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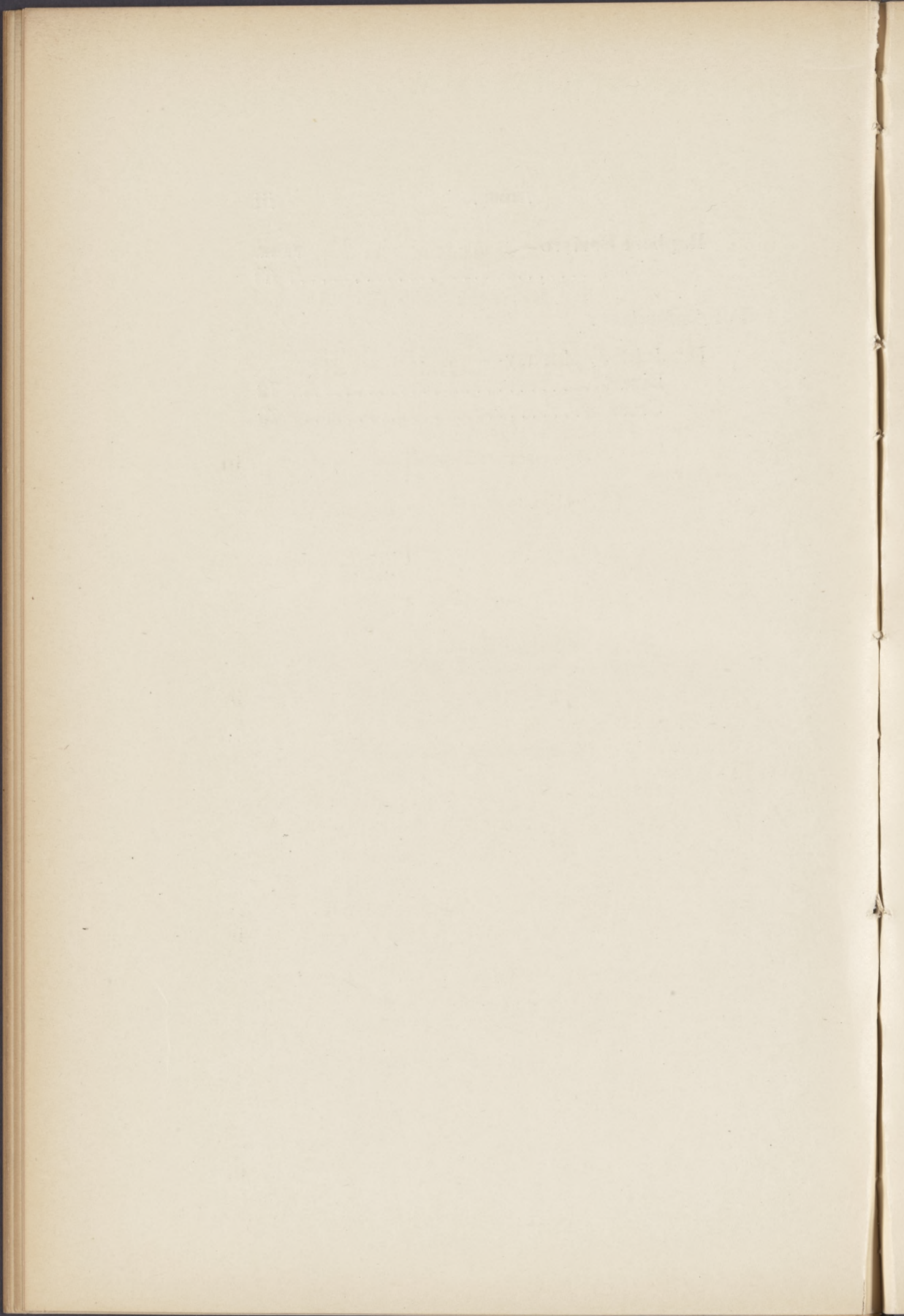
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Notice of Appeal.

(Filed March 31, 1914.)

Hudson County Circuit Court.

DOMINICK SORIERO, an infant, by
his next friend, RAFFELE
SORIERO,

Plaintiff-Appellee,

vs.

PENNSYLVANIA RAILROAD COM-
PANY,

Defendant-Appellant.

10

Action at Law.
on Appeal.

Notice of Appeal.

TO:

20

CHARLES M. EGAN, Esq.,
Attorney for Plaintiff-Appellee.

TAKE NOTICE:

That the defendant appeals to the New Jersey
Court of Errors and Appeals in the last resort in
all causes, from the whole of the judgment en-
tered in this cause.

VREDENBURGH, WALL & CAREY,
Attorneys for Defendant-Appellant.

30

Dated, March 31, 1914.

40

Notice of Appeal

(Indorsed)

HUDSON COUNTY CIRCUIT COURT.

DOMINICK SORIERO, an infant, by his next friend,
 RAFFELE SORIERO,
Plaintiff-Appellee.

vs.

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PENNSYLVANIA RAILROAD COMPANY,
Defendant-Appellant.

ACTION AT LAW.
 ON APPEAL.
 NOTICE OF APPEAL.

Service of within notice of appeal acknowledged
 this 31st day of March, 1913, A. D. 1914.

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CHAS. M. EGAN,
Attorney for Plaintiff-Appellee.

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Grounds of Appeal.

(Filed April 25, 1914)

NEW JERSEY COURT OF ERRORS AND APPEALS.

DOMINICK SORIERO, an infant, by
his next friend, RAFFELE
SORIERO,

Plaintiff-Appellee,

vs.

THE PENNSYLVANIA RAILROAD
COMPANY,

Defendant-Appellant.

Action at Law.
On Appeal from
Hudson County
Circuit Court.

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GROUND OF
APPEAL.

And now comes said defendant-appellant, THE PENNSYLVANIA RAILROAD COMPANY, by Vredenburg, Wall & Carey, its attorneys, and sets down the following grounds of appeal from the judgment of the Hudson County Circuit Court, rendered in favor of the plaintiff in above cause: 20

FIRST: Because said judgment was rendered in favor of plaintiff and against defendant, whereas by the law of the land it should have been in favor of defendant and against plaintiff.

SECOND: Because no negligence was proved against said defendant, as alleged by plaintiff. 30

THIRD: Because on the evidence in the case defendant owed no legal duty to plaintiff at the time and under the circumstances that the injury occurred.

FOURTH: Because plaintiff, at the time and place the injury occurred, was upon the property 40

Grounds of Appeal..

of defendant without its leave, license or invitation, and defendant owed plaintiff no legal duty except to refrain from wilful or wanton injury, and such injury is neither alleged nor proved in the case.

10 FIFTH: Because plaintiff, at the time and place the injury occurred, was a mere loiterer upon the highway, to whom defendant owed no legal duty except to refrain from wilful or wanton injury, and such injury is neither alleged nor proved in the case.

SIXTH: Because the Court erroneously charged the jury that "the defendant company must have used and must use that degree and amount of care which is within the range of human precaution and foresight to keep the wall in such condition as not to cause injury to a person upon the public highway."

SEVENTH: Because the Court refused to grant a nonsuit.

EIGHTH: Because the Court refused to direct a verdict in favor of defendant and against plaintiff.

30 NINTH: Because said judgment is in divers other respects erroneous and illegal.

VREDENBURGH, WALL & CAREY,
Attorneys for Defendant-Appellant.

Dated April 24, 1914.

(Service acknowledged by plaintiff's attorney
40 April 25, 1914.)

RECOGNIZANCE WAIVED.

Order for Appointment of Next Friend to
Prosecute.

(Filed November 13, 1913)

HUDSON COUNTY CIRCUIT COURT.

DOMINICK SORIERO, an infant, by
his next friend, RAFFELE
SORIERO,

Plaintiff,

vs.

PENNSYLVANIA RAILROAD COM-
PANY,

Defendant.

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To the HONORABLE WILLIAM H. SPEER, *Judge.*

The petition of Dominick Soriero, the plaintiff 20
in the above stated cause of action, humbly shows
unto your honor, that he is an infant under the
age of twenty-one years, to wit eight years, and
that he is advised that he has a good and just
cause of action against the Pennsylvania Rail-
road Companies for injuries negligently caused
to him by the said Pennsylvania Railroad Com-
pany permitting heavy stones and loose railroad
ties to fall upon him while he was on Railroad
Avenue and Merseles Street, public streets in the 30
City of Jersey City, on July 8th, 1913, whereby
his right leg was seriously and permanently in-
jured, and his face and body bruised, and he was
otherwise seriously injured so that he was un-
able to walk for upwards of five weeks, and dur-
ing which time he was subjected to great pain
and suffering.

Your petitioner, therefore humbly prays your
honor to permit him to prosecute the said action 40

Petition Appointment of Next Friend to Prosecute

by Raffele Soriero, his father, of the City of Jersey City, in the County of Hudson and State of New Jersey, as your petitioner's next friend.

DOMINIC SORIERO.

WITNESS.

I hereby consent and agree that the above named Dominick Soriero, be at liberty to prosecute this action by me as his next friend, according to the prayer of the above petition.

10

RAFFAELE SORIERO.

Dated November 12th, 1913.

STATE OF NEW JERSEY, }
County of Hudson, } ss.:

WILLIAM DAVIS, being duly sworn on his oath, says, that he was present and saw Dominick Soriero, the Plaintiff named in the foregoing cause of action, sign the foregoing petition, and also that he was present and saw Raffele Soriero, the person named in the foregoing petition, sign the consent thereunder written; that they were signed on the 12th day of November, Nineteen hundred and thirteen.

20

WILLIAM DAVIS.

Sworn to and subscribed before me
this 12 day of November, 1913.

FRANK M. HARDENBROOK,
Master in Chancery of New Jersey.

30

Order for Appointment of Next Friend to Prosecute.

(Filed November 13, 1913)

HUDSON COUNTY CIRCUIT COURT.

DOMINICK SORIERO, an infant, by
his next friend, RAFFELE
SORIERO,

Plaintiff,

vs.

PENNSYLVANIA RAILROAD COM-
PANY,

Defendant.

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It appearing upon reading the petition of Dominick Soriero, and the consent of Raffele Soriero thereunder, written, and the affidavit of William Davis thereto attached, that the said Dominick Soriero is advised that he has a good cause of action against the said Pennsylvania Railroad Company, and is an infant under the age of twenty one years; 20

It is on the motion of Charles M. Egan, attorney of plaintiff,

ORDERED, that Raffele Soriero, be admitted to prosecute the said cause of action for the said Dominick Soriero in the aforesaid Court, against the said Pennsylvania Railroad Company, as the next friend of the said Dominick Soriero. 30

WM. H. SPEER,
Judge.

Complaint.

(Filed November 22, 1913)

The defendant was summoned to answer unto said plaintiff therein in an action at Law upon the following complaint.

The plaintiff residing in Jersey City, Hudson County, New Jersey, says that:—

10 1st. That on the 13th day of November, 1913, Raffele Soriero was appointed next friend of Dominick Soriero, an infant, by the Judge of the Hudson County Circuit Court for the purposes of this action.

2nd. The defendant is a corporation, and as such operates a railroad upon Railroad Avenue in the City of Jersey City, Hudson County, New Jersey.

20 3rd. That the said defendant on the 8th day of July, 1913, caused certain railroad ties to be piled up and certain heavy stones to be placed thereon on its property, immediately adjoining Railroad Avenue and Merseles Street, the same being public streets and highways in said City of Jersey City.

30 4th. That the defendant so carelessly and negligently maintained the said pile of railroad ties and the stones thereon in such close proximity to said public street and highways, that on the said day the same were negligently and carelessly permitted to fall upon the said Dominick Soriero, who was then and there lawfully upon said public highways.

40 5th. That by reason whereof the right leg of said Dominick Soriero was seriously and permanently injured and his face and body bruised and

Complaint

he was otherwise seriously injured so that he was unable to walk for upwards of five weeks, and during which time he was subjected to great pain and suffering to his damage in the sum of \$3000.00.

Plaintiff demands as damage \$3000.00.

CHARLES M. EGAN,
Plaintiff's Attorney.

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Answer.

(Filed November 26, 1913)

THE DEFENDANT ANSWERS AS FOLLOWS:

The defendant, a corporation organized and existing under and by virtue of the Laws of the Commonwealth of Pennsylvania, having an office and place of business at No. 26 Exchange Place in the City of Jersey City, County of Hudson and State of New Jersey, says that

10 It denies the truth of the matters contained in the complaint.

VREDENBURGH, WALL & CAREY,
Attorneys of Defendant.

Amended Complaint.

(Filed January 22, 1914)

The Plaintiff residing in Jersey City, Hudson County, New Jersey, says that:

1st. That on the 13th day of November, 1913, Raffele Soriero was appointed next friend of Dominick Soriero, an infant, by the Judge of the Hudson County Circuit Court for the purpose of this action.

10

2nd. The defendant is a corporation, and as such operates a railroad upon Railroad Avenue in the City of Jersey City, Hudson County, New Jersey.

3rd. That immediately north of Railroad Avenue in the City of Jersey City, County of Hudson, N. J., the defendant at all times hereinafter mentioned maintained an embankment upon which it operated certain of its cars, engines and trains.

20

4th. That along the lower part of said embankment this defendant maintained a stone wall of some five feet in height, behind which is located the aforesaid embankment.

5th. That the said stone wall is constructed of stones varying in size from one to two cubic feet, and are piled one upon another without any mortar or cement to hold them together, and that the upper tier of said stones are and at the time hereinafter mentioned were very loose and without anything whatever to hold them in place and many of which overhung and projected from the face of said wall.

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6th. That immediately at the foot of said wall is an open and unenclosed strip of level ground im-

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Amended Complaint

mediately adjoining and on a level with what would be the public sidewalk had one been laid by the City along the said Avenue at that point, and that said open and uninclosed space was at said time and for a long period of time prior thereto had been used as a play ground for the numerous children living in that neighborhood, and all which facts were well known to the defendant.

10

7th. That it then and there became the duty of the defendant to cause the said stone wall to be maintained in a reasonably safe condition.

8th. That on the 8th day of July, 1913, the said Dominick Soriero was with other children lawfully upon said open strip of ground immediately at the foot of said wall, and at a point immediately opposite #361 Railroad Avenue.

20

9th. That the said defendant at the said time and place so negligently and carelessly maintained the said stone wall, and that one of the loose stones upon the top thereof, was negligently and carelessly permitted to fall upon the said Dominick Soriero.

10th. That by reason whereof the right leg of said Dominick Soriero was seriously and permanently injured and his face and body bruised and he was otherwise seriously injured so that he was unable to walk for upwards of and during which time he was subjected to great pain and suffering, to his damage in the sum of \$3000.00.

30

Plaintiff demands as damage \$3000.00.

CHAS. M. EGAN,
Plaintiff's Atty.

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Amended Answer.

(Filed December 22, 1913).

The Defendant, a corporation organized and existing under the laws of the Commonwealth of Pennsylvania, and having an office and place of business at No. 26 Exchange Place in the City of Jersey City, County of Hudson, State of New Jersey, says that—

FIRST DEFENSE.

10

1. Defendant neither admits nor denies paragraph 1 of the Amended Complaint, not having sufficient knowledge or information thereof to form a belief, and leaves plaintiff to the production of his proof thereof.

2. It admits so much of paragraph 2 of the Amended Complaint as alleges that defendant is a corporation, but denies all the rest and remainder of said paragraph 2 as alleged. 20

3. It admits paragraph 3 of the Amended Complaint substantially as alleged.

4. It admits paragraph 4 of the Amended Complaint substantially as alleged.

5. It admits so much of paragraph 5 of the Amended Complaint as alleges that the stone wall therein referred to is constructed of stones varying in size from one to two cubic feet, but denies all the rest and remainder of said paragraph 5 as alleged. 30

6. It admits so much of paragraph 6 of the Amended Complaint as alleges that immediately at the foot of said wall is an open and unenclosed strip of level ground, but denies all the rest and remainder of said paragraph 6 as alleged. 40

Amended Answer

7. It denies paragraph 7 of the Amended Complaint as alleged.

8. It neither admits nor denies paragraph 8 of the Amended Complaint, not having sufficient knowledge or information thereof to form a belief, and leaves plaintiff to the production of his proof thereof.

10 9. It denies paragraph 9 of the Amended Complaint as alleged.

10. It neither admits nor denies paragraph 10 of the Amended Complaint, not having sufficient knowledge or information thereof to form a belief, and leaves plaintiff to the production of his proof thereof.

SECOND DEFENSE.

20

Plaintiff, Dominick Soriero, an infant, &c., contributed to his own injury, if any, as alleged in the Amended Complaint, in that while upon the property of the defendant, without its consent or invitation, he, by his own negligent acts, caused the stone or stones to fall upon him as in said Amended Complaint alleged.

THIRD DEFENSE.

30

The alleged injury to said plaintiff, Dominick Soriero, an infant, &c., was caused by the acts of some third person or stranger, and not by the defendant, or by any one acting for it, or in its behalf.

VREDENBURGH, WALL & CAREY,
Attorneys for Defendant.

Verdict.

This action was tried before Judge Luther A. Campbell, with a jury at the Hudson Circuit on March 12, 1914.

The cause having been heard and submitted to the jury, they returned their verdict as follows: They say that they find for the plaintiff and against the Defendant and they assess the damages of the plaintiff on occasion of the premises at the sum of Five Hundred (\$500.00) Dollars.

Whereupon it is adjudged that the plaintiff recover of the defendant the sum of Five Hundred (\$500.00) Dollars and his costs which are taxed at the sum of Seventy-five and 85/100 (\$75.85) Dollars, making in the whole the sum of Five hundred and Seventy-five Dollars and eighty-five cents (\$575.85).

Judgment entered this March 12, 1914.

LUTHER A. CAMPBELL,
Judge.

Attest:

JOHN F. CROSBY,
Clerk.

(Seal)

The answer of Luther A. Campbell, Esquire, Judge of the Circuit Court, holden in and for the County of Hudson, and within named the record and proceedings of the Plaint whereof mention is within made with all things touching the same, I send to the Judges of our Court of Errors and Appeals of the last resort of all causes at Trenton, N. J., at the day and year within contained, in a certain schedule to this appeal annexed as within I am commanded

LUTHER A. CAMPBELL,
Judge.

Notice of Appeal.

(Filed March 31, 1914)

HUDSON COUNTY CIRCUIT COURT.

RAFFELE SORIERO,
Plaintiff-Appellee,

vs.

10

PENNSYLVANIA RAILROAD COM-
PANY,
Defendant-Appellant.

Action at Law
on Appeal.

Notice of Appeal.

TO:

CHARLES M. EGAN, Esq.,
Attorney for Plaintiff-Appellee:

20 TAKE NOTICE that the defendant appeals to the
New Jersey Court of Errors and Appeals, in the
last resort in all causes from the whole of the
judgment entered in this cause.

Dated March 31st, 1914.

VREDENBURGH, WALL & CAREY,
Attorneys for Defendant-Appellant.

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Indorsed.

HUDSON COUNTY CIRCUIT COURT.

RAFFELE SORTERO,
Plaintiff-Appelle,

vs.

PENNSYLVANIA RAILROAD COMPANY,
Defendant-Appellant.

10

ACTION AT LAW.
ON APPEAL.
NOTICE OF APPEAL.

Service of within notice of appeal acknowledged
this 31st day of March, A. D., 1914.

CHAS. M. EGAN,
Attorney for Plaintiff-Appellee.

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Grounds of Appeal.

(Filed April 25, 1914)

NEW JERSEY COURT OF ERRORS AND APPEALS.

10	RAFFELE SORIERO, <i>Plaintiff-Appellee,</i> <i>vs.</i>	Action at Law. On Appeal from Hudson Circuit Court.
	THE PENNSYLVANIA RAILROAD COMPANY, <i>Defendant-Appellant.</i>	

GROUNDS OF
APPEAL.

And now comes said defendant-appellant, THE PENNSYLVANIA RAILROAD COMPANY, by Vreden-
 20 burgh, Wall & Carey, its attorneys, and sets down the following grounds of appeal from the judgment of the Hudson County Circuit Court, rendered in favor of the plaintiff in above cause:

FIRST: Because said judgment was rendered in favor of plaintiff and against defendant, whereas by the law of the land it should have been in favor of defendant and against plaintiff.

30 SECOND: Because no negligence was proved against said defendant, as alleged by plaintiff.

THIRD: Because on the evidence in the case, defendant owed no legal duty to Dominick Soriero at the time and under the circumstances that the injury occurred, and plaintiff's right to recover is dependent upon the right of said Dominick Soriero.

40

Grounds of Appeal

FOURTH: Because Dominick Soriero, at the time and place the injury occurred, was upon the property of defendant without its leave, license or invitation, and defendant owed Dominick Soriero no legal duty except to refrain from wilful or wanton injury, and such injury is neither alleged nor proved in the case.

FIFTH: Because Dominick Soriero, at the time and place the injury occurred, was a mere loiterer upon the highway, to whom defendant owed no legal duty except to refrain from wilful or wanton injury, and such injury is neither alleged nor proved in the case. 10

SIXTH: Because the Court erroneously charged the jury that "the defendant company must have used and must use that degree and amount of care which is within the range of human precaution and foresight, to keep the wall in such condition as not to cause injury to a person upon the public highway." 20

SEVENTH: Because the Court refused to grant a nonsuit.

EIGHTH: Because the Court refused to direct a verdict in favor of defendant and against plaintiff. 30

NINTH: Because said judgment is in divers other respects erroneous and illegal.

VREDENBURGH, WALL & CAREY,
Attorneys for Defendant-Appellant.

Dated April 24, 1914.

(Service acknowledged by plaintiff's attorney,
April 25, 1914.)

Complaint.

(Filed October 21, 1913)

**CIRCUIT COURT HOLDEN IN AND FOR THE
COUNTY OF HUDSON.**STATE OF NEW JERSEY, }
County of Hudson, } ss.:

10

RAFFELE SORIERO,
*Plaintiff,**vs.*PENNSYLVANIA RAILROAD COM-
PANY, a corporation,
Defendant.

Complaint.

Action at Law.

20 The defendant was summoned to answer unto said plaintiff therein in an action at Law upon the following complaint.

The plaintiff residing in Jersey City, Hudson County, New Jersey, says that:

1st. The defendant is a corporation and as such operates a railroad upon Railroad Avenue in the City of Jersey City, County of Hudson and State of New Jersey.

30

2nd. The plaintiff is the father of Dominick Soriero, an infant of the age of eight years, and as such is entitled to the services and earnings of said infant.

40

3rd. That the said defendant on the 8th day of July, 1913, caused certain railroad ties to be piled up and certain heavy stones to be placed thereon on its property immediately adjoining Railroad

Complaint

Avenue and Merseles street, the same being public streets and highways in said City of Jersey City.

4th. That the defendant so negligently and carelessly maintained the said pile of railroad ties and the stones thereon in such close proximity to said public streets and highways, that on the said day the same were negligently and carelessly permitted to fall upon the said Dominick Soriero, who was then and there lawfully upon said public highways. 10

5th. That by reason whereof the right leg of said Dominick Soriero was seriously and permanently injured and his face and body bruised and he was otherwise seriously injured so that he was unable to walk for upwards of five weeks, during which time and for a long period of time thereafter he was unable to render and perform such services for the plaintiff as he had theretofore rendered and performed. 20

6th. That a reasonable value of the said services of his said son to the plaintiff is \$500.00.

7th. That the plaintiff was compelled to expend upwards of \$100.00 for nurses and medical attendance and medical services to heal his said son of the said injuries.

Plaintiff demands \$100.00 damages. 30

CHAS. M. EGAN,
Plaintiff's Attorney.

Answer.

(Filed November 7, 1913)

THE DEFENDANT ANSWERS AS FOLLOWS:

The defendant, a corporation organized and existing under the laws of the Commonwealth of Pennsylvania, and having an office and place of business at No. 26 Exchange Place in the City of Jersey City, New Jersey, says that:

- 10 1. It denies the truth of the matters contained in the complaint.

VREDENBURGH, WALL & CAREY,
Attorneys of Defendant.

Amended Complaint.

(Filed January 22, 1914)

- 20 The plaintiff residing in Jersey City, Hudson County, New Jersey, for an amended complaint after leave of the court first had and obtained, says:

1st. That the defendant is a corporation and as such operates a railroad upon Railroad Avenue in the City of Jersey City, County of Hudson, and State of New Jersey.

- 30 2nd. The plaintiff is the father of Dominick Soriero, an infant of the age of eight years, and as such is entitled to the services and earnings of said infant.

3rd. That immediately north of Railroad Avenue in the City of Jersey City, County of Hudson, N. J., the defendant at all the times hereinafter mentioned, maintained an embankment upon

Amended Complaint

which it operated certain of its cars, engines and trains.

4th. That along the lower part of said embankment this defendant maintained a stone wall of some five feet in height, behind which is located the aforesaid embankment.

5th. That the said stone wall is constructed of stones varying in size from one to two cubic feet, 10 and are piled one upon another without any mortar or cement to hold them together, and that the upper tier of said stones are and at the time hereinafter mentioned were very loose and without anything whatever to hold them in place and many of which overhung and projected from the face of said wall.

6th. That immediately at the foot of said wall is an open and unenclosed strip of level ground 20 immediately adjoining and on a level with what would be the public side walk had one been laid by the City along the said Avenue at that point, and that said open and unenclosed space was at said time and for a long period of time prior thereto had been used as a play ground for the numerous children living in that neighborhood, and all which facts were well known to the defendant.

7th. That it then and there became the duty of the defendant to cause the said stone wall to be maintained in a reasonably safe condition. 30

8th. That on the 8th day of July, 1913, the said Dominick Soriero was with other children lawfully upon said open strip of ground immediately at the foot of said wall, and at a point immediately opposite #361 Railroad Avenue. 40

Amended Complaint

9th. That the said defendant at the said time and place so negligently and carelessly maintained the said stone wall, and that one of the loose stones upon the top thereof was negligently and carelessly permitted to fall upon the said Dominick Soriero.

10 10th. That by reason whereof, the right leg of said Dominick Soriero was seriously and permanently injured and his face and body bruised and he was otherwise seriously injured so that he was unable to walk for upwards of four months, during which time and for a long period of time thereafter he was unable to render and perform such services for the plaintiff as he had theretofore rendered and performed.

20 11th. That the plaintiff was compelled to expend upwards of \$100.00 for nurses, medical attendance and medical services to heal his said son of the said injuries.

Plaintiff demands \$1000.00 damages.

CHAS. M. EGAN,
Attorney for Plaintiff.

Amended Answer.

(Filed December 22, 1913)

The defendant, a corporation organized and existing under the laws of the Commonwealth of Pennsylvania, and having an office and place of business at No. 26 Exchange Place, in the City of Jersey City, County of Hudson, State of New Jersey, says that:—

FIRST DEFENCE.

10

1. Defendant admits so much of Paragraph 1 of the Amended Complaint as alleges that it is a corporation, but denies all the rest and remainder of said paragraph 1 as alleged.

2. It neither admits nor denies paragraph 2 of the Amended Complaint, not having sufficient knowledge or information thereof to form a belief, and leaves plaintiff to the production of his proof thereof. 20

3. It admits paragraph 3 of the Amended Complaint substantially as alleged.

4. It admits paragraph 4 of the Amended Complaint substantially as alleged.

5. It admits so much of paragraph 5 of the Amended Complaint as alleges that the stone wall therein referred to is constructed of stones varying in size from one to two cubic feet, but denies all the rest and remainder of said paragraph 5 as alleged. 30

6. It admits so much of paragraph 6 of the Amended Complaint as alleges that immediately at the foot of said wall is an open and unenclosed strip of level ground, but denies all the rest and remainder of said paragraph 6 as alleged. 40

Amended Answer

7. It denies paragraph 7 of the Amended Complaint as alleged.

8. It neither admits nor denies paragraph 8 of the Amended Complaint, not having sufficient knowledge or information thereof to form a belief, and leaves plaintiff to the production of his proof thereof.

10 9. It denies paragraph 9 of the Amended Complaint as alleged.

10. It neither admits nor denies paragraphs 10 and 11 of the Amended Complaint, not having sufficient knowledge thereof to form a belief, and leaves plaintiff to the production of his proof thereof.

SECOND DEFENCE.

20 Dominick Soriero, an infant, &c., of whom plaintiff is the father, contributed to his injury, if any, as alleged in the Amended Complaint, in that while said infant was upon the property of the defendant, without its consent or invitation, he, by his own negligent act, caused the stone or stones to fall upon him as in said Amended Complaint alleged.

THIRD DEFENCE.

30 The alleged injury to said Dominick Soriero, an infant, &c., was caused by the acts of some third person or stranger, and not by the defendant or by any one acting for it or in its behalf.

VREDENBURGH, WALL & CAREY,
Attorneys for Defendant.

Verdict.

This action was tried before Judge Luther A. Campbell, with a jury at the Hudson Circuit on March 12, 1914.

The cause having been heard and submitted to the jury, they returned their verdict as follows:— They say, that they find for the Plaintiff and against the Defendant and they assess the damages of the Plaintiff on occasion of the premises at the sum of Thirty-seven (\$37.00) Dollars.

Whereupon it is adjudged that the Plaintiff recover of the Defendant the sum of Thirty-seven (\$37.00) dollars making in the whole the sum of Thirty-seven (\$37.00) Dollars. 10

Judgment entered this March 12, 1914.

LUTHER A. CAMPBELL,
Judge.

Attest:—

JOHN F. CROSBY,
Clerk.

(Seal)

20

The answer of Luther A. Campbell, Esquire, Judge of the Circuit Court, holden in and for the County of Hudson, and within named the record and proceedings of the Plaint whereof mention is within made with all things touching the same, I send to the Judges of our Court of Errors and Appeals of the last resort of all causes at Trenton, N. J., at the day and year within contained, in a certain schedule to this appeal annexed as within I am commanded 30

LUTHER A. CAMPBELL,
Judge.

Testimony.

Mr. Egan: If the Court please, I will offer a stipulation that has been signed by the defendant company which reads as follows, in both cases:

10 It is admitted for the purposes of the trial of the above action that the defendant is the lessee of, the owner and in possession of the land covered by the defendant's embankment and wall abutting upon and immediately adjoining the public sidewalk on the northerly side of Railroad avenue, in Jersey City, Hudson County, New Jersey, and opposite to No. 361 Railroad avenue. (Signed) Charles M. Egan, plaintiff's attorney. Vredenburg, Wall & Carey, defendant's attorney."
(Paper marked Exhibit P 1.)

20 Mrs. *Josephine Nunziata*, sworn and examined through Italian interpreter:

Direct-examination by Mr. Egan:

Q. Are you married, Mrs. Nunziata? A. Yes.

Q. Have you a family? A. Yes, sir.

Q. Your husband is living? A. Yes, sir.

Q. You live with your family? A. Yes, sir.

Q. Where, Mrs. Nunziata? A. 323 Railroad avenue, Jersey City.

30 Q. Do you recall on or about the 8th day of July last having seen Dominick Soriero—stand up, Dominick. A. Yes, sir.

Q. That is the child who is standing over there on the front row? A. Yes.

Q. Did you see any accident happen to this boy on that day, Mrs. Nunziata? A. I know that in the evening, about seven or half past seven, I don't know the exact time, I was sitting down on the

Josephine Nunziata, for Plaintiff—Direct

rock outside taking fresh air, on the corner of Railroad avenue and Merseles street; I was listening to the children singing at the time as they sing in school; all at once a rock fell down and then he was struck on his feet.

Q. Where did the rock come from, Mrs. Nunziata? A. From the wall.

Q. From what wall? A. The wall of the track.

Q. The wall of the track; that is the railroad track? A. Yes, sir. 10

Q. Now describe to the jury as well as you can the kind of a wall there is there? A. Don't you know the wall that consists of blocks of stone and then it is all loose.

Q. Stones are loose; do you mean they are not cemented by mortar or anything?

Mr. Carey: Objected to as leading.

Q. What do you mean when you say they are loose? A. They are about to fall down. 20

Q. They are about to fall down. How long have you lived about there, Mrs. Nunziata? A. You mean the present address?

Q. Yes. A. That I have lived in Jersey City?

Q. No; but where this accident happened, how long have you lived there? A. Three or four months.

Q. Three or four months; did you live there during the month of July? A. Yes.

Q. Well, now, before the month of July how many months did you live there? A. Three or four months previous to this accident. 30

Q. Did you notice the condition of the wall previous to this accident? A. No, sir.

Q. What was the condition of the wall on this day that you saw the stone fall?

Mr. Carey: I object. The condition of the wall at the particular place ought to be—

Josephine Nunziata, for Plaintiff—Direct

Q. Well, just where this accident happened where the stone fell upon this child? A. They were all about to fall where the boys were.

Q. You say you saw the stone fall on the child? A. Yes.

Q. How far away were you from where the stone fell? A. How far away from the child? A. About from where I am now to the chairs over there, more or less.

10 Q. What was the child doing at the time the stone fell? A. They were sitting down singing as they sing in schools.

Q. You say they; were there more than he there? A. I didn't count them, but there were three or four there.

Q. When the stone fell where did it go to? A. On the leg of this boy.

Q. On the leg of the boy. Just describe to the jury what the stone did when it went on the leg
20 of the boy; what his position was. A. It all at once went down.

Q. When the stone went on the boy's leg what happened to the boy? A. I heard the boy hollering and then his leg was covered with blood.

Q. What did the boy do when the stone fell on him? A. Started to cry.

Q. Did he get up and walk, or what? A. No, sir; the mother picked him up.

Q. How big was this stone which fell on him?
30 A. She says a big stone, indicating this way.

Mr. Hardenbrook: Let the record show about two or three feet, Mr. Carey.

Mr. Carey: I don't know that the record shows anything about size of this particular stone.

Mr. Egan: She indicates.

Mr. Hardenbrook: Let it indicate what she
40 shows—two or three feet square.

Josephine Nunziata, for Plaintiff—Cross

Q. How big was this stone? (Witness indicates.)

The Court: She shows one dimension. Ask her how wide it was.

Q. How big, about, was this stone as far as you can measure it? A. I didn't measure it. I only can see about by my eyes, nothing else.

Q. Then according to the size as it is in your mind, how long do you think it was? Say one foot, 10 three feet or five feet or two feet? A. She says it was one—meaning it was one stone.

The Court: Ask her to show how long this stone was.

(Witness illustrates with hands.)

The Court: Can you estimate how much that is, gentlemen?

Mr. Hardenbrook: Let the record show two and a half feet length.

Mr. Carey: I suppose it is two to two and 20 a half feet.

The Court: How wide was the stone?

(Witness indicates with hands.)

The Interpreter: She says don't you know I didn't measure the stone. I see with my own eyes it was this way, indicating the same thing she did before.

Mr. Egan: I can bring it out by others.

Cross-examination by Mr. Carey:

30

Q. What time of the day was this? A. It was not in day time; it was toward evening, about seven or half past seven.

Q. Was it light or dark? A. It was still clear—light.

Q. Were the street lamps lit? A. Yes; there was light there at the time, yes.

Q. Were the street lights lighted? A. Yes, sir. (1)

Josephine Nunziata, for Plaintiff—Cross

Q. How near was the nearest light on this place? A. The light was very near from the place where I am now indicating here to this gentleman (indicating the stenographer)—three or four paces, I don't know.

Q. How far away from the children? A. From here where I am now, meaning herself, up to the chair there (indicating).

Q. What were the children standing on? A.
10 They were sitting down on some ties—boards.

Q. Sitting down on what? A. These boards—logs they use on the road.

Q. What kind of boards? A. Wood.

Q. How long were those boards? A. From here where I am down there (indicating counsel table).

Q. What were the boards used for? A. Firewood.

Q. Where did they come from? A. I don't know. They were there. I don't know where
20 they came from.

Q. Were they pieces of wood on which railroad rails are laid? A. Yes, sir.

Q. How many of those boards or railroad ties were there in the pile? A. Five or six.

Q. How many children were singing there? A. Three or four.

Q. Who were the other children? A. I don't know who they were.

Q. Did you know Dominick before that day?
30 A. Yes, sir.

Q. How far did he live from you? A. We lived nearby.

Q. You don't know any of the other children who were with him? A. No, sir; I do not.

Q. How high was this pile of ties? A. She says indicating here this way.

Q. That is about three feet? A. She says the second step here.

Josephine Nunziata, for Plaintiff—Cross

The Court: That is about two feet—scarcely, I guess. Two steps high, she says.

Mr. Carey: All right; if you say two feet.

Mr. Hardenbrook: I don't know. Does it to you? Anything you like.

A Juror: Eleven inches.

Mr. Carey: I suppose that is fifteen or eighteen inches.

Mr. Egan: That seems to be right.

10

Q. How long had you seen these children before the accident happened? A. About three-quarters of an hour or a half hour.

Q. They had been playing on the pile of ties during that time? A. They were sitting down.

Q. Sitting there all that time? A. Yes; they were singing.

Q. Singing all the three-quarters of an hour? A. Yes, sir.

Q. What were they singing? A. I don't understand the English language and I don't know what the words were. 20

Q. Were they singing in English? A. Yes.

Q. Was Dominick singing? A. Yes, sir.

Q. Had you seen them playing on this pile of ties before that day? A. No, sir.

Q. Were they facing the wall, or were their faces toward the wall? A. Yes, sir; their faces and legs were toward the wall.

Q. Were their faces toward you? A. No, sir; they were facing the railroad tracks. 30

Q. Their backs towards you? A. Yes, sir.

Q. Where did this stone come from that fell? A. From the wall.

Q. How high on the wall? A. So high—indicating the way she indicates.

Q. Well, so high from what? A. (The interpreter:) She argues with me.

Mr. Egan: Suppose we have her indicate by standing up. 40

Josephine Nunziata, for Plaintiff—Cross

Q. Won't you tell us how high from the floor here? A. So high (indicating).

Q. Stand up, won't you? A. She says the children were playing here.

Q. Wait a minute. Suppose the ties were down here on this floor. A. All right, the ties were here and here is the wall where she indicates and from that wall the stone fell down.

10 Q. Did it come from the top of the wall or from the side of the wall? A. She says from the top and from the side.

Q. From the top and the side both? A. She thinks now from the side.

Q. From the side of the wall? A. Yes; she says sure.

Q. Were there other stones on top of this one that fell? A. No, sir.

Q. How high was the wall? A. More than the length of a man—height.

20 Mr. Egan: More than what?

The Interpreter: The height of a man.

Q. Any other stones fall at that time? A. No, sir; I didn't see that.

Q. What did you do after the stone fell? A. Nothing else. I see the boy was covered with blood, and the mother took the boy away and everybody went home his own way.

Q. Didn't you do anything at all? A. No, sir.

30 Q. Was there anybody there with you? A. No, sir.

Q. What made the stone come down? A. Don't you know, the stone fell down; it was also some dirt attached to it.

The Court: Better ask the question again.

A. Nothing else.

40 Q. Just fell, that is all? A. Yes, sir.

Josephine Nunziata, for Plaintiff—Cross

Q. You had not noticed this stone that fell before the time that it fell? A. No, sir.

Q. You had not noticed any of the other stones before this one fell? A. No, sir.

Q. Did you see the children climbing up on top of that wall?

(Objected to as improper cross-examination. Question permitted.)

A. No, sir; they were sitting down. 10

Q. A little while before this did you see the children climbing up the wall? A. No, sir.

Q. Had you seen children sitting on this pile of ties before the day this boy was hurt? A. No, sir; I didn't pay no attention.

Q. Never saw the children around there before the day this boy was hurt? A. I didn't pay any attention.

Q. Well, did you see anybody there without paying attention? A. No, sir. 20

Q. Never saw anybody around that wall until the day this boy was hurt? A. No, sir.

Q. Are you related to this boy in any way? A. Yes, sir.

Q. How? A. The father is my brother-in-law.

Q. Then this child is your nephew, is he? A. Yes, sir.

Q. Is the mother of this child your sister? A. Yes, sir.

Q. Now you say this stone was about that long —two feet or two feet and a half? A. She says it was about that length, but I don't know anything about measurements. 30

Q. How thick was the stone? A. It was big this way.

Q. That is eighteen inches thick? A. I don't know. She doesn't understand inches.

Q. Well, about that thick? (Indicating.) A. Sure.

Josephine Nunziata, for Plaintiff—Cross

Q. That is eighteen inches, I suppose. How wide? A. I see it was a big stone like this; I didn't measure the stone, I don't know anything about the length.

Q. Show me with your hands how wide it was? A. It was so big. (Indicating.)

Q. Two feet and a half. Was Dominick's foot on the ground or on the ties? A. Well, she says they were sitting down on these ties and then
10 the boy was—all had their feet on the wood itself.

Q. On the other ties? A. On the wood itself.

Q. Where did this stone strike Dominick? A. She says on the low part of the leg, and she says there was a hole here and a hole on the back (indicating left leg).

Q. When did you see these holes? A. When they took hold of the boy and they carried him home and the doctor came and dressed the wounds.

Q. You didn't see them until the doctor came?
20 A. Yes.

Q. Who was the doctor? A. Hetherington.

Q. Did he come that night? A. Yes, sir.

Q. How near to Dominick were the other children sitting? A. Only a small distance between one another; they were all there.

Q. Was he on the end or in the middle? A. On the outside.

Q. On the end? A. On the end.

Q. How near to him was the next child? A. I
30 didn't measure; I don't know; there was one here and one over there.

Q. Show me about how far apart with your hands? (Witness indicates.) She says this way; I don't know; I didn't measure the distance.

Q. Eighteen inches? A. I don't know.

The Court: She may not know that method of measurement. She may know the metric
40 measurement.

Tobias Scarpo, for Plaintiff—Direct

Mr. Carey: I don't know.

The Court: We had experience with that one day last week.

Q. Did more than one stone fall? A. Only one.

TOBIAS SCARPO, SWORN.

Direct-examination by Mr. Egan:

10

Q. Can you speak English, Tobias? A. Yes.

Q. Do you remember the 8th day of July, 1913, having seen this child, Soriero? A. Yes; I seen at night time, about half past seven.

Q. Now just tell the Court and jury what happened about half past seven? A. Well, I was looking on the window, you know—

Q. On where? A. On the window, on across the street from where I live.

20

Q. What number do you live at? A. 357.

Q. Where did you see this child? A. I seen that child sitting down on top of the ties, you know.

Q. In front of what number, if you know, was he sitting? A. 357 Railroad avenue.

Q. He lived in 357? A. I did.

Q. Do you know just about in front of what? A. Right across the street on the railroad.

Q. All right. State what you saw then from your window? A. And I was looking on the window and I saw the child, sitting down on the ties; he was across on the other side of the street.

Q. Talk slowly. A. And I see a child singing, don't you know—I see about three or four children around there, and after that I looked out again the window and I seen the child got hurt.

Q. How did he get hurt? A. The stone fall upon him.

40

Tobias Scarpo, for Plaintiff—Direct

Q. Did you see the stone fall from the railroad?

A. No, sir.

Mr. Carey: I object and ask to have his testimony stricken out that the stone fell from the railroad. He says he did not see it fall.

10 The Court: It will be struck out unless he is able to show us some reason why he does know it. He may be able to show how he knows it. If he does it may remain, otherwise it will go out.

Q. Do you know how the child was hurt? A. I seen the old woman come, all run after him.

Q. What? A. I seen all the women go after him and take the child and lay it down on the street.

Q. Was the child lying in the street? A. Yes; I see the old women take him in the arms.

20 Q. Who was the old woman? A. Don't remember now.

Q. Do you know who she is? A. Down there.

Q. What is her name? A. I don't know her name.

Q. Was it the mother of the child? A. The mother.

Q. Did you see him in the street? A. On the street, yes.

30 Q. What was his condition when you saw him on the street? A. I seen the condition was laying down in the street.

Q. He was lying down in the street? A. Yes.

Q. What else happened to him? A. I never knew nothing about it; I see all the child there.

Q. What else was his condition besides lying on the street? A. He was laying down, you know, all full of blood, you know.

40 Q. Where was the blood coming from? A. Com-

Tobias Scarpo, for Plaintiff—Direct

ing down the stone, I guess. I guess it smashed his leg.

Mr. Carey: I ask that it be stricken out.

The Court: Strike it out.

Q. What part of his body was the blood coming from? A. Coming from here. (Indicating left leg.)

Q. From his leg? A. Yes.

The Court: Ask him if he stood in his 10
home and saw all this from the window, or whether he went to the boy. It may make a very great difference.

Q. Where did you see all this from? A. I saw on the window and I see the old woman.

Q. All right. You saw all the women, you say. Did you stay there all the time at the window?

A. No, sir; I went down stairs to see what was the matter with him.

Q. When you went down stairs where did you go? A. I see the child.

Q. Where did you see the child from down stairs? A. He was over here—down there.

Q. Did you go over to where the child was? A. Yes.

Q. How far were you away from the child when you saw him? A. I was up in the window.

Q. When you went down from the window and went over to where the child was were you up 30
alongside of him? A. Yes; I was alongside.

Q. You found him lying down? A. Laying down.

Q. Were there any stones around him at all? A. I saw only one.

Q. Where was it? A. It was a little far of him after he got hurt.

Tobias Scarpo, for Plaintiff—Cross

By the Court:

Q. What further did you see? A. About a foot or so.

By Mr. Egan:

Q. About a foot or two away from him? A. Yes.

Q. Did you notice anything on the stone? A. I know nothing about that.

10 Q. What? A. I know nothing about that.

Q. You don't know nothing about it?

The Court: I think, Senator, I will have to accede to the request of your opponent that that part of his testimony be stricken out where he says he was hit with the stone, because he has not seemingly connected it up so as to show he saw the actual happening.

Mr. Egan: All right.

20 The Court: That part where he answered he was hit by a stone may be stricken out.

Q. This stone that you say was a little far from him, what was the size of it? A. Oh, I think about six or seven inch wide and about fourteen or fifteen inches long. I don't know how to measure. I didn't measure the stone, how big it is.

Q. Did you see any marks on the stone? A. No, sir.

30 Q. No blood or anything? A. No, sir; I only saw the child and I go upstairs again.

Cross-examination by Mr. Carey:

Q. Where were the children sitting? A. It was down the Railroad avenue.

Q. On what? A. On Marseles street.

Q. What were they sitting on? (No answer.)

Q. On the ground? A. On the ground, yes.

40 Q. How far from the street corner? A. Pretty near over here on the chair. (Indicating.)

Tobias Scarpo, for Plaintiff—Cross

Q. How near to the wall were they sitting?
A. On the wall, yes.

Q. Yes? A. Yes, on the wall of the Pennsylvania.

By the Court:

Q. How close to the wall? A. How close? About, pretty near from here on the chair.

Q. From you to the chairs away from the wall?
A. Yes.

10

By Mr. Carey:

Q. Sitting on the ground? A. Sitting on the ground.

Q. This was about what time? A. About half past seven.

Q. How long did you watch the children? A. Oh, about three or four minutes, and maybe ten minutes I go back in the house again.

Q. Then you went back in the house? A. Yes; 20
I had my supper.

Q. How long was that before the boy was hurt?
A. It was about five or ten minutes, I guess.

Q. When you came back the boy was where?
A. Yes, sir.

Q. Where? A. On the leg.

Q. The boy was on his leg? A. He was hurt on the leg, yes.

Q. Where was the boy when you came back?
A. He was on top of the ties.

30

Q. He was still on top of the ties? A. Yes.

Q. You said a little while ago they were sitting on the ground. A. No, sir; I said same thing. I said before it was on the top of the ties.

Q. Oh, they were sitting on a pile of ties, were they? A. Yes, playing and singing down there, and I went back again—and I went back again on the window and I seen the child singing and after that I went back again and I seen the child hurt 40

Tobias Scarpo, for Plaintiff—Cross

and after that I went down stairs and I see the old woman with him, and after I seen the old woman took him home again and after that I go home again.

Q. When you first saw the children they were sitting on this pile of ties; is that right? A. Yes.

Q. They were singing? A. Yes.

Q. What were they singing? A. I don't know; some crazy English song.

10 Q. Some crazy English song? A. No, sir; English.

Q. They were jumping up and running away from the pile of ties and coming back? A. No, sir.

Q. Sitting right still there? A. Yes.

Q. Now did they sit there all the time that you were watching them? A. Yes; was there all the time.

Q. How far were they from the wall? A. Oh,
20 about—it was pretty close—about four or three, I guess.

Q. Well, as far as from you to me? A. No, no; it was close.

Q. Eh? A. Closer than that.

Q. How close? A. About that. (Indicating.)
About two feet.

Q. About two feet or two and a half? A. Two and a half, yes.

Q. All sitting there in a row, were they? A.
30 No; staying still.

Q. Staying in a row? A. Yes.

Q. Were their faces towards you or their backs towards you? A. Their backs.

Q. What were their faces towards? A. On the wall.

Q. When you came back was Dominick in the same—when you came back to the window was Dominick in the same place he was when you went
40 away? A. Yes; he was in the same place.

Tobias Scarpo, for Plaintiff—Cross

Q. Same place? A. Yes, sir.

Q. Sitting up? A. Yes.

Q. Did you come right down stairs then? A. After I see the child got hurt, yes.

Q. Came right out on the street? A. Yes.

Q. How near did you go to Dominick? A. Oh, just went down the stairs and seen him far away and I went across the street.

Q. He was on the other side of the street from you, wasn't he? A. Yes; across the street. 10

Q. Did you go across the street? A. Yes, sir.

Q. How near to him did you go? A. About from here to the chair.

Q. As far as that chair? A. Yes, sir.

Q. Was anybody else with him there besides the children when you got there? A. The old woman and I see three or four women around there—anything around like that—and the women go up to see what is the matter with him.

Q. You did not go any nearer to him than the 20 chair over there? A. Yes.

Q. Yet you saw blood on his leg, did you? A. Yes, sir.

Q. Which leg? A. I don't know which leg it was on, the left or right; I can't remember that now.

Q. Was it above the knee or below the knee? A. Below the knee.

Q. Did he have on shoes and stockings? A. Yes, he had stockings, I guess. 30

Q. How far was this stone from him when you got there? A. He was about a couple of foot, I guess, after the child got taken to the ground.

Q. Was that the only stone lying down there? A. Only one, yes, sir.

Q. While you were watching the children did you see them climbing up on the wall? A. No, sir.

Q. Did you know this boy's name? A. No, sir.

Q. Had you ever seen him before? A. No, sir. 40

Tobias Scarpo, for Plaintiff—Cross

Q. Did you know his mother? A. No, sir.

Q. Or his father? A. I know the old man, yes.

Q. Was it light or dark at the time the accident happened? A. What say?

Q. Was it daylight or dark when the accident happened? A. It was dark, in the evening.

Q. In the evening, was it? A. Yes.

Q. Street lights lighted? A. Yes.

Q. You say you live where? A. Right across
10 the street.

Q. What number? A. 357.

Q. 357? A. Yes.

Q. Do you know where 341 is? A. I can't remember; I don't know all the numbers on the street, you know.

Q. Was it right straight across the street from where you live that this accident happened?
A. No.

Q. It was not straight across the street? A.
20 No; a little *scrage*,—you know, across the street.

Q. Was it above you or below you that the accident happened? A. What?

Q. Was it above where you were or below where you on the street that the accident happened?
A. Well, about—not far away—only across the street.

Q. You say it was not straight across the street?
A. Yes—no, I know it was not straight, no, sir.

Q. Which way was it across the street? A. I
30 lived on that corner, don't you know, and here it was over here. This is the corner and I run across.

Q. Were you looking down the street or up the street to see this boy? A. I looking down the street.

Q. Down? A. Yes, sir.

Q. Towards what? A. Watch the child playing
40 down there.

Tobias Scarpo, for Plaintiff—Redirect
Antonio Soriero, for Plaintiff—Direct

Q. You were looking down the street towards what—what building is there below in the neighborhood of the place where the child was hurt?

A. Well, my house is on the corner and happened was about across the next corner.

Q. About a block away, was it? A. Block away, yes.

Q. Yet you saw the child that whole distance of a block? A. Yes. 10

Redirect-examination by Mr. Egan:

Q. You say it was light around where they were playing? A. No; it was a nice evening.

Q. It was a nice evening. You could plainly see them, could you? A. Oh, sure, yes.

Q. Light there? A. Light, yes.

Q. Did you ever notice children playing about there before? A. No, I never knew him before. 20

ANTONIO SORIERO, called.

The Court: Is there any question, Mr. Carey, in your mind about this boy knowing the nature of an oath?

Mr. Carey: How old is he?

By the Court: 30

Q. How old are you? A. I am going on eleven.

Q. Do you know what it is to tell the truth? A. Yes, sir.

Q. Do you know what it is to tell a lie, or a story? A. Yes.

Q. What will happen to you if you tell lies? A. It would be a sin.

The Court: Are you satisfied? 40

Antonio Soriero, for Plaintiff—Direct

By Mr. Carey:

Q. Do you go to church? A. No ma'am.

Q. Eh? A. No ma'am.

By the Court:

Q. Go to Sunday School? A. No ma'am.

By Mr. Egan:

10 Q. Who told you if you do not tell the truth it would be a sin? A. Nobody.

Q. How did you know it was not right? A. My teacher told me.

Q. Your teacher where? A. In school.

Q. What school do you go to? A. 32.

Q. Number 32? A. Yes.

Q. Public School? A. Yes.

Q. Don't you go to church on Sunday? A. No, ma'am.

Q. Ever go to Sunday school? A. No ma'am.

20 Q. Do you know what God is? A. Yes.

Q. Where is God? Do you know where God is?
A. Yes.

Q. Where is He? A. Up in the air.

Q. What do you call up in the air? A. The sky.

Q. What is up above the sky? A. God.

Q. God is up there?

The Court: The Court is satisfied.

(Witness sworn.)

30 *Direct-examination by Mr. Egan:*

Q. Now, Tony, talk out so these gentlemen can hear what you say. You are a brother of Dominick, are you? A. Yes, ma'am.

Q. You are older than Dominick? A. Yes, ma'am.

Q. Where were you the day he was hurt? A. Near the railroad.

Q. Near the railroad? Were you with him?
40 A. Yes, ma'am.

Antonio Soriero, for Plaintiff—Direct

Q. What were you doing? A. We were sitting on the logs and we were playing like we sing in school.

Q. What happened while you were singing there? A. While we were singing that stone fall down and it went on my brother's feet; ladies around, they went to call my mother, and my mother came and she took my brothers on the lot with blood falling out of him.

Q. Do you know where the stone came from? 10
A. On the wall.

Q. What wall? A. Over on the railroad.

Q. The railroad wall? A. Yes.

Q. Was it on the top of the wall or was it on the side of the wall? A. Side.

Q. The side of the wall? A. Yes.

Q. What was your brother doing at the time it fell on him? A. He was crying.

Q. He was crying? Well, before the stone fell on him what was he doing, do you say? A. He 20
was singing.

Q. What part did it fall on him? Where was it it hit your brother? A. On his foot.

Q. Did the stone stay on his foot? A. No, ma'am.

Q. What did it do? A. Went a little bit further.

Q. Went a little bit off his foot? A. Yes.

Q. When it hit your brother what did he do?
A. He was crying.

Q. Did he walk after that? A. No, ma'am. 30

Q. How did his leg look after it hit him? A. It was bleeding.

Q. It was bleeding. A. Yes, ma'am.

Q. How many of you were together there at the time? A. Three or four.

Q. Did you ever play around there before?
A. No, ma'am.

*Antonio Soriero, for Plaintiff—Direct**Cross-examination by Mr. Carey:*

Q. Who were the other children playing with you? A. I don't know them.

Q. You don't know them? A. No, ma'am.

Q. Were they boys or girls? A. Boys.

Q. All boys? A. Yes.

Q. How many were there besides you and your brother? A. With me and my brother three or four.

10 Q. Three or four altogether or three or four besides you? A. Altogether.

Q. You never played there before? A. No, ma'am.

Q. You never knew anybody to play there before? A. No, ma'am.

Q. How high was this pile of ties you were sitting on? A. About that high (indicating). Oh, ties?

Q. Yes. A. About from here down here to here
20 (indicating).

Q. From the floor up to there? A. Yes.

Mr. Carey: That is three feet and a half.

By Mr. Egan:

Q. About from here up to there, where you are standing on—right up about how high? A. Here (indicating).

Mr. Egan: That far above this from where my foot is (indicating).

30

By Mr. Carey:

Q. How many piles of ties were there there?
A. Five or six.

Q. Five or six in the pile? A. Yes.

Q. How many piles were there? A. One.

Q. One pile? A. Yes.

Q. Which way were your faces turned? A.
40 My back was toward the wall.

Antonio Soriero, for Plaintiff—Cross

Q. Your back was toward the wall? A. Yes.

Q. Which direction was Dominick's back, toward the wall or toward the street? A. Toward—his back toward the wall there.

Q. His back was toward the wall? A. Yes.

Q. And the other boys, were they sitting facing the same way as you were? A. Yes, ma'am, they was facing—the logs was over here and our faces was down this way.

Q. Then you were facing toward the street? 10
A. Yes, ma'am.

Q. All of you? A. Yes, ma'am.

Q. Your backs were toward the wall? A. Yes, ma'am.

Q. If your backs were toward the wall, how could you see where the stone came from? A. Oh, after we got up and I saw the stone fall.

Q. The stone fell after you got up? A. No, we were sitting down and after the stone fell.

Q. You were sitting down and the stone fell? 20
A. Yes.

Q. And it hit Dominick's leg? A. Yes.

Q. Were you sitting next to Dominick? A. Yes.

Q. Then you got up after the stone fell, did you? A. Yes, I ran away.

Q. Did you stop to look around any before you ran away? A. As soon as I got across the street I looked around and I saw the stone.

Q. As soon as you got across the street you looked around? A. Yes. 30

Q. You did not look around until you got across the street, is that right? A. Yes, sir.

Q. What street was this? A. Railroad Avenue.

Q. Was it near a cross street? A. It was that way (indicating).

Q. Yes; there is a street that crosses Railroad Avenue near there, isn't there? A. Yes, but this street. Merseles Street—

O. Merseles Street? A. Yes. 40

Antonio Soriero, for Plaintiff—Cross

Q. Can you tell me about how far you were from the corner of the street? A. From here over there (indicating).

Q. Over to what, the chair? A. Yes—where those hats are.

Q. Where those hats are? A. Yes.

Q. What street did you run across, Railroad Avenue? A. Yes.

Q. When you got on the other side of the street
10 then you turned around and looked, did you? A. Yes, sir.

Q. What did the other children do? A. They ran home.

Q. They all ran home, did they? A. Yes.

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

Q. Had you ever played with them before?
A. No, sir.

Q. What did Dominick do? A. He was crying.

Q. Was the stone still on his leg? A. Went a
20 little bit further.

Q. Oh, it hit his leg and then went on further, did it? A. Yes, about two inches further.

Q. About two inches further? Show me how much two inches is. (Witness indicates.)

Q. That is pretty well done—that is pretty good. If they all measured as closely as you have they will do pretty well. Now how big a stone was this that fell on Dominick? A. Big.

Q. Big one? A. Yes.

30 Q. Show me how long it was with your hand? (Witness indicates.)

Mr. Hardenbrook: The record will show three feet?

The Court: A little wide in your guess.

Mr. Carey: No. That is how long it was, was it?

The Witness: Yes.

Mr. Carey: That is two feet, perhaps a little more.

40 Mr. Egan: Two and a half.

Antonio Soriero, for Plaintiff—Cross

Q. How wide was it, can you tell me that?
(Witness indicates.)

Q. That is about fifteen inches, I should say.

Mr. Egan: About fifteen inches.

Q. How thick was it? A. This thick (indicating).

Mr. Egan: About fifteen inches.

Mr. Carey: I should think so, somewhere
about fifteen inches.

10

Q. Did you go back there after the stone fell?

A. No, ma'am.

Q. Did you go back there next day? A. No,
ma'am.

Q. Did you ever go back there? A. No, ma'am.

Q. Kept away from there after that, did you?

A. Yes.

Q. Well, how could you tell so closely how big
the stone was? You only saw it that night, didn't
you? A. Yes.

Q. You were pretty badly frightened too?
A. Yes.

Q. I don't blame you. Dominick was frightened,
too, wasn't he? A. Yes, but he was in bed.

Q. How far was the stone from the wall after
it had fallen on Dominick's leg and then gone on
a little further, two inches or so further? A.
From here to about here (indicating).

Q. About three and a half feet or four feet? 30

The Court: Four feet.

Mr. Egan: Three feet and a half or four
feet.

Q. You did not see the stone at all until it
struck Dominick, did you? A. No, sir.

Q. That is the first you saw? A. Yes.

Q. Did it make much noise when it came down?

A. No, ma'am; it crumbled down like that. 40

Antonio Soriero, for Plaintiff—Cross

Q. You didn't see where it came from, did you?

A. Yes, ma'am, from the wall.

Q. Did you see it when it came from the wall?

A. No, ma'am.

Q. Your back was turned toward it, wasn't it, so you could not see it? A. Yes, ma'am.

Q. You jumped right up and ran across the street? A. Yes.

Q. And then you turned around and looked
10 back? A. Yes, ma'am, and I went out and made across the street, and I looked back.

Q. Then who came for Dominick? A. My mother.

Q. Where was Dominick when you got across the street, was he on the ties or was he down on the ground? A. Down.

Q. Down on the ground, was he? A. Yes, sir; the stone was a little bit away from him.

Q. Was he lying right down on the ground or
20 sitting on the ground? A. Yes, laying down.

Q. When they came to get Dominick did you go back there? A. No, ma'am.

Q. You went home, did you? A. Yes.

Q. And never have been back there since? A. No, ma'am.

Q. How long had you been sitting on the pile of ties? A. Oh, about three hours.

Q. About three hours? A. Yes.

Q. What had you been doing? A. Singing.

30 Q. Three hours is a pretty long time. Wasn't it a little less than three hours you were sitting there? A. No, sir.

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

Q. Daylight? A. Yes; the lamp was on the corner, it was making light.

Q. The lamp was making light, was it? A. Yes.

Q. What were you singing? A. I don't know—
40 all kinds,—I was singing school.

Antonio Soriero, for Plaintiff—Cross

Q. School songs? A. Yes.

Q. Were the other boys school boys? A. Yes.

Q. Going to the same school you do? A. Yes.

Q. You were all singing together, were you?

A. Yes, sir.

Q. Did you jump up from the ties and run away and then come back to them again? A. No, sir.

Q. Sat there all the time, did you? A. Yes.

Q. Did you climb up on the wall sometimes?

A. No, sir.

10

Q. Never? A. No, ma'am.

Q. How high is the wall? A. From here to here (indicating).

Q. Then the ties were just about as high as the wall? A. No.

Q. Which were the higher, the ties or the wall?

A. The wall.

Q. Now can you tell me about how high the wall was from the ground, the top of the wall? A. This ground here?

20

Q. Yes, right here. I suppose this is the ground? A. This here (indicating).

Q. About that high, is it? A. Yes.

Mr. Hardenbrook: Five feet.

Mr. Carey: No; four would be nearer to it.

Mr. Hardenbrook: Oh, let it go at that.

A. Higher than that.

Q. Show me about how high? A. This high.

Q. About like that. That is pretty near four feet, not quite. Now you say the stone came from the side of the wall? A. Yes.

30

Q. Were there other stones on top of it? A. No, ma'am.

Mr. Egan: Maybe he does not understand that when you say—he may have reference to the street.

Mr. Carey: Yes.

40

Dr. William Hetherington, for Plaintiff—Cross

Q. After you got across the street did you look to see whether there were any other stones lying there on the street or not? A. No, only one.

Q. Only one? A. Yes.

Q. Sure about that? A. Yes.

Q. And that came from the side of the wall?

A. Yes.

Q. About how high up on the wall did it come?

A. It was right on top of the wall.

10 Q. Well, came from the top of the wall, did it?

A. Here was the wall and the stone was half on top and half on bottom, and it fall right off.

Q. Do you know the man who was on the witness stand just before you went on, Scarpo? A. No, sir.

Q. Don't know him? A. No, sir.

Q. Ever see him before? A. No, sir.

Q. Did you see him come down where Dominick lay? A. No, sir; I didn't see him.

20 Q. Did he come down? A. No.

DR. WILLIAM HETHERINGTON, SWORN.

Direct-examination by Mr. Egan:

Q. Doctor, you are a practising physician in Jersey City? A. Yes.

Q. How long have you practised there? A.
30 Seventeen years.

Q. Did you have on the 8th day of July, 1913, an occasion to examine this Dominick Soriero—stand up there, Dominick—this little boy? A. Yes.

Q. What did you find, Doctor, the matter with him? A. I found severe contusions of the leg between the knee and the ankle on the front part of the leg, and some abrasions, and I believe there was one slight shallow lacerated wound on the
40 front of the leg.

Dr. William Hetherington, for Plaintiff—Cross

Q. Did you find any bones broken, Doctor?
A. No.

Q. How many visits did you make, Doctor?
A. About six, I believe, as far as I can recall.

Q. Did you send any bill for your services? A.
They paid me cash; it was a cash transaction.

Q. Do you recall the amount? A. About twelve dollars in all.

Q. Do you know how long the child was laid up?
A. I believe he stayed off his feet for four weeks. 10

Q. Do you know what treatment you advised at that time? A. I advised rest, in bed.

Q. Rest, in bed? A. For the first few days. And lotions to take the swelling down, and later on wet dressings for the abrasions and open wounds, and massage later on.

Q. Doctor, did you advise the father to take the child out into the open air? A. Not at that time.

Q. Did you at any time? A. Never.

Q. Eh? A. No. 20

Cross-examination by Mr. Carey:

Q. Doctor, what do you mean by contusions?
A. Bruisings.

Q. And abrasions? A. That is where the skin is broken.

Q. And lacerations? A. Where there is a scrape, but a little bit deeper than an abrasion.

By Mr. Egan: 30

Q. An abrasion, you say, is a break? A. Where it is a little deeper. And laceration is a little deeper than an abrasion.

Q. Did I understand you to say he was laid up for about four weeks? A. About four weeks.

By Mr. Carey:

Q. Doctor, what was the extent of the leg that was injured, about how long? A. It extended with 40

Dr. William Hetherington, for Plaintiff—Cross

the abrasions and lacerations and contusions, that is, discolorations from contusions, from about an inch below the knee to about an inch above the ankle, on the front part of the leg.

Q. What, in your judgment, was the cause of the condition in which you found the leg? A. It looked like an injury from direct violence.

Q. That is an injury from a blow? A. From a blow—not a blow, but you might say from a many
10 pointed object.

Q. You attended him for about four weeks, Doctor? A. At various times.

Q. About how many visits did you make altogether? A. About six, as far as I can recall.

Q. When did you first attend him, Doctor? A. I think it was the day of the accident or the day after; I cannot recall distinctly—I haven't any record of it; being a cash transaction didn't have any record of it.

20 Q. Would a blow from a falling stone cause the injury which you found on this boy? A. It would.

Q. Would you suppose that the injury which you found there would have been inflicted by him falling on a stone two feet and a half long by two feet wide and fifteen inches thick? A. I do. If the stone fell on the leg?

Q. Yes? A. Yes, sir.

Q. If a stone of that weight had fallen on the leg wouldn't it have crushed the leg? A. It de-
30 pends on the height of the fall and the direction of it. It would have broken it, but it could have fallen in such a way as to have given him this injury without fracture.

Q. The abrasions, you say, were the removal of the surface of the skin? A. The upper surface, superficial abrasions.

Q. And the injuries from the abrasions were not
40 very serious, were they? A. No.

Dr. William Hetherington, for Plaintiff—Cross

Q. And the contusions, were they serious or not? A. They were, yes, the contusions were the most serious part of it.

Q. How about the lacerations? A. The lacerations—there was one long laceration about parallel with the direction of the bone, and right over the shin—I guess about three or four inches long, but not very deep. It healed up very nicely.

Q. Do you recall whether your first visit was in the evening or in the morning, Doctor? A. I 10 think it was around between four and five o'clock.

Q. In the afternoon? A. Afternoon.

Q. When you saw him the last time what was his condition, Doctor? A. The abrasions and lacerations had healed. There was considerable tenderness on pressure all along the front part of the bone, marked tenderness, and there was—seemed to be an inability to put the foot directly on the ground and walk.

Q. Occasioned by what, Doctor? A. Evidently 20 the injury.

Q. But what condition was then present? A. It was—objectively you could not see much except a slight discoloration, and the scabs, and there was a little swelling yet.

Q. And this is due to stiffness of the muscles, do you suppose? A. And contusion of the muscles, stiffness following.

Q. But the contusions had largely disappeared? A. Yes. 30

Q. There was no permanent injury at all, was there, of the limb? A. No.

Q. Did you recommend treatment at the time you stopped visiting the boy? A. Massage, continuous massage.

Q. And that was all that was necessary? A. That was all.

Q. What do you mean when you say continuous 40

Dr. William Hetherington, for Plaintiff—Redirect

massage? A. Well, daily, over a certain period, you know, every day for a while.

Q. That was not required for a long time each day? A. Well, once or twice a day for a week or two, so as to get the muscles limbered up and get him to use his leg.

Q. For how long a period each day? A. Well, I don't know as I prescribed any certain period for the massage; I just recommended a massage
10 two or three times a day. They could not do it too often.

Q. How long a time each time would have been sufficient, Doctor? A. Five or ten minutes.

Q. Was that massage such as the parents of the child could have given it? A. Anybody could have applied the massage I recommended.

Redirect-examination by Mr. Egan:

Q. Doctor, when was your last visit, do you
20 recall? A. The boy came to the office about probably a month ago.

Q. What then was his condition? A. He limped, I noticed, when he came in the office he limped slightly. I examined the leg and measured it and went over it pretty thoroughly, and objectively I could not find anything, but the boy limped.

Q. When you were attending him there during the summer, do you recall the last day that you visited or treated him? A. No.

30 Q. Don't recall that? A. No.

By the Court:

Q. Do you know how long it was, after your first visit, in weeks, or days, about? A. About—going to the house, I think five weeks would cover the whole period visiting him at the house.

Q. Starting with your first visit? A. Yes.

Dr. William Hetherington, for Plaintiff—Redirect

By Mr. Egan:

Q. Doctor, you testified that you found tenderness about the boy's leg—can you tell about when it was last that you found the tenderness? Did it remain there when you last examined him? A. No; the tenderness was not there on pressure.

Q. When was this boy last examined? A. About a month ago, there was no tenderness.

Q. There wasn't any, but when did you last find any evidence of tenderness there? A. About five 10 weeks after the first visit.

Q. Five weeks after the first visit there was still tenderness? A. Yes.

Q. That was your last examination? A. Yes, before the month ago examination.

Q. Was it necessary, or did you recommend that he receive any open air treatment at the time—necessary for him to receive fresh air or to be brought out in the open air? A. Well, I may have recommended it, but do not recall it just now, as 20 I would recommend to any child who had been confined in doors for four or five weeks.

By the Court:

Q. At that time, Doctor, that is, four or five weeks after the time of the first visit, was the boy able to walk? A. He could walk, but he walked with a decided, noticeable limp.

Q. With any inconvenience or not, as far as pain was concerned? A. He had pain for—I 30 think my last visit he complained of pain upon putting his foot down.

Q. That is your last visit? A. Yes—within the fifth week.

By Mr. Egan:

Q. Doctor, as far as you could discover, was there much pain attached to this injury? A. Very 40 decided pain.

Dr. William Hetherington, for Plaintiff—Recross

Q. What's that? A. Decided pain.

Q. How long do you suppose it would continue, Doctor? A. It will continue?

Q. How long do you suppose it continued from that time, from your examination? A. Well it—there is still some pain, at the last examination, at the end of the fifth week, but the pain has disappeared now.

10 *Recross-examination by Mr. Carey:*

Q. Doctor, for what purpose did you examine the boy the last time you examined him a month ago? A. I wanted to see if there was any shortening of the bone.

Q. Were you examining him in connection with treating him, or examining him for the purpose of observing his present condition to qualify to testify? A. How do you mean?

20 Q. The last time that you examined him were you examining him and treating him or examining him simply to find his condition for the purpose of testifying?

The Court: The last time you mean is a month ago?

A. A month ago? I examined him to see his condition at the time in order to be sure of my ground when I testified.

30 Q. I understand, Doctor, at that time that you could find nothing objective wrong with the limb?

A. Do you mean at that time? That he was completely recovered?

Q. At the time of your examination a month ago? A. No; I did not find anything.

Q. That is correct, is it? A. Yes.

40 Q. And so far as you are able to discover you see no reason why he should limp? A. So far as I could discover, no.

Dr. William Hetherington, for Plaintiff—Recross

Q. Now you spoke of tenderness at the time you last saw him during your course of treatment?

A. Yes.

Q. Was that marked or comparatively little?

A. Well, it had—it was diminished compared to the first time. It was gradually diminishing, but the tenderness was gradually subsiding, it seemed.

Q. The recovery had been satisfactory, had it?

A. It has.

10

Q. At that time was he out of bed, Doctor? A. He was.

Q. How long had he been out of bed, do you recall? A. I can't remember.

Q. Had he been out doors, do you know? A. No.

Q. You saw him walking around the house? A. I did, yes.

Q. Was there any reason why at that time he should not have gone out of doors by himself? A. No, he could have gone out.

20

Q. His condition was such that a continuous and satisfactory improvement was probable, was it not? A. Yes.

Redirect-examination by Mr. Egan:

Q. At the end of the four weeks, Doctor, was he able to walk with the same ease as he would have walked had not that injury been occasioned? A. No; he favored his leg very much.

Q. He favored his leg very, very much? All right, Doctor.

30

Recross-examination by Mr. Carey:

Q. Use of the limb would tend to correct that condition, would it not? A. Yes.

Q. So use was one of the things that was requisite at that time? A. It was required.

Q. For his continued improvement and for recovery? A. Yes.

40

Rugieri Gennaro, for Plaintiff—Direct

RUGIERI GENNARO, sworn and examined through Italian Interpreter.

Direct-examination by Mr. Egan:

Q. Where do you live, Roger? A. 180 Wayne Street.

Q. Did you see the accident happen to this here boy on July 8th last? A. Yes.

10 Q. Tell the court and jury what you saw at that time? A. The boys were playing on this pile of ties; they were singing American style, and while they were singing a stone fell down from the tracks and then injured this boy's leg.

Q. Where were you when this stone fell? A. I was nearby.

Q. How far were you when you say you were nearby? How far were you? A. Nearby from here where I am now, indicating himself, up to where I am now.

20 Q. That is about ten feet? A. Yes.

Q. Did you see the stone fall? A. Yes.

Q. Where did it fall from? A. From the railroad tracks.

Q. Was it the wall? A. Yes, sir.

Q. How big was the stone? A. I don't remember how big it was. I don't remember precisely what the size was. He says, I don't know—maybe so big and so big.

The Court: Seemingly he does not know.

30

Cross-examination by Mr. Carey:

Q. What were you doing at that time? A. I was talking with the companion of mine who had just come from work.

Q. Standing on the street? A. Yes.

Q. What street? A. Railroad Avenue and Merseles Street.

Q. At the corner? A. Yes.

40

Rugieri Gennaro, for plaintiff—Redirect

Q. These children were sitting on the pile of ties, you say? A. Yes, sir.

Q. Which way were their faces, towards the street or towards the wall? A. Towards the wall.

Q. How many were there? A. Three or four.

Q. Did you see the stone when it fell? A. Yes, sir.

Q. You cannot tell how big it was? A. No, sir.

Q. It came from the railroad tracks? A. Yes.

Q. How high is the railroad track from the street there? A. So high (indicating) about the height of a person. 10

Q. You are sure that is as high as the railroad track is above the street there? A. Yes.

Q. How high was the pile of ties? A. It would be about this way (indicating).

The Court: Three feet?

A. About five ties, one on top of the other.

Q. Did you see the children jumping off of the pile of ties? A. No, sir, they were not jumping. 20

Q. How long had you been standing there? A. About fifteen minutes.

Q. What did you do after the stone fell? A. The boys started to cry and then the mother ran toward the boy and picked the boy up and took him away.

Q. Who picked the boy up? A. The mother.

Q. Do you know the mother? A. No, sir.

Q. Know the father? A. No, sir. 30

Redirect-examination by Mr. Egan:

Q. How far were the tracks up from this stone wall—the tracks of the railroad? How far were the iron tracks up from this stone wall? A. About so much; I couldn't say.

Q. Could you stand down on the street and touch the railroad tracks from the street? A. No, sir. 40

Mrs. Dominico Soriero, for Plaintiff—Direct

Q. Well, why don't you say so. How far up was it from where you were standing on the street—were the railroad tracks? A. Little distance.

Q. Well now, if you stood on the top of that stone wall could you touch the tracks from that?

A. No, sir.

Q. Of course not—he says five feet—that is all. One minute. Then you don't mean to understand that the tracks were on top of the stone wall, do you? A. Yes.

Q. First here is the stone wall, and then there is dirt up there above that more on a slant?

Mr. Carey: I object to it as leading. Do not tell him what to say.

Mr. Egan: All right. I am willing to let it go to the jury on that.

20 MRS. DOMINICO SORIERO, sworn, and examined through Italian Interpreter.

Direct-examination by Mr. Egan:

Q. You are the mother of this here boy, aren't you? A. Yes.

Q. When did you first see your child when he was injured that day—or rather where was it when you first saw your child that day? A. When the stone fall down I didn't see the boy.

30 Q. When did you first see him? A. She says the 8th day of July.

Q. Tell us what you found over there when you went over to see your child? A. Well, I saw my son had his leg under this big stone and I picked up my boy and I took him home.

Q. That was on Railroad Avenue when he was lying in the street? A. Yes, sir.

Q. Were you working at that time; I mean were you working during the day? A. Yes, sir.

40

Mrs. Dominico Soriero, for Plaintiff—Cross

Q. Where had you been working? A. In the bag factory.

Q. How long have you been working there? A. Over a year.

Q. Did you continue to work after your son was injured? A. Yes.

Q. Who nursed and cared for him while he was hurt? A. Myself.

Q. Did you stay home from work to take care of him? A. Yes, sir. 10

Q. What were you earning at that time? A. Five or six dollars per week.

Q. How many weeks did you stay home to care for him? A. Seventy or seventy-five days.

Cross-examination by Mr. Carey:

Q. When did the Doctor first come to see the boy—the day he was hurt or the day after? A. The same evening.

Q. What time in the evening was it the boy was hurt? A. About seven o'clock or half past seven. 20

Q. What else did you do while you were taking care of the boy besides caring for him? A. I was attending to my son. (By Interpreter:) I told her besides that and she says, "What do you want me to do; attend my son."

Q. Didn't you do anything else but attend to your son? A. No, sir, nothing else.

Q. Who attended to the housework? A. My mother and my mother-in-law. 30

Q. Your mother and your mother-in-law live with you? A. Yes.

Q. Did they live with you before the boy was hurt? A. Yes.

Q. They did the housework while you were away at work all day? A. Yes, sir.

Q. Couldn't they take care of the boy? A. Ha-ha! The boy was nine years old. The boy didn't need anything like that to be watched. 40

Mrs. Dominico Soriero, for Plaintiff—Cross

Q. Did not need to be watched at all? A. No, sir.

Q. Well, after he was hurt couldn't your mother and your mother-in-law take care of him? A. No, but the boy insist he wanted to have me, not my mother or mother-in-law.

Q. So you stayed home with him because the boy wanted you to? A. Yes, sir.

Q. How long was the boy in bed? A. About
10 two months and a half, more than that.

Q. Didn't get out of bed in that time? A. No, sir.

Q. Didn't he get out of bed before Dr. Hetherington stopped coming to see him? A. No, sir.

Q. Not at all? A. No, sir.

Q. Didn't take all of your time to take care of the boy, did it? A. Yes, sir.

Q. Couldn't do anything else at all? A. No, sir.

Q. What did you do in taking care of him?
20 A. Feed him, giving him something to eat and something to drink, and give him whatever he asked.

Q. That is all? A. That is all.

Q. Were you in the room with him all the time? A. Yes, sir.

Q. Where were you working? A. In the bag factory.

Q. Where is that? A. Down Lafayette.

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

30 Q. What is the name of the people who own the factory? A. I don't know.

Q. Did you go back to work there? A. Yes.

Q. Are you working there now? A. Yes.

Q. You cannot tell the name of the concern that you work for? A. No, sir.

Q. How do you get there? A. I went there and I asked them to work in the shop, I didn't ask what the name was.

Mrs. Dominico Soriero, for Plaintiff—Redirect

Q. How do you go there? A. Walk there.

Q. Know what streets you go on? A. There is so many ways to get there.

The Court: Do you know where she works, Mr. Hardenbrook?

Mr. Hardenbrook: I don't know. How far is it from where she lives?

A. A long distance. About a half hour walk.

Q. You stayed away from your work seventy- 10
five days to take care of your boy, did you?

A. Yes, sir.

Q. Was he in bed all the time? A. Yes, sir.

Q. How long after that was it before he got up?

A. Yes, sir.

The Court: Put the question again.

A. After so many days, and then he started to get up.

The Court: Ask her how many days. 20

A. After seventy-five or eighty days then he began to get up from bed.

Q. But never before that? A. No, sir.

Redirect-examination by Mr. Egan:

Q. What, if any, care, did your husband take of your son?

Mr. Carey: She says she took care of him.

Q. I ask her what, if any, care did your husband 30
take of the son, that is after the seventy or seventy-five days?

Mr. Carey: I object to that. If she was away at her work she could not know what care he took of the son.

The Court: Ask her if she knows.

Q. Do you know whether or not your husband

Raphael Soriero, for Plaintiff—Direct

took any care of your child after seventy or seventy-five days? A. Sure.

Q. How long did he take care of him? A. For four months.

Q. What did he do? A. Whatever should be done.

10 Adjourned to Monday, March 16, 1914.
 Monday, March 16, 1914, trial of the cause
 resumed at 10 A. M.

RAPHAEL SORIERO, SWORN.

Direct-examination by Mr. Hardenbrook:

Q. You are the plaintiff in this action? A. Yes, sir.

20 Q. And the father of Dominick Soriero? A. Yes.

Q. Do you recall when your boy was hurt on the 8th of July, 1913? A. Yes.

Q. What was the boy's condition of health before he was hurt? A. He was well.

Q. What use, if any, did you make of the boy in running errands or doing incidental work? A. The boy go to school.

Q. What was he doing at the time the boy was hurt; what was his business? A. Bartender.

30 Q. How much was he making a month?

Mr. Carey: I object. We are not asked to respond in any damages for loss of time of the father.

The plaintiff alleges that he lost the services of the boy and he expended a hundred dollars for nurses, medical attendance and medical services to heal his son of his injuries.

40

Raphael Soriero, for Plaintiff—Direct

(After argument Mr. Hardenbrook withdrew that line of the case.)

Q. Did you expend any moneys for medicines and bandages and different things? A. Yes.

Q. How much? A. Twenty, twenty-five dollars for medicines alone.

Q. What was the boy's general condition of health and strength after this accident? A. Well, he could not gain his usual good health. 10

Q. For how long a time was he ailing? A. Even now he is not well.

Q. What is the trouble with him? A. Well, I mean to say that the boy is weak and bloodless, and always tried to help him out with medicine or something else.

Q. What is the extent of his activity, running around and playing with the other children after the accident as compared with what it was before? A. The boy also complains during the time of changes, weather changes; he complains of pain in the leg. 20

Q. How long did that continue after the accident? A. Three or four months.

Q. Ask him if he could notice from his observation of the boy's actions whether the boy experienced much pain immediately after the accident.

Mr. Carey: I object.

Q. What is the general nature of the conduct of the boy after the accident? A. Well, it seems to me that the boy, after this accident, he was weak, and then act like he was stupid. 30

Q. Act what? A. Stupid.

Q. What did you notice or what did you observe as to whether the child suffered pain? A. Well, I mean to say that the boy is always sick.

Q. Since the accident? A. Yes, ever since. 40

*Raphael Soriero, for Plaintiff—Cross**Cross-examination by Mr. Carey:*

Q. Where did you buy the medicine you spoke of? A. A drug store on Brunswick Street.

Q. Whose drug store? A. Italian drug store.

Q. What is the name of the owner? A. I don't know.

Q. How far is it from where you live? A. About three blocks.

Q. What street is it on? A. Brunswick.

10 Q. Between what streets? A. Between First Street and Second Street.

Q. On which side of the street? A. When you go out towards Newark Avenue on your right.

Q. Who prescribed these medicines that you bought? A. Doctor Hetherington or Carrington.

Q. Dr. Hetherington? A. Yes.

Q. How long did Dr. Hetherington treat the boy? A. Sixty or seventy days.

20 Q. How often did he come during the sixty or seventy days? A. At the beginning he came there—he called there every day, later on every other day, and then after that every couple days.

Q. For how long a time did he call every day? A. For over two weeks.

Q. How long every other day? A. Eight or nine weeks.

Q. How long every second—every third day? A. Two times a week.

30 Q. How long two times a week? A. Eight or nine weeks.

Q. How many weeks altogether did he call? A. Ten or eleven weeks.

Q. Did you buy any medicines except what Dr. Hetherington ordered? A. No, sir.

Q. What were the medicines that you bought? A. All kinds of liniments and bandages to be used externally on the leg.

40 Q. How many bottles of liniment did you buy?

Motion to Non-suit

A. I don't remember. I had to get that stuff and use it every day.

Q. Didn't you buy them all at one place? A. Yes, sir.

Q. After Dr. Hetherington stopped treating the boy did any other Doctor treat him? A. No, sir.

 PLAINTIFF RESTS.

10

Mr. Hardenbrook: Now, so as to meet the objection of counsel, in which he says we were unable to state—he has been unable to locate where the child's mother works, I will state on the record that this mother works at the Regal Sack and Bag Works, Lafayette; I do not know the exact number of the street.

 MOTION TO NON-SUIT.

20

Mr. Carey: I will make a formal motion for non-suit now, but I would like to ask for it in connection with a motion for direction of verdict.

The Court: Make your motion now and I will reserve that right until the end of the case.

Mr. Carey: I will make a motion for non-suit on the ground that in the case of the child there is no negligence proved against the defendant company; there is no proof that the defendant company knew or ought to have known that the stone which is alleged to have fallen on the plaintiff was in a dangerous condition; and the plaintiff's child is shown to have been playing on a pile of ties located next to the wall of the defendant com- 30
40

Dr. John J. Mooney, for Defendant—Direct

pany, and the defendant company, under the circumstances disclosed by the evidence, owed no duty to the plaintiff. As to the father I move for a non-suit on the same ground, because the father cannot recover, unless the defendant company is liable to the child.

10 The Court: The Court will deny your motion at this time, Mr. Carey, and reserve to you the right to renew it at the end of your case.

DEFENDANT'S TESTIMONY.

DR. JOHN J. MOONEY, SWORN.

Direct-examination by Mr. Carey:

Q. Doctor Mooney, you are a practising physician in Jersey City? A. I am.

Q. And have been for how long? A. Fifteen years.

Mr. Hardenbrook: We admit his qualifications.

Q. Have you made an examination of this plaintiff's child? A. I did.

Q. When did you make the examination, Doctor? A. First examined him October, 1913.

30 Q. You heard the testimony of Dr. Hetherington in regard to the nature of the injury sustained by the child, didn't you, Doctor? A. I did.

Q. And did you examine and confirm the description of the injury given by Dr. Hetherington? A. I agree with what Dr. Hetherington said in regard to the injuries.

Q. At the time of the examination of the child will you state what his general condition was?

40

Dr. John J. Mooney, for Defendant—Cross

Mr. Egan: Didn't you move to strike out the examination?

Mr. Carey: No.

Q. At the time of the examination in October?

A. Why, other than the injuries to the lower third of his leg I figured the boy was in fairly good physical condition.

Q. Did you discover anything to indicate that the boy was suffering from the results of this accident in any other particular except as to the limb that was injured? A. Absolutely none. 10

Q. Have you examined the boy since, Doctor?

A. I have examined the boy twice since.

Q. Can you give the date of those examinations?

A. I cannot recall the exact dates. I believe one of them was made during the month of January. I believe down in Montgomery Street. The other one was made but a short while ago.

Q. On your examination, Doctor, will you state whether or not the boy was suffering in general health as a result of this accident in any way? 20

A. I do not believe the boy suffered in his general health from this accident whatever.

Q. What was the condition of the limb when you examined him in January and in February? A. Why, the limb was practically healed, and while the boy had some limp there was no objective evidence why he should limp.

Q. From your examination, if you had not seen the boy limping—did you discover anything which would induce you to believe that there would be any occasion for his limping? A. I couldn't find any reason why he should limp, and I attributed it to probably habit. 30

Cross-examination by Mr. Egan:

Q. When did you find him limping? A. At all three examinations he limped. 40

Motion to Direct Verdict

Q. When was the last examination you say you made? A. Why, I cannot recall just the exact date. I do not think it is very long ago.

Q. Was it in the year 1914? A. Yes.

Q. Some time in January or February, you don't know? A. No.

Q. You don't know which month? A. I don't know which month. I think it was January.

10

BOTH SIDES REST.

MOTION TO DIRECT A VERDICT.

Mr. Carey: Now, if your Honor please, I would like to make a motion in regard to a non-suit and also with respect to a direction of verdict.

20

The Court: The jury may retire to the jury room for a few minutes while the motion is being heard and discussed.

Mr. Carey: I move for a direction of verdict on the same grounds I moved for a non-suit:

First, that there has been no negligence proved against the defendant company;

30

Second, That on the evidence in the case the defendant owed no duty to the plaintiff at the time and under the circumstances that the injury occurred.

(Discussion.)

The Court: The Court will deny the motion for the direction of verdict, which I believe also includes the motion for non-suit, to which you may have your objection.

40

Court's Charge to Jury.

Gentlemen of the Jury:

You will keep in mind that you are trying two actions, one in which Dominick Soriero, a child under the age of twenty-one years, is suing, and the other in which the father of that child, Raphaele Soriero, is suing. You will also keep in mind that the father cannot recover unless you find that the child, his son, should recover.

As the case stands now it is before you, gentlemen of the jury, upon the Court's construction of a stipulation which is in evidence and is marked Exhibit P-1. The outer or street side of the wall in question abuts upon and immediately adjoins the public sidewalk. That being so, the defendant company must have used and must use that degree and amount of care which is within the range of human precaution and foresight to keep this wall in such condition as not to cause injury to a person upon the public highway. Your first consideration, of course, will go to that question. If you conclude from the evidence that the defendant company did use that degree of care, then there can be no recovery because it has performed its entire and full duty to the public, and especially to this plaintiff, the child.

If you conclude from the evidence that it has not performed that duty, then you may conclude that the plaintiff, the child, is entitled to recover. If you shall in that manner conclude that there is to be a verdict for the child, the verdict will be limited entirely to compensation for the pain and suffering that the child has endured and suffered as the proximate result of the injury complained of. If you conclude from the evidence that that pain and suffering has ceased, then you will find for him, in case you find for him at all, for that pain and suffering which he has endured. If you conclude that the pain and suffering is still con-

Judge's Charge

tinuing, then you will be obliged to determine how long in the future it probably will continue, and in that event you may find for him for what he has endured and what you find he will probably endure for the time in the future which it will probably continue. That is the only verdict he is entitled to have. It is the only element which can go into the makeup of your verdict. There can be no recovery for loss of services or anything of that
10 character; your verdict must deal, if you find for the plaintiff at all, simply with the element of pain and suffering.

If you conclude that your verdict should be for the plaintiff, Dominick Soriero, then you may find a verdict, if the evidence so directs you, for the father, Raphael Soriero. In his case, if you conclude he should have a verdict at your hands, that is also limited in this case to what you find he has expended for physicians' bills and services
20 and for medicines. The testimony seems to show that the amount expended for physicians' bill was twelve dollars, and that the amount expended for medicines is twenty or twenty-five dollars. You are to determine, gentlemen of the jury, what those items are and what the amount thereof should be.

You have probably been told many times during your service as jurors what I am about to tell you, but still it is my duty again to tell you that it is
30 your duty and it is your particular province to determine from all the testimony what are the facts. Those facts constitute the evidence. You are to apply those facts and that evidence to those rules of law which the court gives you, and in doing so, arrive at your verdict. In determining those facts you are to take your own recollection of what the testimony is; you are not to take the
40 statements of either counsel or court, but you are

Judge's Charge

to depend upon your memory and your recollection of what the testimony was.

(The jury retired.)

Defendant's Objections.

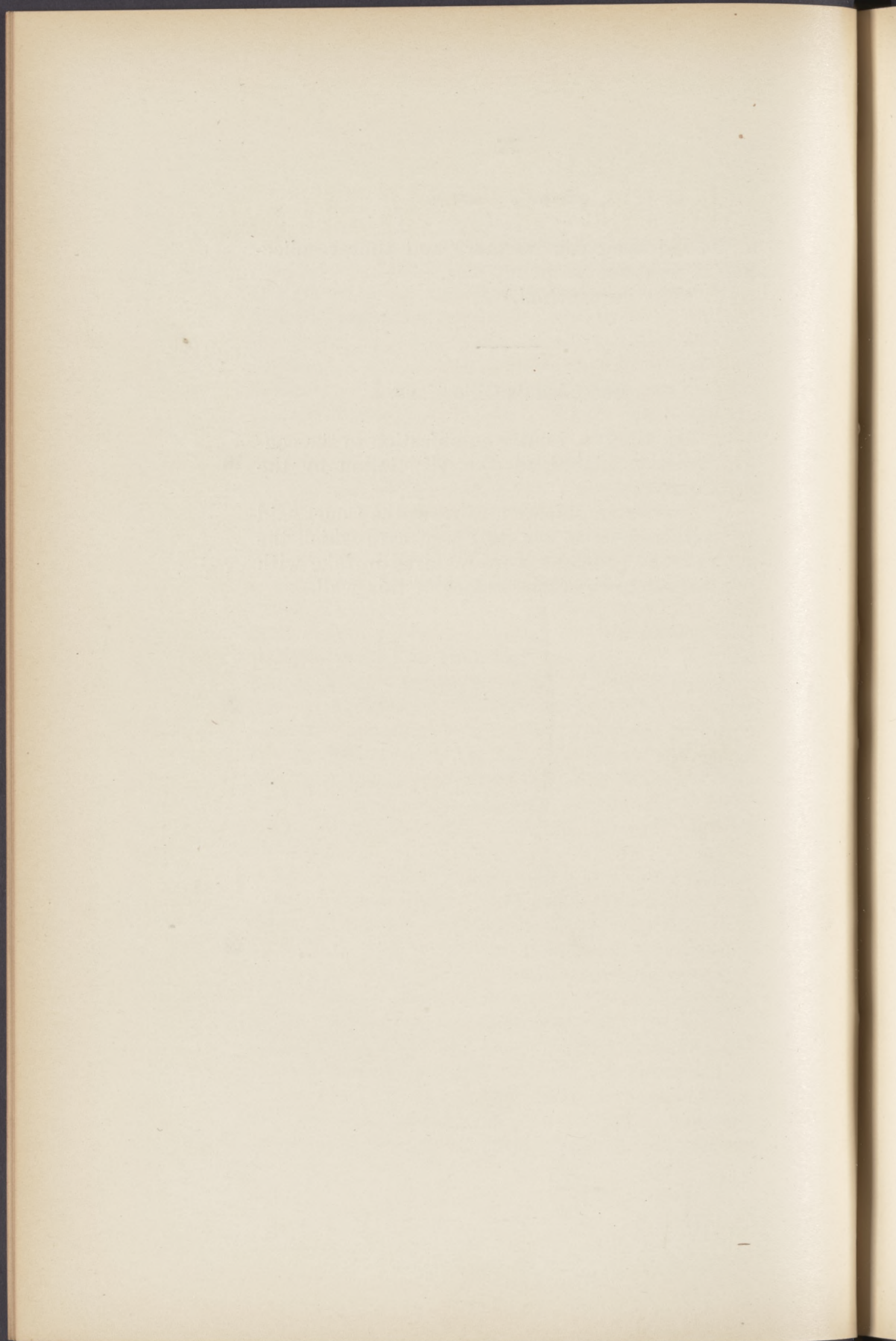
Mr. Carey: I enter an objection to the construction placed on the stipulation by the 10 Court.

I enter an objection to what the Court said with respect to the degree of care which the railroad company were required to take with respect to the maintenance of this wall.

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30

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New Jersey Court of Errors and Appeals

DOMINICK SORIERO, as infant, by
his next friend, RAFFELE SOR-
IERO,

Plaintiff-Appellee,

vs.

THE PENNSYLVANIA RAILROAD
COMPANY,

Defendant-Appellant.

Action at Law.

On Appeal from
Hudson
Circuit Court.

10

RAFFELE SORIERO,
Plaintiff-Appellee,

vs.

THE PENNSYLVANIA RAILROAD
COMPANY,

Defendant-Appellant.

Action at Law.

On Appeal from
Hudson
Circuit Court.

20

BRIEF OF DEFENDANT-APPELLANT.

These two suits were tried together at the Hud-
son Circuit.

Dominick Soriero, a boy eight or nine years of
age (Case, pp. 57-65), was injured on July 8, 1913, 30
by a stone falling from defendant's wall, while
playing upon some old railroad ties that had been
piled up in the street beside the wall or embank-
ment of the defendant, abutting Railroad Avenue,
in Jersey City, New Jersey (Case, pp. 28, 32, 37,
41, 47, 62, 63, 64). The street was light at the time
(Case, p. 31).

There was some testimony to the effect that the
stones in the wall were loose, not cemented by 40

mortar, (Case, p. 29), but there is no testimony in the case showing that the defendant knew or ought to have known that the wall was in a dangerous condition, or that it had ever been warned or informed that it was in a condition of danger.

Upon the grounds that (1) no negligence of defendant had been shown, and (2) that defendant owed no legal duty to the injured boy under the circumstances disclosed, defendant moved for a nonsuit (Case, p. 71), and renewed its motion at the close of the case and also moved for a directed verdict in its favor (Case, p. 74).

These motions were denied by the trial Court (Case p. 74), and the jury rendered a verdict against the defendant and in favor of the plaintiff Dominick Soriero, the infant, for \$500.00 (Case, p. 15), and in favor of the plaintiff Raffele Soriero, the father of the infant, for \$37.00 (Case, p. 27).

From the judgments entered upon this verdict defendant has appealed. Both appeals are considered together in this brief, inasmuch as the rights of both parties stand upon the same basis.

I.

No negligence of Defendant was shown.

The complaint alleges that the stone wall was constructed of stones laid in tiers without cement or mortar, and that they were "very loose" and "overhung and projected from the face of said wall" (Par. 4th, Case, p. 11); that it became the duty of defendant to maintain the wall "in a reasonably safe condition" (Par. 7th, Case, p. 12); and that defendant so carelessly and negligently maintained said wall that "one of the loose stones upon the top thereof was negligently and carelessly permitted to fall upon the said Dominick Soriero" (Par. 9th, Case, p. 12).

The only testimony in the case upon this point is that of Josephine Nunziata, a witness for plaintiffs, who testified as follows (Case, pp. 28-30):

“Q. Did you see any accident happen to this boy on that day, Mrs. Nunziata? A. I know that in the evening, about seven or half past seven, I don’t know the exact time, I was sitting down on the rock outside taking fresh air, on the corner of Railroad avenue and Merseles street; I was listening to the children singing at the time as they sing in school; all at once a rock fell down and then he was struck on his feet. 10

Q. Where did the rock come from, Mrs. Nunziata? A. From the wall.

Q. From what wall? A. The wall of the track.

Q. The wall of the track; that is the railroad track? A. Yes, sir.

Q. Now describe to the jury as well as you can the kind of a wall there is there? A. Don’t you know the wall that consists of blocks of stone and then it is all loose. 20

Q. Stones are loose; do you mean they are not cemented by mortar or anything?

Mr. Carey: Objected to as leading.

Q. What do you mean when you say they are loose? A. They are about to fall down.

Q. They are about to fall down. How long have you lived about there, Mrs. Nunziata? A. You mean the present address? 30

Q. Yes. A. That I have lived in Jersey City?

Q. No, but where this accident happened, how long have you lived there? A. Three or four months.

Q. Three or four months; did you live there during the month of July? A. Yes.

Q. Well, now, before the month of July how many months did you live there? A. Three or four months previous to this accident.

Q. Did you notice the condition of the wall previous to this accident? A. No, sir. 40

Q. What was the condition of the wall on this day that you saw the stone fall?

Mr. Carey: I object. The condition of the wall at the particular place ought to be—

Q. Well, just where this accident happened where the stone fell upon this child? A. They were all about to fall where the boys were.

Q. You say you saw the stone fall on the child? A. Yes."

10 There is nothing in this testimony (and which at best is but an expression of opinion of a woman bystander not shown to have any technical knowledge of construction) to show that the condition of the wall was in any way unusual or different from walls of similar character, to its disadvantage, or that its nature required it to be cemented or otherwise fastened, nor does it contain any statement of facts from which an inference of neglect may be drawn. That the stones were "about to
20 fall" is the mere expression of her untrained opinion or conclusion. There is no fact stated from which such a conclusion may be drawn or upon which such an opinion may be based. If she were to look at the Woolworth Building she would be stricken with the same fear—that it is "about to fall."

There is nothing to show how this condition compared with other like situations; there are no measurements to show the amount of overhang;
30 nothing to show that the overhang was not proper construction; nothing to show how long it had continued,—whether it was of long standing or of sudden occurrence; nothing to bring it home to the knowledge of defendants, even assuming it to have been in improper condition.

As was said by Mr. Justice Garrison, speaking for the Court of Errors and Appeals, in *Bien vs. Unger*, 35 Vr. 596, at p. 579:

40 "With respect to this accident, nothing is

proved excepting that it happened, and if it happened without interference with the treadle, no hypothesis whatsoever has been advanced to account for it that has the slightest foundation in the testimony. Now, the issue tendered by the *Narr*, placed upon the plaintiff the burden of proving something by preponderance of proof,—something that was, to say the least, more consistent with the negligence of the defendants than it was with 10 their innocence.

“The right of the defendant to have his plaintiff bear the burden of the affirmative is a substantial one and not a mere matter of form. *McGilvery v. Newark Electric L. and P. Co.*, 34 Vroom, 591.

“This burden may be borne by direct proof of some negligent act or by the proof of circumstances from which the defendant’s want of due care is a legitimate inference. 20

“In the present case it is not pretended that there was any direct proof of negligence. * *

“To charge the master with negligence in permitting the use of this machine because of its unaccountable tendency to behave in a dangerous fashion, something in the nature of scienter must be proved, or at least be fairly inferable from the testimony. Unless this be done, there is no particular in which negligence has been shown by the greater weight 30 even of probability. There is no such thing as negligence at large.

“This is not one of those cases in which the plaintiff, in default of proof of the particular in which the defendants were negligent may point to the occurrence by which he was injured and say that this of itself made the probability that the defendants had acted carelessly of greater weight than the presumption that they had not, which is the doctrine called *res ipsa loquitor*. * * * 40

"Nonsuit should have been granted."

And, again, in *Wyckoff vs. Birch*, 47 Vr. 646, at p. 652, the same learned Justice, speaking for the same Court, said:

10 "Aside from the elliptical shape thus assumed by the stand-pipe in the course of construction, and the consequent lack of reach of some of the angle-irons, no concrete act, either of omission or of commission, constituting negligence, is laid by the testimony at the door of the master. If he was negligent in some other regard that caused the death of plaintiff's intestate, it must have been either with respect to some act done by him or some duty that he omitted to perform, but as to any such act or as to any such duty the testimony is not only silent but is conclusively to the contrary. Arguments based upon isolated circumstances or detached statements of witnesses or upon general allegations of negligence go for nothing when unsupported by testimony as to concrete facts. In its essence negligence is always concrete. There is, as was said upon another occasion, 'No such thing as negligence at large.' *Bien vs. Unger* 35 Vroom 596."

20

Judgment for plaintiff reversed.

30 So, also, in *Kelly &c. Co. vs. C.R.R. Co.* 41 Vr. 90, it was held that mere proof of delivery of a shipment of glass to a common carrier in good condition, and the discovery that the glass was broken when the box was opened, at the premises where it was delivered, was not sufficient evidence to carry the case to the jury. The Supreme Court held that a nonsuit should have been granted. Mr. Justice Fort, who wrote the opinion for the Court, said:

40 "There is no proof that the glass had not been broken in carting it from the Perth

Amboy station to the place where it was unpacked. As to the care with which it had been carted, there was no proof offered. When the plaintiff rested there was no evidence from which the jury could reasonably infer that the defendant's negligence had caused the injury. In fact, there was no proof that the glass had been broken by the negligence of any one, or that it was, in fact, broken when it was delivered by the defendant to the plaintiff at the 10 Perth Amboy station."

And in *Michaels vs. Adams Express Co.*, 42 Vr. 41, it was held by the Supreme Court that, where goods were shipped by Express, subject to a provision in the Express receipt exempting the carrier from liability in case of destruction or damage by fire,—

"Mere non-delivery and proof of loss by fire did not make out the case for the plaintiffs, which, in view of the contract of carriage must rest upon the negligence of the carrier with respect to the loss by fire. Such negligence not appearing in the testimony of either party, the defendant was entitled to a judgment for costs against the plaintiffs. * * * The verdict was properly directed."

And so in *O'Hara vs. Gould*, 55 Vr. 583, it was held by the Supreme Court that where there was 30 no evidence of careless driving the mere fact that an automobile ran over a dog, both dog and auto being lawfully in the street, was not sufficient "to charge negligence, much less can it support a claim for wilful injury."

II.

Defendant owed no legal duty to Plaintiff except to refrain from wilful injury.

10 The boy was not engaged in any legitimate use of the highway and therefore there was no duty of care owing by the defendant to him. The part of the highway which was occupied by the pile of ties was for the time being withdrawn from the proper uses of the highway. If the ties were the property of the defendant and placed there by it (and there is no proof that they were or were not) although they were there wrongfully, the child had no right to be using the personal property of the defendant for his convenience as a resting-place. And in that situation the defendant owed him no duty.

20 *Friedman vs. Snare & Triest Co.*, 42 Vr. 605, 617.

If, on the other hand, the ties were the property of a third person, they were at all events wrongfully in the street, and neither the owner of the ties nor the child with the owner's permission could assert any duty of care while using the obstruction as a resting-place.

30 Under the doctrine of the *Friedman case*, *supra*, the defendant was presumably the owner of the portion of the street adjoining its property where the ties were placed. Whether the ties were the property of the defendant or of someone else, does not seem material. If the defendant allowed the ties to remain there, it was, as regards their use by third persons, the same as if it had placed them there itself.

40 In the *Friedman Case*, the Court of Errors and Appeals, through Mr. Justice Pitney, at pp. 610, 611 of the report, said:

"It is manifest that every deposit of building materials of the character now in question necessarily amounts to a temporary exclusion of the public from the space thus occupied. A reasonable interference with the public easement is rightful. If the public be unreasonably hindered and endangered, the party at fault may be indicted for maintaining a public nuisance or may be required to remove the obstruction. And further, an individual member of the public, if specially damnified by the nuisance while in the exercise of his rights in the street, may maintain a private action. But this refers only to parties injured while using the street as a street, and not to those whose injuries arise from their attempted use of the obstructing materials for their own purposes, whether of pleasure, convenience or profit. For the building materials themselves do not in any sense become public property by being allowed to remain in the street. And neither a traveler, nor an idler, nor even a playful child, can gain rights against the landowner, or against his agent who stands in his rights, by using such building materials as a resting place or playground. In the absence of circumstances denoting invitation, one thus using the private property of another for his own purposes may be either a licensee or a mere trespasser, depending upon circumstances. In neither case is there any duty incumbent upon the proprietor to make his property safe for such use. Aside from the notion that temptation is equivalent to invitation (with which we cannot concur), there is nothing in the mere existence of building materials as an obstruction in the street, that denotes an invitation to the

passer-by or to the idler or playful child to use the materials for his own purposes."

The only real difference between the *Friedman Case* and the case at bar is, that in the *Friedman Case* the child (who was only between four and five years old) was injured by the falling of the building materials upon which he was playing, while in the present cases the injury was caused
 10 by the falling of a stone from a wall abutting on the street, while the child (who was eight or nine years old) was playing on the ties in the street. We do not see how this can make any difference in the result, since in either case the defense is based upon the fact that the child was either a trespasser or a mere licensee.

To a trespasser or licensee, a landowner owes no duty except to refrain from wilful or wanton injury. No legal responsibility can ensue unless
 20 there is a breach of some duty.

"The rule is, that he who enjoys the permission or passive license is only relieved from the responsibility of being a trespasser, and must assume all the ordinary risk attached to the nature of the place or the business carried on." (Cases cited)

Per Bedle, J., in Vanderbeck vs. Hendry, 5 Vr. 467 (Sup. Ct.)
 30

"If there is no duty, there can be no negligence; there can be no such thing as the negligent performance of a non-existent duty."

Per Gummere, C. J., in

D. L. & W. R. R. Co., vs. Reich, 32 Vr. 635 (Ct. E. & Ap).

The same rule applies as to personal property.

Friedman vs. Snare & Triest Co. supra.

Hoberg v. Collins & Lavery Co., 51 Vr. 425 (Ct. E. & Ap).
 40

III.

The age of the injured person has no bearing upon the duty of Defendant.

In *Vanderbeck vs. Hendry*, 5 Vr., 467, the Supreme Court held that, where a pile of lumber was so insecurely bound together that it fell upon and killed a child (who was ten years old) who came upon defendant's lands unsolicited, there could be no recovery, and that "the age of the plaintiff could have no bearing, except on the question of contributory negligence." 10

And in the following cases, among many, recovery has been denied where the plaintiffs were of tender age:

Barcolini vs. R. R. Co., 53 Vr. 107 (21 months old).

Turess vs. R. R. Co., 32 Vr. 214 (10 years old). 20

D. L. & W. R. R. Co. vs. Reich, 32 Vr. 635 (13 years old).

Hoberg vs. Collins, Lavery Co., 51 Vr. 425 (9 years old).

Ulshowski vs. Hill, 32 Vr. 375 (3 years old).

IV.

The trial court erred in charging the jury that 30
 "the defendant company must have used and
 "must use that degree and amount of care
 "which is within the range of human precaution and foresight to keep the wall in such
 "condition as not to cause injury to a person
 "upon the public Highway."

To this, objection was made (Case, p. 77).

This charge fails to take into consideration whether plaintiff was lawfully upon the highway 40

or upon it in a way that may have modified or abrogated any duty that the landowner otherwise might have owed him, and leaves the bald statement of a duty, regardless of circumstances, for the jury to consider.

Further, the duty of the defendant was not such as indicated by the trial court in any event, but simply to use a reasonable degree of care under the circumstances.

- 10 *Thomas v. Cons. Trac. Co.*, 33 Vr. 36, at 38 (Sup. Ct.);
 Finnigan v. Moore, 17 W. 602, at 630 (Ct. E. & Ap);
 Phillips v. Library Co. 26 Vr. 307 (Ct. E. & Ap.);
 McCormick v. Anistaki, 37 Vr. 211 (Ct. E. & Ap);

- 20 The degree of care charged by the trial Court is that extraordinary care incumbent upon those who are handling instrumentalities dangerous in themselves, as in *Van Winkle vs. Am. Steam Boiler Co.*, 23 Vr. 240, where it was held by the Supreme Court that, in the use of a steam boiler, there was a duty to exercise *great care and skill* by those having charge of it, it being an instrument which, if mismanaged, was highly dangerous to the lives of persons in its neighborhood;

- And in,
 30 *McAndrews vs. Callerd*, 13 Vr. 159, in which the Court of Errors & Appeals held that, a defendant using powder or other high explosive for blasting purposes, was liable for injury to plaintiff, even though defendant showed that it had done its work in a most careful manner.

- But this wall was not shown to be such a dangerous instrumentality, and the trial Court should have limited the care required in its safe maintenance to *reasonable care*, and not *that degree and amount of care which is within the range of*
 40 *human precaution and foresight.*

V.

The judgments under review should be reversed, set aside and for nothing holden, and new trials granted.

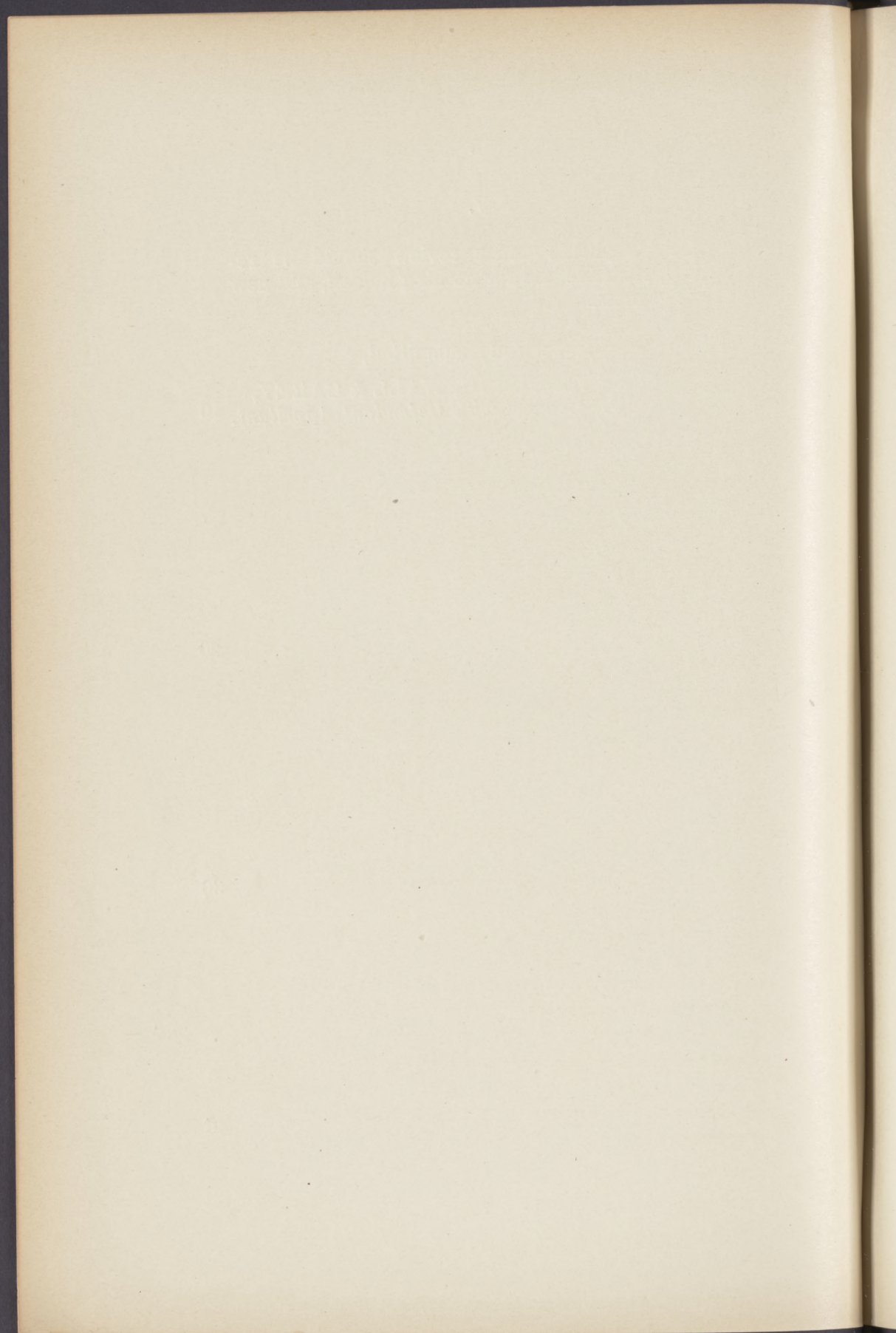
Respectfully submitted,

VREDENBURGH, WALL & CAREY,
Of Counsel with Defendant-Appellant. 10

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NEW JERSEY
Court of Errors and Appeals.

DOMINICK SORIERO, AN INFANT,
BY HIS NEXT FRIEND, RAFFELE
SORIERO,

Plaintiff-Appellee,

vs.

THE PENNSYLVANIA RAILROAD
COMPANY,
Defendant-Appellant.

RAFFELE SORIERO,
Plaintiff-Appellee,

vs.

THE PENNSYLVANIA RAILROAD
COMPANY,
Defendant-Appellant.

Brief on Behalf of Plaintiff-Appellee.

It appears from the record in these cases that the defendant's embankment and wall abuts upon and immediately adjoins the public sidewalk (stipulation, p. 28, case,). The fourth ground of appeal, to the effect that the plaintiff was upon the property of the defendant, is based solely upon the contention of the defendant that it owns to the center of the street and that the public sidewalk, upon which the infant plaintiff was injured, and immediately adjoining the embankment, was upon the railroad company property.

The stipulation (p. 28, case) specifically limits the defendant's property to a line "abutting upon and immediately adjoining the public sidewalk."

No claim was then made, on the trial, that the ownership of the defendant extended to the center of the street and included the sidewalk where the infant plaintiff was injured.

While the infant plaintiff, with other children, were upon this portion of the public sidewalk immediately adjoining defendant's embankment a large rock fell from the wall striking the infant plaintiff. The wall consists of blocks and stone, that are all loose and about to fall down (p. 29, case, p. 62, case). The stone which fell was about $2\frac{1}{2}$ ft. x 2 ft. x 18 inches (p. 30, p. 36, p. 50, case).

There is no evidence in the record on behalf of the defendant contradicting or disputing any of the facts as to the happening of or manner of the accident or the dangerous condition of the wall. No witnesses were called by the defendant to dispute any of these facts.

II.

The decision of this Court in *Snare & Trust Co. vs. Friedman*, 71 N. J. L., 605, has no bearing whatsoever upon the facts as appear in this action, and were so entirely different that we will not take up the time of the Court by referring to them.

III.

The law is well settled in innumerable cases, that an owner of building or property adjoining the street, is liable to a pedestrian on the street, for damages sustained by reason of falling objects, and the highest degree of care must be exercised to prevent injury to persons on the street from this cause. *It appears from the uncontradicted testimony, that*

the stone wall from which the stone fell upon the infant plaintiff, was composed of loose stones, very loosely and negligently held together. The owner of a building or other structure abutting on a street or highway is under a legal obligation to take reasonable care that it or any part of it shall not fall into the street or highway and injure persons lawfully there. The owner is liable for injury caused by the falling of materials or substances from such building by reason of its defective condition, or the manner of its construction. So persons engaged with tools and materials directly over a thoroughfare where people are constantly passing are in duty bound to exercise the greatest care to prevent injury to travelers. And the same is true in regard to throwing substances into the street.

"Where a person permits dangerous obstructions to be on his land so near the highway that they result in injury to persons passing along the highway, he is liable." *Mullen v. St. John*, 57 N. Y., 567, 15 Am. Rep., 530.

"An abutting owner, erecting a fence around an excavation, must make it sufficiently strong to withstand any wind that a reasonably prudent person would anticipate." *Sutphen v. Hedden*, 67 N. J. L., 324; 51 Atl., 721. See also *Ryder v. Kinsey*, 62 Minn., 85; 64 N. W. 94; 54 Am. St. Rep., 623; 34 L. R. A. 557; *Murray v. McShane*, 52 Md., 217; 36 Am. Rep., 367; *Butts v. National Exch. Bank*, 99 Mo. App., 168; 72 S. W., 1083; *Reynolds v. Van Buren*, 51 N. Y. App. Div., 632; 64 N. Y. Suppl., 724; *Tarry v. Ashton*, 1 Q. B. D., 314; 45 L. J. Q. B., 260; 34 L. T. Rep. N. S. 97, 24 Wkly. Rep., 581; *Ferrier v. Trepannier*, 24 Can. Sup. Ct., 86, 59; *Shepherd v. Creamer*, 160 Mass., 496; 36 N. E. 475; *Smethurst v. Darton Square Independent Cong. Church*, 148 Mass., 261; 19 N. E. 387; 12 Am. St.

Rep., 550; 2 L. R. A., 695; Shipley v. Fifty Associates, 106 Mass., 194; 8 Am. Rep., 318; Hannem v. Pence, 40 Minn., 127; 41 N. W., 657; 12 Am. St. Rep., 717.

"A person using a public street has a right to presume that it is free from dangerous obstacles, and the mere fact that he receives injury by coming in contact with such an obstacle, does not warrant the conclusion that he contributed to the injury by his own negligence." Suburban Electric Co. v. Nugent, 58 N. J. L. (29 Vr.), 658; 34 Atl., 1069.

"One entering premises by right or by invitation, and using a path which for many years has been used with the acquiescence of the owner, is not precluded from recovery for an injury caused by a hole dug by the owner in the path merely because the owner has provided another way that was safe and might have been used by plaintiff." Phillips v. Library Co., 55 N. J. L. (26 Vr.), 307; 27 Atl., 478.

"Where the plaintiff was injured by falling into a hole dug by defendant in a path crossing his premises, it is a question of fact for the jury whether the path had, by use known to defendant, gained the appearance of a way that persons were invited to use." Phillips v. Library Co., 55 N. J. L. (26 Vr.), 307; 27 Atl., 478.

"The owner or occupier of lands, who, by invitation, express or implied, induces persons to come upon the premises, is under a duty to exercise ordinary care to render the premises reasonably safe for such purposes, or at least to abstain from any act that will make the entry upon or use of the premises dangerous." (1893) Phillips v. Library Co., 55 N. J. L. (26 Vr.), 307; 27 Atl., 478; (1901) McCormick v. Anistaki, 66 N. J. L. (37 Vr.), 211;

49 Atl., 505; (1899) *Devoe v. New York, etc., R. Co.*, 63 N. J. L. (34 Vr.), 276; 3 Atl., 899.

“Invitation which creates such a relation may be express, as when the owner or occupier of land, by words, invites another to come on it, or make use of it or some thereon; or it may be implied, as when such owner or occupier, by acts or conduct, leads another to believe that the land, or something thereon, was intended to be used as he uses them, and that such use is not only acquiesced in by the owner or occupier, but is in accordance with the intention or design for which the way or place or thing was adapted and prepared or allowed to be used”. (1901) *McCormick v. Anistaki*, 66 N. J. L. (27 Vr.), 211; 49 Atl., 505; (1898) *Turess v. New York, etc., R. Co.*, 61 N. J. L. (32 Vr.), 314; 40 Atl., 614; (1893) *Phillips v. Library Co.*, 55 N. J. L. (26 Vr.), 307; 27 Atl., 478.

“A contractor, building a wall of a building, owes it to an employee of a sub contractor engaged in other work about the building to take reasonable care that the wall shall not fall while in process of construction.” *Dettmering v. English*, 64 N. J. L. (35 Vr.), 16; 44 Atl., 855; 48 L. R. A., 106 (h) 1900.

“Where an owner invites another to come upon his premises, he is required to use reasonable care to have them in a safe condition.” *Land v. Fitzgerald*, 68 N. J. L. (39 Vr.), 28; 52 Atl., 229.

“An owner or occupier of lands who by invitation, express or implied, induces persons to come upon the premises, is under a duty to exercise ordinary care to render the premises reasonably safe for such purposes.” *Nolan v. Bridgeton, etc., Traction Co.* (Err. & App.), 65 Atl., 992.

IV.

**The judgment in these cases should be affirmed
with costs.**

Respectfully submitted,

CHARLES M. EGAN,
Attorney for Plaintiff-Appellee.

