.)

WALTER KOROCY recalled in behalf of plaintiff.

Direct examination by Mr. Mylod.

Q. Mr. Korocy, you were on the same train that Mr. Kinder was on on the night of Lincoln's Birthday, 1923? A. Yes, sir.

Q. You were on the same train? A. Yes, sir.

Q. You got off at Bloomfield? A. Yes, sir.

Q. And when the train reached Bloomfield, what door did you go out, what door did you leave by? A. First door from the engine.

Q. Front door? A. Front door.

By the Court.

Q. Which car was you riding on? A. On the first car.

By Mr. Mylod.

Q. On the first car? A. On the first car.

Q. Did you go down the steps on the right or on the left? A. I got just step, two steps, and tried to get out; I saw the big hole, you know.

Q. Just let me stop you. You tried to get out on which side? On which side did you try to get out? A. On the right-hand.

Q. When you tried to get out on the right-hand side of the platform of the coach, what did you see? A. I saw big hole in the bridge.

Q. Did you see anything else besides the hole in the bridge? A. Iron wall, you know, iron steel wall, you know.

Q. Then after you saw this hole in the bridge that you talked about, and the iron and steel wall, what did you do after that? A. I turned back on the left.

Q. Did you go down the steps on the left side of the coach? A. I saw the platform on the left. Then I got off on the left.

Q. When you say you saw a platform on the left, what do you mean? What did you see on the left? What do you refer to as a platform on the left? A. That is a platform, wood platform, big planks.

Q. Did you step on them? A. I step on them.

Q. And when you stepped out on this wood platform, or whatever you described it, what did you see there? What did you do? A. I just step on the wood platform. I see on the second bridge another train come up from Montclair.

(The last answer is read by the stenographer.)

Q. Was that train traveling on the same track that the train in which you came into Bloomfield on, or was it on a different track? A. On a different track.

Q. That was the track— A. That is the eastbound track.

Q. (Continuing) On which the cars go into New York, the eastbound track? A. Yes.

Q. Do you know what direction the cars traveling from Bloomfield, Glen Ridge and Montclair go in? What track do you call that? A. What we come down, that goes to the west.

Q. The train you came in on was westbound? A. On the westbound track.

Q. And the engine that you saw on the second bridge, was on the eastbound track? A. On the eastbound.

Q. Now, did this train on the eastbound track stop before it crossed the canal bridge, or didn't it? A. Why, I saw as soon as he comes in eastbound, going up to New York where he is coming in on the bridge, and I saw where I pass around, pass the westbound train, pass on the front of the engine, and I hear him pull three times the whistle. Maybe I was out——

Mr. Selser: Not maybe.

Q. After you heard this whistle pulled three times, what became of the train that was going to Montclair, the train that you got off of? A. That train started to go.

Q. Did it go right up to Glen Ridge and Montclair? A. Going right up to Glen Ridge.

Q. And the other train that you say you saw on the eastbound track coming down, had that crossed

the canal bridge at the time that you heard these three blasts of the whistle? A. Engine pull on past the bridge.

Q. It pulled past the canal bridge? A. Canal bridge.

Q. After the train passed up to Montclair, what did you do? A. I heard as soon as the train passed and I heard the whistle, then I returned—I heard somebody got hurt.

Q. Where did you go? A. I go back on the platform. Go back again. I seen the man lay down.

Q. You saw the man lay down. Where did you see this man lay down? A. Nearest to bridge.

Q. Was he near the tracks? A. Between the tracks.

Q. Between what tracks? A. Between the east and west tracks.

Q. Between the eastbound and the westbound tracks? A. Yes, sir.

Q. Where was the body lying with reference to the canal bridge? A. Body laying on the side to the station.

Q. Did you pick the man up, or the body up? A. I picked up and the conductor get off the train and come up from station—the agent.

Q. Did this train that came down from Montclair on the eastbound track stop at any time prior to the three blasts with a whistle which you heard?

Objected to as to form.

Q. Well, describe the course. Do you know what the word course means? Describe how the train that you saw coming from the second bridge—that is, the Spruce Street bridge I mean; is that right? A. Spruce Street, yes.

Q. Describe how that came along from that point until you heard the three blasts of the whistle. A. That was the engine past the canal bridge, and second car, and was stopped; and where we picked up that man we pulled to the station.

Q. After you picked up the man it pulled down all the way to the station?

By the Court.

Q. So that we understand; the engine and one car pulled over the canal bridge before it stopped; is that right? A. Yes, sir.

By Mr. Mylod.

Q. Did that train travel fast or slow, the train that came from the Spruce Street bridge on the eastbound track? A. Came up fast, same like that, see; came up fast.

Q. How did this train that you traveled on from Arlington to Bloomfield that night differ in size from the train that you usually came home on? A. That is express.

Objected to.

Objection sustained.

Q. Was there any difference in the size of the train on which you traveled from Arlington to Bloomfield on this night in question, Lincoln's Birthday, from the train that you usually came home on?

Objected to.

The Court: I sustain the objection for two reasons. I do not see what possible bearing it can have as to the size of the trains that this man rode on; and then if I

have understood his testimony, this was his usual train. I understood him to say that this was his usual train.

(Discussion.)

Q. Can you tell us about how many coaches were on this train that you came up from Arlington on?

Objected to as immaterial.

Objection overruled. Exception noted as ground of appeal.

(The last question is read by the stenographer.)

A. About around seven or eight coaches.

Q. Why do you say that this train had seven or eight coaches? A. It is longer than the other days.

Q. When you say around seven or eight, how many do you mean? A. Because it is longer. I know it is longer than the other days.

Q. How many coaches would you say were on this train? Not around. How many would you say, in your opinion? A. Seven or eight coaches.

Q. What was the condition of the weather? Do you know what I mean by condition? How was the weather when you got in at Bloomfield? A. It was foggy.

By the Court.

Q. Was it light or dark? A. Dark.

Q. What? A. Dark.

Cross-examination by Mr. Selser.

Q. You could see the train away up at the Spruce Street bridge coming down, though, couldn't you? It wasn't that foggy, was it? A. As far as Spruce Street.

Q. Spruce Street is about 500 feet up the tracks, isn't it, or is it more than that? A. I don't know how many feet.

Q. How far is Spruce Street away from the canal bridge in your opinion? A. I can't tell you.

Q. You aren't very good on measurements, are you? A. Not so far though.

Q. You were in the same coach Mr. Kinder was in, weren't you? A. Yes, sir.

Q. You got on at the same station, Arlington? A. Yes, sir.

Q. Were there many people who got on the train at Arlington? A. Full train.

Q. How many got on at Arlington? A. I don't know how many.

Q. What? A. I don't know.

Q. Were there just you and Kinder or were there more than you and Kinder who got on the front coach? A. Oh, more, more.

Q. How many more? A. I can't tell you.

Q. About how many, Mr. Korocy? A. From the Dupont works, I know from all over——

By the Court.

Q. Well, was there a large number that got on the train, or only just a few people? A. Oh, large people got on.

By Mr. Selser.

Q. On that front coach were there as many as ten people who got on? A. Ten or fifteen.

Q. Ten or fifteen you would say. Did you look up to see how many people got on the other coaches? A. I won't look up, no.

Q. You didn't look towards the other coaches in the train, did you, Mr. Korocy, to see how many

people were getting on in those coaches? A. I look up. Now I stand around on the side by the station.

Q. The station at Arlington? A. Yes, and I walk down to the front coach in the smoking room.

Q. The smoking room, front coach? A. Yes, and a lot of people got off the train, and a lot of people stand around, but they got on, and when the people got off the train, I got on.

Q. Most of those passengers at Dupont's were men and they went up to the smoking coach, didn't they? A. Some went to smoking room, some was down.

Q. You had a seat, didn't you? A. What?

Q. You were sitting down all the way from Arlington to Bloomfield, weren't you? A. No. I standing.

Q. You stood? A. I standing. Then I tried to get a seat, Forest Hill, North Newark.

Q. You got a seat at Forest Hill, North Newark? A. Yes.

Q. And Mike was sitting down, too? A. Mike was sitting.

Q. Were you sitting in the same seat with Mike? A. The same seat.

Q. Were you on the aisle side or were you toward the window? A. What is that?

Q. Were you nearer to the window or was Mike nearer to the window? A. Mike was nearer to the window.

Q. When did you get out of your seat, Mr. Korocy? After the train stopped at Bloomfield or before it stopped? A. When I got out it was stopped at the station.

Q. After it stopped? A. They stopped every station.

Q. You kept your seat until the train stopped, is that right? A. What do you mean?

(The last question is read by the stenographer.)

By the Court.

Q. Did you get up before the train stopped? A. No.

By Mr. Selser.

Q. The train came to a stop and you were still sitting there? A. I was seated.

Q. And then after the train came to a stop you got up out of your seat? A. I get up.

Q. And you walked toward the front door? A. No. I was seated by the front door.

Q. Then you went to the front door, didn't you after you got out of your seat? A. I saw the front door is open and two men get off before me.

Q. Who opened that door? A. I don't know who is open.

Q. You don't know? A. I don't know.

Q. Mr. Korocy, did you or did you not see someone open that door? A. Yes, somebody opened it.

Q. Who opened it? A. I don't know who opened it.

Q. Was it a trainman who opened it, or was it one of the other passengers? A. I don't know.

Q. Did you actually see somebody open it? A. I see the doors were open.

Q. Did you see somebody open it? A. No.

Q. You testified at the last trial, didn't you? Is that right? You told the Judge and the jury what you saw and heard and what you knew about this accident the last time the case was tried? A. Yes.

Q. On page 33 of the record. Do you remember being asked this question and giving this answer: "Question: Did I understand you to say that you opened the door on the car?" And you answered, "No, the man before me opened it." Is that right? A. That is right.

Q. Then you did see the man before you open the door, didn't you? A. Well, the two men standing around by the door.

Q. Before the train came to a stop, then do I understand you to say that there were two men standing by the door? A. By the door.

Q. And one of those two men opened the door? A. Opened the door.

Q. And then you got up out of your seat and followed those two men out of the door, is that right? A. That is right.

Q. And Mike was behind you? A. I don't know.

Q. But at any rate you followed the two men? A. Two men.

Q. One of the men opened the door out on the platform and then after you saw the girders on the right side you stepped down to the left side? A. I stepped down on the right side.

Q. First? A. First.

Q. And you saw the bridge there? A. Yes.

Q. And then you came back and went over to the left side? A. Left side.

Q. And stepped down on the boards of the bridge? A. Yes, sir.

Q. Now, I understand you went up towards Montclair, is that right? A. Yes, sir.

Q. And between the tracks over which you walked, the space over which you walked west on the bridge toward Montclair from the bridge, that was all rough, loose stone, wasn't it? A. After the bridge, yes.

Q. Now, did you run or did you walk? A. I run as soon as I can.

Q. Where did the other two men go? A. I don't know. I don't see them.

Q. You don't know anything about them? A. I don't see them.

Q. Did they get right off the left-hand side or did they go to the right-hand side, too? A. I don't know where he get off.

Q. You don't know anything about that? A. I don't know.

Q. Now, as you were running up toward Montclair you ran past the engine of your train, didn't you? A. Yes, sir.

Q. And then you turned in around in front of your engine? A. I turned around on the right-hand.

Q. To the right-hand side and you went in front of your engine? A. Yes, sir.

Q. And you were going to go down the bank, weren't you? A. Yes.

Q. And make a short cut? A. Yes.

Q. Where do you live with respect to Mike's place. Do you live near Mike? A. No.

Q. Or does Mike live on the same side of town as you? A. I don't know; maybe a little farther, farther away.

Q. But does Mike usually go home? You get another train, don't you? A. Yes.

Q. But Mike, when he goes home, goes the same direction you go, doesn't he, ordinarily? A. Walk home?

Q. Yes. A. You mean with me?

Q. Well, Mike's home is in the same direction as your home, isn't it? A. On the right hand.

Q. What? A. On the right hand he lives, too.

Q. How far does Mike live from you? A. About three blocks from me.

Q. And that is up toward Montclair on the right-hand side of the tracks, isn't it? A. Yes.

Q. You got around in front of the westbound engine before the eastbound engine got to the place where you crossed over the track, didn't you? A. I run on the right hand.

Q. When you turned in front of the engine, Mr. Korocy, when you turned in front of your engine, where was the eastbound engine at that very minute? A. Why, past the bridge.

Q. Already past the bridge? A. Half coach was on the bridge, and half engine.

Q. You don't understand me, Walter. When you stepped from between the two tracks, running along and turning in front of your engine, where was the other engine at that minute? A. Eastbound?

Q. Yes, the eastbound engine, just when you turned off the track in front of your engine. A. Just like that, coming fast; pass on the front of the engine and the train like that coming (indicating).

Q. You just got in front of it? A. Just I got in front of it.

Q. Is that right? A. That is right.

Q. And then, of course, you weren't able to see it any more, were you? You weren't able to see the eastbound engine any more after you ran in front of your engine? A. Eastbound?

Q. Yes. A. As soon as the train passed I walked down.

Q. As soon as which train passed? A. Westbound.

Q. Walter, let us get this very carefully. When you stepped in front of the westbound engine, the westbound engine then started to move? A. Started to move.

Q. Started to pull right out as you stepped in front of it? A. I was on the side of the engine.

Q. Then you say you heard that somebody was hurt and you waited for the westbound train to go by? A. Yes.

Q. And that you walked back to the station? A. Yes.

Q. And you thought it was Mike? A. I don't know who it was, but I tried to see it, whose body lay down.

Q. Then you saw who it was, and it was Mike, wasn't it? A. It was Mike, yes.

Q. Did you hear the conductor call the name of the station from the back end of the car before your train stopped at Bloomfield? A. No.

Q. You didn't hear that? A. No.

Q. Are you sure you didn't hear it? A. Yes, sir.

Q. You knew the conductor was back there, didn't you? A. I don't looking.

Q. You don't know that? A. I don't know.

Q. Didn't you see the people getting off the car at the back? A. I don't look at the back car either.

(Discussion.)

Redirect examination by Mr. Mylod.

Q. I forgot to ask you, Mr. Korocy, whether or not you heard any bell ringing or whistle blown by the westbound train until you heard the three loud blasts that you talk about? A. I don't hear at that time.

By the Court.

Q. Do you know which engine blew the three blasts? Was it the engine on the westbound train or the engine on the eastbound train? A. On the eastbound.

By Mr. Mylod.

Q. You said something in answer to one of Mr. Selser's questions that you heard or knew there was an accident. How did you know or how did you hear there was an accident? How did you know there was an accident? A. I hear what three times pull whistle, I hear some accident.

Q. Three times pull whistle; then you knew there was an accident? A. Yes.

Q. No one told you there was an accident? A. No.

Q. No one said there was an accident? A. Nobody did.

Q. The only way you knew there was an accident was on account of the blowing of the whistle? A. What is that, Judge?

Q. The only way you knew there was an accident was on account of the whistle, the three blasts of the whistle, wasn't it? A. Yes.

Q. How long did you say you had been traveling on the Erie getting off at Bloomfield? A. Fourteen years.

Q. Had you ever been taken up on that bridge before? A. No, sir.

Q. Did you tell us how many men went out of this front door before you went out? A. Two or three men.

Recross-examination by Mr. Selser.

Q. Walter, when you got around in front of the westbound engine, didn't you stand on the bank waiting for Mike? A. No. I don't wait for him.

Q. You didn't wait for Mike? A. No.

Q. Weren't you going to walk home with Mike? A. No. I started to walk. I hear pull three times, whistle. I go back again. I went to see who get hurt.

Q. You weren't going to walk home with Mike that night at all? A. No.

Q. You weren't standing there waiting for Mike? A. No.

Q. And when Mike didn't come, did you go back to find out what happened? A. I don't know who was. I don't now where he wanted to go; maybe go on the other side, on the left side, or go on the right side.

Q. Having been seated with Mike all the way up from Arlington or from Forest Hill or wherever it was you and Mike got seats, you hadn't made any arrangements or hadn't understood between yourselves that you and Mike would walk home together? A. No.

Q. You were working in the same Dupont plant? A. The same place.

Q. You didn't know where Mike was going? A. I didn't take notice.

WILLIAM F. ROGERS, sworn in behalf of the plaintiff.

Direct examination by Mr. Mylod.

Q. Where do you live? A. Now I live in Montclair. Well, in fact, Clifton, right opposite the Normal School, Clifton, New Jersey, 95 Woodlawn Avenue, Clifton, New Jersey.

Q. Near the Normal School? A. Near the Normal School.

Q. Where did you live during the month of February, 1923? A. Why, I lived eight years in Haskell, and I moved eighteen months ago to Montclair.

Q. Where are you employed? A. Dupont Company, Arlington.

Q. Were you employed by the Dupont Company in Arlington during the month of February, 1923? A. Yes.

Q. Were you a passenger on the train leaving Arlington about 5 o'clock on Lincoln's Birthday, 1923? I will change the form of the question. Were you a passenger on a train during the month of February, 1923, at a time when a man was injured at the Beach Street station of the Erie Railroad? A. Yes.

The Court: Beach Street?

Mr. Mylod: I think it is called Beach Street.

The Witness: I don't know the station exactly, but I think it is Bloomfield right there.

Mr. Mylod: You see there are three stations in Bloomfield, and this is the Beach Street station.

Q. You were traveling from Arlington to Haskel? A. Yes.

Q. What coach were you riding in? A. Front coach.

Q. And after your train reached Bloomfield, did you see a man struck by another train? A. I did.

Q. In what direction was the train traveling that struck the other man? A. Arlington; towards Arlington.

Q. It was going towards Arlington? A. Yes.

Q. It came down from Glen Ridge? A. I don't know where it came from, but he was going towards Arlington.

Q. Was that train traveling on the eastbound track? Did it pull down past the train in which you were a passenger while your train was standing still at the station? A. The train I was on going west may have moved slightly, but it hadn't moved 10 feet, I wouldn't say. It was probably stationary. It is right hard to tell right there.

Q. And the other train pulled right on the other track? A. On the other track, yes.

Q. Did you see the man struck by the other train? A. I did.

Q. Can you tell whether or not the car in which you were riding or any part of the car in which you were riding, the first car, was up on the canal bridge? A. Very near it. I would say the engine was on the bridge.

Q. But you are not certain as to where the car was with reference to the bridge? A. Well, just rough say half the length of this room. This room is about 50 feet; say 25 feet from where I was sitting the bridge must have been. Of course, that is just rough. I didn't go and look at the bridge, but I knew the location, riding every day. I knew it wasn't far from it. I would say 25 feet from where I was sitting the bridge was.

By the Court.

Q. Suppose you tell us where in that first car you were sitting, Mr. Rogers. A. Just rough, Judge, I would say about middle of the coach on the left-hand side.

Q. Next to the window or inside? A. I was talking to a man by the name of McGary, and I think—say this is the aisle here and that I was sitting on the other side. Say I was sitting on the middle. So that is how I saw the accident. I think I must have been looking out the window. I think he was next to the window. Of course, it is hard to remember five years, but I think I was sitting next to the aisle looking toward the back, and I saw this accident.

Q. Did this accident occur just about opposite you or where did it occur with reference to where you were seated in this train? A. Let us see, now. It was just about, say this is the aisle. The train going this way, McGary sitting here right next to the window; here is the window. I would say just about like that, about like that.

By Mr. Selser.

Q. About ten degrees, isn't it? A. Twenty-two, something like that. That is just rough.

By Mr. Mylod.

Q. And your train was moving slowly? It hadn't gone over 10 feet? A. No, it hadn't gone over 10 feet if it was moving at all.

Cross-examination by Mr. Selser.

Q. You didn't look to the rear of the coach seats, did you, Mr. Rogers, as your train was standing at the station? A. Did I look towards the rear?

Q. The rear of the coach in which you were riding. A. No, I didn't.

Q. And you have no present recollection as to whether or not a trainman calls the name of the station from the rear of your coach? A. Well, no, because you get so used to that, traveling for eight or ten years on the same train practically, you don't notice those things.

Q. You don't pay any attention to any station except your own, is that it? A. That is about the fact.

Q. Can you now recollect, Mr. Rogers, approximately how long the train had been standing at the station prior to the accident? In other words, about how long a step had been made? A. I can't tell that.

By the Court.

Q. Was the car lighted or was it still daylight? A. It was still daylight. It was still daylight, yes, still daylight.

Q. Can you tell me whether the car was lighted? A. Not except from imagination. No, Judge, I couldn't tell you.

Mr. Mylod: If the Court please, I have a book of rules supplied by the Erie Railroad Company, rules of the operating department. I don't think we want to read into the record all the rules. I think, perhaps, Mr. Selser and I can agree upon what should go in.

(Counsel argue.)

Mr. Selser: I say if your Honor rules that the rule itself hasn't any application to these issues, then I insist that the whole rule be read; but I am objecting to any portion of it because it has no application to this particular situation. Allow me an exception.

The Court: It will be admitted, and an exception noted.

Mr. Mylod: Rule 98A, Erie Railroad Company, Rules of the Operating Department, November 1, 1908: "Enginemen and trainmen on a train approaching a station on a track adjoining one where another train is receiving or discharging passengers are required to exercise great care.

"It is forbidden for a train to run between a station building or platform and a train standing to receive or discharge passengers, unless signaled to proceed by the yardmaster, conductor, or trainman of the standing train, in which case they may proceed slowly and cautiously until their engine has passed the standing train.

"Trains running on an adjacent outer track when passing a standing passenger train are required to proceed slowly and with great care.

"At stations where passengers are obliged to cross other tracks in order to board a train or get to the station or platform from a train, the conductor and trainmen are required to observe whether there is a train approaching before allowing them to do so."

I would like to recall Mr. Demott, the engineer.

ARTHUR DEMOTT recalled in behalf of the plaintiff.

Direct examination by Mr. Mylod.

Q. Mr. Demott, when you brought your train into the Bloomfield station on Lincoln's Birthday, 1923, and after you had crossed Spruce Street, or rather Walnut Street, was the semaphore or signal set against you? A. No, sir.

Q. Was it set against you after you had passed the station? A. After I had passed the signal? I didn't look. I didn't look back.

Q. As you approach any station, Mr. Demott, Forest Hill, for instance, there is a semaphore or a signal indicating the point where you are to stop your train, isn't there, and you are not to go beyond that?

Objected to.

Objection sustained.

By the Court.

Q. What station was this? What is the name of this? A. Bloomfield. At Bloomfield.

Q. That is what you call the station, Bloomfield station? A. Yes, sir.

Q. As you approached that station you say the semaphore wasn't against you? A. No, sir.

Q. It was clear? A. Yes, sir.

By Mr. Mylod.

Q. In other words, it was clear for you to go right on to Montclair? A. Clear for me to go to Montclair; yes, sir.

By the Court.

Q. Of course, these are automatic signals on that road? A. No, not there.

Q. They are not? A. No. Manual blocks pulled by the operator at the station, or in the tower.

By Mr. Mylod.

Q. Is there any signal along the tracks indicating where you are to bring your rachet to a stop at a station? A. No, sir.

Q. You are permitted to bring your engine to a stop at a station at any place along the right of way that you see fit? A. As long as you pull in at the platform, stop at the station stop.

Q. The signal has nothing to do with it? A. No, sir.

By the Court.

Q. The semaphore is used simply for a signal stop? A. No, sir, to control a train in case another train—if the track is obstructed or anything like that. They can hold you there for orders. When you meet another train somewhere or pass another train, they hold a signal on you or put another train up.

By Mr. Mylod.

Q. Can you pick out for us, Mr. Demott, the rule in this book, if there is such a rule which says that you must stop your train so that all coaches are opposite the platform? A. Well, we are on the platform as near as we can.

Q. They are on the platform? A. Yes, sir, you make a station stop, and that is the platform.

Q. Do the rules provide that to make a station stop you must stop at the platform? A. Well, we are supposed to.

Q. That is your instructions? A. Yes, stop at a station stop.

Mr. Mylod: I think that is all.

Mr. Selser: No further questions.

Mr. Mylod: That is all. We rest, if the Court please.

PLAINTIFF RESTS.

Defendant's counsel moves that the plaintiff be non-suited on the following grounds:

That the plaintiff has not proved that there was any invitation extended by the railroad company for him to alight at the time and place he attempted to alight, and that therefore he took the risk of that voluntary action upon himself.

That there is absolutely no evidence of negligence upon the part of the railroad company, as pleaded in the complaint.

That the plaintiff was guilty of contributory negligence.

(Counsel argue.)

The Court: I am very sure were it not for the decision of Mr. Justice Lloyd given on the appeal of this case to the Supreme Court, that I would have hardly invited argument upon this motion but would have refused it.

Since I am not familiar with what was proved in the other case except as indicated by Justice Lloyd's decision, I cannot now say that the facts in this case at this point

are the same as they were at the former trial of the case. If that be shown, of course I am bound by this decision of our Supreme Court and recorded in 137 Atlantic, page 88. But as I read the statement of facts by Justice Lloyd under number paragraph 2, the facts are quite different in this case at this time from what they were in that case.

For instance there is no testimony yet in this case that the trainman in the rear had called the station, or that there was any invitation for the plaintiff to go to any particular part of that car to alight. There is nothing in that decision which indicates whether or not the testimony in the former case was, as it is here, that this train was longer than the trains upon which he had habitually ridden, and that it was the first time he had ever been confronted with this situation; so that so far as the situation which confronted him was concerned, the train going up upon the bridge, it was practically as though he were a stranger notwithstanding the fact that he said he knew that the platform came up to the bridge. It is true he identified the photograph, but no particular attention was called to the sign which was there of the danger of going upon the bridge.

I think that the motion for a non-suit must be denied and an exception to that ruling will be noted.

Defendant's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

THOMAS WHALEN, sworn in behalf of the defendant.

Direct examination by Mr. Selser.

Q. Mr. Whalen, you were the collector on the forward part of this train, were you not? A. Yes, sir.

Q. Upon the train arriving in Bloomfield station, will you tell us what you did, if anything? A. Pulled into Bloomfield station, called out at Bloomfield in the two forward cars, two head cars.

Q. Tell us where you called out Bloomfield for the forward car, the first car? A. Rear door of the first car.

Q. In calling that out, just describe in detail what you did. Had you been riding in the forward car, or had you been riding on the next car? A. Riding on the next car.

Q. Your train is approaching the platform. You were in the second car. Now, what did you do? A. Called out Bloomfield in the second car; stepped across the platform to the forward car.

Q. As you stepped across the platform, was the door open or closed? A. It was closed. I opened and latched it and called out Bloomfield.

Q. That would be the right hand or rear door of the forward coach? A. That would be the right hand or rear door of the forward coach.

Q. You called out Bloomfield in that coach? A. Yes.

Q. Then what did you do? A. Got down on the platform and assisted passengers getting off both sides.

By the Court.

Q. What did you do? Close the door or leave it open? A. Latched it open

By Mr. Selser.

Q. Now, Mr. Whalen, where was that first coach with respect to the station platform? A. Right on it.

Q. Did you observe the rear platform of that coach? A. Yes, sir.

Q. Where was that? A. The forward platform I judge is 15 or 20 feet from the edge of the platform —canal bridge.

Q. 15 or 20 feet from the end of the platform?

By the Court.

Q. Beyond it, you mean? A. No, this side of it. This side of the block signal. This way on the platform. The block signal is right at the end of the platform near the canal bridge.

By Mr. Mylod.

Q. Just a moment. The front was beyond it? A. This way would be toward the block.

By the Court.

Q. You mean that the front platform was out on the bridge? A. No, sir.

Q. Or was it opposite the platform of the station? A. Opposite the station platform.

Q. So that the front of the front car, according to your testimony, was about 20 feet east of the bridge? A. East of the bridge.

By Mr. Selser.

Q. That would be east of the bridge on the right-hand side of the train? A. Correct.

Q. Of course that bridge runs at an angle, doesn't it? A. Yes.

Q. So that the right-hand side as your train was facing would be farther west than the left-hand side. A. Right.

Q. Now, did passengers leave the coach by the rear door or not? A. By the rear door; yes, sir.

Q. When you called in the forward coach of that train, did you observe whether or not the coach was crowded? A. Crowded?

Q. Yes. A. No. I had passengers standing up to get off.

Q. Were there seats sufficient for all passengers? A. Yes, sir; all the way out.

Q. Did you observe the approaching eastbound train? A. Yes, sir.

Q. Where was it when you first saw it? A. When I got down on the platform and looked forward I saw it was just coming very slow over Spruce Street bridge.

Q. And Spruce Street bridge is about how far away from the canal bridge? A. I judge four or five hundred feet or so, rough guess.

Q. How long were you standing at the station? A. About a minute and thirty seconds.

Q. Was or was not that— A. Regular station stop.

Q. It was the regular station stop? A. Yes.

Q. Then what happened from that point on. Just tell us how you started your train. A. Why, after the passengers got down on both sides of me, got up, looked through my cars. My cars were all clear; looked down on the other side, seen if everything was all clear. I saw there was only one passenger on the opposite side standing on the platform; got back, got down on the platform, give a signal to my conductor.

Q. And then did your train start? A. The signal was passed along.

Q. And at the time your train started, where was the eastbound train? A. Oh, I judge it was about the west end of the canal bridge as the engine passed, because I was calling out the next station then on the platform.

Q. That is outside of the station grounds, is it not? A. Yes.

Q. You didn't know that any person had been struck at this station? A. No, sir, nothing in sight when I looked out.

Q. How fast was that train going when your train started in motion, approximately? A. Approximately—I didn't take notice of the speed. It was just about moving, as far as I remember, because we were just moving ourselves, starting from the station.

Q. Now, to the left side of your train, Mr. Whalen, was there any platform? On the west side of your westbound train, to the left side, I mean. A. The left side, no, sir.

Q. That is rough, loose ballast? A. Only loose ballast is all, except the walk in the middle of it, halfway between the street and canal bridge, opposite the station, there is a small platform for running a baggage truck across, and that's all. It is not for passengers.

Q. It is built along level with the top of the rails? A. Level with the top of the rails.

Q. A narrow thing? A. Narrow.

Q. How far away was that from the canal bridge, approximately? A. About 150, 200 feet, something like that.

By the Court.

Q. Do you know how many cars you had that night? A. Four coaches, a combined car—five cars.

By Mr. Selser.

Q. Was a G. S. 2 made out on that? A. You will have to ask the conductor that.

Cross-examination by Mr. Mylod.

Q. When had you stopped at the Bloomfield station prior to Lincoln's birthday, 1923, on your westbound trip? A. In the middle of the day.

Q. During the middle of the same day? A. Yes, sir.

Q. This run that you had on the night in question wasn't your regular run, was it? A. It was my regular run, but not the regular schedule. Run on a holiday schedule.

Q. Had any trains been taken off? A. One train taken off.

Q. The train before this train or the train after? A. The train after.

Q. Was this a combined train? A. No.

Q. I didn't get your answer. A. Holiday time table don't make no combined trains. Holiday schedule has less trains.

Q. On this particular train, what was the number of the train? A. Train 519.

Q. That is the number on the schedule. How long had you been running the 519 prior to this night? A. About two years.

Q. And that 519 never stopped at Bloomfield, did it, except on holidays? A. No, sir.

Q. That is correct, isn't it? A. Yes.

Q. And every night or every time when that train stopped at Bloomfield, on which you are a member of the crew, before the train starts you look up and down the left-hand side of the track, don't you? A. Yes, sir.

Q. You look up and down the left-hand side of the train to warn the people before you start your trains?

Objected to.
Objection sustained.

Q. Was there a lock provided on the front door of the front coach, or was there on this night in question? A. Yes, sir.

Q. Who has the key for that front door? A. Every trainman.

Q. Isn't it your duty when you have a particularly long train and there is likelihood of the front coach running up into a position where it is dangerous for passengers to alight—isn't it your duty to lock the front door?

Objected to.
Objection overruled.
Exception noted as ground of appeal.

Q. Is it your duty to lock the front door under such circumstances? A. No, sir.

Q. You never lock the front door? A. No, sir, not when there is passengers on.

Mr. Mylod: That is all.
Mr. Selser: No further questions.

DEFENDANT RESTS.

(Defendant's counsel moves for a directed verdict on the same grounds as the motion for a nonsuit.)

The Court: It seems to me that in the decision of this case Justice Lloyd must have assumed, as I did, that this was a vestibule train. It appears now that it was not a vestibule train.

He uses these words, "That it had not opened the front door, nor had it authorized others to do so. This might be done at any time by one sufficiently familiar with its mechanism." From that it would appear that he assumed the manipulation of some kind of mechanism such as there is in the opening of a vestibule door, instead of merely the turning of a knob, for the reason that he later says, "The plaintiff knew that the right-hand rear door was open, but used the left-hand front door, as he stated."

As I understand it, the admission is that this was not a vestibule car, that there was nothing on the outside but the steps, that there was no right-hand rear door, that there was no left-hand front door, and that all this plaintiff had to do was to turn a knob and walk out.

Mr. Selser: That is right, your Honor.

The Court: The motion will be denied.

(Defendant's counsel prays an exception to this ruling of the Court.)

(Exception noted as ground of appeal.)

(Mr. Selser sums up for the defendant.)

(Mr. Mylod sums up for the plaintiff.)

(The Court charges the jury as follows:)

The Court's Charge.

DUNGAN, J.:

Gentlemen of the Jury, it is undisputed in this case that the plaintiff Kinder on the 12th day of February, 1923, within four months of six years ago, was a passenger on one of the Erie Railroad trains operating between Arlington and Bloomfield and beyond, and that as he alighted from the train on which he was riding he was struck by the engine of a train going in the opposite direction and rereived injuries for which he brings this suit.

Dr. Thompson, the attending physician at the hospital, tells us that at the time the plaintiff was admitted to the hospital he had bruises of the left shoulder and forearm, of the left hip and thigh and leg; but the serious injury seems to have been a fracture of the pelvic bone in three different places, and he showed you upon himself approximately where the breaks were. The plaintiff was in the hospital for seven weeks, and for three and a half months—I assume including the seven weeks—he was on crutches, after which he says he went around with a cane and a crutch, and up to thirteen months after this accident he went to the hospital for treatments. He says that even to this day, five and two-third years after the accident, when he walks there is noise all the time—it jumps; and Dr. Thompson tells us that while there is good bony union as to all of these fractures, there is a soft rubbing over the left hip bone which is permanent and that he now limps and will always limp.

If the plaintiff is entitled to your verdict, he is entitled to be compensated for that injury and for that pain and suffering and for that continuing disability, and what is compensation must be left largely to the good judgment of you twelve gentle-

men. It can be readily seen that this is an element of damage which cannot be accurately calculated as you may calculate his loss of earnings, but must, as I have indicated, be limited to what will be compensation—that is, a money return—for these injuries and for his consequent pain and suffering and disability. In this compensation should be included not only damages up to this time, but for such length of time as you believe he will suffer as the result of these injuries and be disabled by them, because he cannot at some time in the future bring another suit to recover for the elements of his damage from this time to the time of such suit. That must be compassed within your verdict in this case as damages past, present and future.

In addition to what will compensate him for these elements of damage, he is entitled to be compensated for his loss of earnings. He says that he was working for du Pont's at piece-work and earning thirty-five or forty dollars a week for an eight-hour day. He says after five and a half months he went back to work at du Pont's, where he was given some sitting work, for which he earned sixteen or seventeen or eighteen dollars a week; that he stayed there only two weeks because this hurt his leg and the doctor told him to stay home, which he did for three or four weeks, during which time I think it may be assumed that he earned nothing. There is no testimony that he did. Then he went to work in a rubber mill on a press for four dollars a day for five and a half days, which amounted to twenty-two dollars a week. They shut down after about eight or nine months and he went back to the du Pont Company, where he earned as before, sixteen to eighteen dollars a week, but he had to cease that work, he says, after six or seven weeks to go to the hospital. Then he worked in a

paper mill, receiving at first twenty-eight dollars a week, and being advanced in due time to his present wage, which he says is thirty-five dollars a week.

It will be your duty to compute as accurately as you can what his loss of earnings was and add that to what you decide will be compensation to him for his injuries and the pain and suffering and disability resulting therefrom, and the sum total of the two should be the amount of your verdict provided, you first determine that he is entitled to your verdict.

Of course, the first question for you to decide is whether or not the plaintiff is entitled to a verdict. The subject of damages need not be considered by you at all unless and until you find that he is entitled to your verdict.

The mere fact that the plaintiff was struck by this eastbound train would not entitle him to your verdict. More than that must appear in the case. It must appear by the greater weight of the evidence, because the burden of proof is upon the plaintiff, that his injuries occurred as the result of negligence on the part of the Erie Railroad Company, or its employees, for whose negligence the company is responsible.

He was a passenger on that train, and a railroad company owes to its passengers the duty to exercise reasonable care not only to carry them safely, but to provide a safe place and way to alight at the place of destination. Our decisions say that reasonable care toward a passenger is a high degree of care. It is more than ordinary care. It is true it must be reasonable care, but reasonable care in the case of a passenger is a high degree of care. And our decisions say that the relation of carrier and passenger does not terminate until the passen-

ger reaches his destination and alights from the train on which he has been riding and has had a reasonable time and opportunity to leave the place where the passengers are discharged.

If a passenger alights at a place other than that provided for by the company knowingly, knowing that it is not a place provided by the company to alight, and thereby knowingly runs into danger and is injured, then, of course, the relation of carrier and passenger does cease to exist at the instant that the passenger knowingly violates the rules of the company or alights at a place, knowing the dangers to him, other than that which has been provided by the company for him to alight.

The plaintiff was in the first car. According to his testimony, this was not his usual train. It was the train which left Arlington at 5.01 and arrived at Bloomfield at about 5.16 or 5.17, he thinks. Mr. Whalen, the front collector on the train, tells us that this train ordinarily does not stop at Bloomfield. It stops there only on holidays.

There is no question but that the company had provided a platform on the right-hand side or the northerly side of that track for passengers to alight right up to the canal bridge. That appears by the photographs in this case.

But Kinder and his fellow-traveler on that train, whose name is rather difficult to pronounce (it is spelled K-o-r-o-c-y), say that the front end of the forward car in which they were riding ran out upon the canal bridge beyond the end of this platform. Mr. Kinder says that that station was not called. He says that the conductor did not call in that car and that he did not see any trainmen. He travels there every day, however, upon another train and usually gets off at the right-hand side. He says that at this time when the train stopped

he with three other men went to the forward end of the car and opened the door and went out and attempted to alight as he usually had, on the right-hand side; that he saw right there a hole in the bridge and could see the water twenty or twenty-five feet below; that then they came back and all four of these men went down on the left platform; that there he saw planking; that the other three men got off and he does not know what became of them, and that he stepped down on this planking, started toward the station and had taken only one or two steps when he was struck by this eastbound train.

Mr. Whalen, who testified for the defendant and who was the collector upon that train, says that he did call at the rear end of that car; that he called first in the second car and then crossed the platform, called into the front car, "Bloomfield," left the door open and went down to assist passengers to alight. If he did call and the plaintiff heard it, and if you think that was an indication to him as to where he should alight from that train, then it will be for you to say whether or not there was any negligence upon the part of the defendant's employees.

Not only that, but Mr. Whalen says that the front end of that car was along the platform. He says that no part of the car was upon the bridge, that the front of that car was twenty feet east of that bridge and that the step was along the platform. If that be true, was there any duty which the defendant company owed to its passengers that it did not perform? If not, then your verdict should be in favor of the railroad company, notwithstanding the serious injuries to this man.

You cannot award verdicts in cases of this kind simply because the plaintiff needs the money and

the defendant railroad company has the money to pay. You can award verdicts only if the evidence shows negligence.

But if no member of that train crew called into that car at all, and if the front of that car ran out upon that bridge and the passengers were left to their own judgment as to whether or not they should go to the front or to the rear, and no precaution was taken to warn them of the dangers of the situation which existed with the right-hand side of that car on the bridge, with the canal twenty feet below them, and nothing to warn them of the dangers of getting off on the other side, with the appearance of a platform there by its being planked over—that you may also take into consideration in determining whether or not a safe place had been provided and proper warning given to this plaintiff as a passenger upon that train.

If you decide that the greater weight of the evidence does not show negligence on the part of the defendant, then your verdict must be in its favor. If you decide that it does show negligence, then you come to the consideration of another important question, and that is whether or not Kinder in alighting from that train took that care for his own safety which reasonably careful and prudent persons should take under the same or similar circumstances and conditions.

He admits that he habitually day after day went from Arlington to this station. He admits that he usually alighted from the right of the train and that he knew that the platform was there. He knew that the bridge was there. He knew that the platform ended at the bridge. He knew that there was a double track there and that trains ran in the opposite direction. He saw when he went to that front platform that he was upon the bridge. He

knew when he alighted on the left-hand side that he was alighting on or near the eastbound track.

Why did he not go back to the rear platform? He says because there were so many passengers in the car standing in the aisle even after the passengers for Bloomfield had alighted that he feared if he did so the train would go on and he would not get off. That is denied by Mr. Whalen, who says that all the passengers had seats. The traveling companion of Mr. Kinder denies this and says that he stood part of the way and eventually got a seat. Even if that be true, even if he did fear that he would not be let off, was he justified in risking his life, if you think that there was such a risk and that he ought to have anticipated it, by getting off on the left side of that car when there was, according to his own testimony, a safe place to alight on the right side of that car at the rear of it?

In addition to that, when he alighted from this left platform, if you believe he was justified in doing so under the circumstances, did he take such care as he ought to have taken to protect himself against an oncoming train on a track where he knew trains were operated in the opposite direction? He does not say that he looked and did not see a train, but he just took a step or two and was struck by this oncoming train, which he did not see and which Mr. Korocy, who also alighted from that front platform at the left and walked to the front of the engine, says came along j ust as he turned to the right to pass in front of the engine of that westbound train.

Mr. Whalen says that that westbound train did not move at all until the passengers had all been discharged and the train had moved forward, and then it came in very slowly. And I think Korocy

says that immediately upon his going to the right side of the westbound train that train started to move.

In view of all the circumstances in this case, it will be your duty first to say whether or not negligence on the part of the railroad company's employees has been shown by the greater weight of the evidence. If it has not, your verdict should be for the defendant. If it has, then you should consider the subject of contributory negligence, the burden of proving which is upon the defendant. The burden shifts there to the defendant, and if the greater weight of the evidence shows that the plaintiff failed to take that degree of care for his safety which reasonably careful and prudent persons ordinarily take under such circumstances and conditions, then even though the railroad company, by its servants and agents, the train crew, was negligent, he cannot recover. In other words, if they were both negligent he cannot recover. If you decide that question in his favor—that is, that there was negligence on the part of the railroad company and that his contributory negligence has not been established—then you consider the amount of damages which you should award and give your verdict accordingly.

Mr. Selser: Your Honor charged that a railroad company has a duty to use reasonable care not only to carry passengers safely to their destination, but to provide a safe way to alight, and then your Honor went on and said that reasonable care had been held to be a high degree of care. My objection to the charge is not that reasonable care does not apply as in the Mason case, but because your Honor said that a high degree of care is owed with respect to providing platforms, and so forth.

My point is that there is a different duty to carry than to provide means of exit. Reasonable care only applies to the means of exit.

I wish to except to that part of your Honor's charge wherein you said that the relationship does not terminate until reasonable time has been allowed to alight, my objection to that being that in this case the evidence is that reasonable time was allowed to alight by the way and means provided by the company. The point of my objection to the charge is that we are not under a duty to anticipate passengers leaving the train by means other than that provided, and with respect to those persons, we are not charged with the duty of seeing that they are safely off our trains. If we see them it is true we must protect them, but if we do not we are not charged with any duty with respect to them.

Then I except to that portion of your Honor's charge where you say that if a passenger knowingly alights by other means than that provided, and knowingly runs into danger, the relationship ends. I say that if he negligently runs into danger, not necessarily knowingly, then, of course, the rule is different.

Then I except to that portion of your Honor's charge in which you said that if Whalen did call out through the coach and the plaintiff heard it, and that was an invitation and you can say that was an invitation for him to alight by the rear door, then it is your duty to say whether or not there was negligence on the part of the railroad company. I object to that first on the ground that it is not necessary that it be shown that this man heard it. It is enough that the invitation was extended. Second, I object to it with respect to its application at all to this situation, because Kinder

knew the fact with respect to where he was to get off and knew he was at the station and, of course, he knew that he was invited to leave by the proper means.

I except to that portion of your Honor's charge wherein you say, "But if no member of that train crew called into that car at all and if the front of that car ran out upon that bridge and the passengers were left to their own judgment as to whether or not they should go to the front or to the rear and no precaution was taken to warn them of the dangers of the situation which existed with the right-hand side of that car on the bridge, with the canal twenty feet below them, and nothing to warn them of the dangers of getting off on the other side, with the appearance of a platform there by its being planked over—that you may also take into consideration in determining whether or not a safe place had been provided and proper warning given to this plaintiff as a passenger upon that train.

"If you decide that the greater weight of the evidence does not show negligence on the part of the defendant, then your verdict must be in its favor. If you decide that it does show negligence, then you come to the consideration of another important question, and that is whether or not Kinder in alighting from that train took that care for his own safety which reasonably, careful and prudent persons should take under the same or similar circumstances and conditions."

My objection to that is that it permits the jury to apply their imaginations really to whether or not there was negligence, it not having been limited to the issues raised by the pleadings.

(At 12.30 P. M. the jury retired.)

(At 2.15 P. M. the jury returned.)

The Court: Gentlemen, I have received a note from you in which you say, "We request that the stenographer read to us that part of the Judge's charge which referred to negligence."

My whole charge referred to that. That was the subject of the charge and that is the whole issue of the case.

I do not exactly know whether you want my whole charge read or whether there is some particular part of it which has been misunderstood or in which I failed to make myself clear. Our stenographer here is obliged to go on with the next case and it means that we must suspend everything to read back the charge to you.

I am wondering if there is anything in particular about the charge on the subject of negligence that has not been understood.

A Juror: Your Honor, the part of the charge we would like a little further information about is the part referring to equal negligence.

The Court: Equal negligence?

A Juror: Yes.

The Court: You mean contributory negligence?

A Juror: Contributory negligence.

The Court: Shortly, what I said was this. I am not repeating the exact words, of course, and not reciting the facts. The legal situation is that the plaintiff in this case, Mr. Kinder, who is seeking to recover damages from the Erie Railroad Company because of the negligence of its employees, was obliged to exercise reasonable care for his own safety. If he failed to act as a reasonably careful and prudent man for his own safety, and the greater weight of the evidence so shows, and he thereby contributed to the accident and to his injuries, he cannot recover even though you find that the company's employees were negligent. I wonder if that answers the question?

A Juror: I think so.

The Court: If there are any other questions, I should be glad to answer them. That is what I am here for.

(At 2.25 the jury again retired.)

The Court: Since the attorney of the plaintiff is not here, I order that an objection be entered to what I have just said to the jury. If you desire an objection to what I have said, that may also be noted.

Mr. Selser: I do not wish to take any exception. I think your Honor correctly stated the law.

The Court: Then there will be an objection noted as to the plaintiff.

Judgment.

(Entered October 25, 1928.)

This action was tried before Judge Nelson Y. Dungan, with a jury at the Essex Circuit Court on October 25, 1928.

The cause having been heard and submitted to the jury they return their verdict as follows:

They find in favor of the plaintiff, Michael Kinder, and against the defendant, Erie Railroad Company, for the sum of Five Thousand Dollars ($5,000.00) damage.

Whereupon it is adjudged that the plaintiff recover of the defendant the sum of Five Thousand Dollars ($5,000.00) damage and costs which are taxed at One Hundred Eight Dollars and ninety-seven cents, making in the whole the sum of Five Thousand One Hundred Eight Dollars and ninety-seven cents.

Judgment Entered and Signed October 25, 1928.

JOHN H. SCOTT,
Clerk.

Notice and Grounds of Appeal.

(Filed December 10, 1928.)

Take Notice that the defendant appeals to the New Jersey Supreme Court from the whole of the judgment entered in this cause on the following grounds:

1. The trial court erroneously refused to grant defendant's motion for nonsuit, whereas said motion should have been granted for one or more of the following reasons:

(a) There was no proof that any invitation was extended to the plaintiff by the Railroad Company for him to alight at the time and place he attempted to alight.

(b) The defendant voluntarily assumed the risk of alighting from the train at a place other than that provided by the company for that purpose.

(c) There was no proof of negligence within the issues raised by the pleadings which should be submitted to the jury.

(d) Contributory negligence on the part of the plaintiff appears as a matter of law in that the plaintiff alighted from the defendant's train between the east and westbound tracks on the canal bridge a long distance from the defendant's station and he did not look for the train, but stepped directly in front of same; and in that on the plaintiff's own testimony he could have seen from the place where he alighted had he looked.

2. The trial court erroneously refused to grant defendant's motion for a directed verdict in its favor, whereas said motion should have been granted for one or more of the following reasons:

(a) There was no proof that any invitation was extended to the plaintiff by the Railroad Com-

pany for him to alight at the time and place he attempted to alight.

(b) The defendant voluntarily assumed the risks of alighting from the train at a place other than that provided by the company for that purpose.

(c) There was no proof of negligence within the issues raised by the pleadings which should be submitted to the jury.

(d) Contributory negligence on the part of the plaintiff appears as a matter of law in that the plaintiff alighted from the defendant's train between the east and westbound tracks on the canal bridge a long distance from the defendant's station and he did not look for the train, but stepped directly in front of the same; and in that on the plaintiff's own testimony, he would have seen from the place where he alighted had he looked.

3. The trial court erroneously instructed the jury as follows:

"He was a passenger on that train, and a railroad company owes to its passengers the duty to exercise reasonable care not only to carry them safely, but to provide a safe place and way to alight at the place of destination. Our decisions say that reasonable care toward a passenger is a high degree of care. It is more than ordinary care. It is true it must be reasonable care, but reasonable care in the case of a passenger is a high degree of care."

4. The trial court erroneously instructed the jury as follows:

"And our decisions say that the relation of carrier and passenger does not terminate until the

passenger reaches his destination and alights from the train on which he has been riding and has had a reasonable time and opportunity to leave the place where the passengers are discharged."

5. The trial court erroneously instructed the jury as follows:

"If a passenger alights at a place other than that provided for by the company, knowingly, knowing that it is not a place provided by the company to alight and thereby knowingly runs into danger and is injured, then of course the relation of carrier and passenger does cease to exist at the instant that the passenger knowingly violates from the rules of the company or alights at a place, knowing the dangers to him other than that which has been provided by the company for him to alight."

6. The trial court erroneously instructed the jury as follows:

"Mr. Whalen, who testified for the defendant and who was the collector upon that train, says that he did call at the rear end of that car, and that he called first in the second car and then crossed the platform, called into the front car 'Bloomfield,' left the door open, and went down to assist passengers to alight. If he did call and the plaintiff heard it, and if you think that was an indication to him as to where he should alight from that train, then it will be for you to say whether or not there was any negligence upon the part of the defendant's employees."

7. The trial court erroneously instructed the jury as follows:

"But if no member of that train crew called into that car at all, and if the front of that car ran up on that bridge and passengers were left to their own judgment as to whether or not they should go to the front or to the rear, and no precaution was taken to warn them of the dangers of the situation which existed with the right hand side of the car on the bridge with the canal twenty feet below them, and nothing to warn them of the dangers of getting off on the other side, with the appearance of a platform there by its being planked over, that you may also take into consideration in determining whether or not a safe place had been provided and proper warning given to this plaintiff as a passenger upon that train."

8. The trial court erroneously instructed the jury as follows:

"If you decide that it does show negligence, then you come to the consideration of another important question, and that is whether or not Mr. Kinder in alighting from that train took that care for his own safety which reasonably careful and prudent persons should take under the same or similar circumstances and conditions."

9. The trial court erroneously admitted in evidence over objection of counsel Rule 98-A of the Operating Department of the Erie Railroad Company, which reads as follows:

"Enginemen and trainmen on a train approaching a station on a track adjoining one where another train is receiving or discharging passengers are required to exercise great care.

It is forbidden for a train to run between a station building or platform and a train standing to receive or discharge passengers, unless signalled, to proceed by the yardmaster, conductor or trainman of the standing train, in which case they may proceed slowly and cautiously until their engine has passed the standing train.

Trains running on an adjacent outer track when passing a standing passenger train are required to proceed slowly and with great care.

At stations where passengers are obliged to cross other tracks in order to board a train or to get to the station or platform from a train, the conductor and trainmen are required to observe whether there is a train approaching before allowing them to do so."

HOBART & MINARD,
Attorneys of Defendant.

OPINION OF SUPREME COURT.

Filed July 3, 1929.

NEW JERSEY SUPREME COURT.

No. 98 January Term, 1929.

MICHAEL KINDER,
Plaintiff-Respondent,

vs.

ERIE RAILROAD COMPANY,
Defendant-Appellant.

Submitted January Term, 1929. Decided June , 1929.

On appeal from Essex County Circuit Court.

For appellant, Hobart & Minard.

For respondent, James P. Mylod.

Before Justices Trenchard, Kalisch and Lloyd.

Per Curiam:

This is an appeal by the defendant from a judgment for plaintiff on a second trial in the Essex Circuit Court. The grounds of appeal urged are that the trial judge should have controlled the case by non-suit or direction of a verdict in favor of the defendant. The case was before the Court on defendant's appeal from a previous trial, and was then reversed in an opinion which held that a non-suit should have been granted. (137 Atl., 88.)

The essential facts of the case as now presented do not very materially from the facts as presented on the former trial.

For the reasons expressed in the opinion filed on the earlier review the present judgment is reversed.

RULE FOR JUDGMENT.

NEW JERSEY SUPREME COURT.

MICHAEL KINDER, *Plaintiff-Appellee,* *vs.* ERIE RAILROAD COMPANY, a corporation, *Defendant-Appellant.*	*Action at Law.* *Rule for Judgment.*

This case having been submitted at the January Term, 1929, on the appeal of the defendant from the judgment entered against it in the Essex County Circuit Court, and the Court having considered said appeal and the argument of counsel thereon, it is

ORDERED that said judgment be reversed and a new trial granted and the record be remanded to the Court below to be proceeded with according to law.

Rule entered this 21st day of September, 1929.

On motion of

HOBART & MINARD,
Attorneys of Defendant-Appellant.

NOTICE OF APPEAL AND GROUNDS OF APPEAL.

NEW JERSEY SUPREME COURT.

MICHAEL KINDER, *Plaintiff-Respondent,* *vs.* ERIE RAILROAD COMPANY, a corporation, *Defendant-Appellant.*	*Notice of Appeal and Grounds of Appeal.*

To Hobart & Minard, Esqs., attorney for defendant-appellant.

TAKE NOTICE that the plaintiff in the above-entitled cause appeals to the Court of Errors and Appeals in the last resort in all cases in New Jersey, from the whole of the judgment entered in the New Jersey Supreme Court in this cause on the following grounds, to wit:

1. Because the Supreme Court erred in reversing the judgment obtained by the plaintiff on the second trial of said cause in the Essex County Circuit Court, instead of affirming said judgment.

2. Because the Supreme Court erred in deciding that a non-suit should have been granted at the close of the plaintiff's case.

3. Because the Supreme Court erred in deciding that a verdict should have been directed in favor of the defendant.

JAMES P. MYLOD,
Attorney of Plaintiff.

Service of a copy of the within Notice and Grounds of Appeal is hereby acknowledged this 10th day of December, 1929.

HOBART & MINARD,
Attorney for Defendant.

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Arthur W. Cross, Law Printer, 55-57 Lafayette Street, Newark, N. J.

New Jersey Court of Errors and Appeals

MICHAEL KINDER, *Plaintiff-Appellant,* *vs.* ERIE RAILROAD COMPANY, a corporation, *Defendant-Respondent.*	*On Appeal from Supreme Court.*

BRIEF IN FAVOR OF MICHAEL KINDER, Plaintiff-Appellant.

Statement.

This appeal brings up for review a judgment of the Supreme Court wherein it is ordered that a judgment of Five Thousand ($5,000.00) Dollars obtained by the plaintiff in the Essex County Circuit Court be reversed and a new trial granted.

The case was first tried before Hon. William A. Smith, Circuit Court Judge, in which trial the jury found in favor of the plaintiff and awarded damages in the amount of Four Thousand ($4,000.00) Dollars. This judgment was appealed to the Supreme Court which reversed the Circuit Court for trial errors, and remanded the case for a trial de novo.

Hon. Nelson Y. Dungan presided at the second trial of the cause, and the jury awarded damages in the sum of Five Thousand ($5,000.00) Dollars. This second judgment was subsequently appealed, and the Supreme Court in a Per

Curiam opinion reversed the second judgment entered in the cause in the following language:

> "For the reasons expressed in the opinion filed on the earlier review the present judgment is reversed."

The same justices, with one exception, who reversed the judgment entered before Judge Smith in the first trial of the cause heard and reversed the judgment entered before Judge Dungan on the second trial.

The opinion of the Supreme Court on the first appeal is printed on page 16 of the State of the Case, and the Per Curiam opinion is printed on page 101 of the State of the Case.

Plaintiff-appellant contends that the Supreme Court erred in reversing the judgment entered before Judge Dungan and a jury on the second trial of the cause.

Facts.

On the evening of February 12, 1923, the plaintiff was a passenger in a train of the defendant, operating over the Greenwood Lake Division, having boarded the train at Arlington, New Jersey, at approximately 5:01 P. M. (Case, p. 27, l. 24.) Plaintiff had resided in Bloomfield for some time and was employed at the Arlington plant of the DuPont Company. (Case, p. 27, l. 10.) Plaintiff had been in the habit of riding on a train which left Arlington at 4:49 P. M., but due to the fact that February 12th, was a holiday, this train was omitted from the schedule. (Case, p. 28, l. 5.) The train which left Arlington at 5:01 on this particular evening was longer than the train on which the plaintiff was accustomed to ride. (Case, p. 28, ll. 15-26, and

also Case, p. 47, ll. 36-38.) Plaintiff rode in the front car of the train directly behind the engine. (Case, p. 29, ll. 10-15.) And upon the arrival of the train after the trainman had announced the station got up and went with other passengers to the front of the car for the purpose of alighting. (Case, p. 28, ll. 36-39.) Reaching the front end platform of the car, it was an open platform, not a vestibule car, he turned to leave the car by the right-hand side and found that he was on a bridge over the Morris Canal. (Case, p. 29, ll. 27-29.) He first became aware of this when he saw a big iron wall on the bridge and then looked down into a big hole about twenty feet deep. (Case, p. 29, ll. 30-40.) Seeing this situation, he turned back on the platform of the car and proceeded across to the left-hand side of the platform, following two or three fellows who got off the train before him, (Case, p. 30, ll. 7-10), and on to a wood platform in the middle of the bridge, and turning to go down to the station, he was struck by an engine, coming in the opposite direction from the train upon which he had been riding. (Case, p. 30, ll. 30-40.) As a result, he was severely injured.

The plaintiff had never been up on the railroad bridge before the night in question. The train on which he had been accustomed to ride had never stopped on the railroad bridge before. (Case, p. 34, ll. 28-39.) On the evening in question, it was dark and foggy and there was snow on the ground. (Case, p. 34, l. 40; p. 36, l. 38; also p. 37, l. 8; p. 57, l. 35.) The plaintiff was unable to see the station building. (Case, p. 37, l. 12.)

The coach was crowded with people standing in the aisle toward the rear of the car (Case,

p. 40, ll. 12-17), no trainmen of the defendant directed the passengers to the rear of the coach (Case, p. 40, ll. 18-31). The defendant company provided each trainman with a key to lock the front door, but the door was not locked (Case, p. 81, ll. 11-30), although the engine, the tender and the forward part of the first car were up on the canal bridge. (Case, p. 29, ll. 13-30.) When the plaintiff reached the front of the coach the door was open. Several passengers went out by way of the front door before the plaintiff (Case, p. 60, ll. 20-25).

The train on which the plaintiff was a passenger was standing on the westbound tracks. Plaintiff was struck by a train coming into the station on the eastbound track. (Case, p. 54, ll. 10-18.) The train which was coming into the station while the westbound train was still discharging passengers was travelling at a fast rate of speed (Case, p. 56, ll. 20-24) and gave no signal of its approach (Case, p. 64, ll. 32-40; p. 65, ll. 1-10). It was the custom for passengers to alight from the left-hand side of the train because several passengers other than the plaintiff did so, and witness, Thomas Whalen, the defendant's ticket collector stated that he looked down on the other side to see if everything was clear (Case, p. 78, ll. 31-39; p. 80, ll. 37-40), and that every time when his (Whalen's) train stops at Bloomfield, he looks up and down the left-hand side of the track.

ARGUMENT.

POINT I.

Defendant's motion for a non-suit and for a directed verdict were properly denied by the Trial Judge.

The evidence presented in the plaintiff's case shows the following factual situation:

Plaintiff resided in Bloomfield and worked in Arlington. He was in the habit of returning to his home in Bloomfield on a train which left Arlington at 4:49 in the afternoon. The accident occurred on Lincoln's Birthday and the 4:49 train was taken off on account of the holiday schedule. The plaintiff, therefore, was obliged to take the next train which left Arlington for Bloomfield. This train was longer than the train in which the plaintiff had been accustomed to ride.

Plaintiff was riding in the front coach directly behind the engine and tender, and upon the train coming to a stop at the Bloomfield station, plaintiff, with other passengers, got up and left the car by the front exit, as was his usual custom. He started to go down the steps on the right-hand side of the coach, as he had always done, when he discovered that if he stepped off the train at that point he would be precipitated into the waters of the Morris Canal twenty feet below. In front of him was a high iron girder. This extra long train, according to the plaintiff's case, had run beyond the station platform, so that passengers leaving the forward car by the front entrance were obliged to get off on the bridge. Plaintiff was not aware of this situation until in the semi-darkness he was about to step off the coach on the right-hand

side. Upon observing the conditions, plaintiff retraced his steps and went back over the front platform of the railway coach, and followed other passengers down the steps on the left-hand side onto a wooden platform, which platform is described by one of plaintiff's witnesses in the following language:

> Q "Did you go down the steps on the left side of the coach?
> A I saw the platform on the left, then I got off on the left.
> Q When you say you saw the platform on the left, what do you mean? What did you see on the left? What do you refer to as a platform on the left?
> A That is a platform, wood platform, big planks.
> Q Did you step on that?
> A I step on them."
> (Case, p. 53, ll. 20-30.)

The plaintiff, although generally familiar with the station, had no knowledge whatsoever as to the conditions which existed on the bridge, and any assumption that the plaintiff was familiar with the situation which existed on the bridge would be unjust and unwarranted. This was the first time plaintiff was ever on the bridge.

The question of plaintiff's knowledge of the bridge was thoroughly discussed on defendant's motion for a non-suit, as appears from the language of the Trial Judge in denying the non-suit, as follows:

> "For instance there is no testimony yet in this case that the trainman in the rear had called the station, or that there was any invitation for the plaintiff to go to any particular part of that car to alight. There is nothing in that decision which indicates whether or not the testimony in the former case was, as it is here, that this train was

> longer than the trains upon which he had habitually ridden, and that it was the first time he had ever been confronted with this situation; so that so far as the situation which confronted him was concerned, the train going up upon the bridge, it was practically as though he were a stranger notwithstanding the fact that he said he knew that the platform came up to the bridge."

There is no inherent vice in leaving a railroad coach by a forward exit, particularly so when no trainman or attendant is provided to direct the passengers to the rear exit, or to warn them not to leave by the forward exit. The proofs at the close of the plaintiff's case indicates that no attendant of the defendant was present at any time in the front coach.

It is elementary that a railroad company is under a duty to exercise reasonable care to provide its passengers a reasonably safe place at which to alight from its trains, and while ordinarily there is no duty devolving upon the company to assist passengers in alighting, special circumstances arising from the manner of operation of the train may exist which would create a situation that calls for the exercise of some care by the defendant for the safe exit of passengers from the train. While the various acts of the defendant or omission to act, taken separately, may not constitute a violation of any duty owed to the plaintiff "an alternate or conditional duty may arise from their fortuitous combination."

This rule is aptly stated by Mr. Justice Garrison, in the case of *Gore* v. *D. L. & W. R. R. Company*, 89 N. J. L. 224, at page 225:

> "The discussion whether this accident was due to faulty construction or to negligence in operation and whether the care owned by the defendant was of a high degree or only

such as was reasonable, seems to be entirely academic, in view of the fact that no degree of care was exhibited and that the accident was at least in part attributable to matters of train operation. The arrangement and extent of the station platform, and the height of the car steps from the ground, may be matters of construction; but the stopping of the train at one place rather than at another, the providing of proper light, the presence of trainmen to assist passengers in alighting under certain circumstances or to warn them of certain conditions are pure matters of operation. It may well be that as to no one of the elements that contributed to cause the plaintiff's accident did the defendant violate any direct duty owing to her, and yet it may also be true that the combination of all of these elements created a situation that called for the exercise of some care by the carrier for the safe exit of the plaintiff from its train."

"Such duties by a carrier are often in the alternative, so that while no one duty is specific, it does not follow that they may all be neglected with impunity. Thus, under ordinary conditions, there is no direct duty to assist passengers to alight, or to warn or instruct them, or to furnish additional light, so, also, there may be no direct duty to stop the train opposite the station platform or to avoid disembarking passengers on a paved roadway, but, notwithstanding the absence of direct duty as to each of these isolated elements, an alternate or conditional duty may arise from their fortuitous combination. Thus the duty to warn or assist, not in itself a direct duty, may arise from the unusual conditions created by the place of stoppage, not in itself the violation of a direct duty."

"This, it seems to us, is the situation presented by the plaintiff's testimony from which a jury might infer an invitation to leave the train under conditions that placed upon the defendant the duty of using such

> care as arose out of such conditions and was commensurate with the danger to be reasonably apprehended therefrom."

The situation existing in the Gore care was in many respects analogous to the situation in the case at bar. The train stopped at a point where the plaintiff in leaving the car in which she rode, alighted not on the station platform, but on a roadway paved with rough Belgian blocks; the light was so dim that she could not see the surface of the road, and there was no brakeman to show a light or to assist her in getting off.

In *Smith* v. *D. L. & W. R. R. Co.*, 89 N. J. L. 643, the plaintiff was a passenger of the defendant railroad and his destination was Bernardsville. On the arrival of the train, passengers were not delivered at the station, but were delivered on a side track between which and the station was located the main line of the railroad. In crossing the space between his landing and the station, plaintiff had to pass in front of a standing train, and striking his toe against the first rail, he was thrown forward and was injured.

A motion was made for a non-suit and for direction in this situation which was denied by the trial court.

The Court of Errors and Appeals, by Mr. Justice Bergen passing upon this phase of the case, said:

> "This proposition is based upon a false premise, for the question was not one of construction of railroad or platform, but whether by the operation of its trains, the defendant had provided the plaintiff with a proper landing place when he was left with his family between two lines of tracks with an uneven surface to cross, with a reason-

> able apprehension that the standing train might start, and was compelled to pass over uneven ground in order to leave the company's property."

And in *Spofford* v. *Central R. R. Co.*, 89 N. J. L. 273, the plaintiff alighted from the left-hand side of a train which was standing to discharge passengers. It was necessary to cross the tracks as in the case at bar, to get to the defendant's station. As he proceeded to cross the tracks, he was struck by an express train travelling in the opposite direction and was killed. In its discussion on a denial of a motion to non-suit, the Court of Errors and Appeals, said:

> "It was permissible from the evidence to conclude that the station was not well lighted and the night was dark, and it may well be that the decedent was misled by the distant lights in the railroad yard on the east side, and so naturally made the mistake of alighting upon that side. A stranger arriving at his station cannot always stop to take into consideration all the surroundings. The fact that there was a platform on the side where he alighted, leading across the track where he was hit, was another one of the circumstances all of which rendered it possible and legitimate for the jury to conclude that the circumstances were such as to induce the decedent to believe it safe for him to alight as he did * * *."

> "It was a permissible assumption that the defendant company knew or ought to have known that a passenger upon the local was likely to get off on the east side of the train in the absence of notice to the contrary. Now we do not say that it was the positive duty of the company to have provided a fence between the tracks; nor do we say that it was its positive duty to have provided gates upon the local train to prevent passengers from alighting upon the side along which the express would pass. But we do say that it was

> open to the jury to find that there was a want of reasonable care in its failure to take any precaution whatever. The jury may well have found that ordinary prudence upon the part of the railroad company, under such circumstances, required it to inform its passengers which of the two ways alighting was intended to be used upon that occasion, or to in some way obstruct the one not so intended in such manner as to give notice of the fact."

The rules laid down in this decision are peculiarly applicable to the situation in the case at bar. It was dark and foggy. The station of the defendant company was situated on the left-hand side of the train from which the plaintiff alighted. Defendant constructed on the left-hand side of the train from which the plaintiff alighted, a wooden platform, which could be seen by the passengers as they walked down the steps on the left-hand side of the coach, the exit on the right-hand side, the side on which the plaintiff usually alighted, being barred by the iron girder. The wooden planking or platform on the left-hand side of the coach was a sufficient invitation to warrant the plaintiff in alighting on that side of the coach, the station side, considering the point at which the train for the first time to the knowledge of the plaintiff came to a standstill. There were no loose stones or rocks at the point where the plaintiff and other passengers alighted on the left-hand side of the coach, but a wooden platform. The station was on the left-hand side, and plaintiff turned to go toward the station. No gate or fence was provided between the tracks. The company failed to inform its passengers that the platform on the left of the coach was not intended to be used when the first coach of the train stopped on the bridge. There was no other way provided by the defendant for passengers to

alight from the forward door of the front coach, except onto the platform constructed on the left-hand side of the coach. Surely, under the circumstances, a passenger has a right to make his exit from a railroad coach by either the rear or front door, and if by the positive act of the railroad company the front coach is stopped at a point where it is dangerous for a passenger to alight, it is the duty of the railroad company to warn passengers accordingly. The defendant in the present case not only failed to warn its passengers, but induced its passengers to alight on the left-hand side of the coach by the construction of the platform in question.

A recent opinion of the Supreme Court in the case of *McCarron* v. *Erie R. R. Co.*, 10 N. J. Misc. Rep. 498 (decided April 8, 1932), seems to add strength to the plaintiff's position. In that case the plaintiff was a passenger between Paterson and New York. The train came to a stop before it reached the Jersey City Terminal of the road. When nearly all of the passengers had alighted, the plaintiff got off and started to walk along a small wooden foot-path between the tracks when she tripped and fell.

The Court held:

> "There was testimony that there was a wreck ahead; the train was delayed in pulling into the station; the passengers were all alighting and there were trainmen and employees who were permitting such action to be taken, and who were guiding and cautioning the passengers who had so alighted. This is not a case where the passenger had reached the street, or a point of safety outside the station, but a case where there was a permissive exit at a place not generally provided for the purpose but made necessary because of the wreck. The court could find from the proofs a failure to exercise the

> care required under all the circumstances. The mere existence of the pipe and defective planking is not the negligence complained of, but the failure to use due care for her safety, by reason of the permissive use of the way in question.
>
> Under the facts proved the plaintiff was not a trespasser. The railroad permitted her to leave the train in the same way that other passengers had gone, and, as before indicated, the contract of carriage obligated the railroad to carry her with due care to her destination."

In the case last above cited, the train did not stop at the station platform because of a wreck. In the case now before the court, the defendant's train ran beyond the station platform either because of negligence in the operation of the train or due to the fact that the train was longer than usual on account of it being a combination train, the regular train having been taken off and combined with another train under the Holiday Schedule. The carrier, therefore, did not perform its whole duty by conveying the passenger to his destination, giving him notice and a reasonable opportunity to leave the train under the special circumstances recited above. The defendant not only failed to give the plaintiff notice under the special circumstances *but mislead* the passenger with reference to the place to alight. The opinion in the suit of *McCarron* v. *Erie Railroad Company, supra,* quotes the following authorities:

> "In the absence of special circumstances the carrier performs its whole duty by conveying the passenger to his destination and giving him notice and a reasonable opportunity to leave the train. 10 Corp. Jur. 830.
>
> The carrier is bound to exercise care in securing the safety of the passenger while

> boarding and alighting from its cars or other conveyances, and the degree of care required in the discharge of this duty is the highest care, or the care which a very prudent person would use under the circumstances, that is, that high degree of care which is required with reference to the transportation of passengers; and where a carrier misleads a passenger with reference to time, the place, and the safety of boarding or alighting, it is liable for the injuries sustained. 10 Corp. Jur. 924."

The rule laid down in the *McCarron* v. *Erie Railroad Company* case, *supra*, is the prevailing rule in other jurisdictions as shown by the following cases:

> "If a railroad car is stopped at a place where it would not be safe for the passengers to alight, it is the duty of the company to give assistance or warning or move the car to a more suitable place. *Cartwright* v. *Chicago & G. R. Ry. Co.*, 18 N. W. 380."

The opinion in the foregoing case written by Chief Justice Cooley of the Michigan Supreme Court, shows that the plaintiff alighted from the rear exit of the last car which was short of the usual stopping place and was injured in alighting. The front exit was at the regular stoppage and provided a safe means of alighting. But the plaintiff was held not negligent because she choose the rear exit in preference to the front.

The same rule of law is applied by the Pennsylvania Courts as appears from the following decision:

> "Where a brakeman has announced the name of the station on the approach of a train, and *the train makes its next stop short of or beyond the station,* the brakeman should announce such fact before the passengers attempt to leave the train; and failure to do

so is a neglect of duty, rendering the carrier liable for resulting injuries.

In action for injuries to a passenger alighting on a dark night at what he thought was a station, evidence HELD to show negligence on the part of the carrier." *Englehaupt* v. *Erie R. Co.*, 58 Atl. Rep. 154.

The testimony presented on behalf of the plaintiff shows that the plaintiff was seated in the forward coach and when the train reached Bloomfield, the aisles were crowded with passengers, some of whom went to the rear exit and others to the front exit. Plaintiff followed the passengers using the front exit. The door was open and he left by the front exit. He was not directed to leave in any manner by any employee of the defendant company, nor was he warned of any danger. It was dark and foggy and difficult to see for any considerable distance. The coach on which he was a passenger was stopped at an unusual place. It was upon a bridge. If the plaintiff had not noticed that the train was upon the bridge and had stepped off on the right-hand side as was his custom, he would have been precipitated into the canal and, under the circumstances, there would be no question as to the plaintiff's right to have a jury pass upon the question of the defendant's negligence under the doctrine laid down in the *Gore case, supra.* The plaintiff observed that he could not alight on the right-hand side and retraced his steps across the platform of the coach, following other passengers down the steps on the left-hand side, where he alighted on a platform made of heavy planks, which was mistaken by him for a place where he might safely alight.

That plaintiff's testimony did leave this impression on the court, the jury and counsel for

the respective parties, is borne out by the charge of the court, to which no exception was taken (Case, p. 88, ll. 17-22) where the court said:

> * * * "With the canal twenty feet below them and nothing to warn them of the dangers of getting off on the other side, with the appearance of a platform there by its being planked over * * * that you may also take into consideration in determining whether or not a safe place had been provided and proper warning given to this plaintiff as a passenger upon that train."

It is true that the plaintiff was a commuter on the defendant's train and as such was familiar generally with the situation, but it cannot be assumed that in the position in which he was placed, which arose primarily because of the negligence of the defendant, that he ought to have known that to leave by the left-hand side of the train and step down on the planking which had been provided on that side by the defendant, would be to throw himself into danger.

> "It is the duty of the railway company to provide passengers with reasonably safe and convenient means of ingress and egress from its cars and carriages and the railway company is liable for accidents happening by reason of the neglect of such duty to its passengers in descending from a car when at rest at a station, if the circumstances are such to induce the passenger to believe that he has reached his point of destination and that it is safe for him to get out." Patt. Ry. L. p. 261 and cases cited: Central Railroad Co. *ad.* Van Horn, 9 Vroom 133; D. L. & W. R. R. Co. *v.* Trautwein, 123 Vroom 169; Falk *v.* N. Y. C. & W. R. R. Co., 56 N. J. L. 380.

It cannot be successfully contended that the Court should have said as a matter of law, that the plaintiff at the time of the happening of the

accident, had ceased to be a passenger of the defendant. The rule is stated in *Atlantic City R. R. Co.* v. *Kiefer,* 75 N. J. L. at page 57, that

> "Whether a person passing across a railway track by a planked way provided for that purpose, after he has alighted from the train and after it has moved out from the station, is still a passenger and entitled to cross without looking or listening, is a question of fact for the jury, if there be controversy under the proof as to whether the person claiming to have been a passenger proceeded from the station to a place of safety within a reasonable time after alighting from the train.
>
> The rule is that the relation of passenger and carrier, when established, does not terminate until the passenger has reached his destination, alighted from the train, and had a reasonable time in which to leave the place where passengers are discharged." 4 Ell. Rail., Para. 1592; Houston & T. C. R. Co. *v.* Batcheler, 83 S. W. Rep. 902 (Tex.); Imhoff *v.* C. & M. R. Co., 20 Wis. 344; 5 Am. & Eng. Encycl. L. 497.

In 10 *Corpus Juris,* at page 626, Section 1049, the following rule is cited:

> "The relation of carrier and passenger does not cease at the moment the passenger alights from the carrier's vehicle by its invitation at a place selected by the carrier at the point of destination, but continues until the passenger has had a reasonable opportunity to leave the carrier's premises, and what is a reasonable time for a reasonable delay within this rule is to be determined from all of these circumstances."

Under this rule, the question of whether the plaintiff leaves in a proper manner and by the route usually proper in such case or whether he knowingly deviated from the route provided by the carrier becomes a question for the jury and

was properly submitted to them in the Court's charge. (Case, p. 86; ll. 9-18.)

> "If a passenger alights at a place other than that provided for by the company knowingly, knowing that it is not a place provided by the company to alight, and thereby knowingly runs into danger and is injured, then, of course, the relation of carrier and passenger does cease to exist at the instant that the passenger knowingly violates the rules of the company or alights at a place, knowing the dangers to him, other than that which has been provided by the company for him to alight."

Can the defendant say that when it failed to provide a trainman to direct the plaintiff in alighting, failed to warn him of any danger which might have existed, permitted its eastbound train to be run in at a fast rate of speed and without warning, on the eastbound track, while passengers were alighting from the westbound train, that the plaintiff ceased to be a passenger merely because of the fact that he left by the front door along with other passengers instead of leaving by the rear door?

There was, of course, no express invitation to the plaintiff to alight by the way and means he adopted to leave the train, but there was unquestionably an implied invitation, and certainly an absence of any precaution to guard him against the dangers of so doing.

In *Furey* v. *N. Y. C. R. R. Co.*, 67 N. J. L. 275, it is said:

> "Implied invitation, therefore, is part of the law of negligence by which an obligation to use reasonable care arises from the conduct of the parties; its essence is that the defendant knew, or ought to have known, that something that he was doing or permitting to be done might give rise in an or-

dinarily discerning mind to a natural belief that he intended that to be done which his conduct had led the plaintiff to believe that he intended."

The facts appearing from the testimony which would give rise to the inference that the defendant knew or ought to have known that something it was permitting to be done, might give rise in an ordinarily discerning mind to a natural belief that it intended that to be done which its conduct had led the plaintiff to believe that it intended, was (a) that the defendant did not see fit to direct the plaintiff to leave in any particular manner, although the train ran past the station platform and came to a stop upon the bridge; (b) that there was on the left-hand side of the train a platform which might easily be, and which in fact was taken as a place where the plaintiff might alight, and (c) that the defendant had permitted others to alight on the left-hand side of the train, or at least had followed a course of conduct in this respect which made it a fair inference for a jury to determine whether or not the defendant had permitted others to alight on the left-hand side.

That others were permitted to alight on the left-hand side of the train is borne out by the fact that the defendant provided a crosswalk which went from the southerly side of its right of way to the northerly side, on which latter side the station was located, and especially by the testimony of the defendant's witness, trainman Whalen, who testified as follows:

"Q Then what happened from that point on? Just tell us how you started your train.
A Why after the passengers got down on both sides of me, got up, look through my cars. My cars were all clear; looked down on the other side, seen if everything was all

clear. I saw there was only one passenger on the opposite side standing on the platform, got back, got down on the platform, give a signal to my conductor. (Case, p. 78, ll. 31-39.)

Q And every night or every time when that train stopped at Bloomfield, on which you are a member of the crew, before the train starts, you look up and down the left hand side of the track, don't you?

A Yes, sir." (Case, p. 80, ll. 37-41.)

The fact that the trainman never failed to look up and down the left-hand side of the track every time his train, the 5:01 from Arlington, stopped at Bloomfield to see if everything is clear, coupled with the fact that a number of passengers on the night in question left the train by the left-hand steps, and that two platforms were provided by the defendant between the westbound and the eastbound tracks, one platform on the bridge and the other platform opposite the station makes it a question for a jury to determine whether or not the defendant not only permitted but impliedly invited passengers to alight on the left-hand side.

In considering the *Furey* v. *N. Y. C. R. R. Co.* case cited within, it should be borne in mind that the plaintiff was the employee of an independent contractor and not a passenger of the defendant railroad.

The question of whether there was proof of facts from which the jury might draw an inference of negligence on the part of the defendant, is closely associated with the argument as to whether the plaintiff was guilty of contributory negligence, as a matter of law, and the many cases cited with regard to the question of contributory negligence are also authority for the

contention that the negligence of the defendant as shown by the facts was a matter for the jury.

In *Atlantic City R. R. Co.* v. *Kiefer, supra,* the Court said at page 56:

> "Whether, therefore, Kiefer was bound to anticipate the approach of a train from the opposite direction, depends upon whether the jury should says, under the proof, that he was, at the time he was hit, still a passenger, passing from the train to a place off the premises of the defendant company by the way provided by the defendant for that purpose * * *."

And on page 57 of the same case:

> "A person alighting from a standing train, and crossing the tracks to get to the station platform, a place of safety, is undoubtedly a passenger, *and is not required to look or listen in anticipation that a train may pass and hit him.* That law is too familiar to require any citation of authority. * * *."

If it be established that the plaintiff at the time he was injured, was still a passenger and an invitee, then it follows closely from the aforementioned rule that the jury might then consider that the plaintiff was not guilty of contributory negligence and *a fortiori,* that the question as to the plaintiff's contributory negligence, if any, was one for the jury.

Considerable weight ought to be given to the fact that this situation was twice presented to a trial court and was twice submitted to a jury, which on each occasion found that the defendant was guilty of negligence and that the plaintiff was free from contributory negligence. This statement is made with due regard to the fact that both of the aforementioned jury verdicts were reversed by the Supreme Court. It should be borne in mind that the first reversal was due

in part at least to error in the charge of the Court. On the question of negligence and contributory negligence the trial courts had the benefit of personally hearing the testimony and being able to better visualize the situation because of their first-hand knowledge. Matters of this kind almost invariably present jury questions and it is difficult to say as a matter of law, what will or what will not give rise to an inference of negligence.

Mr. Justice Minturn in the case of *Napodensky* v. *West Jersey, &c. R. R. Co.*, 85 N. J. L. 336, at page 338, says:

> "Negligence is not an *ex cathedra* pronouncement with which an act may be arbitrarily branded in the abstract as the judicial eye may conceive it. It presents a concrete proposition for a jury to solve, where the facts vary, as narrated by opposing witnesses, and from which different minds may conjecture differently, as they may view the conduct of a man in a difficult or trying situation, harassed and confused in the compass of seconds, with conflicting and contending views for self-preservation and deliverance, from a zone of danger, in which he is charged by law with the natural duty, presumably uppermost in his mind, of observing due care for himself and his property.
>
> Negligence in such circumstances becomes a relative term, incapable of exact determination, except upon consideration not only of the facts, but of all the circumstances, and in view of the entire environment in which the actor is placed. *Kingsley* v. *Delaware, Lackawanna and Western Railroad,* 52 Vroom 536.
>
> The true and practical solution of such a situation, and the legal characterization of the acts of a man so jeopardized, must necessarily present a jury question, under proper instructions from the court defining the legal

responsibility of the parties concerned. *McCool* v. *West Jersey and Seashore Railroad Co.*, 52 Vroom 479."

Negligence under any circumstances is an entirely relative term and the existence or absence of it must be examined into as a factual question by the jury.

In the case of *Munroe* v. *Pennsylvania R. R. Co.*, 85 N. J. L. 688, at page 691, the Court said:

> "The negligence of such an act it must be apparent is entirely relative. Under certain circumstances and situations it might be clearly foolhardy and extremely negligent, but whether it is so in any given case, where the danger is neither obvious nor apparently existent, presents a question of fact into which must enter for the consideration of the jury, all the details and minutiae of the environment, which throw light upon the situation, and the conduct of the deceased."

It appears from a reading of the opinion of the Supreme Court in the second appeal that the Court relied upon its decision in the first case, and that the Court assumed that the facts on the second trial were identical or substantially so with the facts on the first trial. This assumption would perhaps tend unconsciously to control the mind of the Court, especially since practically the same set of Justices heard both appeals, and counsel submits that considerable new evidence came into the case on the second trial, such as the violation of the rules promulgated by the company for the safety of its passengers; the fact that passengers alighted on either side of westbound trains; the practice of the defendant's ticket collector to make observations along the left-hand side of westbound trains at the Bloomfield station, which testimony considered in connection with other testimony, such as the

construction of wooden platforms by the defendant on the left-hand side of the train, strongly indicates an implied invitation on the part of the defendant, and counsel submits that the case contains ample evidence of conduct on the part of the defendant which justified the belief that the defendant intended the plaintiff to alight on the left side of the train, and that the plaintiff, as a matter of fact, was led to believe that the defendant company had intended the plaintiff to alight on the wooden platform or planking on which the plaintiff did alight.

Counsel submits that it is entirely erroneous to use the decision in the first appeal as the decision of the Supreme Court in the second appeal, because the facts in both cases were different. The difference of the two cases was pointed out by the Judge who presided at the second trial in denying defendant's motion for a non-suit. The Trial Judge in ruling on the motion said as follows:

> "Since I am not familiar with what was proved in the other case except as indicated by Justice Lloyd's decision, I cannot now say that the facts in this case at this point are the same as they were at the former trial of the case. If that be shown, of course I am bound by this decision of our Supreme Court and reported in 137 Atlantic, page 88. But as I read the statement of facts by Justice Lloyd under number paragraph 2, the facts are quite different in this case at this time from what they were in that case.
>
> For instance there is no testimony yet in this case that the trainman in the rear had called the station, or that there was any invitation for the plaintiff to go to any particular part of that car to alight. There is nothing in that decision which indicates whether or not the testimony in the former case was, as it is here, that this train was longer than

the trains upon which he had habitually ridden, and that it was the first time he had ever been confronted with this situation; *so that so far as the situation which confronted him was concerned, the train going up upon the bridge, it was practically as though he were a stranger notwithstanding the fact that he said he knew that the platform came up to the bridge.* It is true he identified the photograph, but no particular attention was called to the sign which was there of the danger of going upon the bridge.

I think that the motion for a non-suit must be denied and an exception to that ruling will be noted." (Case, p. 74, ll. 38-43; p. 75, ll. 1-35.)

It scarcely need be mentioned that the case should be determined from the testimony as it appeared on the second trial and that any reference to the testimony taken at the first trial would only tend to confusion.

Justice Lloyd in his opinion after the first trial, placed a great deal of reliance on the fact that the defendant had complied with the Act of 1922, defining the number of men required to make up a train crew and stated in his opinion that the defendant was not required to provide a train man for each coach since this would "make railroad travel a costly luxury."

It is respectfully submitted that the compliance with a statutory regulation such as this, is not intended to provide an exclusively hard and fast rule applicable to all hazards and to all situations regardless of actual conditions (*Paulsen* v. *Klinge,* 92 N. J. L. 99.)

The absurdity of a rule providing that compliance with the statute such as this, exempted a carrier from all liability from negligence in a situation such as is here presented, may be illustrated by the following example:

Assume that a carrier provided one trainman for every coach in a train of cars and that when the train arrived at the station, all the trainmen so provided were congregated in one car while a passenger, who was entitled to aid, assistance or direction of the trainman, attempts to alight without that aid, assistance or direction and was injured. It could scarcely be said that since the company had complied with the statute, that it had discharged its duty to that particular passenger.

If it be admitted merely for the sake of argument, that the plaintiff when he alighted from the left-hand side of the train, exercised poor judgment and placed himself in a position of danger, the defendant ought not to be allowed to take advantage of this fact, because it was the primary negligence of the defendant which permitted him to go out from the train without assistance or warning as to the danger of leaving by the forward exit and which placed him in a situation where he might be under a reasonable apprehension of physical injury. And it is well settled that when one, by negligence, puts another under a reasonable apprehension of personal injury and in a reasonable effort to escape, the latter sustains injury, a right of action arises to recover for the damage thus occasioned. *Marshall* v. *Suburban Dairy,* 96 N. J. L. 91; *Barry* v. *Borden Farm Products Co.,* 106 N. J. L. 107; *Dickinson* v. *Erie Railroad Co.,* 81 N. J. L. 52; *Tuttle* v. *Atlantic City Railway,* 66 N. J. L. 327.

POINT II.

The instruction of the Trial Court as to the relationship of passenger and carrier and the duty owing by the defendant to the plaintiff was correct.

Under this heading will be discussed defendant's grounds of appeals Nos. 3, 4, 5, 6, 7 and 8. (Case, pp. 96, 97, 98.)

Ground of Appeal No. 3.

Defendant in the court below, argues that the Trial Judge in his instructions to the jury, charged the jury that as a matter of law, the plaintiff was a passenger at the time of the accident. He points out the following portion of the charge:

> "He was a passenger on that train, and a railroad company owes to its passengers the duty to exercise reasonable care not only to carry them safely, but to provide a safe place and way to alight at the place of destination. Our decisions say that reasonable care toward a passenger is a high degree of care. It is more than ordinary care. It is true it must be reasonable care, but reasonable care in the case of a passenger is a high degree of care. And our decisions say that the relation of carrier and passenger does not terminate until the passenger reaches his destination and alights from the train on which he has been riding and has had a reasonable time and opportunity to leave the place where the passengers are discharged." (Case, p. 85; ll. 30-40; p. 86, ll. 1-8.)

An attempt is made to point out that the first sentence of the excerpt just quoted directs the jury to find as a matter of law, that the relationship between carrier and passenger existed when the accident occurred. This is an attempt

to place a strained interpretation on the words referred to. It seems obvious that the Court in making that statement was merely commenting on a fact which appeared from the testimony; that is, that the plaintiff had been a passenger on the defendant's train unquestionably at the time the train arrived at its destination. Closely behind this statement, the Court lays down the true rule applicable to the determination of whether or not the plaintiff was a passenger at the time of injury, and about this there is no complaint. However, it should suffice to say that the *defendant did not take exception to this portion of the charge,* or at any rate, did not point out to the Court the specific ground of his objection.

At page 90, lines 30-40; page 91, lines 1-3, defendant's counsel said:

> "Your Honor charged that a railroad company had a duty to use reasonable care not only to carry passengers safely to their destination, but to provide a safe way to alight, and then your Honor went on and said that reasonable care had been held to be a high degree of care. *My objection to the charge is not that reasonable care does not apply as in the Mason case, but because your Honor said that a high degree of care is owed with respect to providing platforms, and so forth. My point is that there is a different duty to carry than to provide means of exit.* Reasonable care only applies to the means of exit."

The rule is well settled that counsel must put his finger on the erroneous proposition and thus attract the mind of the judge to it. This he failed to do in the exception above quoted. *Thibodeau* v. *Hamley*, 95 N. J. L. 180; *Noyes* v. *State*, 41 N. J. L. 418; *Packard* v. *Bergenneck R. R. Co.*, 54 N. J. L. 553.

Ground of Appeal No. 4.

Under this ground of appeal, the defendant complains of the following instruction:

> "And our decisions say that the relation of carrier and passenger does not terminate until the passenger reaches his destination and alights from the train on which he has been riding, and has had a reasonable time and opportunity to leave the place where the passengers are discharged."

This appears to be a correct statement of the law applicable to the case. See *Kiefer* v. *Atlantic City R. R. Co.,* and *Spofford* v. *Central R. R. Co., supra.*

Referring to the exception to this portion of the charge, it will be found that counsel for the defendant stated as follows:

> "* * * My objection to that being that in this case the evidence is that reasonable time was allowed to alight by the way and means provided by the company."

This does not point out any specific error in the charge (Thibodeau *v.* Hamley, *supra*), but merely asks the Court to assume that a reasonable time was allowed to alight and to force that assumption upon the jury rather than to allow the jury to exercise its proper function and determine whether or not a reasonable time was allowed to alight.

Ground of Appeal No. 5.

Under this ground of appeal, the following excerpt from the charge is complained of:

> "If a passenger alights at a place other than that provided for by the company knowingly, knowing that it is not a place provided by the company to alight, and thereby knowingly runs into danger and is in-

> jured, then, of course, the relation of carrier and passenger does cease to exist at the instant that the passenger knowingly violates the rules of the company or alights at a place, knowing the dangers to him, other than that which has been provided by the company for him to alight." (Case, p. 86, ll. 9-18.)

This appears to be the law as it is laid down in 10 Corpus Juris, page 626, Section 1049:

> "A railroad company has the right to determine the routes by which passengers shall enter and leave its trains and premises and where it has *made safe and suitable arrangements for the exit* by passengers from its station grounds, a passenger must use the ways provided, and where he *knowingly* fails so to do and without invitation makes an exit in some other way, he ceases to be a passenger and becomes at most a mere licensee." (Italics mine.)

Under this rule, it would seem to be a question of fact as to whether safe and suitable arrangements had been made by the company which were known to the plaintiff under the circumstances and a question of fact as to whether the plaintiff knowingly chose the way he did in preference to the other way the company provided.

Exception to this portion of the charge was that if he negligently runs into danger not necessarily knowingly, then the rule is different. (Case, p. 91, l. 22.)

For the purpose at hand it amounted to the same thing for the Court to use the word "knowingly" rather than the word "negligently," because one of the elements that the jury had a right to consider, was whether the company took proper precaution in providing a

safe place to alight and under this, whether the company directed the plaintiff to alight by other means or warned him against alighting by the means which he took, and if he was warned and therefore knew of the danger, it would be assumed that he acted negligently.

Ground of Appeal No. 6.

Under this ground of appeal, the following excerpt from the charge is complained of:

> "Mr. Whalen, who testified for the defendant and who was the collector upon that train, says that he did call at the rear end of that car; that he called first in the second car, and then crossed the platform, called into the front car, 'Bloomfield,' left the door open and went down to assist passengers to alight. If he did call and the plaintiff heard it, and if you think that was an indication to him as to where he should alight from that train, then it will be for you to say whether or not there was any negligence upon the part of the defendant's employees."

The exception to this portion of the charge points out that it was not necessary that the plaintiff hear the call of Whalen, it being sufficient merely that Whalen did call out. The obvious fallacy in this point is that if there existed a duty at all on the part of the defendant to direct the plaintiff to a particular exit, then the direction must have been brought home to the plaintiff. The defendant would not argue that if Whalen had come into the front coach and whispered his direction or had stood at the rear of the train and shouted, he would by so doing discharge the obligation which existed.

In the Spofford case, *supra*, the Court said:

> "The jury may well have found that ordinary prudence upon the part of the railroad

> company under such circumstances, required it *to inform* its passengers which of the two ways of alighting was intended to be used upon that occasion * * *"

If there was a duty to inform, then surely the information should have been brought home to the plaintiff.

Ground of Appeal No. 7.

Under this ground of appeal, the following excerpt from the charge is complained of:

> "But if no member of that train crew called into that car at all, and if the front of that car ran out upon that bridge and the passengers were left to their own judgment as to whether or not they should go to the front or to the rear, and no precaution was taken to warn them of the dangers of the situation which existed with the right hand side of that car on the bridge, with the canal twenty feet below them, and nothing to warn them of the dangers of getting off on the other side, with the appearance of a platform there by its being planked over—that you may also take into consideration in determining whether or not a safe place had been provided and proper warning given to this plaintiff as a passenger upon that train."

This instruction appears to be in line with the statement of the Court in the Spofford case, *supra.*

However, it may be pointed out that the ground of exception taken to this portion of the charge is vague and indefinite and fails to point out to the Court explicitly the portion challenged or the legal reason for the challenge.

In taking exception counsel said:

> "My objection to that is that it permits the jury to apply their imaginations really

> to whether or not there was negligence, it not having been limited to the issues raised by the pleadings." (Case, p. 92, ll. 36-39.)

It is not clear just which portion of the charge the exception refers to and certainly it does not place a finger on the erroneous proposition, if any. Thibodeau *v.* Hamley, *supra.* Furthermore, this ground of appeal does not seem to have been argued in the court below, beyond the fact that the exception was re-stated in the brief of the defendant-appellant below and it is therefore deemed to have been waived. *Cleaves* v. *Yeskel,* 104 N. J. L. 497; *Hy-Grade Cut Fabric Co.* v. *U. S. Stores Corp.,* 105 N. J. L. 324.

Ground of Appeal No. 8.

Under this ground the following excerpt from the charge is complained of:

> "If you decide that the greater weight of the evidence does not show negligence on the part of the defendant, then your verdict must be in its favor. If you decide that it does show negligence, then you come to the consideration of another important question, and that is whether or not Kinder in alighting from that train took that care for his own safety which reasonably, careful and prudent persons should take under the same or similar circumstances and conditions." (Case, p. 92, ll. 26-35.)

It hardly requires any citation of authority to show that this is a correct general statement of the law with regard to the weight of the evidence and contributory negligence on the part of the plaintiff. It may be further pointed out that the exception to this portion of the charge is the same exception which was taken by defendant's counsel to the portion of the charge brought up under ground of appeal No. 7 and is like-

wise vague, indefinite and meaningless and fails to comply with the rules laid down in the Thibodeau case and others cited. In addition, it does not appear to have been argued in the court below and it is deemed to have been waived in accordance with the case of Cleaves *v.* Yeskel, *supra.*

POINT III.

It was not error for the Trial Court to receive in evidence Rule 98A of the defendant company.

This rule which appears in the State of Case, at page 71, seems to be entirely applicable to the situation in this case. The train which struck the plaintiff was approaching a station on a track adjoining one where another was receiving or discharging passengers. At this particular station, there was a platform leading from the southerly side of the right of way to the station on the northerly side. It therefore may be assumed that passengers might be obliged to cross the tracks in order to board a train or to get to the station or platform from a train.

The rule is simply a statement of law which was applicable to the case and provides rules of conduct for the defendant's employees designed for the protection of passengers.

In the case of *Pullman Co.* v. *Waln,* 4 F. (2nd) 1, 1925, 41 A. L. R., 1393, the Circuit Court of Appeals for the Third Circuit held that in an action against the Pullman Company for injury to a passenger falling through an open vestibule, the agreement between the railroad company and the Pullman Company and the rules appurtenant to the situation were admissible in evidence.

If the rule applies to a situation different than the situation which existed at Bloomfield as argued by the defendant on the last appeal, the defendant had the opportunity of offering testimony to that effect and the opportunity of moving to have the question of the violation of the rule taken away from the consideration of the jury, and it is submitted that it was not error on the part of the Trial Court to admit the rule.

CONCLUSION.

For the Reasons above stated, the Judgment of the Supreme Court should be reversed.

Respectfully submitted,

JAMES P. MYLOD,
Attorney for Plaintiff-Appellant.

163MAY.1.1932

NEW JERSEY

Court of Errors and Appeals

MICHAEL KINDER, Plaintiff-Appellant, vs. ERIE RAILROAD COMPANY, Defendant-Respondent.	On Appeal from Supreme Court.

BRIEF IN FAVOR OF ERIE RAILROAD COMPANY, DEFENDANT-RESPONDENT.

Statement of the Case.

This case comes before the court on an appeal by the plaintiff-appellant (hereinafter called plaintiff) from a judgment of the Supreme Court reversing a judgment of the Essex Circuit Court entered in that court in favor of the plaintiff and against the defendant-respondent (hereinafter called defendant).

The grounds of appeal are that the Supreme Court erred in reversing the judgment of the Essex Circuit Court instead of affirming the same (p. 104).

Brief of the Argument.

Summary of Facts.

Plaintiff brought suit for damages in the Essex County Circuit Court for personal injuries alleged to have been sustained by him as the result of an accident on a railroad bridge, a short distance west of the defendant's station in Bloomfield, N. J.

The opinion of the Supreme Court on which was entered the judgment from which this appeal is taken says:

> "The essential facts of the case as now presented do not vary materially from the facts as presented on the former trial" (p. 101, lines 35-40; 7 N. J. Misc. 637; 146 Atl. 923).

The facts as stated in the opinion of the Supreme Court reversing the judgment on the first trial are as follows:

> "* * * The accident happened in this way: The plaintiff was a passenger in the forward coach of a westbound eight-car train on the evening of February 12, 1923, at Bloomfield. The railroad is a double-track system extending generally in an east and west direction through Bloomfield from a street known as Walnut Street, curving slightly to the north as it runs west. The station building and waiting room are on the south side of the tracks about one hundred and thirty feet west of Walnut Street. On either side of the right of way there is a platform, the one on the north side extending from Walnut Street to a point within seventy feet of a canal bridge; the bridge itself being five hundred feet west of Walnut

> Street. The plaintiff's evidence established that when the train on which he was riding stopped, the engine was on this bridge and the forward part of the car in which he was riding was also on the bridge; that he got out of the left-hand side following two other passengers who had preceded him, one of whom opened the door. Before getting off he observed that the bridge abutments were too close to permit him to get out on the right side. Stepping out on the left he landed on the wooden flooring of the bridge and between the east and westbound tracks. He had taken but two steps when he was struck by a train going east. It further appeared that there was no trainman at the front end of the car, but that there was a trainman at the rear who called out the station and opened the door at that end. The accident happened about five P. M. and the plaintiff said that it was a smoky evening, not dark, nor yet light, but he could see the station quite a distance away.
>
> His own testimony showed that he was familiar with the entire situation; that he was a regular rider on the road and train, and knew that the platform provided for passengers leaving the train was on the right; that there was none on the left, but that the eastbound track was there with loose stone between it and that of the westbound track. He knew that there was no trainman at the front door" (p. 16, line 30, to p. 17, line 35; 103 N. J. L. 316; 137 Atl. 88).

The railroad tracks and the bridge over the canal are shown in two photographs, marked Exhibits P-1 and P-2. These were identified by the plaintiff and were received in evidence as plaintiff's exhibits (p. 38, lines 1-20).

Exhibit P-2 shows, on the right-hand side of the westbound track, a sign reading as follows:

"DANGER. All Persons Are Forbidden To Go Upon This Railroad Bridge."

The originals of these two exhibits (which were not included in the state of case furnished by the plaintiff) are filed with this brief, together with photostatic copies thereof.

Plaintiff obtained a verdict for $5,000, on which judgment was duly entered; defendant appealed to the Supreme Court and that court reversed the judgment, following the former opinion (p. 101).

I.

The judgment of the Supreme Court reversing the judgment of the Essex Circuit in favor of the plaintiff is correct for the reason stated by that court, to wit, that the trial court should have granted a nonsuit.

At the trial defendant moved for a nonsuit (and at the close of the case, for a direction in its favor), on certain grounds which may be summarized as follows:

(a) There was no proof that any invitation was extended to the plaintiff to alight from the train at the time and place he attempted to alight.

(b) There was no proof of negligence within the issues raised by the pleadings, the evidence showing that the proximate cause of the accident was the plaintiff's contributory negligence (pp. 74, 75, 82).

(a) Invitation.

It is conceded that a railroad company is under a duty to exercise reasonable care to provide its

passengers a reasonably safe place at which to alight from its trains, but we contend that there was no evidence of any failure to exercise such care.

The evidence in the plaintiff's case was as follows:

The plaintiff had lived in Bloomfield, N. J., for twenty-one years (p. 26, lines 34-38); he worked at the Dupont factory in the Town of Arlington, N. J. (p. 27, lines 1-10). He customarily traveled between these two cities on the Erie Railroad on a fifty-trip ticket (p. 27, lines 10-20). At 5.01 P. M., on Lincoln's Birthday, 1923, he boarded a westbound train at Arlington intending to ride to Bloomfield. Ordinarily he took the 4.49 train, but that train was not operated on holidays; the 5.01 train was a "bigger" train than the 4.49 (p. 27, lines 20-40; p. 28, lines 1-26).

He was in the first coach of the train (p. 29, lines 1-17). When the train arrived at Bloomfield he went to the forward door of the first coach, out of that door and onto the platform of the coach (p. 28, lines 30-40). The forward door of that coach had been opened by one of two passengers who had been standing near the door as the train entered the Bloomfield station (p. 61, lines 1-18). The plaintiff had been sitting next the window on a seat near the front of the first coach, one Mike Korocy sitting in the same seat next the aisle (p. 59, lines 25-35). Neither the plaintiff nor Korocy left his seat until after the train had stopped at the Bloomfield station (p. 59, lines 35-40; p. 60, lines 1-20).

Upon reaching the platform of the coach, the plaintiff turned "to go just like I always go on the right side, and I saw a big iron wall on bridge"

(p. 29, line 18). The plaintiff was familiar with conditions at the station and knew that the bridge upon which he claims the forward platform of the coach stood was a few feet west of the station platform (p. 37, lines 24-40; p. 38, lines 1-37; p. 39, lines 10-28). The plaintiff customarily left his train at the Bloomfield station on the right-hand side, alighting on the station platform (p. 39, lines 10-13). He knew that between the westbound track and the eastbound track there was no platform, but rough loose stones (p. 39, lines 1-10).

When he saw that the forward platform of his coach was on the canal bridge he turned back on the coach platform and saw two or three persons alight on the left side. He then stepped down to the planks which were in the middle of the bridge (p. 30, lines 1-20), turned to go toward the station, and was struck by an eastbound train (p. 30, lines 20-40). When asked why he did not walk through the coach and alight from the train by the rear platform on the right side, he said:

> "Full of people; can't get out. Already full car. Before I go, train moves. I no get out. Too late then; train moves.
>
> Q. Did this train move before you got off? A. No.
>
> Q. When you got out and looked over to the right-hand side and saw the girders of the bridge, then you came back to the door of the coach, did you? A. Yes.
>
> Q. Did you look back to see how many people were getting off? A. Full of people just the same.
>
> Q. A lot of people? A. Yes.
>
> Q. Were they still in the coach near the door? A. Yes, sir.
>
> Q. Could you see them getting off the steps when you were outside on the plat-

> form? A. I see from front left side, three fellows get off.
>
> Q. I mean on the back of the coach? A. I don't looking.
>
> Q. You only know that there were persons standing in the coach going out of that back door, don't you? A. Yes.
>
> Q. And you didn't go through the coach to get off with them because there were so many persons there; is that right? A. Yes, sir" (p. 39, lines 28-40; p. 40, lines 1-18).

The three men who preceded the plaintiff in alighting from the left side of the coach had disappeared when the plaintiff attempted to alight (p. 42, lines 5-40). These men were not trainmen but workingmen (p. 43, lines 25-30).

Korocy, the plaintiff's companion, who preceded the plaintiff from the train, attempted to leave the coach by the forward platform on the right side; and, upon observing that exit from that side was barred by the girders of the canal bridge, turned back and alighted at the left on the planks of the bridge (p. 53, lines 1-31). He then testified:

> "Q. And when you stepped out on this wood platform, or whatever you described it, what did you see there? What did you do? A. I just step on the wood platform. I see on the second bridge another train come up from Montclair.
>
> Q. Was that train traveling on the same track that the train in which you came into Bloomfield on, or was it on a different track? A. On a different track.
>
> Q. That was the track— A. That is the eastbound track.
>
> Q. (Continuing) On which the cars go into New York, the eastbound track? A. Yes" (p. 53, lines 32-40; p. 54, lines 1-12).

The witness ran in a direction toward Montclair, or westerly, up the right of way past the engine of the westbound train and then turned to the right in front of the westbound engine (p. 62, lines 1-22). When he passed the front of that engine, the eastbound engine just passed the front of the standing westbound engine (p. 63, lines 24-30). As he stepped in front of the westbound engine it started to move (p. 64, lines 1-10).

Rogers, a witness for the plaintiff, testified that he was a passenger on the westbound train riding in the first coach (p. 67, lines 25-40; p. 68, lines 1, 2). He saw the accident (p. 68, lines 3-12). At the time of the accident the westbound train had moved about 10 feet (p. 68, lines 20-25). In this witness' opinion, the engine of the westbound train was on the canal bridge and the first coach was very near it. The bridge was about 25 feet from the place where he was sitting (p. 68, lines 32-40), and he occupied a seat about the middle of the first coach on the left-hand side (p. 69, lines 1-20).

On these undisputed facts, it is obvious that there was no invitation to the plaintiff to alight by the way he adopted.

The essence of invitation is that the defendant knew, or ought to have known, that something it was doing, or permitting to be done, gave rise in an ordinary discerning mind to a natural belief that it intended to be done that which its conduct had led the plaintiff to believe it intended (*Furey* v. *New York Central R. R. Co.*, 67 N. J. L. 270, at 275; *Webb* v. *West Jersey & S. S. R. Co.*, 100 N. J. L. 204; *Kinder* v. *Erie R. R. Co.*, 103 N. J. L. 316).

In the present case there is no evidence of conduct on the part of the defendant which justified the belief that it intended the plaintiff to alight on the left side of the train; and there is no evi-

dence that the plaintiff was led to believe that the defendant had intended passengers to alight on that side.

The evidence shows that passengers had opened the forward door of the coach; there was no trainman there; many passengers were leaving by the right side of the coach at the rear door. The plaintiff knew the proper way to leave; he knew the space between the east and the westbound tracks was filled with rough, loose ballast; he knew that the forward coach platform on the right side was blocked by the girders of the canal bridge, a short distance west of the westbound passenger platform. There was no evidence that the defendant failed to maintain the westbound passenger platform in a safe condition, nor was there any evidence that it was not accessible for the plaintiff's use, had he left the coach by the rear coach platform, which was being used by other passengers.

The defendant had provided a safe exit from its train by means of the rear door of the coach in which the plaintiff was riding and the plaintiff at his peril adopted another way. Disregarding his own observations as to the location of the train and the means of exit, he adopted a means not provided by the company.

In *Gore* v. *D., L. & W. R. R. Co.,* 89 N. J. L. 224, a passenger alighted from the defendant's train while the train was at standstill. On previous occasions she had made the same trip and alighted from the train upon the station platform at about the center of its length. On the occasion in question the light was "so dim" she could not see the surface of the road, and she was unable to determine just where the train had stopped. She stepped out on the car platform and down the steps until

she stood on the bottom step. She then took hold of the rail with her right hand and reached down from the step with her left foot as far as she could; letting go with her hand, her foot descended a long distance before striking the rough surface of a Belgian block pavement of a street adjoining the station, whereupon she lost her balance and fell.

The present case is very different. It was light enough for one to see as far west as the Spruce Street bridge, which was four or five hundred feet away (p. 78, line 25); and the plaintiff did in fact see that the girders of the canal bridge barred his exit from the right side. Knowing the situation as he did, knowing that the rear of his coach was at the station platform, and seeing other people alighting at that place, he needed no assistance, no additional light, no advice from the trainmen as to the location of the coach platform. He knew that the way provided for exit from the train was not over or upon the *east*bound track. In short, no situation is here presented from which it might reasonably be inferred that, through ignorance of the situation, the plaintiff was placing himself in a position of danger requiring from the trainmen the additional duties spoken of in the *Gore* case.

In *Abbott* v. *D., L. & W. R. R. Co.*, 65 N. J. L. 310, this court, in affirming a judgment of nonsuit, said:

> "The sole contention is that there was evidence from which a jury might find that the defendant had not performed a duty which it owed to her in providing a safe mode of egress from its station, after she had alighted from its train, upon which she had been carried as passenger. An examination of the evidence clearly shows that no

such breach of duty was established. By the platform provided by the defendant, Mrs. Abbott could have proceeded in safety to Roseville avenue, a public street crossing the tracks of the defendant, by which street she intended to go to her place of residence. Had she availed herself of the mode of egress thus provided, she would have reached the public street in safety, and would then have found the gates provided by the defendant to be shut when trains were approaching, were in fact shut, and indicated that there was danger in crossing. Instead of doing so, she went upon the platform adjoining the main line of defendant's railroad at a point distant from the crossing at Roseville avenue. According to the evidence of some of her witnesses, she attempted to cross the tracks of the main line at that point and was struck by the engine of a train running upon the track nearest to her. By her own evidence, she was not attempting to cross the tracks, but had taken a position so near the tracks that the engine struck her. She testified that she stood there for some time, watching another engine standing upon the other track, to see when it would be safe to cross. Under these circumstances, it is obvious that the defendant owed her no duty which it had not performed. It had provided a safe mode of egress from its station. There was nothing to indicate that it had permitted or invited her to cross at the point at which she had stationed herself."

In *Dieckman* v. *D., L. & W. R. R. Co.,* 81 N. J. L. 460, the deceased, on a misty morning and while holding an umbrella in front of him, was crossing the defendant's tracks on his way from a well-beaten path which led from the public highway to the mail crane on the railroad right of way and across the tracks, the path having been used by

residents in getting to and from the station, instead of going under the railroad bridge at Stuyvesant Avenue and climbing the stairway to the station. While crossing the tracks he was struck by an express train. He was an intending passenger. This court affirmed a judgment of nonsuit on the ground that there was no invitation, express or implied, to make use of the pathway, even though employees of the defendant had known of its use.

In *Zelman* v. *Pennsylvania R. R. Co.,* 93 N. J. L. 57, the plaintiff was a passenger upon a train which was slowly moving into the Park Place station at Newark. A trainman called into the coach, "Park Place, last stop, Newark," and then opened the door of the coach through which passengers made their exit. The plaintiff thereupon arose from her seat, walked to the open door, and, following another passenger, stepped off the slowly moving train. Her injuries resulted. It was held that there was no invitation to the plaintiff to alight.

In *Spofford* v. *Central R. R. Co.,* 89 N. J. L. 273, the plaintiff alighted from the left-hand side of the train while the train was standing in the station to discharge passengers. He was not familiar with the station and its surroundings. The station was not well lighted and the night was dark. The settlement in and about the station was on the left side of the tracks. The court, at page 276, said:

> "* * * It may well be that the decedent was misled by the distant lights in the railroad yard on the east side, and so naturally made the mistake of alighting upon that side. A stranger arriving at his station cannot always stop to take into consideration all the surroundings. The fact that there was a platform on the side where he alighted, leading across the track where he was hit,

> was another one of the circumstances all of which rendered it possible and legitimate for the jury to conclude that the circumstances were such as to induce the decedent to believe it safe for him to alight as he did."

The present case is different, for it here appears that the plaintiff was acquainted with the station and its surroundings. He knew the way provided by the defendant for exit from the trains. He knew that there was rough, loose stone ballast on the left side of the westbound track, and he knew, too, that neither he nor anyone else had ever alighted from a train upon the canal bridge between the east and westbound tracks. The way provided by the defendant was open to him had he walked to the rear of his coach, where other people were alighting. The door through which he passed was not opened by a trainman. It was light and he could and did see the situation.

In the opinion filed by this court following the first trial (*Kinder* v. *Erie R. R. Co.,* 103 N. J. L. 316), Mr. Justice Lloyd reviewed the facts, which were substantially the same as in the present case. He called particular attention to the fact that by his own testimony the plaintiff showed he was familiar with the entire situation, having been a regular train rider and knowing that the platform for passengers was provided by the company on the right side of westbound trains. He knew that no trainman was at the front door of the coach. The court concluded:

> "* * * It is difficult to discover anything further the company could have done to protect its passengers."

On the motion for direction the attention of the trial judge was called to this opinion, but he stated

that the reviewing court must have "assumed" that it was a vestibule train. He quotes from the opinion wherein Mr. Justice Lloyd said:

> "That it had not opened the front door, nor had it authorized others to do so. This might be done at any time by one sufficiently familiar with its mechanism."

Commenting upon that statement, the trial judge said:

> "From that it would appear that he (Justice Lloyd) assumed the manipulation of some kind of mechanism such as there is in the opening of a vestibule door, instead of merely the turning of a knob, for the reason that he later says, 'The plaintiff knew that the right hand rear door was open, but used the left hand front door, as he stated'" (p. 82).

Assuming, but not admitting, that the trial judge was correct, that difference cannot change the law with respect to invitation. Nothing in the difference in style of coach could have misled the plaintiff into believing that the railroad company intended him to do that which he was doing, and if the company did not intend it, or if reasonably prudent men under the circumstances would not have been led by defendant's conduct to believe it had intended that which was being done, the plaintiff was acting at his peril.

But we do not admit that the Supreme Court was under a misapprehension of fact when the opinion was filed, as the testimony left no doubt as to the type of coach in use.

The court, in its opinion, said that the plaintiff was familiar with the entire situation and knew that there was no platform on the left of his train,

and that no trainman was provided to assist him from the train by the means of exit adopted by him; and, therefore, concluded that it was error to refuse the motions of nonsuit and direction of verdict (p. 17, lines 26-35). The court further said:

> "For the unauthorized opening of the forward door it was not responsible" (p. 18, line 11).

Then, by way of comment or explanation, it was said that that might have been done by anyone sufficiently familiar with the "mechanism" (p. 18, line 15). Obviously, there was some mechanism upon the door, if only a knob and bolt such as is on the ordinary house door.

(b) Proximate Cause.

The complaint charges that the defendant was negligent in the following respects:

1. It ran a train without notice and at a high rate of speed between the depot and the standing train, in violation of the duty of the company to see that the eastbound track might be crossed in safety by the plaintiff and other passengers leaving the standing train, which was then on the westbound track.

2. It failed to give warning by bell or whistle or otherwise of the approach of the eastbound train while the plaintiff and other persons were rightfully alighting from the standing train and crossing the eastbound track which intervened between the standing train and the depot.

3. It did not provide a safe place at which the plaintiff might alight.

4. It did not provide the plaintiff with safe conduct to the defendant's station, as was lawfully required by virtue of the contract.

5. It permitted the train which struck the plaintiff to approach the station in violation of the rules of the company.

6. It permitted the doors of the cars, which extended beyond the end of the platform, to be kept open, thereby inviting passengers to alight at an unsafe place.

7. It failed to provide railings, enclosures and other guards or means of protection to prevent plaintiff from being struck by trains operated in the opposite direction and to prevent his leaving trains at a place not invited to be used (pp. 2-4).

Each of the allegations which may have any legal substance depends upon the existence at the time of the accident of the relationship of passenger and carrier. Unless that relationship existed the plaintiff was a mere licensee at the best, to whom there was owing a duty only to refrain from wilful and wanton injury, and it is neither alleged nor proved that the defendant was guilty of negligence in that respect.

The companion of the plaintiff, Mike Korocy, who left the coach by the left forward platform prior to the plaintiff, saw the approaching eastbound train on the second bridge four or five hundred feet away when he stepped down to the planks of the canal bridge. This witness ran up the right of way between the east and westbound tracks and turned to his right over the westbound track in front of the standing westbound train. As he crossed in front of the westbound train the east-

bound train passed the forward part of the standing engine and at about that time sounded three blasts of the steam whistle.

The plaintiff stepped down from the standing westbound coach and was almost immediately struck by some part of the eastbound train—whether it be the engine or one of the coaches no one knows. Kinder doesn't know what struck him; Korocy was unable to see because the westbound train obstructed his view, and Mr. Rogers doesn't say. We do know, however, that the engine of the eastbound train was brought to a stop a very short distance past the canal bridge and that plaintiff was lying on the right of way between the east and westbound tracks. Whether in stepping off the coach he walked into the side of the eastbound engine or the side of one of the coaches of that train the jury could merely guess, and in either case it is hard to understand how they could have justified his conduct. Assuming that no signals were given by the engineer of the eastbound engine, there is nothing in the record to justify the court or jury in determining that the operator of that train at any time saw plaintiff in a place of danger; and no warning signals could be required except it is shown that there was someone who was entitled to receive a warning. The two passengers who preceded Korocy from the train had disappeared. Korocy was safely around the standing engine, no one was in a position of danger; certainly the plaintiff was not, if his own testimony is to be believed.

The plaintiff did not look for the eastbound train, although had he looked he would have seen it. He describes weather conditions as "smoky," but Korocy was able to see the train as far west as the second bridge (p. 57, line 40)—four or five hundred feet distant, and saw it continuously as

it approached the canal bridge. The train was so close to the plaintiff that he was able to take but two steps when the accident occurred. Certainly, it made some noise, even though the whistle had not been sounded or the bell was not ringing. There is no evidence of noise other than that made by the approaching train. There was nothing to prevent plaintiff from exercising his reasonable powers of observation, and had he taken the slightest care for his own safety, knowing that he was in a position in which he had no right to expect protection from the company, the accident would not have occurred.

II.

The judgment of the Supreme Court reversing the judgment of the Essex Circuit in favor of the plaintiff is correct for the reason that there was error on the part of the trial judge in his instructions to the jury as to the relationship of passenger and carrier, and as to the duty owing by the defendant with respect to persons alighting from its trains.

The trial judge, in his instructions to the jury, charged as a matter of law that the plaintiff at the time of the accident was a passenger and that the company owed to him a duty of more than ordinary care. At page 85 of the record, lines 30 to 40, and at page 86, lines 1 to 18, the court said (italics ours):

> "He was a passenger on that train, and a railroad company owes to its passengers the duty to exercise reasonable care not only to carry them safely, but to provide a safe place and way to alight at the place of desti-

nation. Our decisions say that reasonable care toward a passenger is a high degree of care. It is more than ordinary care. It is true it must be reasonable care, but reasonable care in the case of a passenger is a high degree of care and our decisions say that the relation of carrier and passenger does not terminate until the passenger reaches his destination and alights from the train on which he has been riding and has had a reasonable time and opportunity to leave the place where the passengers are discharged.

If a passenger alights at a place other than that provided for by the company *knowingly*, knowing that it is not a place provided by the company to alight, and thereby *knowingly* runs into danger and is injured, then, of course, the relation of carrier and passenger does cease to exist at the instant that the passenger *knowingly* violates the rules of the company or alights at a place, knowing the dangers to him, other than that which has been provided by the company for him to alight."

Again, at page 87, line 18:

"Mr. Whalen, who testified for the defendant and who was the collector upon that train, says that he did call at the rear end of that car; and that he called first in the second car and then crossed the platform, called into the front car, 'Bloomfield,' left the door open and went down to assist passengers to alight. If he did call and the plaintiff heard it, and if you think that was an indication to him as to where he should alight from that train, then it will be for you to say whether or not there was any negligence upon the part of the defendant's employees * * *."

Again, at page 88, line 7:

"But if no member of that train crew called into that car at all, and if the front of

> that car ran out upon that bridge and the passengers were left to their own judgment as to whether or not they should go to the front or to the rear, and no precaution was taken to warn them of the dangers of the situation which existed with the right-hand side of that car on the bridge, with the canal twenty feet below them, and nothing to warn them of the dangers of getting off on the other side, with the appearance of a platform there by its being planked over—that you may also take into consideration in determining whether or not a safe place had been provided and proper warning given to this plaintiff as a passenger upon that train."

Under this charge the jury was directed to find that the relationship of carrier and passenger existed when the accident occurred. After specifically so stating, the trial judge may have attempted to qualify his statement, but from the instruction given the jury was justified only in considering the conduct of the defendant as to operation of its trains and the conduct of the plaintiff as to his contributory negligence, and even though the instruction may be construed as permitting the jury to examine into the plaintiff's own conduct with respect to care for his own safety, the jury was unable to find that he was himself negligent except it was found that he "knowingly" ran into danger and was injured. At page 97, lines 12, etc., the trial judge told the jury that if a passenger *knowingly* alights at a place other than that provided for by the company

> "* * * and thereby *knowingly* runs into danger and is injured, then of course the relation of carrier and passenger does cease to exist at the instant that the passenger *knowingly* violates from the rules of the

> company or alights at a place, *knowing the dangers to him* other than that which has been provided by the company for him to alight."

It is true that the company is under a duty to exercise reasonable care to make known to its train riders its rules and regulations with respect to the time and place adopted for leaving its trains and station grounds. A passenger may recover who, without knowledge of the company's rules, is misled by circumstances for which the company is responsible, to adopt means which seem reasonable to the ordinarily prudent person, and in making use of such means, exercises reasonable care to make observations for his own safety and sustains injury by reason of the negligence of the defendant. But he cannot make use of such means in the face of actual knowledge, without observation for his own safety, as the jury were instructed in the present case. It is not necessary that he knowingly go into danger; it is not necessary that he attempt to commit suicide or to inflict a wilful injury upon himself. A passenger who is familiar with the situation, and whose only reason for not leaving the train in accordance with the company's rules is the inconvenience of walking through a coach with the possible result that the train might start before he had alighted, cannot contend that he was misled into believing that the railroad company intended him to do that which he attempted to do, and intended it to such an extent that he could make use of the means of exit without any care for his own safety.

The plaintiff knew that at the place where he alighted he was without the protection of the company's employees. He knew that the eastbound

track immediately adjoined the westbound track to the left. He knew that he was upon the canal bridge. He knew that to get from the canal bridge to the station he must walk along the right of way upon the rough, loose stone ballast, but notwithstanding this knowledge he stepped from the standing westbound train, faced to the east and took two steps toward the station and he was struck. In view of the facts that the eastbound train was approaching so close to the canal bridge; that no platforms were provided by the company at the place where he alighted, and that no trainman was at that place, it cannot be said that the company impliedly invited him to adopt the course of conduct he did adopt, and, therefore, the relationship of passenger and carrier did not exist and the instruction to the jury with respect to that relationship was erroneous and harmful to the defendant.

The attention of the trial judge was called to the error in the charge by exceptions at pages 91 and 92 of the record. At line 7 defendant's trial counsel excepted to that portion of the court's charge wherein the trial judge said that the relationship does not terminate until reasonable time has been allowed for the train rider to alight and the reason for the objection was stated as follows:

> "* * * in this case the evidence is that reasonable time was allowed to alight by the way and means provided by the company * * *. We are not under a duty to anticipate passengers leaving the train by means other than that provided, and with respect to those persons, we are not charged with the duty of seeing that they are safely off our trains. If we see them it is true we must protect them, but if we do not, we are not charged with any duty with respect to them."

At line 22, page 91, exception was taken to that portion of the court's charge wherein the trial judge instructed the jury that if a passenger knowingly alights by a means other than that provided and knowingly thereby runs into danger, the relationship ends. The reason for that exception is stated as follows:

> "I say that if he negligently runs into danger, not necessarily knowingly, then, of course, the rule is different."

At line 30 on the same page exception was taken to that portion of the trial judge's instruction wherein he said that if Whalen (the company's trainman) did call out through the coach and the plaintiff heard it, and if that was sufficient to acquaint the train rider with the invitation to alight by the rear door, then you may say whether or not the company was negligent. The reason for that exception was stated as follows:

> "I object to that first on the ground that it is not necessary that it be shown that this man heard it. It is enough that the invitation was extended. Second, I object to it with respect to its application at all to this situation, because Kinder knew the fact with respect to where he was to get off and knew he was at the station and, of course, he knew that he was invited to leave by the proper means."

Exception was further taken to the trial court's statement that if no member of the train crew called into the train and passengers were left to their own judgment as to whether they should go to the front or rear, no precaution being taken for their safety, the jury might consider those facts with respect to the company's negligence.

We need not repeat the citations under Point I, but we again call attention to the opinion of the Supreme Court on the first trial. At page 17, line 38, etc., the court, in referring to the motions for nonsuit and directed verdict, said:

> "We think it was error to refuse these motions. The company had provided a safe and proper place for the plaintiff to alight, and had provided a trainman to assist passengers in thus alighting. It had not opened the front door, nor had it authorized others to do so. The plaintiff, knowing the facts, chose of his own volition and without invitation to leave the train by a dangerous exit, and in so doing assumed the risk of the dangers thereby incurred. We discover in the facts no duty of the railroad company which had been violated. For the unauthorized opening of the forward door it was not responsible. This might be done at any time by one sufficiently familiar with its mechanism. A trainman at the rear had called the station, but this did not imply an invitation to alight on the wrong side of the train and by an unopened door. The plaintiff knew that the right-hand rear door was opened, but used the left-hand front door as he stated because of the number of passengers passing out at the rear end and he feared that the train might start before he got off. Presumably the company had employed an adequate train crew in compliance with the requirements of the act of 1922, page 665, and was not obliged to provide a trainman at each end of every car. To hold such an obligation to exist would transcend that which the legislature has impliedly declared sufficient and make railroad travel a costly luxury. In the above it is difficult to discover anything further the company could have done to protect its passengers."

It may be argued by plaintiff's counsel that the court cured the error appearing in the early part of its charge wherein it stated as a fact that the plaintiff was a passenger at the time of the accident by the later instruction that the jury were to consider the conduct of the defendant in calling into the rear door of the coach the station in question, assuming that the plaintiff heard the direction of the trainman, but that, if he did not hear it, then of necessity they were not to consider whether that was an indication to him of the place the company intended him to alight. In answer to that argument, we again refer to the opinion of the Supreme Court (p. 19, line 28, etc.), wherein the court said:

> "It is urged by the respondent that conceding the erroneous instruction appellant was not injured thereby, as the trial judge in other portions of his charge laid down the correct rule when he defined reasonable care as applied to the present case to be such as a reasonable person exercises in view of all the circumstances presented to him. While even this definition is in doubtful accord with the rule laid down by our cases, in that a reasonable person is not necessarily either a reasonably or ordinarily prudent person (Pesin v. Jugovish, 85 N. J. L. 256), it was given to the jury without a withdrawal of the precise duty previously imposed on the company, and hence left the jury to determine for itself which of the two standards it would accept. Collins v. Central R. R. Co., 90 N. J. L. 593."

This court has considered this question in *Dulberger* v. *Radli,* 105 N. J. L. 126, wherein it was said:

> "Hence a charge that in order to hold defendant for the fall of the ceiling, he should

> have actual notice of its danger, erroneously limited the scope of inquiry, and to the prejudice of the plaintiffs. The duty of inspection was laid down elsewhere in the charge, but that does not cure the error. *Niebel* v. *Winslow,* 88 N. J. Law 191, 95 Atl. 995; *State* v. *Tapack,* 78 N. J. Law 208, 72 Atl. 962; *Collins* v. *Central R. R. Co.,* 90 N. J. Law 593, 101 Atl. 287."

The same principle was restated with the citation of numerous cases in support thereof, including the decision of the Supreme Court in this case on the first trial, in *State* v. *Guarino,* 105 N. J. L. 549, at p. 553.

III.

The judgment of the Supreme Court reversing the judgment of the Essex Circuit in favor of the plaintiff is correct for the reason that there was error on the part of the trial judge in admitting in evidence a certain rule of the defendant, as that rule had no application to the station and bridge in question.

Rule 98-A of the operating department reads as follows:

> "Enginemen and trainmen on a train approaching a station on a track adjoining one where another train is receiving or discharging passengers are required to exercise great care.
>
> It is forbidden for a train to run between a station building or platform and a train standing to receive or discharge passengers, unless signalled to proceed by the yardmaster, conductor or trainman of the standing train, in which case they may proceed slowly and cautiously until their engine has passed the standing train.

> Trains running on an adjacent outer track when passing a standing passenger train are required to proceed slowly and with great care.
>
> At stations where passengers are obliged to cross other tracks in order to board a train or to get to the station or platform from a train, the conductor and trainmen are required to observe whether there is a train approaching before allowing them to do so."

This rule was offered without any evidence to support its application to the existing situation. An attempt was made by the plaintiff to prove the application of the rule by examination of some of the defendant's employees, but an objection was sustained. Thereafter the rule was admitted and exception noted (p. 70, lines 30-40; p. 71, lines 1-33).

The first paragraph of Rule 98-A refers to a situation different from that at the Bloomfield station. That rule contemplates the movement of a train on a track immediately adjoining a platform *to* which passengers are being discharged from a standing train. The second paragraph of the rule applies to the same situation. The third paragraph refers to an outer track adjacent to a platform to which passengers are being discharged by the standing train. The last paragraph obviously has no application.

IV.

Comment on Plaintiff's Brief.

In the "Statement" is set forth what purports to be a summary of the testimony. In several respects this is inaccurate and misleading.

The brief states that the judgment on the first trial was reversed by the Supreme Court "for trial errors." The opinion of the court shows that the judgment was reversed because the court thought "it was error to refuse" the motions for nonsuit and for direction of verdict (p. 17, line 35).

After so deciding, the court then proceeded to discuss alleged errors in the charge and concluded that the grounds of appeal, which alleged such errors, were well-taken (pp. 18, 19).

The brief states that the plaintiff was "unable" to see the station building. The implication from such statement is that it was too dark to see the building, but that is not what the plaintiff testified. There is nothing in his testimony to show that he even *looked* at the station building. He described conditions as "a little bit dark, fog, just like smoke" (p. 36, line 35; p. 37, line 5). He saw the water in the canal underneath the bridge and he saw the girders of the bridge in front of him (p. 37, lines 10-20).

The brief says it was "dark and foggy." Plaintiff testified "a little dark" (p. 34, line 40); plaintiff's witness Korocy although he described the condition as "dark" (p. 57, line 35), said that he saw the eastbound train "as far as Spruce Street" (p. 57, line 40). This was a distance of 400 or 500 feet from the scene of the accident. The collector also saw that train when it was at Spruce Street (p. 78, lines 20-25). Plaintiff's witness Rogers says: "It was still daylight" (p. 70, line 25).

The brief says that the eastbound train was traveling at a "fast rate of speed" and refers to the testimony of Korocy. Whalen says that when

he saw the train at Spruce Street it was "coming very slow"—"just about moving" (p. 78, line 20 to p. 79, line 15).

The brief states that no trainmen directed the passengers to the rear of the coach. This is true, as far as it goes; but it is equally true that no trainmen directed the passengers to the front of the coach. In fact, there was no proof that any member of the crew opened the front door of the first coach; plaintiff himself said "somebody opened it," but he does not know who it was (p. 60, line 35); the only door opened by Collector Whalen was the rear door of the first coach (p. 76, line 28).

The brief states that it was the "custom" for passengers to alight from the left-hand side of the train, and in support of that statement says that several passengers, other than the plaintiff, did so and that the defendant's collector stated that he looked on the other side of the train to see if everything was clear.

But there is not a word of testimony to show that any passenger, prior to the occasion of this accident, ever alighted on the left-hand side of the train, and on this occasion, according to the plaintiff, "three fellows get off" on the left-hand side (p. 40, lines 1-10).

The reference to the testimony of Whalen does not prove any *custom* for passengers to alight on the left-hand side. There is nothing in Whalen's testimony to suggest any such custom; it is true that it was the practice to make an observation on the left-hand side "before the train starts." The purpose of such observation was to see if there were any other passengers on that side who might be preparing to *board* the train—not to alight from it.

(1)

Reply to Point I of Plaintiff's Brief.

In the summary of facts under this point we again note several inaccuracies—perhaps the most glaring of which is the statement "that the plaintiff had no knowledge whatsoever as to the conditions which existed on the bridge." The fact is, that the plaintiff well knew the conditions which he found when he went out on the rear platform; the bridge was in plain sight as were also the conditions in the immediate vicinity. He was a commuter between Arlington and Bloomfield, and had lived in the latter town for twenty-one years. As stated by the Supreme Court in its opinion on the first trial, "His (plaintiff's) own testimony showed that he was familiar with the entire situation" (p. 17, line 25).

The brief states that "There is no inherent vice in leaving a railroad coach by a forward exit." Of course, that is true, but the difficulty with this case is that, as pointed out by the Supreme Court, "the plaintiff, knowing the facts, chose of his own volition and without invitation to leave the train by a dangerous exit" (p. 18, lines 1-5).

The brief cites *Gore* v. *D., L. & W. R. Co.,* 89 N. J. L. 224. We have discussed this case under Point I; we agree with the legal principles therein stated, but the situation there presented was one from which the jury might infer an invitation to alight—such is not the present case.

The brief cites *Smith* v. *D., L. & W. R. Co.,* 89 N. J. L. 643. That case is obviously different for the reason that the plaintiff was not landed at "the regular station platform."

The brief cites *Spofford* v. *Central R. R. Co.*, 89 N. J. L. 273. We have already discussed this under Point I.

The brief urges that defendant had constructed a wooden platform on the left-hand side of the train, *but there is no proof that this platform was intended for the use of passengers.* It does not afford any means of exit from the station grounds, and obviously was not so intended. It is, therefore, impossible to deduce from the mere fact of such platform a "sufficient invitation" to alight on the left-hand side, particularly in face of the warning sign forbidding all persons to go upon the bridge.

The brief cites *McCarron* v. *Erie*, 10 N. J. Misc. 498. The facts are entirely dissimilar in that there the plaintiff alighted at a point a considerable distance from the station and the court concluded, that under the circumstances it was a question of fact whether defendant impliedly permitted passengers to use the exit which was made necessary by reason of an emergency resulting from a train wreck.

The brief states that plaintiff followed other passengers in using the front exit, but omits to say that proof is lacking that the front door was opened by any member of the train crew—in fact, that proof on the point is to the contrary. The brief states that plaintiff was not directed to leave "in any manner" by an employee, but the plaintiff was forty-one years of age and, presumably, of sound mind, and was familiar with conditions and could see the dangers for himself, and he voluntarily chose to walk out the front door into a place of obvious danger, although he had full opportunity to alight from the rear door in a place of safety while the train was standing at the station for one and one-half minutes.

The brief cites the case of *Furey* v. *N. Y. Cent. R. R. Co.*, 67 N. J. L. 270. We agree with the legal principle of that case and have already discussed it under Point I.

The brief again asserts, in further discussion of the question of invitation, that defendant had permitted others to alight on the left-hand side—an assertion which, as we have previously shown, is inaccurate and misleading, as there was no proof that on any other occasion prior to this accident any passengers had alighted on the left-hand side, and on this occasion only three passengers did so.

The brief persists in misrepresenting the facts as to the "platform on the bridge"—arguing that this was intended for use of passengers. There is no proof whatever to justify such statement, and, on the contrary, the danger sign warns all persons not to go upon the bridge—of which the platform was a part.

Counsel argues that the Supreme Court, in its decision on the second trial, erroneously assumed that the facts were substantially the same as on the first trial, and then refers to what he calls "considerable new evidence."

(a) Part of this so-called new evidence, counsel says, is the violation of the rules promulgated by the company for the safety of its passengers. If this refers to Rule 98(a) (p. 71, State of Case), the answer is that the rule was erroneously admitted in evidence (see Point III of this brief); and, in any event, it had no application to the facts of the case, and if it did apply, there was no proof that it was violated.

(b) Counsel says that part of the new evidence was that passengers alighted "on either side of

westbound trains," but there was no proof of any such custom in the present case—in fact, whatever proof there was on the subject, was to the contrary, as the plaintiff himself says that ordinarily when he alighted from a westbound train at the Bloomfield station he got off *on the right-hand* side (p. 39, lines 1-12).

(c) Counsel refers to the practice of the ticket collector to make observations along the right-hand side of westbound trains. But, as we have shown, his testimony on that subject did not refer to passengers who had alighted from trains, but was for the purpose of making observations to see if there were any passengers who desired to *board* trains.

(2)

Reply to Point II of Plaintiff's Brief.

This point discusses the various grounds of appeal in the Supreme Court, which were based upon exceptions to the charge of the trial judge. The error in these instructions has been sufficiently discussed under Point II of our brief, which anticipates the argument now presented by the plaintiff, and cites additional cases in support of our position that an error in one part of the charge cannot be cured by a correct statement of the law in another part, unless the error is expressly withdrawn.

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(3)

Reply to Point III of Plaintiff's Brief.

This discusses the question of the admissibility of Rule 98 (a). We have already considered this in Point III. Nothing need be added, except to point out the manifest error in the plaintiff's brief wherein it is said that "There was a platform leading from the southerly side of the right of way to the station on the northerly side." The station was on the *southerly* side, but that platform has nothing to do with the case, as the plaintiff was not *on or near that platform* at the time of the accident.

CONCLUSION.

The judgment of the Supreme Court reversing the judgment of the Essex County Circuit Court should be affirmed.

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