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Notice and Grounds of Appeal.

Warren County Circuit Court

(Filed Jan. 8, 1927.)

To:

WM. C. GEBHARDT & SON,
Attorneys for Plaintiff.

Sirs:

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

1. The following question was admitted:

   To the plaintiff:
   "Take the condition of your left shoulder. Will that interfere or not?"

2. The following question was admitted:

   To the plaintiff:
   "Let us assume that two cars were put together on a side track and that the hand brake of each of those cars was fastened securely. Will you please tell me whether or not from your experience as a brakeman those cars would be held more or less securely there with two hand brakes instead of just one on each car, than they would be with only one hand brake set on one car."

3. The following questions were overruled:

To the witness Dr. F. A. Sherrer:

(a) "Are you able to say from the examination of this document marked D-1 for identification what part of the anatomy it is an X-ray film of?"

(b) "Now, are you able to tell what portion of the anatomy the film marked D-1 for identification shows?"

(c) "Can you see any evidence of skull fracture in that?"

4. The following question was admitted:

To the witness Dr. Frank Wolfe:

"You said you made an examination of Mr. Hendershot. What conditions did you find?"

5. The following question was admitted:

To the witness J. J. Potter:

"This derail that you spoke of, at the time that you saw these two cars going out, going east, starting on that runaway trip, was that derail on or off the track at that moment?"

6. The Court refused to strike out the following answer of the witness J. J. Potter to the question recited in Ground No. 5 and refused to rule on the motion to strike out:

"The derail must have been off if they went out of the switch."

7. The Court, of its own motion, propounded the following questions to the witness J. J. Potter and permitted the answers thereto to stand notwithstanding an objection on the part of counsel for the defendant:

"How could they possibly have gotten out of the switch? Was the derail on or off when they got out of the switch? A. It must have been off.

"Could they have gotten out if it was on? A. No, sir."

8. The table of mortality in Dickinson's Chancery Precedents of 1894 was admitted in evidence.

9. Defendant's motion for nonsuit after the plaintiff rested was overruled, whereas said motion should have been granted on the following grounds or on some one or more of them:

(a) There is no evidence to prove the allegation of the complaint that the defendant carelessly, negligently and unlawfully ran and propelled the westbound train.

(b) There is no evidence to prove the allegation in the complaint that the defendant negligently and unlawfully ran said train at a dangerous and excessive rate of speed.

(c) There is no evidence to prove the allegation in the complaint that the defendant ran the train without keeping a lookout for other cars or train on the track.

(d) There is no evidence to prove the allegation in the complaint that the defendant ran the said train without receiving any orders or signals that it was safe to proceed.

(e) There is no evidence to prove the allegation in the complaint that the defendant carelessly and negligently ran and propelled a locomo

tive and train of cars on the same track in an easterly direction.

(f) There is no evidence to prove the allegation in the complaint that the defendant carelessly, negligently and unlawfully allowed and permitted the brakes on two of the cars on the said train to be and remain in an unsafe, inefficient, defective and dangerous condition on the said day for a long period of time prior thereto.

(g) There is no evidence to prove the allegation in the complaint that the defendant carelessly, negligently and unlawfully failed to provide good and sufficient derailing devices or any such devices whatsoever on the said track on which the said train was running for the purpose of derailing runaway cars.

(h) There is no evidence to prove the allegation in the complaint that the defendant carelessly, negligently and unlawfully failed to provide any good, safe, proper and lawful signal devices on the said track to warn one train of the approach or presence of another train or car or cars on the said track.

(i) There is no evidence to prove the allegation in the complaint that the defendant carelessly, negligently and unlawfully detached or uncoupled said cars from the rest of the said train.

(j) There is no evidence to prove the allegation in the complaint that the defendant carelessly, negligently and unlawfully detached or uncoupled the said cars from the rest of the said train without properly setting the brakes on the said cars.

(k) There is no evidence to prove the allegation in the complaint that the defendant uncoupled the cars from the rest of the train without placing the same in a safe location.

(l) There is no evidence to prove the allegation in the complaint that the defendant uncoupled the cars from the rest of the train without having a man in charge thereof.

(m) There is no evidence to prove the allegation in the complaint that the defendant uncoupled the cars from the rest of the train without keeping any lookout to see if they started to run away.

10. At the close of the plaintiff's case and after evidence had been submitted in behalf of the defendant the Court permitted plaintiff to reopen his case.

11. Defendant's motion for nonsuit after the plaintiff had rested for the second time was overruled, whereas said motion should have been granted on one or more of the following grounds:

(a) The testimony shows that the cars referred to by the witnesses in the reopening of the plaintiff's case had efficient brakes.

(b) The testimony shows that the brakes on said cars were properly applied.

12. Defendant's motion for direction of verdict in its favor was overruled, whereas said motion should have been granted, on the following grounds or some one or more of them:

(a) There is no evidence to go to the jury upon the allegation of the complaint which reads as follows:

> "The defendant, its servants and agents then and there (referring to the day of the accident) carelessly, negligently and unlawfully ran and propelled a train" (referring to the

train upon which Mr. Hendershot was employed).

(b) There is no evidence to go to the jury upon the allegation of the complaint which reads that the defendant

> "then and there carelessly, negligently and unlawfully ran and propelled said train at a dangerous and excessive rate of speed, and without keeping any lookout for other cars or trains on the said track, and without receiving any orders or signals that it was safe to proceed."

(c) There is no evidence to go to the jury upon the allegation of the complaint which reads as follows:

> "The defendant, its servants and agents, also then and there carelessly and negligently ran and propelled a locomotive and train of cars on the same track in an easterly direction, and then and there carelessly, negligently and unlawfully allowed and permitted the brakes on two cars on the said train to remain in an unsafe and inefficient, defective and dangerous condition on the said day" (referring to the day of the accident), "and for a long time prior thereto."

(d) There is no evidence to go to the jury upon the allegation of the complaint which reads as follows:

> "The defendant, its servants and agents, then and there carelessly, negligently and unlawfully failed to provide good and sufficient de-

> railing devices, or any such devices whatsoever, on the said track on which the said train was running."

(e) There is no evidence to go to the jury upon the allegation of the complaint which reads as follows:

> "The defendant, its servants or agents, carelessly, negligently and unlawfully failed to provide any good, sufficient, proper and lawful signal devices on the said track to warn one train of the approach or presence of another train or car or cars on the said track, and also then and there carelessly, negligently and unlawfully detached or uncoupled the said cars from the rest of the said train, and also then and there carelessly, negligently and unlawfully detached or uncoupled the said cars from the rest of the said train without properly setting the brakes on the said cars and without placing the same in a safe location and without having a man in charge thereof and without keeping any lookout to see if they started to run away."

(f) There is no evidence to go to the jury from which they can find that any act of the defendant, its servants or agents, was the proximate cause of the accident.

(g) There is no evidence to go to the jury upon which they could find that the defendant hauled or permitted to be hauled upon its line any car not equipped with efficient hand brakes, and therefore the Safety Appliance Act, its supplements and amendments, has no application in the case.

(h) Under the undisputed testimony the two cars were properly braked and blocked.

(i) The testimony shows that while the cars were on the back track of the Wharton & Northern Railroad they ran away, out upon the track of the defendant, at which time no agent or servant of the defendant was near them.

(j) It is as consistent with sound reason to conclude that the brakes were released and the blocks removed by an employee of the Wharton & Northern Railroad Company, or a tramp, or other person, as that the brakes were inefficient, or negligently applied, or for some other negligent act of the defendant.

13. The Court charged the jury:

"It appears that the plaintiff was employed by the defendant railroad company, which is admitted to have been an inter-state common carrier at the time of the accident in question, and because of such employment and the nature of the business of the railroad company this action is predicated upon what we know and commonly speak of as the Federal Employers' Liability Act, that is to say, an Act of Congress; and I may say that the general features of that Act may be stated in this way:

" 'Every common carrier by railroad while engaged in commerce between any of the several states shall be liable in damages to any person suffering an injury while he is employed by such carrier in such commerce for such injury or death resulting in whole or in part from the negligence of any of the officers, agents or employees of such carrier, or by reason of any defect or insufficiency, due to its

negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves or other equipment.' "

14. The Court charged the jury:

"Then, again, in the Act in this section:

" 'That in all actions hereafter brought against such common carrier by railroad under or by virtue of the provisions of this Act to recover damages for personal injury to an employee, or where such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee, provided, however, that no such employee who shall have been injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by any such carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee.'

"Then again: 'That in any action brought against any common carrier under or by virtue of any of the provisions of this Act to recover damages for injury to, or the death of any of its employees, such employee shall not be held to have assumed the risk of his employment in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee.' "

15. The Court charged the jury:

"They, as it appears to me, are the sections of the Act which are applicable to the issue presented to you in this case."

16. The Court charged the jury:

"I may say that there is still another Act of Congress, known as the Safety Appliance Act, and, generally, the provision of that is that it is the duty of the common carrier, railroad company, to have the cars used by it equipped (now I am simply speaking of the issue presented to you) with efficient handbrakes, and I refer to the Safety Appliance Act in that respect."

17. The Court charged the jury:

"We have been speaking of negligence in this case because the plaintiff charges the employees of the defendant company with negligence, and in our law by that is meant either the omission to do something which a reasonable man, guided by circumstances which ordinarily regulate the conduct of human affairs, would do, or the doing of something which a reasonable and prudent man would not do; and when negligence arises out of an act of commission by one for whose conduct another is responsible it must be with reference to some duty which the responsible person owed to the party injured. I have already read to you the provisions of the Federal Employers' Liability Act which placed the duty or obligation upon the defendant railroad company with regard to its employees and their safety, and you will

recall what I read of the statute in that respect, and also the reference to the Safety Appliance Act."

18. The Court charged the jury:

"It may be said with regard to the operation of railroads that a high degree of care is necessary, but our courts have held that whether it be extraordinary or high degree of care means nothing more or less than that degree of care commensurate with the risk of danger, in some instances being spoken of as high degree of care, in other extraordinary care, or ordinary or reasonable care; and in speaking of reasonable care it has said, 'It is not extraordinary care, but such care as ordinarily prudent men would exercise under existing conditions.' So you will observe, after all, it is the reasonable care which would be observed in the immediate circumstances involving risk of danger."

And after exception was taken by the defendant to that part of the charge, the Court thereupon further charged the jury:

"As a result of exceptions taken to the Court's charge by the respective counsel and in order that no misapprehension may be in your minds as to the definition of negligence and the degree of negligence of which the Court spoke in its charge, I desire to say this to you further: I spoke of extraordinary care, high degree of care and ordinary care. You are not to be misled by those definitions which the Court gave you. The defendant company was charged with ordinary or reasonable care; that

is the test here. Reasonable care means not extraordinary care, but such care as ordinarily prudent men would exercise under the existing conditions. So that the rule as to ordinary or reasonable care applies to the present case. Bear that in mind. It is not extraordinary care or a high degree of care but ordinary or reasonable care on the part of the employees of the defendant company that is the issue. That does not mean that you are obliged to find either way. I am simply giving you that in connection with the definition of negligence, the burden being on the plaintiff always to prove negligence, within such definition of negligence, and the failure of the employees of the defendant company to exercise ordinary or reasonable care."

19. The Court charged the jury:

"The defense appears to be (and that is a mere comment of the Court, you will understand) that there was no negligence on the part of the defendant railroad company; but in any event, while the plaintiff in his complaint charges a series of alleged acts of a negligent character on the part of the defendant railroad company I think that you will find, when you come to consider the case, that the issue narrows down to the question as to whether or not the runaway cars had been properly equipped with efficient hand brakes or whether the employees of the defendant company in moving the cars in the yard of the railroad to which reference has been made, and the name of which I do not now recall, acted negligently and carelessly."

20. The Court charged the jury:

"So that I submit to you as a proposition of law if you find under the greater weight of the evidence that either the railroad company failed to equip the cars in question or was responsible for the equipment of the cars in question with efficient hand-brakes, or the employees of the company acted carelessly so as to bring them within the definition of negligence that I have given to you, then I say to you there can be a recovery in either aspect of the situation, provided the plaintiff has carried the burden of satisfying you under the greater weight of the evidence that the defendant company through its employees was negligent within the definition given you."

21. The Court charged the jury:

"I take it then that the issue is rather narrow and centers around the incidents with reference to the handling of those two cars or their proper equipment, because if there were inefficient hand-brakes, so as to be a violation of the Safety Appliance Act, or the employees of the defendant railroad company acted carelessly and negligently in moving those cars, then I charge you that you may find (that is no direction, of course); it is a mere comment) that the plaintiff has established his case, assuming it be supported by the greater weight of the evidence."

22. The Court charged the jury:

"We have a rule in our State, for example, which it occurs to the Court is pertinent for

consideration in this case. Here was a situation where an employee of the defendant company, the plaintiff, was in the performance of his duty apparently, if you believe the testimony, and suddenly two loose cars came around the corner with no one in charge of them, and the collision in question occurred. Whether that circumstance of itself is an evidence of negligence on the part of those responsible it seems to me will be a question for consideration by the jury, because we have this rule: The principle is that when through any instrumentality or agency under the management or control of the defendant or his servants there is an occurrence injurious to the plaintiff, which, in the ordinary course of things, would not take place if the person in control were exercising due care, the occurrence itself in the absence of explanation by the defendant affords prima facie evidence that there was want of due care."

23. The Court charged the jury:

"That brings me to say this: There is testimony on behalf of the defendant to the effect that the brakes on the cars in question were efficient and that they were properly set, and the cars blocked, but notwithstanding such testimony the proofs tend to indicate that the cars ran away. You may consider whether the mere declaration by the brakeman, produced by the defendant, that the brakes were efficient is sufficient to satisfy you that they were. May it not be said (and this is a mere comment and suggestion on the part of the Court; you are the judges of the facts in the case) that the declaration on the part of the employee of

the defendant company that the brakes were efficient is not proof that they were? You might say what proof is there in the case that any test had been made of a character which would support the brakeman's declaration that the brakes were efficient?"

24. The Court charged the jury:

"If tests had been made prior to this accident by those qualified either as mechanics in the construction of such equipment for cars or by those who, as the result of years of experience, come here and say, 'Yes, the brakes were tested and these cars were set in motion or attached to a train or were moved the day before, or the week before, or within a reasonable time before, and these brakes tested efficiency.' It is conceivable that if that sort of evidence were in the case, aside from the mere declaration of the brakemen in question, they might well say that the cars' running away was not due to inefficient brakes. Bear in mind that I am not taking from your consideration at all the testimony of that brakeman in relation to the efficiency of the brakes. It is a question of fact for you to determine in the case, and you must consider all of the evidence offered, whether coming from the plaintiff or the defendant."

25. The Court charged the jury:

"In the second place, assuming that the brakes were efficient but that they had not been properly set or the cars blocked, if you ascertain that as a fact would you then say as an inference of fact that the employees of the

defendant company had been careless or negligent in setting the brakes or blocking the cars, because the cars did run away?"

26. The Court charged the jury:

"It has been suggested to you that since the employees of the company have testified in support of the claim that they were not negligent that some outside source was responsible for the cars running away; but is there any evidence in the case that any persons, such as tramps, were seen around these tracks? I am obliged to say to you that positive testimony as against mere negative testimony or the entire absence of testimony on a given subject presents very little difficulty to the jury. In analyzing such classes of testimony I take it that you would be inclined to take the positive testimony, giving consideration to the negative testimony and very little to the absence of any testimony. What testimony is there in this case that any person was around the yard where those cars were at the time of this occurrence other than the employees of the defendant company who were shifting cars, as has been testified? (That again is a mere comment of the Court. You may take it or reject it, as you see fit.) Again the Court reminds you that you are the judges of the facts."

27. The Court charged the jury:

"Having passed upon the question of compensation for the personal injuries, I may say again in comment that if you find the injuries are as claimed by the plaintiff and that he has carried the burden of satisfying you under the greater weight of the evidence, then he is entitled to recover a substantial sum therefor. In addition to that he claims a loss of ability to work, and again he must satisfy you under the greater weight of the evidence. It appears that as a brakeman, at which employment he had been engaged for many years, he was receiving at the time of the accident approximately fifty dollars a week."

28. The Court charged the jury:

"* * * and in estimating his loss therefrom, if there was a loss in that respect, you have the right to resort, as it were, to what we know as the mortality table; it has been so held by the Appellate Court of this State; but in so resorting to the mortality tables you will remember that the purpose would be to ascertain the present worth of his loss from the time of the accident to the present time and what his probable loss might be in that regard in the future. This table, however, is only a general rule, based upon the average expectation of life, and there are a great many elements which should enter into your consideration thereof. Of course, the plaintiff may live longer than the tables provide; on the other hand, he may be killed in an accident or die of disease at a much shorter period than the average expectation of life; he might suffer an injury whereby his earning power might be greatly depreciated; he might earn more; that is for you to take into consideration."

29. The Court refused to charge the following request of the defendant:

"There is no evidence in this case that the defendant carelessly, negligently and unlaw-

fully ran and propelled the train upon which Mr. Hendershot was employed at the time of the accident, and you cannot, therefore, find against the defendant upon that allegation of the complaint."

30. The Court refused to charge the following request of the defendant:

"There is no evidence in this case that the defendant carelessly, negligently and unlawfully ran and propelled the train upon which Mr. Hendershot was employed at a dangerous and excessive rate of speed and you cannot, therefore, find against the defendant upon that allegation of the complaint."

31. The Court refused to charge the following request of the defendant:

"There is no evidence in this case that the defendant carelessly, negligently and unlawfully ran and propelled the train upon which Mr. Hendershot was employed without keeping any lookout for other cars and trains upon the track and you cannot, therefore, find against the defendant upon that allegation."

32. The Court refused to charge the following request of the defendant:

"There is no evidence in this case that the defendant carelessly, negligently and unlawfully ran and propelled the train upon which Mr. Hendershot was employed without its having received orders or signals that it was safe to proceed and you cannot, therefore, find against the defendant upon that allegation of the complaint."

33. The Court refused to charge the following request of the defendant:

"There is no evidence in this case that the defendant carelessly and negligently ran and propelled a locomotive and train of cars in an easterly direction on the same track along which the train upon which Mr. Hendershot was employed was operated and you cannot, therefore, find against the defendant upon that allegation of the complaint."

34. The Court refused to charge the following request of the defendant:

"There is no evidence in this case that the defendant carelessly, negligently and unlawfully allowed and permitted the brakes on two of its cars to be and remain in an unsafe, inefficient, defective and dangerous condition on the day of the accident and for a long time prior thereto and you cannot, therefore, find against the defendant upon that allegation of the complaint."

35. The Court refused to charge the following request of the defendant:

"There is no evidence in this case that the defendant carelessly, negligently and unlawfully failed to provide any good, sufficient, proper and lawful signalling devices on its track to warn one train of the approach or presence of another train or car or cars on the said track and you cannot, therefore, find

against the defendant upon that allegation of the complaint."

HOBART & MINARD,
Attorneys of Appellant.

Service of the within notice and grounds of appeal is acknowledged this 7th day of January, 1927.

WILLIAM C. GEBHARDT & SON,
Attys. of Plaintiff.

Complaint.

(Filed Sept. 13, 1926.)

WARREN COUNTY CIRCUIT COURT.

JAMES HENDERSHOT, Plaintiff, vs. NEW YORK, SUSQUEHANNA AND WESTERN RAILROAD COMPANY, Defendant.	Action At Law

The plaintiff, who resides in the Borough of Blairstown, County of Warren, and State of New Jersey, says:

1. That on the 23rd day of June, 1925, the defendant was a common carrier by railroad, and was then and there the owner and operator of a certain railroad running from the City of Paterson, in the County of Passaic, and State of New Jersey, to the City of Wilkes-Barre, in the State of Pennsylvania.

2. The defendant was then and there engaged in interstate commerce between the State of New Jersey and other States of the United States.

3. On the said day the plaintiff was then and there employed by the defendant in the capacity of brakeman, and was then and there engaged in interstate commerce, and was then and there engaged in his duties as brakeman on a certain train of the defendant, which was then and there proceeding on a journey on the said railroad from Undercliff, New Jersey, to Beaver Lake, New Jersey, and to other points or other places in New York and Pennsylvania, in a westerly direction.

4. The defendant, its servants and agents, then and there carelessly, negligently and unlawfully ran and propelled the said train, and then and there carelessly, negligently and unlawfully ran and propelled the said train at a dangerous and excessive rate of speed, and without keeping any lookout for other cars or trains on the said track, and without receiving any orders or signals that it was safe to proceed (this being then and there a single track road) all of which was contrary to the statute in such case made and provided.

5. The defendant, its servants and agents, also then and there carelessly and negligently ran and propelled a locomotive and train of cars on the same track in an easterly direction, and then and there carelessly, negligently and unlawfully allowed and permitted the brakes on two of the cars

on the said train to be and remain in an unsafe, inefficient, defective and dangerous condition on the said day and for long time prior thereto, all of which was contrary to the statute in such case made and provided.

6. The defendant, its servants and agents, then and there carelessly, negligently and unlawfully failed to provide good and sufficient derailing devices or any such devices whatsoever on the said track on which the said train was running for the purpose of derailing runaway cars, and also then and there carelessly, negligently and unlawfully failed to provide any good, sufficient, proper and lawful signal devices on the said track to warn one train of the approach or presence of another train or car or cars on the said track, and also then and there carelessly, negligently and unlawfully detached or uncoupled the said cars from the rest of the said train, and also then and there carelessly, negligently and unlawfully detached or uncoupled the said cars from the rest of the said train without properly setting the brakes on the said cars, and without placing the same in a safe location, and without having a man in charge thereof, and without keeping any lookout to see if they started to run away, so that as a result of all the aforesaid carelessness, negligence and unlawfulness of the defendant, its servants and agents, the said cars then and there ran away in an easterly direction on the said track at a high rate of speed, and as a result of all the aforesaid carelessness, negligence and unlawfulness of the defendant, its servants and agents, collided with the train on which the plaintiff was then and there riding, with great force and violence, and knocked him off the said train to the ground with great force and

violence, and he was greatly bruised, wounded and injured thereby.

7. By reason of the injuries received as aforesaid the said plaintiff has suffered, and will in the future suffer, great pain, and has been unable, and will in the future be unable, to attend to his necessary business and affairs and has lost and been deprived of, and will in the future be deprived of, great gains and profits which he otherwise would have received, and has spent, and will in the future spend, large sums of money in endeavoring to be cured of the injuries received as aforesaid.

8. This action is based on an Act of Congress of the United States of America entitled, "An Act relating to the liability of common carriers by railroad to their employees in certain cases," being a public act and approved April 23, 1908, and the amendment thereof being a public act approved April 5, 1910, and all the other amendments and supplements thereto; and also on the act known as the Safety Appliance Act, and the amendments and supplements thereto, and upon the orders and regulations of the Interstate Commerce Commission based on the said two Acts.

9. This action was commenced within two years from the time the said cause of action accrued.

Plaintiff demands $40,000 damages.

WILLIAM C. GEBHARDT & SON,
Attorneys of Plaintiff.

Answer.

WARREN COUNTY CIRCUIT COURT.

(Filed Oct. 2, 1926.)

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

FIRST DEFENSE.

1. It denies paragraph 1.
2. It denies paragraph 2.
3. It admits that the plaintiff was employed by it on June 23rd, 1925, as a brakeman, but it denies the remaining allegations of paragraph 3.
4. It denies paragraph 4.
5. It denies paragraph 5.
6. It denies paragraph 6.
7. It denies paragraph 7.
8. It denies paragraph 8.
9. It admits that the accident alleged in the complaint to have occurred happened within the period of two years last past.

SECOND DEFENSE.

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

THIRD DEFENSE.

The alleged accident, as set forth in the complaint, was due to contributory negligence on the part of the plaintiff in failing to exercise reasonable care for his own safety.

FOURTH DEFENSE.

The plaintiff has heretofore instituted proceedings before the New Jersey Department of Labor, Workmen's Compensation Bureau, by petition dated July 1, 1926, in which he seeks to recover compensation under the Workmen's Compensation Act of New Jersey for injuries sustained by him. The defendant, New York, Susquehanna & Western Railroad Company, has filed an answer to the said petition and said court has jurisdiction of the subject matter of this suit.

HOBART & MINARD,
Attorneys for Defendant.

Reply.

WARREN COUNTY CIRCUIT COURT.

(Filed Oct. 6, 1926.)

The plaintiff, replying to the answer filed by the defendant in the above-stated cause, says:

1. Plaintiff denies the allegations contained in the Second Defense and denies that the plaintiff was guilty of contributory negligence in any way whatsoever.

2. Plaintiff denies the allegations contained in the Third Defense and denies that the plaintiff was guilty of contributory negligence in any way whatsoever.

3. Plaintiff admits the allegations contained in the Fourth Defense except the allegation to the effect that the Workmen's Compensation Bureau of New Jersey has jurisdiction of the subject matter of this suit, which is denied, and in answer to which the plaintiff says that his contention is that both the plaintiff and defendant were engaged in interstate commerce at the time and place of the accident upon which this action is based, and, if so, the Workmen's Compensation Bureau does not have jurisdiction of the subject matter of the suit.

WILLIAM C. GEBHARDT & SON,
Attorneys of Plaintiff.

Testimony.

WARREN COUNTY CIRCUIT COURT.

No 31, September Term, 1926.

James Hendershot, Plaintiff, vs. New York, Susquehanna and Western Railroad Company, Defendant.	Action at Law

Transcript of shorthand notes of testimony, etc., taken in the above-entitled matter on the trial thereof before Hon. Rulif V. Lawrence, Circuit Court Judge, and a jury at the Court House, Belvidere, New Jersey, on Tuesday, October 26, 1926.

Appearances:

William C. Gebhardt and W. Reading Gebhardt (William C. Gebhardt & Son), for the Plaintiff.

John E. Selser (Hobart & Minard), for the Defendant.

(Jury empaneled and sworn.)

(Mr. W. Reading Gebhardt opened for the plaintiff.)

(Mr. Selser opened for the defendant.)

Mr. W. Reading Gebhardt: I understand we can have it stipulated on the record that both the

plaintiff and the defendant were engaged in interstate commerce at the time the accident occurred.

Mr. Selser: I thought I admitted that in the opening, but if I did not it may be so stipulated.

Mr. W. Reading Gebhardt: But we do not abandon any of the grounds of negligence that we alleged in the complaint.

JAMES HENDERSHOT, the plaintiff, sworn.

Direct examination by Mr. W. Reading Gebhardt.

Q. Mr. Hendershot, you are the plaintiff in this case? A. Yes, sir.

Q. On the 23rd day of June, 1925, by whom were you employed?

Mr. Selser: It is admitted, by the New York, Susquehanna & Western Railroad.

Q. Did you hear what I said then? A. I did not understand you, no, sir.

Q. Where do you live? A. Blairstown, New Jersey.

Q. In this county? A. Yes, sir.

Q. How long has that been your home off and on? A. For about twenty-one or twenty-two years.

Q. You were employed as a brakeman for the Susquehanna Railroad on June 23, 1925? A. Yes, sir.

Q. On that day did you meet with an accident? A. Yes, sir.

Q. Up to the time that you met with the accident what was your condition of health, in a general way? A. It was good.

Q. Please tell me whether or not you worked every day. A. I worked every day.

Q. What train was it you were on when this accident happened? A. 79.

Q. What do you mean by "79"? A. That is the number of the train.

Q. And it was going from where to where? A. Going west; going to Beaver Lake.

Q. Where did it start from? A. From Little Ferry Junction.

Q. This railroad at the point where the accident happened, or in that vicinity, was a one-track or two-track road? A. A single-track road.

Q. Approximately what time of the day or night did this accident happen? A. I don't know; it was dark; it was about 3 o'clock; I couldn't tell.

The Court: 3 o'clock in the morning?

The Witness: About 3 o'clock in the morning, yes, sir.

Mr. Selser: I will agree that it was 3.25.

Q. Was it dark or not? A. Yes, sir.

Q. Were there any automatic block signals or other signals of any kind on this railroad at the place where this accident happened? A. No, sir.

Q. Were there any automatic block signals on this section of the railroad at all? A. Not at that point.

Q. Did you have one or two engines on your train? A. We had two engines.

Q. Do you know why you had two engines? A. That is the rule. We had been using two engines right along, all the time.

Q. What position did you occupy in this crew? A. Head brakeman.

Q. What are the duties of a head brakeman? A. He is supposed to ride the head end and throw the switches; and we had to meet at Kinney's switch.

Q. On the head end of the train? A. On the head engine.

By the Court.

Q. Where, on the cowcatcher? A. No. I am on the left side; on the fireman's side.

Q. In the cab? A. Yes, sir. And when I come close to the switch I go down and throw the switch.

By Mr. W. Reading Gebhardt.

Q. Now, you said the crew got orders to do what? A. To pass No. 60 at Kinney's switch.

Q. And No. 60 is what? A. An eastbound freight.

Q. Your train was a freight train? A. Yes, sir.

Q. Consisting of about how many cars? A. I should think we had about eighteen or twenty cars; something like that.

Q. Where was Kinney's switch with respect to the point where this accident occurred—was it east or west from it? A. It was west from where we were.

Q. Your train was going west? A. Yes, sir.

Q. And No. 60 was going what direction? A. Supposed to come east.

Q. Please tell me whether or not it was your duty to be where you were, as I understand it, in the fireman's cab, at the time this accident happened. A. It certainly was, yes, sir.

Q. What was your next duty to do? A. When we got to Kinney's switch to open the switch and let the train in there and go on again and open up the west end of the switch and pull out after 60 passed us.

Q. From the point where this accident happened up to Green Pond Junction, going in a westerly direction, was it up or down grade? A. All down grade.

Q. Going west? A. It is up grade going west and down grade going east.

Q. At the point where the accident happened was the track straight or curved? A. A curve on the left side.

Q. As you go west or east? A. Yes, sir, going west.

Q. Can you tell me whether or not this grade just referred to from Green Pond Junction to the point where the accident happened was a heavy or light grade? A. A heavy grade.

Q. What were you doing as you sat on the fireman's side of the engine? A. I was riding along to Kinney's switch.

Q. Were you looking in any direction, or what? A. Looking straight ahead.

Q. Where was the engineer? A. On the right side. I suppose he was there.

Q. Where was the fireman? A. Back in the tank.

Q. Incidentally, what happened to the fireman in this accident?

Mr. Selser: I object to that. We are not trying his case.

A. He got killed.

Mr. Selser: Well, let it go.

Mr. W. Reading Gebhardt: It explains why he is not here as a witness.

Q. What happened next? A. Well, the cars ran into us.

Q. What did you see as you looked ahead? A. It didn't give me a chance to see anything. I saw they were cars, and that is all I had time to see. They shot around the curve and as soon as the headlight shone on them I saw them.

By the Court.

Q. Well, there was a collision with your engine? A. Yes, sir.

Q. And you were hurt? A. Yes, sir.

Q. Tell us what happened to you. Were you thrown out of the engine, or what? A. As soon as I saw the cars I made a move to get off—to save myself—and got on the running-board to let myself down, and I was struck with something, and that is the last I remember.

Q. When you came to where were you? A. I don't know. Someone said they found me on the bank. I could not see and I did not know where I was.

Q. Why couldn't you see? A. My eyes were plugged full of cement.

Q. Were you surrounded by anything at all? A. I could not see. I could not tell which way to go and I couldn't get away.

By Mr. W. Reading Gebhardt.

Q. Were you unconscious or not after this crash came? A. I do not remember anything after I was hit.

Q. Were you unconscious or not? A. I must have been, because I do not remember anything.

Q. What was done with you after, presumably, you were found there somewhere in the vicinity of this wreck? A. Someone came there—I do not know who it was—and I asked the name, and the

first man who was there was Mr. Frank Kithcart, and I think the next was Mr. Henry.

Q. What did they do with you? A. They led me down to the caboose, they say.

Q. Did they lead you somewhere? A. They took me down to the caboose, I believe.

Q. Did you walk there unassisted or not? A. They had to assist me. I couldn't have got there if they didn't. I could not see anything and I didn't feel able to walk, but I got along the best way I could.

Q. Did they both assist you? A. Yes, sir.

Q. Then what was done? A. They took us down to Butler.

Q. What was done there? A. Dr.—I have forgotten his name—bandaged up my head.

Q. Was that the company doctor or not? A. The company doctor.

Q. Go ahead. A. And they got a hack there and took us to the General Hospital, and when we got there the doctor put something in my eyes and washed my eyes out and they bandaged up my head and led me upstairs to a cot.

The Court: How long were you there?

The Witness: I went there on Tuesday morning and stayed there until Saturday afternoon.

Q. What parts of your body were hurt? A. My head; a hole cut through my forehead.

Q. Where was this cut on your forehead? A. Right here, above my eye.

Q. On the right-hand side of your forehead? A. Yes, sir.

Q. Is there a scar there yet? A. Yes, sir.

Q. Just step down and let the jury observe that. A. (Witness illustrates.)

Q. How severe a cut was that? A. About 3 inches long.

Q. And what other parts of your body were hurt —did you have any other injuries to your head? A. My ribs.

Q. What happened to your ribs? A. They were broken.

Q. How many? A. One or two—two, I think.

Q. Were there any other injuries to your head besides this cut on the right side? A. Well, yes. I had a noise in my head——

Q. No. Were there any other injuries to your head at the time the accident happened? A. Not that I know of, no, sir.

Q. Go ahead. What other parts of your body were injured? A. My side and my shoulder.

Q. Your left shoulder? A. Yes, sir.

Q. What was wrong with the left shoulder? A. I couldn't say. I couldn't raise it.

Q. Was it cut or bruised, or what? A. Bruised.

Q. Were there any other parts of your body that were injured? A. The right knee.

Q. What was the nature of the injury to that? A. I could walk on the level, but——

Q. Was it cut or bruised, or what? A. Bruised.

Q. Did you bleed any at the time this accident happened to you? A. My clothes showed I was bleeding.

Q. Did you or not? A. I did.

Q. From what part of your body? A. From my wound and from my nose.

Q. Did you have any further nosebleeds after the accident? A. Yes, my nose bled for a long time afterward.

Q. How long? A. It must have bled for three months afterward. If I would lay down in bed at

nights I would find my nose bleeding for about three months.

Q. After you got out of the hospital what did you do or where did you go? A. I went to the Y. M. C. A.

Q. How did you happen to go there? A. I didn't have any boarding house just that time. I did not have the job very long.

Q. What condition were you in for a couple of months after the accident? A. I was in pretty bad condition.

Q. In what respects? A. I could not sit up very long. I would have to lie down. And I could not walk very far.

Q. What did you complain of—how did the cut in your head get along? A. Not very good.

Q. In what respects didn't it get along good? A. Maybe if I walked along a little bit fast I would get kind of dizzy.

Q. Did you have pain also? A. Pain over my eye.

Q. How much pain did you have for, say, a period of two months after the accident in your head? A. I had pain right along, mostly every day, in my head.

Q. How long did it last? A. Oh, it would last maybe for half an hour or an hour, or like that. If I would sit down it would be all right.

Q. How often did you get dizzy during the first two months? A. Well, if I happened to walk a little fast—I didn't stroll around a whole lot. I didn't feel as if I could.

Q. How did your shoulder get along? A. It got improved a little, but it gets lame a little yet.

Q. How did your right knee get along? A. Well, that is lame yet.

Q. Now, coming down from the period of, say, two months after the accident until the present time what is the condition to-day in respect, in the first place, to your head—do you suffer with your head now? A. I certainly do, yes, sir.

Q. How? A. I have awful pain, and if I walk a little fast I get dizzy.

Q. How often do you have headaches now? A. About every day.

Q. How long do they last? A. An hour or two sometimes.

Q. Do you have any other feeling of discomfort in your head besides this headache? A. I have a rumbling. If I go upstairs I get an awful rumbling.

Q. A rumbling in your head? A. Yes, sir.

Mr. Selser: If your Honor please, I object to leading the witness.

The Court: Yes. Do not lead.

Q. How is your left shoulder to-day? A. It is lame yet.

Q. In what way is it lame—do you have trouble in moving it, or anything of that kind? A. I cannot raise it up where it should be.

Q. Can you raise it up over your head in the way you used to? A. No, sir.

Q. How is your right knee now? A. Well, that is just about the same. I have to put my hand on my knee to go up steps, or like that. When I walk on the level it don't bother me, but going upstairs I have to put my hand on my leg.

Q. How are your ribs? A. They seem to be pretty fair.

Q. Now, you appear to have some difficulty with

your hearing. Did you have any difficulty before the accident?

Mr. Selser: I object to that, if your Honor please.

The Court: Yes. It is leading. Do not do that. He can tell what his injuries are.

Q. You told us about the pain in your forehead and this rumbling in your head, and so on. Do you have any other trouble around your head or any part of your head, or the organs of the head? A. I have a pain across my forehead that goes around this way (indicating).

Mr. Selser: Indicating across the front of the forehead.

Q. Are there any organs or parts of your head that you have trouble with? A. No more than I have had pain in my head, and sometimes I have a pretty bad pain.

Q. Well, do you see all right, hear all right, taste all right, smell all right? A. I cannot hear as well as I did.

Q. How was your hearing just before the accident? A. Good.

Q. How is it now? A. Not so very good.

Q. What was your general condition before this accident as to strength and ambition, and so on? A. I haven't got the strength that I had before.

Q. What was it before the accident? A. I had good strength and good health, and everything.

Q. What change, if any, has there been in that since the accident? A. I don't seem to have any ambition, or anything, at all. It seems to have knocked me all to pieces.

By the Court.

Q. When had you seen a doctor before the accident? A. I hadn't seen any doctor.

Q. You never had a doctor? A. Not to amount to anything.

Q. You never were obliged to consult a physician? A. Well, maybe something for a physic, or like that, but outside of that I didn't have to.

Q. No organic trouble? A. No, sir, I never did.

By Mr. W. Reading Gebhardt.

Q. Did you have any of these troubles you are suffering from now before the accident? A. No, sir, I never had any trouble. My eyes was good and my hearing was good, and I was all right, and I considered myself rugged and stout, but I don't now.

The Court: How old are you?
The Witness: Fifty-six.

Q. You have alluded now to the pain in your head and the trouble with your hearing. Did you have any trouble with any other organs about your head—your seeing, smelling, talking or tasting or——

Mr: Selser: Objected to.
The Court: Let him tell.

A. I have a rumbling in my head when I walk and get dizzy if I walk too fast.

By the Court.

Q. Is there anything else the matter with you? A. That is as far as I know. Of course, my ribs and shoulder and knee—all those things I didn't have before I was hurt.

By Mr. W. Reading Gebhardt.

Q. You have referred to the fact that after the accident happened your eyes were plugged full of cement. How did they get after the accident—did they get that cement out or not? A. They never could get clear. I do not see as good as I did.

By the Court.

Q. Do you wear glasses? A. I do to read, yes, sir.

Q. That is all? A. Yes, sir. I could see as good as anybody before, but I don't now.

Q. Do you mean you do not have the vision now you had before? A. I have not.

Q. Have you consulted an oculist? A. Yes, sir.

Q. You are not wearing glasses for distant seeing? A. No, not yet.

By Mr. W. Reading Gebhardt.

Q. You said for a period of two or three months after the accident that you had some nosebleeds. Will you please tell me whether or not you have any more difficulty with that? A. For about two months I have not had any nosebleeds.

Q. Up to two months ago did you have any or not? A. Before that right along; up to about two months ago my nose bled nights.

Q. Do you have any discharge of a bloody nature from your nose? A. On the left side.

Q. You have what? A. I have a discharge from the left side of my nose.

Q. How much discharge is there? A. I have quite a good deal.

Q. Did you have anything of that kind when you were in a normal condition before the accident? A. No, sir.

Q. Have you ever gone back to your work of brakeman since the accident? A. I would make a very poor brakeman now.

By the Court.

Q. No. You have not gone back? A. No, sir.

Q. Why? A. I did not feel able to go back. I did not think that I was qualified for it.

By Mr. W. Reading Gebhardt.

Q. What wages were you making on an average a week at the time the accident occurred? A. About $50 a week.

Q. Why do you say that you are not able to go back and do that work of brakeman?

Mr. Selser: I object.

The Court: Objection sustained.

Mr. W. Reading Gebhardt: May I state my grounds for the question?

The Court: Yes.

Mr. W. Reading Gebhardt: The purpose of asking the question was to permit the witness to explain to the jury how the various disabilities he now complains of interfere with his work, or occupation of brakeman, he having been a brakeman for a long period of years and thoroughly familiar with the duties of a brakeman and knows how these disabilities would interfere with it.

The Court: Do you think it rests with him to say whether he is able to go back or not?

By the Court.

Q. Have you submitted to any examination as to whether you are able to go back or not? A. No, sir.

Q. And all you say is you do not feel physically able to go back to work? A. No, sir. When I go back to work I have to do my work, and I do not think I can do it. I do not think my head would let me do it.

Q. You do not feel physically fit, then, to go back? A. No, sir. With my knee I could not jump cars.

By Mr. W. Reading Gebhardt.

Q. How would the condition of the left shoulder —would that interfere any with your occupation of brakeman? A. I could not get up a ladder——

Mr. Selser: I object.

The Court: Well, he has been a brakeman.

Mr. Selser: He does not know whether or not he can do it, because he has not tried.

By the Court.

Q. Have you tried any of these things? A. I have not.

Q. It is just your feeling that you are not physically fit to do it? A. Yes, sir.

The Court: That is the reason. What weight it will have with the jury is for the jury to say.

By Mr. W. Reading Gebhardt.

Q. Take the condition of your left shoulder. Will that interfere or not?

Mr. Selser: I object.

The Court: Objection overruled. You may have an exception.

Q. To what extent, if any, would the condition of your left shoulder interfere with your duties as brakeman? A. I do not think my left shoulder will allow me to pull a switch, either.

The Court: Have you tried it?

The Witness: No.

Q. Have you tried to do other things with it? A. I used to exercise with it, and everything else, hoping it may get better, but it hasn't got better since.

The Court: Have you tried work that would require the strength required to turn a switch?

The Witness: No, sir. I have not touched a switch.

Q. Do you have all the movements of your shoulder that you had before, and that a brakeman would have to have in climbing around cars, and all those things? A. No, I do not think I have.

Q. Why not? A. I do not think I would be able to do it.

The Court: Well, you have not tried?

The Witness: I have not tried it, no, sir.

Q. What is wrong with your shoulder—how does any condition there interfere with the use of it? A. I cannot raise it only up so high.

Q. How would that interfere with your duties of brakeman? A. I would have to be very active to get hold of a ladder and get on a car or on an engine, and I would have to have the use of it.

By the Court.

Q. You say you could not lift that hand to catch a ladder and climb? A. Not quick enough, I couldn't.

Q. What is the matter with your shoulder? A. Well, it is lame; it got hurt in some way. It catches me right in here (indicating).

Q. It does now? A. A little bit, yes, sir.

By Mr. W. Reading Gebhardt.

Q. How would the condition of your right knee interfere with your duties of brakeman? A. It would bother me jumping off or getting on.

Q. How? A. I have an awful pain around there when I step on it. I stepped off a car the other day and it caught me with an awful pain in the knee.

Q. Please tell me to what extent the duties of a brakeman require a man to jump on and off cars. A. You have to get on and off them and get on ladders and run up the ladders and cut cars off and switch cars.

Q. Does it make any difference in the duties of a brakeman whether or not you make a misstep or miss a hold, or anything like that?

Mr. Selser: I object.

The Court: Objection sustained.

A. Yes, it would make a whole lot of difference.

The Court: Strike it out.

Mr. W. Reading Gebhardt: We ask an exception.

Q. Just tell us, then, to what extent you have to jump off and on the cars and the danger, if any, that there is involved. A. The engineer cannot always be looking out for men getting on the cars, and they have to take their own chances in getting on, and sometimes they move a car a little faster than others and sometimes they move a train faster than others, and you have to be very active.

Q. Well, is there any danger involved in that? A. Yes, sir.

The Court: Wouldn't you think the Court would almost take judicial notice of the duties of a brakeman?

Mr. W. Reading Gebhardt: Yes, sir. But counsel is getting so captious I would not be surprised at anything that counsel states.

Mr. Selser: I object. I do not propose to be insulted by counsel.

The Court: Nothing was meant by it. Proceed.

Q. What doctors, if any, have attended you since the accident? A. Dr. Cummins.

Q. Please tell me whether or not he is still attending you. A. He is.

Q. How often do you see him for medical attention? A. About once in two weeks I go down to see him. At first I had to go every week.

Q. Have you calculated the amount in wages that you have lost since the time of this accident? A. Yes, sir.

Q. What does it amount to to date? A. They amount to about $2200 a year that I have lost.

By the Court.

Q. Have you tried to obtain employment elsewhere? A. No, sir.

Q. Haven't you been doing anything? A. I have not done anything since I got hurt. I do not feel as if I am able to work. My head won't allow me to, I don't think.

Q. Have you tried? A. No.

By Mr. W. Reading Gebhardt.

Q. Have you tried to do any light work? A. Yes, sir. Cutting kindling wood, and light work like that.

Q. Where do you live? A. At Blairstown, at Mr. Cooper's.

Q. You spoke of the Y. M. C. A. A. I did, in Jersey City.

Q. What was the effect on you, if any, of doing these various kinds of light work? A. If I stoop over I get kind of dizzy and everything seems to turn black in front of me.

Q. How long have you been a brakeman? A. About thirty or thirty-five years.

Q. How much of that time have you been in the employ of the Susquehanna Railroad? A. About twenty-seven years this last time.

Q. Now, will you please tell me what the custom was at the time of the accident on the Susquehanna Railroad with respect to a situation of this kind, where two loaded box cars are left standing on a track—what was the custom at that time with respect to securing those cars by brakes or otherwise?

The Court: If he knows.

Mr. Selser: Within the single period of time stated by counsel.

Mr. W. Reading Gebhardt: Certainly.

A. According to the grade in the yard where these cars stood they were supposed to have a brakeman on them. They were supposed to be blocked.

Q. What was the custom with respect to setting any brakes, or anything of that kind? A. You are supposed to set your brakes when you put the car on the switch—to see they are on.

Q. What brake? A. The hand brake.

Q. Suppose that two cars are hooked together, what was the custom with respect to the putting on of the hand brake, as to whether it would be put on one car or both cars? A. Well, there are all kinds of brakes on these cars. Some have hand brakes on and some don't, and some have got two, and with two cars they are supposed to put both brakes on.

Q. Is there anything in the rules of the company with respect to that? A. Why, yes. There is supposed to be a standing order about the men putting brakes on. They are supposed to be capable men.

Q. What do you mean? In this situation, where two cars are lefting standing on a sidetrack together, what do the rules require to be done? A. You are supposed to blow the air first and then put the hand brake on both cars if you are going to leave them there. It is supposed to be done.

Q. Let us assume that two cars were put together on a sidetrack and that the hand brake of each of those cars was fastened securely——

Mr. Selser: I object——

The Court: Let him finish the question.

Q. —will you please tell me whether or not from your experience as a brakeman those cars would be held more or less securely there with two hand brakes instead of just one on each car than they would be with only one hand brake set on one car?

Mr. Selser: I object to that on the ground there is no duty proved or any rule or regulation requiring that two brakes be set. This question is far too general for this case, because there is no comparison between the situation existing where these cars were placed and the general condition that is presented.

The Court: You will have to show, Mr. Gebhardt, that the question is pertinent to the issue, and unless you connect it it is not admissible. If you assure me you are going to connect it I will allow it.

Mr. W. Reading Gebhardt: We intend to do that. It is admitted by counsel in his opening that these two cars were left on this track with only one hand brake on.

The Court: You are discussing a standard order. On the assurance that you propose to connect it I will allow it.

Mr. W. Reading Gebhardt: Very well.

Mr. Selser: May I have an exception?

The Court: Yes. Which is the safer, two brakes or one?

The Witness: Two brakes.

Q. Now, are you familiar with the conditions existing on this back track at the yard at Green Pond Junction and the conditions between that and the main line track of the Susquehanna Railroad track as they were at the time of the accident?

A. Yes. There is a rail between that and the main line of the Susquehanna.

Q. In the first place, let us get a little more definitely in our minds the layout of the tracks there. In the first place, there was a main line track of the Susquehanna? A. Yes, sir.

Q. What, in the nature of tracks, led off from that? A. Well, they had what they call the back track and middle track and the river switch.

Q. Counsel on the other side in his opening said that there was one lead track that led off from the Susquehanna track into the Wharton & Northern yard, and that lead track a little further on led off into three or four other tracks, one of them being the back track. Is that correct? A. Yes, sir.

Q. At the time this accident happened what derails, if any, were there on these tracks on the main line of the Susquehanna and on this lead track leading off of it and on this back track? A. No derails whatever—only one derail.

Q. Where was that located? A. That was connected with the Susquehanna switch, but when you throw the switch to back in on the Northern road you take the derail off.

Q. In other words, was there a derail on this lead track in between the lead track and the main track? A. Yes, sir.

Q. Was there any derail in between the lead track and the back track? A. No, sir. We have to leave the derail off to do our drilling.

Q. Now, assume there were two cars placed on this back track. Was there any derail to prevent their running out onto the lead track? A. No, sir.

Mr. W. Reading Gebhardt: If the Court please, in the necessary development of our case there will be some witnesses produced

as to the situation at Green Pond Junction when these two cars got away, and it may be that we will want to put Mr. Hendershot on for some other questions applying to that situation, and I assume it will be a more orderly procedure to reserve the right to recall him for that purpose and I would like to do that.

The Court: Cross-examine.

Cross-examination by Mr. Selser.

Q. Mr. Hendershot, these four tracks consisted of the main track, the river track, the back track and the middle track in the Wharton & Northern yard? A. Yes, sir.

Q. They are all in the Wharton & Northern yard? A. Yes, sir. Will you come closer, so I can hear you plain?

Q. You heard Mr. Gebhardt plainly. A. No, sir. I am not putting on.

Q. You hear me now? A. Yes, sir.

Q. Those four tracks are on the Wharton & Northern property? A. There is three switches there, the back track, the middle track and river switch, and the main line of the Northern.

Q. Those are the Wharton & Northern tracks? A. Yes, sir.

Q. And the only track the New York, Susquehanna & Western owns there is the New York, Susquehanna & Western main track? A. Yes, sir.

Q. That derail is on the Wharton & Northern property? A. Yes, sir. But when you threw the main line of the Susquehanna Railroad you threw the derail off. The derail stays off while we are doing work.

Q. The derail operates in conjunction with the Susquehanna switch? A. It operates, but when we have to meet there one of us has to go down and throw the derail out of there. When we are working this side of it the derail is off entirely.

Q. When you are drilling back and forth it is off? A. Yes, sir.

Q. When were you up in that yard before the accident occurred, a day or two days before? A. On the trip east I was there.

Q. When was that?

The Court: Was that the day before or two days before?

The Witness: That was—I got hurt on Tuesday. The following week I was there.

Q. Before the accident?

The Court: He means the week before.

The Witness: Yes, sir.

By the Court.

Q. You had a regular trip? A. Yes, sir.

Q. You got down there once a week? A. Yes, sir.

By Mr. Selser.

Q. Don't you, as a matter of fact, go there more than once a week? A. Why, we make three round trips for a week's work.

Q. So you are there three times a week? A. Yes, sir.

Q. You were there sooner than a week before the accident, weren't you? A. I don't know.

Q. This accident happened on a Tuesday? A. Yes, sir.

Q. And you were there on Sunday, weren't you? A. No, sir, we didn't stop there Sunday.

Q. Were you there on the Friday before? A. We had cars there when we went west and put them in there. We start out on Monday and make three round trips a week.

Q. When you were there before did you have occasion to operate the derail? A. We have to operate the derail to get in there.

Q. Did you do it on one of your trips just before this accident? A. Sometimes the flagman throws the switch, at the back end.

Q. Do you recall whether or not you did it? A. If we had to meet there and there was another train coming west——

By the Court.

Q. No. Did you do it yourself the week before? A. I do not remember.

Q. The last time you were there did you throw the derail? A. I couldn't say.

By Mr. Selser.

Q. Were you always head brakeman? A. Yes, sir.

Q. Isn't it the duty of the head brakeman to throw the main line switch when you are going to drill in the Wharton & Northern yard? A. Of course, that depends. Now, if we come east and are going to back in there sometimes the flagman throws the derail and throws the line switch. But if we have to meet a train there coming west and we are going east the conductor tells me, "You get down and throw the switch." And I do.

Q. You are talking now about the Wharton & Northern? A. Yes, sir.

Q. You don't recall when you last threw the derail, do you? A. I couldn't exactly tell you just now, no, sir.

Q. It was not very long before the accident, was it? A. I hadn't got there.

Q. Oh, I mean days before. A. Oh, we worked in that yard all that week before.

Q. So that the week before the accident occurred you were up in the Wharton & Northern, weren't you? A. Yes, sir. That was where we come to get part of our train out.

Q. How many days before the accident was that? A. I couldn't say.

Q. Within a week before did you throw the derail? A. If we backed in I must have throwed it.

Q. Was it a good derail? A. If we had a train to pass there I had to throw it.

Q. Was it a good derail? A. Yes, sir.

The Court: It was all right, was it?

The Witness: It was all right when I saw it, yes, sir.

Q. When did you start being treated by Dr. Fellows—when did you first go to Dr. Fellows for treatment? A. I don't know Dr. Fellows.

Q. Who is your doctor? A. Dr. Cummins.

Q. Where is he? A. He lives here in Belvidere.

Q. Is he the only doctor you have had since you had the accident? A. No. I have had several.

Q. Is Dr. Cummins the doctor that you go to every two weeks? A. Yes, sir.

Q. When did you first go to Dr. Cummins——

By the Court.

Q. Where are you living? A. At Blairstown.

Q. When did you first see Dr. Cummins? A. About April.

By Mr. Selser.

Q. That is, 1926? A. Yes, sir.

Q. And you have been going to see him once or twice a week or every second week ever since? A. Just as I felt, yes, sir.

Q. You had not gone to him prior to April, 1926, at all? A. Well, no.

Q. Who did you go to prior to April, 1926? A. I had Dr. Vanerde, who lives in Hawthorne.

Q. He is the company doctor, isn't he? A. Yes, sir.

Q. Have you had any other doctors besides Dr. Vanerde and Dr. Cummins? A. Yes.

Q. What other doctors? A. Dr. Hunt.

Q. Where is Dr. Hunt? A. I don't know.

The Court: Where is his office?

The Witness: He lives in Hampton.

Q. Who else? A. And a doctor that lives in Easton. I cannot think of his name. And Dr. Gordon.

By the Court.

Q. Where is he? A. He lives in Blairstown.

Q. Who is the doctor in Easton connected with the Easton Hospital? A. There he sits, over there.

Q. He is here in the court room? A. Yes, sir.

By Mr. Selser.

Q. Is it Dr. Cohen? A. No, I do not think so.

Q. Will you point out the doctor from Easton? A. Yes, sir.

Q. Where is he? A. There he is (indicating).

Mr. W. Reading Gebhardt: Referring to Dr. Sherrer.

Q. Was that the doctor who took X-ray pictures? A. Yes, sir.

Q. That is the only reason you went to him, just to have pictures taken? A. There was something the matter with my head and I wanted to know what it was.

Q. That was all he did, just took pictures, didn't he? A. Yes, sir.

Q. Who else besides Dr. Gordon? A. Oh, I can't think of their names now.

The Court: You have had other doctors?

The Witness: Yes, sir. I had a doctor from Easton, but I cannot think of his name just now.

Q. How many visits did you make to these other doctors? A. Three visits.

Q. One to Dr. Sherrer and three to the other doctor? A. Three times to Dr. Sherrer.

Q. Three to the other doctors? A. Yes, sir.

Q. Now, isn't it true that you were under a doctor's care some years ago, about four or five years ago—weren't you in an accident? A. Do you remember where it was?

Q. No, I don't. I am asking you. A. I was hurt, yes, sir.

Q. How long ago was that? A. I think about 1910.

By the Court.

Q. You went to a doctor then, didn't you? A. They took me to a hospital for my hip.

Q. You had medical treatment then? A. Yes, sir, but outside of that I had no more. That is, the hospital.

By Mr. Selser.

Q. How long were you in the hospital at that time? A. I was in the hospital about six weeks.

By the Court.

Q. What were your injuries? A. A broken hip.

Q. Is that all? A. That was all I was bothered with.

Q. No head injuries? A. No head injuries whatever.

Q. Or knee? A. Nor knee. Nothing but my hip.

Q. No broken ribs, or anything like that? A. No, sir.

By Mr. Selser.

Q. Weren't you injured again about six years ago? A. Not to my recollection.

The Court: Not "again."

Mr. Selser: He now testifies it was 1910.

The Witness: I am not sure whether it was 1910. But I was hurt; I know that. I had my hip broken. I got pulled off with a wire.

Q. Did you have any injury after that? A. Not that I know of.

Q. Now, you have spoken about having nosebleed at various times during a period up until two months ago. A. Yes, sir.

Q. Did your nose bleed very profusely or just the very slightest trace of blood come out? A. Some days it bled quite freely.

Q. How long would it bleed? A. Maybe fifteen or twenty minutes.

Q. It would bleed very freely for fifteen or twenty minutes? A. Yes, sir.

Q. How often did that occur? A. Some days it would not bleed and some days it would. I did not keep track of that.

Q. Did it happen as often as once a week? A. Yes, and sometimes twice; and sometimes when I woke up in the night my nose would be bleeding.

Q. And it would bleed ten or fifteen minutes? A. Yes, sir.

Q. Quite profusely? A. Yes, sir. I didn't keep track of it. I know my nose bled.

Q. Did you mop it up with your handkerchief? A. Yes, sir.

Q. How many handkerchiefs would you soak up? A. One.

Q. So that it got all wet with blood? A. It wouldn't be so awful yet, but there would be blood on it.

Q. There would be quite a lot of blood, would there? A. There would be some.

Q. Well, let us know how much. A. I know my nose bled.

Q. Was it just a spot of blood or was it a nose-bleed? A. It bled pretty good, yes, sir.

Q. Enough to soak up a handkerchief? A. Soaked up some of it.

Q. And did it go on for fifteen minutes? A. Well, I should think something like that, yes, sir. I did not keep track of the time, but I know my nose bled.

Q. You have not had any of those at all during the two months passed? A. No, not so much. Sometimes when I blow my nose some blood will come out on my handkerchief.

Q. Isn't it true that since July, 1925, the only blood that has come from your nose has come when

you have blown your nose into your handkerchief? A. Well, sometimes, if I blowed it, yes. I would wake up in the night and my nose would be bleeding.

Q. You remember Kithcart being there at the scene of the accident? A. He started out with us, yes, sir.

Q. After the accident, when you had the cement in your eyes? A. Somebody had hold of me; I couldn't say, but he said it was Kithcart.

Q. Didn't you recognize his voice? A. I think I did.

Q. You know him very well? A. Yes, sir.

Q. You have been on his train for quite a number of years? A. Yes, sir.

Q. And you knew Henry's voice, too? A. Yes, sir.

Q. He has been on your train for a number of years? A. Yes, sir.

Q. Kithcart was the engineer? A. He was the second engineer.

Q. And Henry was his fireman? A. No.

Q. Who was Henry? A. Kithcart's fireman was Preston.

Q. You remember those two men helping you from the scene of the accident? A. Yes, sir. They told me who they were. I could not see them.

Q. You recognized their voices? A. Yes, sir. They told me who they were.

Q. Now, you know that this eastbound train was within the block, didn't you—what is the extent of the block——

Mr. William C. Gebhardt: Speak up.

Mr. Selser: His answer is "no," by a shake of the head.

The Witness: I had the switch closed and walked down toward the engine and the

engineer told me he had orders to meet No. 60 at Kinney's switch.

Q. That was at Butler? A. Yes, sir. And then we pulled out and started.

Q. When you threw the switch at Butler you operated a block semaphore, didn't you? A. There was a hand block there, yes, sir.

Q. Those blocks are all manual blocks and have to be operated by hand? A. Yes, sir.

Q. Where is the next block west of Butler? A. At Smith's Mills. That throws by hand.

The Court: How far away is that?

The Witness: I should think it was about three miles, or a little over.

Q. Three miles west of Butler? A. About that.

Q. Where is the next block after that? A. Kinney's switch.

Q. That is a manual block? A. Yes, sir.

Q. Where is the next block west of that? A. There was one at Charlottesburg. There is a block there.

Q. That is west of Kinney's switch? A. Yes, sir.

Q. How far west of Kinney's switch? A. I couldn't say.

Q. Is it west of Green Pond Junction? A. Yes, Charlottesburg is.

Q. Is there a block at Green Pond Junction? A. There is a block at Green Pond Junction.

Q. So the next one west of Kinney's switch is at Green Pond Junction? A. Yes, sir.

Q. Then the next one is Charlottesburg? A. Yes, sir.

Q. These are all manual blocks? A. All used by hand. You have to throw the block before you throw the switch.

Q. If the switch is open—that is, if the switch is placed in such a position that the trains can proceed along the main track the block is in a position up or down? A. If the switch is open the block is supposed to be straight across.

Q. By "open" you mean so trains can proceed along the main line track? A. Yes, sir.

Q. When the switch is closed, so that the trains can go in the switch, the block is in what position? A. Some is up and some is down.

Q. Is there a uniform system there? A. Yes. There is some blocks sticks right straight up.

Q. Well, they all do in this vicinity, don't they? A. I believe they do, yes, sir.

Q. You did not see anything wrong with any of those blocks, did you? A. I didn't have a chance to.

Q. You saw the one at Smith's Mills? A. I didn't have to get off at Smith's Mills. The engineer was watching the blocks. I was sitting on the left side.

Q. Weren't you head brakeman? A. Some might be on my side.

Q. Don't you know where that one was? A. I do not remember. I know there was one there.

Q. Do you remember whether that was up or down? A. I could not say. I was not watching the blocks.

Q. That is the only block you saw that night? A. I couldn't say I seen that block.

Q. So you did not see any block other than the one at Butler? A. I throwed the switch there and I have to go to that block to throw the switch.

Q. That block operated all right, didn't it? A. Yes, sir.

Dr. F. A. SHERRER, sworn for the plaintiff.

Direct examination by Mr. W. Reading Gebhardt.

Q. Dr. Sherrer, what is your profession? A. Physician.

Q. You have been practicing how many years? A. Twenty-seven years.

Q. Where are you practicing now? A. Easton, Pennsylvania.

Q. You are a graduate of what medical school? A. Medico Chirurgical.

Q. What hospital are you connected with? A. Easton Hospital.

Q. In what capacity? A. Associate roentenologist.

Q. What do you mean by that? A. X-ray man.

Q. How much of the X-ray work in the Easton Hospital do you do? A. Half of it.

Q. What is done after the X-ray pictures are taken in general practice in the hospital there? A. These pictures are interpreted and filed.

Q. Who interprets them? A. I interpret half of them.

Q. You interpret the ones you take? A. Yes, sir.

Q. What is done with your interpretations, or what use is made of it in the treatment of the patient? A. It is made a portion of the treatment of the patient. This history of the patient and treatment is based upon the findings.

Q. Are the X-ray findings used in the treatment of patients in the Easton Hospital? A. Yes, sir.

Q. Have you taken some X-ray pictures and made a physical examination of Mr. Hendershot for the purpose of testifying in this case? A. Yes, sir.

Q. What parts of his body did you X-ray? A. The head, the chest, the left shoulder and the right knee.

Q. I now show you an X-ray——

(Marked Plaintiff's Exhibit 1 for Identification.)

Q. I show you what purports to be an X-ray film, marked Plaintiff's Exhibit 1 for Identification, and ask you whether you took that of Mr. Hendershot, and if so of what part of his body? A. I did.

Q. What part of his body does it show? A. His chest, especially the ribs.

Q. About when was it that you took that? A. March 18th, 1926.

Q. Will you please tell me whether or not you took that in the usual and approved way? A. I did.

Q. And whether or not you developed the picture personally yourself? A. I did.

Q. And whether this correctly represents the conditions as they existed in that part of his body at that time? A. It does.

Mr. W. Reading Gebhardt: I offer the picture in evidence.

The Court: Is there any objection?

Mr. Selser: I do not know.

The Court: You may examine it.

Mr. Selser (after examining Plaintiff's Exhibit 1 for Identification): I object to it in its present form.

The Court: Why do you object?

Mr. Selser: Because it has got pen and ink marks on it.

The Court: That would not be proper.

Q. I call your attention to some pen and ink marks that appear on one portion of that. Will you please tell me how they got there? A. I put them on to more easily identify the fracture of the ribs.

Q. Will you please tell me whether or not the picture is in the same condition as it was when you finished taking it, or finished making these marks upon it? A. It is.

Mr. W. Reading Gebhardt: I again renew the offer.

Mr. Selser: I will allow it to go in.

(X-ray film heretofore marked Plaintiff's Exhibit 1 for Identification is marked Plaintiff's Exhibit 1.)

Q. Now you may tell me what that picture shows. A. It shows a healed fracture at the twelfth rib about 2 inches from the spine, and a healed fracture of the fourth rib about 4 inches from the spine.

Q. I now show you two pictures that purport to be of someone's skull.

(X-rays films last referred to are marked, respectively, Plaintiff's Exhibit 2 for Identification and Plaintiff's Exhibit 3 for Identification.)

Q. And which have been marked Exhibits P-2 and P-3, respectively. What is Exhibit P-2 a picture of? A. P-2 is a picture of the skull taken in a posterior anterior position.

Q. How was the patient lying on the plate when that was taken in that position? A. The face was toward the plate and the X-ray tube above the head.

Q. I now show you Exhibit P-3 for Identification and ask you what part of the body that shows? A. That is a view taken with the right side of the head toward the plate and the tube above the head.

Q. Will you please tell me whether or not these are pictures of Mr. Hendershot's head? A. They are.

Q. Taken on what date? A. March 18, 1926.

Q. Please tell me whether they are taken in the usual and approved manner. A. They were.

Q. And developed by you personally? A. Yes, sir.

Mr. W. Reading Gebhardt: I offer those pictures in evidence.

The Court: Do you desire to examine them?

Mr. Selser: Yes, we should like to. (After examining X-ray films) No objection.

(X-ray films heretofore marked Plaintiff's Exhibit 2 for Identification and Plaintiff's Exhibit 3 for Identification are marked, respectively, Plaintiff's Exhibit 2 and Plaintiff's Exhibit 3.)

Q. I now call your attention to Exhibit P-2 and ask you what that picture shows with respect to the condition of Mr. Hendershot's skull at that time? Just step down before the jury and point out any abnormalities in the picture that there may be. A. The abnormality in this picture does not show anything.

Q. What condition does it show? A. I made two views of the head and in one view the fracture is readily shown and in the other——

Q. I call your attention to Exhibit P-3 and ask you to tell the jury what that shows? A. P-3 shows

a fracture, starting in the frontal region, running downward toward the sinus of the sphenoid bone.

By the Court.

Q. You say that is a fracture there? A. Yes, sir.

Q. You mean a fracture of what part of the body? A. Of the frontal parietal region of the skull.

Q. Have you pointed it out to the jury, so that they can see the line of the fracture? A. (Witness exhibits X-ray film to the jury.)

By Mr. W. Reading Gebhardt.

Q. I now show you a group of three other pictures.

(Three X-ray films referred to are marked, respectively, Plaintiff's Exhibit 4 for Identification, Plaintiff's Exhibit 5 for Identification and Plaintiff's Exhibit 6 for Identification.)

Q. I show you these three pictures, marked P-4, 5 and 6, respectfully, for identification. Will you please tell me what Exhibit P-5 shows? A. That is a lateral view of the right leg of Mr. Hendershot.

Q. Including the right knee? A. Yes, sir.

Q. I call your attention to Exhibit P-6 and ask you what part of the body that is taken of? A. An anterior posterior view of the knee of Mr. Hendershot.

Q. And now P-4. A. P-4 is an anterior posterior view of the left shoulder of Mr. Hendershot.

Q. Were these pictures taken in the same manner that you have stated you took the others? A. Yes, sir.

Mr. W. Reading Gebhardt: I will offer them in evidence.

The Court: Is there any objection?

Mr. Selser: I will look at them, if you please.

By Mr. Selser.

Q. These pen and ink marks on here were placed on by you, I suppose? A. Yes, sir, I put them on there.

Mr. Selser: All right.

(X-ray films heretofore marked Plaintiff's Exhibits 4 for Identification, Plaintiff's Exhibit 5 for Identification and Plaintiff's Exhibit 6 for Identification are marked respectively, Plaintiff's Exhibit 4, Plaintiff's Exhibit 5 and Plaintiff's Exhibit 6.)

By Mr. W. Reading Gebhardt.

Q. I now call your attention to Exhibit P-4 and ask you what condition that discloses of the shoulder? A. No bony pathology is found in this picture excepting the fracture of the fourth rib.

Q. I also ask you what the other two exhibits, taken of the knee, Exhibits P-5 and P-6, respectively, show, if anything? A. They show no bony pathology.

Q. Now, will you please tell me which one of these pictures it was, Exhibit P-2 or P-3, that shows the fracture? A. This one (indicating).

Q. Exhibit P-3? A. Yes, sir.

Q. Did you also make a physical examination of Mr. Hendershot? A. I did.

Q. What did your physical examination disclose? A. I found a scar about an inch or an inch and a

half long over the right eye. Upon palpating the scar I could feel distinctly a ridge of bone.

Q. What relationship with respect to the location, if any, is there between that scar and the fracture that you felt? A. It is in the same location.

Q. Now, what else did your physical examination disclose? A. His reflexes, occular, knee jerks and Rhomberg were normal. There was limitation of motion of the left shoulder. In extension he could only raise it up about one-half. There was limitation in the flexion of the right knee joint.

Q. To what extent? A. About one-third.

Q. Will you please tell us a little more clearly what is the nature and condition, and so on, of this fracture you found that extends down into the sphenoid sinus? A. The fracture runs into the sphenoid sinus and I believe is responsible for the nosebleeds he has and some other conditions from focal infection.

Q. Can you give me some idea what part of the head the sphenoid sinus is located in? A. It is between the eyes, right straight back, about 2 inches.

Q. Inside of the head? A. Yes, sir.

Q. What do you say the condition of that sinus is? A. There is inflammation of the sphenoid sinus, which we call sinusitis.

Q. What would that have to do, if anything, with the nosebleeds, the discharge of blood, and so forth, from the nose, that he has complained of? A. It would be very apt to be the cause of it.

The Court: What?

The Witness: The sinusitis or inflammation of the membrane of the sinus would cause a closing of the bone in that part of the nose.

Q. In your opinion is or is not that the cause of the nosebleeds and discharge and pain, and so forth? A. I believe it is.

Q. In what way would this produce any pain? You said you thought it was the cause of the pain, and so on. In what way would that cause pain in his head? A. The membrane lining of the sinus swells up and closes the opening into the outer air. The pressure inside the hollow bone there is not the same as the pressure outside in the air, and consequently makes the swelling worse.

Q. Can you tell me whether or not in your opinion there is any relationship between this condition you found, the sphenoid sinus trouble, and the weakness he complains of? A. Yes, sir; because the man is suffering from focal infection there, absorbing germs from this diseased membrane into the sinus, and I believe that is largely responsible for the stiffness of the shoulder and also of the knee joint.

Q. What connection, if any, in your opinion is there between this sinus condition and his impaired hearing?

Mr. Selser: Assuming there is some, of course.

A. It could also have a distinct connection; the inflammation of the mucous membrane traveling from that portion of the nose up the Eustachian tube could also cause deafness.

Q. Where is the Eustachian tube? A. Inside of the head, in the back of the throat, and connects with the middle ear.

Q. What connection, if any, in your opinion is there between this fracture that you found and this

dizziness that he complains of on bending over? A. It could be the cause of it.

Mr. Selser: I object.

The Court: No. What is your opinion, doctor?

Q. What is your opinion as to whether it is or not? A. I think it is the cause of it.

Q. Will you please tell me what effect, if any, the condition which you found as a result of your physical and X-ray examination would have upon Mr. Hendershot's ability to pursue his occupation of brakeman?

Mr. Selser: I object to that.

The Court: That presumes a knowledge on the part of the doctor of the duties of a brakeman.

Q. Are you familiar in a general way with the duties of a brakeman on an ordinary railroad, doctor?

Mr. Selser: I object. That will not qualify him. He has got to be familiar in a particular way and not in a general way.

Mr. W. Reading Gebhardt: I submit that if he is familiar in a general way he can express his opinion.

The Court: You may incorporate in your question the duties as stated by Mr. Hendershot while he was on the stand.

Q. Assuming that the duties of a brakeman require a man to throw switches for trains and to jump on and off moving trains and to climb up and down the ladders of box cars, and take signals and to throw switches and to jump around cars in a

general way—and I think I already said to jump on and off cars that are in motion; and, of course, being out in all kinds of weather, day and night, and to couple and uncouple freight cars, coal cars, and all kinds of cars—assuming that those are the duties of a brakeman, to what extent, if any, would the conditions that you found interfere with his performing such duties?

Mr. Selser: I object to it. It incorporates features which have not entered into this case at all.

The Court: What, for example?

Mr. Selser: Being out in all kinds of weather and taking signals. Those are two that I now recall.

The Court: Eliminate those and let the rest of the question stand.

Mr. Selser: I am not admitting now that that is all. It seems to me I remember others.

The Court: You may state them.

Mr. Selser: Jumping around cars in a general way was not testified to.

The Court: Eliminate that from the question, and also eliminate the coal cars and all kinds of weather and the taking of signals, and the rest of the question may stand and he may answer.

Q. Assuming those conditions, then, to what extent would the conditions that you found in him interfere with pursuing his occupation as brakeman? A. I do not believe he would be able to pursue the occupation of a brakeman.

By the Court.

Q. Why not? A. Because if he has to leap upon a moving car with that left arm, getting on a car

in motion, he would be liable to fall under the car. If he is dizzy he is liable to fall off the car, and if his knee is bad, if he jumps off a moving car he is liable to fall.

Q. Is his knee bad? A. It has imperfect flexion.

Q. You say "if his knee is bad." A. His knee is bad, and if he jumps off a moving car with that knee he would be liable to fall under the car. If he has headaches—he has headaches—he would not be liable to get his orders straight; he would be liable to get his orders confused. I think that is all I could specify.

By Mr. W. Reading Gebhardt.

Q. What have you to say as to the reasonable probability of this man's recovering from this condition? A. I do not believe he will get much better.

By the Court.

Q. You think it is a permanent condition, do you? A. Yes, sir.

Q. Isn't it better now than when you last saw him? A. I could not see any improvement.

Q. Did you make an examination recently? A. Yes, sir.

Q. When? A. Last week.

Q. And you took the X-rays when? A. I took some Friday and took some March 18th.

Q. What is the difference between his condition now and when you saw him March 18th? A. Practically the same. His hearing, if anything, is a little worse.

Q. How did you test that? A. With a watch.

Q. With what results? A. That he could not hear a watch tick about 6 inches.

Q. Did you test him in that regard on March 18th? A. Yes, sir.

Q. Is he better or worse in that regard? A. I think he is worse.

By Mr. W. Reading Gebhardt.

Q. Now, assuming that prior to June 23, 1925, Mr. Hendershot was a man in apparent good health, pursuing the occupation of a brakeman, which included the duties that I outlined to you in my previous question; and assuming that on that day he was riding the left side of an engine pulling a freight train, and that on that occasion, he being going upgrade, two freight cars came down in the opposite direction, going at a considerable rate of speed, and collided with his engine, as a result of which he was rendered unconscious for a time and had his eyes plugged full of cement and received a cut about 3 inches long on the right-hand side of his forehead and a bruised left shoulder and a bruised right knee and two broken ribs; and assuming that he was given first aid by a doctor at Butler, New Jersey, and was then taken to the Paterson General Hospital where he stayed from June 23rd to June 27th; and assuming that during that time he suffered pain across his forehead and lameness and soreness and pain in his left shoulder and right knee; assuming, furthermore, that at the end of the time in the hospital he went and spent some time in a Y. M. C. A.; assuming, further, that for a period of about three months afterward he had nosebleeds occurring about once a week, and since that time he has had occasional nose bleeds up to about two months ago, and that since that time he has had discharge from his nose, including occasionally some bloody discharge; and assuming

that he attempted to carry wood and water recently and he was affected with dizziness and unable to continue such labor; and assuming he has not gone back to his occupation as brakeman, that since the accident he feels unable to do so; and assuming he still suffers pain in his head and lameness and soreness of the left shoulder and right knee; and assuming that he had none of those conditions before the accident, to what would you attribute the conditions that you now find? A. To the result of the accident which he received.

Mr. W. Reading Gebhardt: Cross-examine.

Cross-examination by Mr. Selser.

Q. Doctor, these X-rays were all taken March 18th, 1926? A. The head and chest were made March 18th, 1926. The knee and the shoulder were made last Friday.

Q. You have not taken any X-rays of the head and chest since March 18th, 1926? A. That is correct.

Q. And you have not taken any X-rays of the knee and shoulder prior to last Friday? A. That is correct.

Q. Now, this X-ray which is marked P-3 in evidence is one that shows the fracture of the skull; is that correct? A. That is correct.

Q. And that fracture of the skull you have indicated to the jury as being where? A. (Indicating) Right there.

Q. Running from directly above the eye socket? A. Yes, sir.

Q. Slightly obliquely to the center of the skull? A. And running backward and downward toward the sphenoid sinus.

Q. Now, there is an abrasion upon that film, isn't there, right there at the place where you say the fracture is indicated? A. There is a slight abrasion there; yes, sir.

Q. The abrasion was put there by you intentionally? A. No, sir.

By the Court.

Q. How do you account for that? A. It got there during transit in the mail.

By Mr. Selser.

Q. And that to some extent obliterates the X-ray, doesn't it? A. Not a particle.

Q. It does not? A. No, sir.

By the Court.

Q. It still shows the fracture? A. Yes, sir.

Q. You are sure it is not a vein groove? A. No, sir.

Mr. Selser: Your Honor has beaten me to that.

Q. Were you ever fooled by an X-ray that showed or reproduced a groove where there was an actual fracture? A. Yes, sir.

Q. It does fool you once in a while? A. Yes, sir.

Q. How about this one? A. I do not think so in this case. We must remember we are not making a picture of an old fracture.

By Mr. Selser.

Q. So there is doubt in your mind, doctor? A. No, sir.

Q. Not a bit of doubt as to whether that is a fracture? A. No, sir.

Q. Did you ever hear of the meningeal artery? A. Yes, sir.

Q. Where is that located? A. Very near the location of that fracture.

Q. Can you show it on that picture? A. Yes, sir. It is right alongside, going on up.

Q. That is the one you pointed to as the fracture, isn't it? The one you are now pointing to as the meningeal artery? A. (Indicating) There is the fracture and there is the artery behind it. The fracture is wider; and there is the meningeal groove running up here.

By the Court.

Q. Now, how is that, doctor?

Mr. Selser: Would Dr. Wyatt and the X-ray man come up here?

The Witness (illustrating): The fracture is the wider shadow and the artery is on the other side of it, and the fracture runs down here. This is the sinus, indicated by the portion of my pencil there.

Q. Now, you say both the fracture and the artery are shown there? A. Yes, sir.

By Mr. Selser.

Q. And those cross the fracture at various places? A. Yes, sir. The majority of it is to the posterior of the fracture and some of the ramifications are crossed by it.

Q. I understood you to say that this mark on this X-ray is in the vicinity of a scar that you felt upon Mr. Hendershot's head. A. Yes, sir.

Q. That could not by any chance be the shadow of the suture, could it? A. I do not think so.

Q. Are you in doubt at all? A. Not a particle.

Q. You are sure then that it is not? A. Yes, sir.

By the Court.

Q. Were there sutures, or stitches taken in the man's head? A. He means the sutures in the skull.

Q. Oh, where the skull is put together? A. Yes, sir.

Q. You say it is not the conformation of the skull? A. I do.

By Mr. Selser.

Q. You are positive of that? A. I am.

Q. You have not been fooled in taking X-ray pictures and having a shadow such as that show up and later finding out it was merely the suture of the skull? A. Not that I can recall.

Q. Well, you would recall such an important happening, wouldn't you? A. Yes, indeed.

Q. How many years have you specialized upon the physical examination of eyes, ears, nose and throat? A. I never have specialized on them.

Q. And this physical examination that you made of Mr. Hendershot was not a specialist's examination of the nose, was it? A. No, sir.

Q. What kind of an examination of the nose did you make? A. I used the spectrum.

Q. Were you able to see anything at all? A. No, sir.

Q. Nothing at all? A. No, sir.

Q. So that this sinus condition that you referred to is not the result of any objective symptoms that you observed? A. No, sir.

Q. It is purely the result of subjective symptoms? A. Yes, sir.

By the Court.

Q. Purely what he told you? A. Yes, sir.

By Mr. Selser.

Q. The difference between objective symptoms and subjective symptoms is just this, that objective symptoms are those which you yourself can discover? A. Yes, sir.

Q. Subjective symptoms are those which the patient himself tells you about, and you have to take those things as being accurately stated? A. Yes, sir.

Q. So your deduction as to that sinus condition was purely the result of statements given to you by Hendershot? A. Confirmed by the X-ray findings.

Q. The X-ray findings shows the sinus condition then, does it? A. No, sir.

Q. Then how did that confirm it? A. It shows the fracture.

Q. It shows shadow? A. It shows a shadow which I interpret as a fracture.

Q. Without showing the sinus condition in any way? A. That is right.

Q. And in your opinion, this being a fracture which has entirely healed, hasn't it? A. Yes, sir.

Q. There is no other separation? A. Some.

Q. There is a separation? A. You would not get a shadow if there wasn't separation.

Q. You would not get any at all? A. If there was no separation and no callous formation you would get no shadow.

Q. But with the callous formation there is no separation, is there? A. Some.

By the Court.

Q. You mean the X-ray would show the callus? A. Practically.

By Mr. Selser.

Q. And the callus is nothing more than newly formed bone? A. Yes, sir.

By the Court.

Q. It is a substitute. It is not really bone, is it? A. No, sir.

By Mr. Selser.

Q. It is bone matter which has not hardened to the same extent as the rest. A. The microscopical characteristics are a little different from regular bone.

Q. But for all practical purposes it is bone. A. Yes, sir.

Q. And for all purposes except X-ray purposes it is bone, isn't it? A. Yes, sir.

Q. The only difference between callus and actual bone is that one is not as old as the other, plus a slight microscopical difference in the make-up of the matter? A. Very good.

Q. Did you ever hear of catarrh? A. Lots of times.

Q. Did you find it in Mr. Hendershot? A. A scientific physician never refers to catarrh any more.

Q. Well, I am a practical one and I am referring to it. Now, as a practical physician, such as I, did you ever hear of catarrh? A. I have heard the laity speak of catarrh.

The Court: What is it?

Q. Did you find a catarrhal condition in Mr. Hendershot—as the laiety speak of it? A. Somewhat, yes.

By the Court.

Q. Is it congenital? A. Not necessarily, no.

Q. It may be of long standing, though? A. Yes, sir; it may be.

Q. Did you ever see Hendershot before this accident? A. No, sir.

By Mr. Selser.

Q. And if he had such a condition would that account for the discharge from the nose? A. It could.

Q. Would it account for the nose bleeds? A. It could.

Q. Now, doctor, would poor eyesight cause headache? A. It could.

Q. Would it cause dizziness? A. It could.

Q. Would an infected sinus cause headache? A. It could.

Q. And dizziness? A. It could.

Q. Doctor, if the fracture had entered an infected sinus, what in your opinon would have been the outcome of that injury? A. He would have been very apt to have a septic meningitis and die.

Q. In your opinion did Mr. Hendershot have a fracture which entered the sinus? A. That is my opinion; yes, sir.

Q. It is your opinion? A. Yes, sir.

Q. Now, in your opinion——

By the Court.

Q. How do you reconcile that answer with your previous answer? A. An infected sinus means pus

present in the sinus and that pus would be spread by continuity to the covering of the brain and set up a meningitis.

Q. Why didn't the man have meningitis if he had a fracture running down into the sinus? A. Either because his body resistance was great enough to cope with the germs or because there was no infection in the sinus. One or the other.

By Mr. Selser.

Q. Doctor, isn't it true that in more than 90 per cent. of the fractures of the skull entering the sinus, which are infected, the result is fatal? A. The result is fatal in a vast proportion of the cases, but there is also the exception.

By the Court.

Q. What percentage would you believe? A. I would not take it over 90 per cent.

By Mr. Selser.

Q. But 90 per cent. you would? A. Yes, sir.

Q. It is likely that a catarrhal sinus, using the laiety term, could cause deafness? A. Yes, sir.

(Adjourned until Wednesday, October 27, 1926, at 10 o'clock in the forenoon.)

Belvidere, N. J., October 27, 1926.

(Case resumed pursuant to adjournment.)
(Appearances as before noted.)

DR. F. A. SHEERER, resumed the stand.

Cross-examination continued by Mr. Selser.

Q. Dr. Sheerer, how long have you been associated in the X-ray department of the Easton General Hospital? A. A little over ten years.

Q. Did you have any previous experience in X-ray development? A. Yes, sir.

Q. Where did you have your experience pervious to that? A. At Dr. Correll's private hospital.

Q. Where is that? A. In Easton, Pennsylvania.

Q. How long have you been associated in the X-ray department of the private hospital? A. About three years.

Q. Did you have anything previous to that? A. I had my own laboratory.

Q. How long did you have your laboratory? A. At Easton I had done X-ray work for at least fifteen years, if not more.

Q. During the period of fifteen years have you used the same type of machine? A. No, sir.

Q. The present machine you are using is what? A. A Victor Snook special.

Q. And prior to that? A. Kellecet(?).

Q. Was that the one immediately before the present? A. Yes, sir.

Q. How many years have you used the present machine? A. I have had the present machine about four years.

Q. And that is the one which is now installed in the hospital? A. No, sir; in my private laboratory.

Q. What one were you using in the hospital? A. At the Easton Hospital they have an old Victor Snook.

Q. The machine with which these pictures were taken, was that the one in the hospital or the one in your private laboratory? A. The one in my private laboratory.

Q. So that these pictures were not taken in the hospital, were they? A. No, sir.

Q. This was not a hospital patient? A. No, sir.

Q. It was a private patient of yours? A. Yes, sir.

Q. Now, this machine you have has a control upon it that the intensification of the rays might be regulated, has it not? A. Yes, sir.

Q. So that you can take a picture using intense rays or rays of less intensity? A. Yes, sir.

Q. In taking pictures of the skull, isn't it important that the intensification of the rays be carefully controlled? A. Yes, sir.

Q. Assuming that a picture was taken with rays of least intensity, minimum intensity, what would be the result on the film? A. You would have a very poor picture.

Q. What would be the result with respect to the meningeal artery showing upon the film? A. It probably would not show at all.

Q. Now, assuming that the machine was regulated so that the rays were being cast from the tube at its greatest intensity, what would be the effect upon the film? A. You would overexpose your film and have a very black film.

Q. What would be the effect so far as the meningeal artery is concerned? A. It might be obliterated.

Q. So that if it were taken intermediate, that is, at a point between extreme intensity and minimum intensity, the meningeal artery would show the greatest; is that correct? A. That is correct.

Q. Now, these plates of yours marked P-2 and P-3 are the plates of the skull? A. Yes, sir.

Q. How were they taken? A. They were taken with a kilo voltage of 88 and amperage of 20, a time of ten seconds, at a distance of 25 inches of the anode from the film.

Q. The anode is the element in the X-ray tube? A. Yes, sir.

Q. And the voltage upon the anode regulates the intensity of the ray? A. That is correct.

Q. So that when you speak of a voltage of 80 how does that compare with the minimum or maximum intensity? A. It is in between you might say.

Q. It is the intermediate stage? A. Yes, sir.

Q. That is the same situation as in the photograph marked P-3 in evidence, isn't it? A. In every respect, except that the exposure was five seconds instead of ten seconds.

Q. But the voltage was the same? A. The kilo voltage was the same.

Q. Now, I think you said yesterday that the callus is of a different microscopic formation than the natural bone, the bone itself. A. Yes, sir.

Q. Just explain to the jury what callus is. A. Callus is Nature's method of healing a fractured bone. When you first have a fracture you have an outpouring of serum.

Q. That serum is what? A. Blood plasma, you might say.

Q. In other words, bone matter. A. The watery constituents of the bone matter, and as time goes on some of the constituents are absorbed and it becomes thicker and then imperfect fibrous tissue

cells are deposited in its place; they are, at first, circular like a ball, and as they grow they become elongated, like an egg, and then later on like a thread, and then later on lime salts are deposited in this.

Q. They are deposited upon the material, you say? A. Yes, sir.

Q. Then what? A. Forming a hard callus and new bone.

Q. So that really hard callus is new bone? A. You might say so.

Q. Now, you said yesterday that callus is different from the bone with respect to X-ray, to its application to X-ray photography? A. Yes, sir.

Q. I believe you said yesterday that callus does not show up in X-rays. A. It will show up, but not as dense as the surrounding bone until possibly several years have elapsed.

Q. So it would take several years in order that callus might be shown? A. No, sir. You can show it before that time, but not as dense as the surrounding bone until sufficient lime salts have been deposited to raise the callus to the density of the surrounding bone.

Q. So if callus be shown on the X-ray with equal density with the other bone that is an indication that the callus has been there six or seven years? A. A long time.

Q. Now, suppose we look at the X-ray film marked P-1 in evidence. That is an X-ray of the back and ribs, and we look at the one in which you have a rib marked with four arrows. What rib is that? A. The twelfth rib.

Q. Now, does not the callus show up on that X-ray with the same density as the rib itself? A. Yes, it does.

Q. That indicates to you what? A. That is of long standing.

Q. More than six or seven years? A. I would not say six or seven years. I said a long time.

Q. Now let us look at the fourth rib. You also have that marked with four arrows. What about that? A. The density is the same as the surrounding bone.

Q. And indicates to you that is of long standing? A. Yes, sir.

Q. Did I understand you yesterday to say that you felt Mr. Hendershot's skull when you were making your physical examination and felt a ridge? A. Yes, sir.

Q. And that that ridge was in the vicinity of the scar itself? A. Yes, sir.

Q. Were you able to tell that he had a fractured skull from the mere physical examination without the aid of the X-rays? A. No, sir.

Q. So that the fact that you felt a ridge on the skull did not permit you to diagnose his case as a fractured skull? A. No, sir.

Q. Did you feel any other ridges in his skull? A. I felt an exostosis on the opposite side.

Q. Suppose you tell us what an exostosis is. A. A little lump on the bone of the skull on the left side.

Q. So you felt ridges on both sides of the skull, one at the scar and one on the opposite side? A. I felt a ridge on the side the scar is on and a round bump about the size of a five-cent piece on the opposite side.

Q. Was that ridge you felt in the vicinity of the shadow on X-ray P-3? A. I noticed one, but that is in this one (indicating).

Q. That is P-2. A. That shows on P-2, yes, sir.

Q. The ridge shows in P-2? A. Yes, sir.

Q. And P-2 in your opinion shows no fracture? A. The original fracture and the main fracture is shown in the lateral view and the branching line is shown in this; yes, sir.

Q. Didn't you tell the jury yesterday that P-2 showed no indication of fracture? A. I did, because from this line I would have very great difficuly in diagnosing a fracture of the skull, but coupled with the lateral view it confirms it.

Q. I think you said yesterday the fracture is in the place where you felt a ridge and directly beneath the scar. A. Yes, sir.

Q. And that that fracture is shown here on P-3 as the first shadow over the left eye, isn't it? A. Yes, sir.

Mr. Selser: Now, Mr. Hendershot, come up here, please.

(The plaintiff goes to the witness stand.)

Q. Now, will you indicate to the jury upon Mr. Hendershot here just where that fracture is? A. (Indicating) Right there.

Q. That is just above the center of the left eye, isn't it? A. Yes, sir.

Q. Now, this X-ray P-3 does not show the shadow in that place, does it? A. Yes, sir—no, sir; that does not, but P-2 does.

Q. The shadow in P-3 is in an entirely different place, isn't it? A. Yes, sir; that is the main fracture, and this one here is the branch running off from it.

Q. So there are two fractures? A. Yes, sir.

Q. So that he has a fracture on the left of the head as well as one above the eye and one running from the side over toward the eye, does he not? A. Yes, sir.

Q. You did not tell us about that yesterday. A. I was waiting for you to question my diagnosis.

Q. So you were going to jump on me as soon as I did it, were you? A. Not exactly.

(X-ray produced and marked D-1 for Identification.)

Mr. W. Reading Gebhardt: We ask that the witness be permitted to inspect the whole plate.

Q. Are you able to say, from an examination through that center hole, what that is? A. Yes, sir, with certain qualifications. I will ask you first with what machine this was made, what film was used, the age of the patient, the history of the patient.

The Court: You decline to answer until you know those details?

The Witness: I decline.

The Court: I think you are within your rights.

Mr. Selser: If your Honor please, I submit I have a right to insist upon an answer, whether he is able to say from an examination through that what it is.

Mr. W. Reading Gebhardt: He has already said "No."

The Court: It does not appear what it is; it is not in evidence; it has not been offered, and the witness, in the circumstances, is asked to pass upon something he has never seen. You never saw that before, did you, doctor?

The Witness: No, sir.

The Court: And it is part of your affimative case?

Mr. Selser: No, sir. It is part of the cross-examination. I may very well attack the doctor's ability.

Q. Are you able to say from an examination of this double cardboard with a hole in the center and a black object in the middle of it what it is? A. Yes. I would say it was an X-ray film.

Q. Are you able to say from the examination of this document, marked D-1 for Identification, what part of the anatomy it is an X-ray film of?

Mr. W. Reading Gebhardt: I object to that.

The Court: Objection sustained.

Mr. Selser: I ask an exception.

The Court: You may have an exception. Now the Court will put on the record that counsel for the defendant, in cross-examining a doctor, who is a witness for the plaintiff, produces an X-ray which has not in any way been identified or offered in evidence, and, while he claims the right to cross-examine the doctor by producing it and asking questions about it, the Court now rules that, the doctor having already testified that he does not know the method in which it was taken, with what machine, and the X-ray itself is not in evidence, the Court now sustains the objection to the last question. You may have an exception.

Mr. Selser: May I suggest to your Honor that you undoubtedly misunderstood the witness? He said he was going to be as particular as I was and demand an explanation. The question was an attack on the credibility and general experience.

Mr. W. Reading Gebhardt: May I add, for the purpose of the record, that the X-ray film in question appears to be a film about 14 inches square, surrounded on each side by cardboard, heavy cardboard, through which it is impossible to see, and out of which a hole is cut on each side somewhere in the center, about 3 inches square.

Mr. Selser: That is correct. I will ask that the film itself be marked D-1 for Identification and the other cardboard so marked. Now we will expose the film.

Q. Now, are you able to tell what portion of the anatomy the film marked D-1 for Identification shows?

Mr. W. Reading Gebhardt: I object to that unless it is shown of whom this picture was taken, under what circumstances it was taken, and of what kind of a skull it was taken and of whom it was taken. It is entirely incompetent, irrelevant and immaterial unless that is shown and unless such a foundation is laid for the question.

The Court: I will allow the doctor to answer. You may have an exception.

(Last question read.)

A. A skull.

Q. Can you indicate upon that X-ray the shadow of the skull suture? A. Yes, sir.

Mr. W. Reading Gebhardt: We object to that on the same ground.

The Court: The objection is overruled. He may answer.

The Witness: Yes, sir.

Q. Can you indicate upon that film the shadow of the middle meningeal artery? A. Yes, sir.

Q. Will you indicate to the jury—It is not in evidence——

The Court: No. You cannot do that.

Q. Can you see any evidence of skull fracture in that?

Mr. W. Reading Gebhardt: We object to that on the ground it is incompetent, irrelevant and immaterial as far as this case is concerned.

The Court: Yes. Objection sustained.

Mr. Selser: We ask an exception.

The Court: You may have an exception.

Mr. W. Reading Gebhardt: The picture in question is not in evidence.

The Court: It is merely marked for identification.

Mr. Selser: I am not asking him to indicate to the jury, of course.

Q. Doctor, did you ever determine what this man's condition was in respect to pulse at the time he was in the Paterson General Hospital immediately following the accident? A. No, sir, for I did not see him there.

Q. Did you inquire of him his early history prior to your physical examination? A. I did, of him.

Q. Did you inquire as to the pulse?

The Court: Just a moment. The previous questions relating to the X-ray that was produced and marked for identification I admitted upon the theory that it would test the doctor's competency and ability and that is

all. Now I am inclined to reverse myself on that last ruling and allow an answer to that question with the idea that it relates solely to a test of the doctor's ability, that is all, and in that respect I think I will allow an answer, and for that purpose only.

Mr. Selser: If your Honor please, the effect of it has already been destroyed.

The Court: Now, see here. This is not a contest—we are endeavoring to arrive at the truth and that is all and I will not allow any technical pyrotechnics or anything of the sort. We are trying to find out the truth in the matter. I will allow an answer to this question. If you do not want an answer, that is all there is to it. Now, do as you like. This is not a mere contest between counsel as to shrewdness or smartness or anything of the sort. You must remember where you are.

Mr. Selser: I wish to apoligize to your Honor if I have offended.

The Court: If you want your answer to that question, take it. The question was as to the X-ray. Can you see any evidence of fracture?

Mr. Selser: What was the last question?

(Last question read as follows: "Did you inquire as to the pulse?")

A. I did not.

Q. Did you inquire as to the respiration? A. I did not.

Mr. William C. Gebhardt: You are asking questions now with respect to June, 1925, in the hospital?

Mr. Selser: Yes, sir.

Q. Did you inquire as to the blood pressure? A. I did not.

Mr. W. Reading Gebhardt: May I interrupt a moment, in order that the record may be clear? I understand that your Honor has ruled that the previous question may be answered.

The Court: Yes; and if he does not care to take advantage of it, the record will show it. If he wants to go ahead now from where he is, he is permitted to do so. I offer now to allow an answer to that former question. You may proceed.

Q. Did you inquire as to the temperature? A. I did not.

Q. In order to make a diagnosis of the skull fracture are those elements material? A. Those are elements that I do not think he knew anything about himself.

The Court: That is not responsive. Are they elements that are material for the purpose of ascertaining whether there is a fracture of the skull?

The Witness: Sometimes they are and sometimes not.

The Court: Did you make such tests?

The Witness: No, sir.

Q. Are you able to say as a physician that a man has a fractured skull with an intracranial injury, basing the diagnosis solely upon the X-ray photograph taken a year approximately after the accident occurred, without regard to temperature, pulse, blood pressure and respiration as exhibited

by the patient immediately after the accident? A. I base my diagnosis upon my own findings.

Q. Do you consider a diagnosis of that type, without those elements, an effective diagnosis? A. At this stage of the game, yes.

Q. If you were to have been informed, doctor, that the pulse rate, the temperature, the blood pressure and the respiration were normal for a period of four days following the injury, would you or would you not change your mind as to your diagnosis?

Mr. W. Reading Gebhardt: I object to that. I think that question should be put in the form that assuming that was the fact, and then it should be connected up later.

(Last question read.)

The Court: Assuming that to have been so, would you change your diagnosis—I will allow it.

Mr. W. Reading Gebhardt: We reserve the right to strike out if it is not connected.

The Court: Yes.

A. Not necessarily.

Q. What do you mean by that? A. There are exceptions to all rules.

Q. Why can't you answer the question yes or no? A. I cannot.

Q. Did you take his temperature at the time of your physical examination? A. No, sir.

Q. Did you take his pulse rate? A. Yes, sir.

Q. What was his pulse rate? A. 72.

Q. How does that compare with normal? A. Practicaly normal.

Q. What was his blood pressure, if you took it? A. I did not take it.

Q. Did you observe the respiration? A. I did not count it.

Q. Do you not consider those essential elements in order that diagnosis might be effectively made? A. Not a year after the accident, no.

Q. In your opinion if a patient who is being examined by you physically shows some indications by X-ray photographs of shadows upon the skull which indicate to some extent fracture of the skull, those things are not essential elements for a complete diagnosis? A. Not a year after the accident; no, sir.

Q. And you would say that a person who has a fractured skull with an intracranial injury resulting in an infected sinus, loss of eyesight, practical loss of hearing, that those are not necessarily exhibited by the patient at that time? A. Not a year later; no, sir.

Q. At the time of the actual infected sinus, at the time that the eyesight is affected, at the time the hearing is affected, all resulting from an intracranial injury, you would say those symptoms would not be exhibited? A. Not necessarily, no.

Q. Do you make a physical examination of all your patients? A. No, sir.

Q. How many of your X-ray patients do you examine physically? A. Only those who are referred for that purpose.

Q. Mr. Hendershot was referred to you for that purpose? A. Yes, sir.

Q. How many physical examinations have you made of skull fracture within the period of the last five years—physical examinations? A. I cannot answer that question.

Q. Have you any idea?

The Court: Half a dozen or a dozen?

The Witness: Probably somewheres around there.

Q. And Mr. Hendershot was one of that half-dozen or a dozen? A. Yes, sir.

Redirect examination by Mr. W. Reading Gebhardt.

Q. How many X-ray pictures have you taken of skulls in the last fifteen years? A. Several hundred, probably.

Q. What have you to say as to the fact that this man was unconscious after the accident, what that injury——

Mr. Selser: I suppose he does not know how long he was unconscious.

Q. I am asking you now about the fact that he was unconscious, what that indicates? A. It would indicate a severe injury, either concussion or fracture.

Q. To what? A. To the brain—or skull, rather.

Q. What would the fact that he had profuse nosebleed at the time of the accident and at intervals thereafter for three months and also at intervals up to two months ago and still has bloody discharge, what would that indicate as to the possible fracture of the skull?

Mr. Selser: I thought he had answered that.

Mr. W. Reading Gebhardt: I am not sure about it.

A. That indicated to my mind the fracture of the skull which entered into the sphenoidal sinus in this case.

Q. What is your age, doctor? A. Fifty-two.

Recross-examination by Mr. Selser.

Q. Assuming that a man was unconscious for a period of a moment or two following this injury, what would that indicate to you? A. Nothing at all.

Q. So that when you answered counsel's question as to a man being unconscious for a period of time following his injury, and stated to counsel and to the Court and jury that that indicated a serious head injury, it was lacking a very essential element, was it—the period of unconsciousness? A. Yes, sir.

Q. As a matter of fact, shock alone is sufficient to make a person unconscious, isn't it? A. Yes, sir.

Q. Without any intracranial injury? A. Yes, sir.

Q. Prize fighters who are punched on the point of the jaw in the prize ring, and over whom the referee counts ten, are unconscious, aren't they? A. Yes, sir.

Dr. Frank Wolfe, sworn on behalf of plaintiff.

Direct examination by Mr. Gebhardt.

Q. You are a practicing physician? A. Yes, sir.

Q. In the town of Phillipsburg? A. Yes, sir.

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

Q. You are a graduate of what medical school? A. Jefferson.

Q. Are you connected with any hospital? A. Yes, sir; Warren Hospital, surgeon in chief.

Q. Located in what place? A. Phillipsburg, New Jersey.

Q. Have you made one or more examinations of Mr. Hendershot for the purpose of testifying in this case? A. Yes, sir.

Q. About when were they made? A. October 22nd, I think, and three or four days later.

Q. Of this year? A. Yes, sir.

Q. What experience have you had in specilizing in eye work? A. I did eye work before I took up surgery.

Q. For how many years did you specialize in that? A. About eight years.

Q. What are you specializing in now? A. Surgery.

Q. And have been for how many years? A. The past seven.

Q. You said you made an examination of Mr. Hendershot. What conditions did you find?

Mr. Selser: That is objected to. As to what, eyes or what?

Mr. Gebhardt: All conditions he found on examination.

The Court: Objection overruled.

Mr. Selser: To which we except.

The Court: Exception for the defendant.

A. I examined his skull and found a scar over the forehead, right eye, near the posterior. The scar in front was tender. On palpation you could find a ridge; and over the left eye there was a little nodule, little bone, practically an exostosis.

Q. What is that? A. It's new bone.

Q. Proceed, and try to confine yourself to Anglo-Saxon words. A. I took his vision, and found it 12/70 in both eyes.

Q. What does that mean? A. About one-sixth of normal, approximately.

Q. Did you ascertain what that defective vision was due to? A. Not exactly. I found he had terregiums in both eyes. I didn't examine the back of his eye, the optic nerve. I just took his vision. I found terregiums in both eyes, that is, new growth of tissue, extending from the angle of the eye toward the cornea.

Q. What would that be due to? Have you any opinion? A. Usually to irritation extending over a long period.

Q. What relation, if any, in your opinion, is there between that condition and the cement that this man got in his eyes? A. It might be due to the irritation resulting, but not the cement.

Mr. Selser: I move to strike out what it might be due to.

Q. Please state in your own opinion, from the standpoint of reasonable probability, whether it was due to that or not. A. It is probably, but I can't say it was due to that; there is reasonable probability.

Q. What next? A. I took his hearing, and found it very defective. At 20 feet he couldn't hear you at an ordinary tone of voice.

Q. How did you test him? A. I spoke to him, got across the room and spoke to him. I then used the watch; of course, I had to take his word for that. He couldn't hear it 3 inches from the ear.

By the Court.

Q. Was there any malingering in the case? A. I found no reason to suspect it. The questions I asked him were with reference to how he was hurt, and so forth.

By Mr. Gebhardt.

Q. What next did you find? A. I found a wound over his chest. I examined his heart and lungs, and found them normal, and found the twelfth rib on the left side protruding. I examined his urine, and found that normal. I examined his extremities. There is a limitation of motion in the left shoulder.

By the Court.

Q. How much? A. About one-third loss. He has about two-thirds motion to it. There is no ankylosis, though.

By Mr. Gebhardt.

Q. What is ankylosis? A. Ankylosis is a stiffening. It is really a joint out of function, stiff either from bony ankylosis or contraction of the tendons.

Q. What next? A. The left elbow on that same side is also out of function; but he told me that that was due to a previous injury. He has only about one-half function of the left elbow. He told me that that was due to a previous injury about ten years ago. He has also a part of the thumb off on the left hand, and he said that was due to a former injury. I took reflexes and found them all normal. I found his blood pressure 150 systaltic and 90 disystaltic; the systaltim and disystaltic are practically normal, but there is a variation

of his pulse pressure, ten points high. I didn't find any sclerosis of his arteries.

Q. That is hardening of the arteries, which comes with age? A. With age, yes, sir.

By the Court.

Q. Most of us old men have it? A. As a rule.

By Mr. Gebhardt.

Q. Assuming that this man previous to June 23rd, 1925, had no trouble with his head, and assuming that on that day he sustained a fractured skull in the frontal region, a fracture there, running from the frontal region to the ethmoid sinus, assuming that to be the case, what did you find in your physical examination that would confirm that or would not confirm that? A. The only thing that I would get would be part of the history and the ridge above his forehead.

Q. What about the ridge above his forehead? A. That may be the result of a fracture.

Mr. Selser: We object to what may be.

The Court: When you use the term "may be" it sounds as though you were guessing. You are an expert, giving your opinion; and a responsive answer would involve your opinion.

Q. Assuming in this case that this man did have such a fracture as I have described, what relation, if any, is there between this bony ridge and that fracture? A. I would say it was the result of the fracture.

Q. Assuming that this man had no trouble with his head or nose previous to this accident, and sustained a fractured skull, and since that time has

had nosebleed down to about two months ago, and since that time has had a discharge occasionally, mixed with blood from his nose, and headaches, off and on, continuously since the accident, pain to the present time across his forehead, what relation, if any, in your opinion, is there between this fracture and these conditions? A. I would contribute them to the fracture.

Q. Why would you do that? A. If he had a fracture extending, as you say, into those sinuses, then the infection can extend across to the middle ear and he would have his deafness. I cannot attribute his vision to that fracture, though.

Q. What relation, if any, is there between the nosebleed and discharge from the nose and pain in the forehead? A. There is a possibility of its being due to the fracture.

Mr. Selser: That is objected to.

The Court: The objection is sustained. Strike it out.

Q. What is your opinion? A. I would say it was.

Q. Can you tell us from a medical standpoint how that would produce those things, the blood and discharge and these headaches? A. Yes. By setting up an inflammation in the sinuses.

Q. Assuming that in this accident he sustained a bruise of the left shoulder, what relation, if any, do you think there would be between the injuries sustained in this accident and the shoulder condition you now find? A. Contraction of the muscles around the shoulder joint.

By the Court.

Q. What relation between the accident and the condition of the shoulder, is the question. Is there any relation? A. Yes.

By Mr. Gebhardt.

Q. What is that relationship? A. The contraction of the muscles surrounding the shoulder joint.

By the Court.

Q. Could it be the result of a blow? A. Yes; sure it could be the result of a blow.

By Mr. Gebhardt.

Q. What have you to say as to whether or not these conditions which you found are of a permanent nature or not, in your opinion? A. I believe they are permanent.

Q. Can you give us any reason, in a word or two, as to why that is, what your belief is based upon? A. The ear condition is due probably to an inflammation in the middle ear, resulting from the extension of the infection.

By the Court.

Q. Why, isn't there a cure for that? A. Well, there isn't.

By Mr. Gebhardt.

Q. Is there any cure for this sinus condition? A. No. You can't reach it to treat it. If it were in one of the superficial sinuses it could be treated.

Q. What is the extent to which medical science

has advanced up to this point, with respect to the treatment of sinus trouble? A. Very unsatisfactory.

Q. What have you to say as to the extent which this condition you found would interfere with this man's performing the work of a brakeman, if any?

Mr. Selser: Objected to.

By the Court.

Q. Assuming that you know what the duties of a brakeman are. A. He wouldn't be able to.

Q. Do you know the duties of a brakeman? A. Climbing on cars while in motion, jumping up and down, throwing switches, being on the lookout for trains coming in the opposite direction.

Q. On the same track? A. On the same track and on other tracks.

Q. Having those duties in mind, couldn't he perform them? A. No. He could see an engine coming, or hear one coming if it was on top of him; he couldn't climb on cars unless they were standing still, because he would misreach with that left arm; it wouldn't permit him; he would fall off.

Cross-examination by Mr. Selser.

Q. In your medical experience, anything is possible, isn't it? A. Sure.

Q. So that a diagnosis made by you on mere possibilities of conditions existant, which you yourself did not discover, may not be entirely accurate? A. That is true.

Q. What objective evidence did you find other than the ridge that you felt? A. His blood pressure; examination of the chest; his shoulder joint.

Q. Let us confine ourselves to the head now. What objective evidence other than the ridge? A. I guess that's about all on the head.

Q. You found no objective evidence of intracranial injury, did you? A. No, sir.

Q. A person could have a fractured skull without intracranial injury? A. Yes, sir.

Q. And without intracranial injury there is no serious or permanent condition, is there? A. No, sir.

Q. The mere fact that there was a ridge upon his head in the vicinity of that scar was not an extraordinary condition? A. No, sir.

Q. As a matter of fact, that is quite a normal condition in that vicinity? A. No, not necessarily; not always. You find lots of scars on foreheads that don't have ridges.

Q. Do you notice a scar over my left eye? A. Yes, sir.

Q. Running down over the eye? A. Yes, sir.

Q. Will you see if you feel a ridge there? A. A small one, yes.

Q. Does that indicate to you that there is a fractured skull? A. No, sir.

Q. Why not? A. It may be simply a thickening of the periosteum over the bone.

Q. And that is so of Mr. Hendershot, isn't it? A. It may be true.

Q. So that the only objective evidence you had of intracranical injury was the ridge on the skull, which may have been due to any number of things? A. That is true.

Q. Those terregiums, those hang in the eyes of any person who is exposed to dust and general eye irritation? A. Yes, sir.

Q. Would you say that terregiums in the eye are unusual conditions for brakemen who are out in all kinds of weather, exposed to all wind conditions, dust out in the country along the railroad

tracks, cinders from locomotives? A. No, they are not unusual.

Q. It would be quite unusual to find a person who had been a railroad man for twenty-seven years or thereabouts who hadn't terregiums? A. Oh, no. There are a great many who haven't got them.

Q. I think you said you didn't examine the eye except in a gross way? A. That's all.

Q. Just had them make observations? A. That's true.

Q. You didn't have them examine the inside of the eye? A. No.

Q. As to the hearing, your examination was gross? A. I tested him out by simply talking to him and by listening to the watch.

Q. So that the only way you had of determining whether there was any defect was that he didn't answer your questions? A. That's true.

Q. And he said he didn't hear the ticking of the watch? A. I had to depend on his answers for the watch; but while I talked to him the questions I asked him were relative to the accident, and I am sure he would have answered me if he had heard.

Q. You could have determined that with a much greater degree of accuracy had you made a physical examination of his ears, couldn't you? A. That's true.

Q. And you made no such examinations? A. No.

Q. I think you said that there was a limitation of the elbow? A. The left elbow. He told me that was due to a former injury.

Q. Did he tell you when he had that injury? A. He did, but I don't recall.

Q. You spoke of a vision of 12/70. That was the vision you found in his case? A. Yes, sir.

Q. Is that corrected by glasses? A. He wasn't wearing glasses when I examined him.

Q. Can it be corrected by glasses? A. I couldn't tell you unless it would be refracted.

Q. You didn't make such an examination? A. No, sir.

Q. At the time you examined him he was not wearing glasses? A. No, sir.

Q. You don't know whether he customarily wore glasses or not? A. No.

Q. You didn't inquire from him as to whether he customarily wore glasses? A. No, sir, I did not.

Q. The condition of 12/70, which, in practical language is one-sixth normal, may be corrected by glasses? A. Yes, sir.

Q. It depends on the condition which causes that defect in vision? A. Yes, sir.

Q. Terregiums themselves don't, do they? A. They will interfere to some extent with vision, but not to that extent.

Q. That is due to a condition beyond terregiums? A. Yes, sir.

By the Court.

Q. What are terregiums, irritations? A. New tissue.

Q. You discovered that in his eyes, you say? A. Yes, sir.

Q. Which, in turn, you said was due to some sort of irritation? A. True.

By Mr. Selser.

Q. Were there any terregiums upon the cornea? A. No. They stopped at the cornea.

Q. Isn't it true that terregiums do not interfere with sight except they be on the cornea? A. No.

They will interfere to some extent even though not on the cornea. They will cause an excessive irritation and an excess amount of tears to be excreted by the tear glands.

Q. So it is not, in fact, the terregiums? A. No, but they cause it.

Q. It is the excessive tears in the eyes which interferes with the vision actually? A. Yes.

Q. You said he had a thumb off, which was a previous accident? A. True.

Q. You don't remember when that accident happened? A. They were different accidents, and they were something like ten, twelve or fifteen years apart.

Q. He had more than one previous accident? A. He had two previous accidents, he told me.

Redirect examination by Mr. Gebhardt.

Q. Please tell me whether or not that is the usual way of testing a person's hearing, the methods you used? A. For a gross examination, yes, sir.

Recross-examination by Mr. Selser.

Q. By gross examination you mean mere superficial? A. True. There are more scientific methods, but you must depend on the man's answers, no matter what the examination.

Q. Isn't it possible to examine the ear and eye for objective evidences of injury to the ear and eye? A. The eye, yes; but you have to take the patient's answers for the ear. You can examine the patient's eardrum.

Q. You didn't do that? A. Yes, I did. You can also tell if there is a hardening of the ear; but beyond that you must depend on the man's answers.

By Mr. Gebhardt.

Q. Did you examine the eardrum? A. Yes, sir.

Q. How did you find it? A. Normal.

Q. What would that indicate? A. No hardening of the eardrum; no sclerosis.

Q. What is hardening due to? A. Standing inflammation of the ear.

By the Court.

Q. A catarrhal infection, or something like that? A. Yes, sir.

By Mr. Selser.

Q. Do you know whether or not he had a catarrhal infection? A. Of what?

Q. General. A. That is too broad. You will have to tell me of what.

By the Court.

Q. Do you know whether or not he had any catarrhal condition of any sort? A. Only from his history.

Q. Did he or didn't he? A. Yes, from the nostril.

By Mr. Gebhardt.

Q. Could that have anything to do with sinus trouble? A. It may be the result of the inflammation of the sinuses.

Q. In your opinion, in this case was it the result of that or the result of something else? A. I would have to take the history into consideration. Taking the history into consideration I would say it was.

By Mr. Selser.

Q. Left side or right side? A. Both sides of the nostril.

Q. Not predominating on either side? A. No.

Q. And the fracture was on the right? A. Right.

DR. G. WYKOFF CUMMINGS, sworn for the plaintiff.

Direct examination by Mr. Gebhardt.

Q. You are a practicing physician? A. Yes, sir.

Q. In the town of Belvidere? A. That is correct.

Q. How long have you been practicing? A. Since 1890.

Q. You are a graduate of what medical school? A. The College of Physicians and Surgeons, New York.

Q. Have you taken any special work in any special line of medicine? A. I am a general practitioner.

Q. You are the Dr. Cummings who treated this man? A. I am.

Q. When did you first start to treat him, approximately? A. Last April.

Q. What condition was he in at that time? A. He came to me for treatment for stiffness of his left shoulder and stiffness of his right knee. I have been treating him for that since.

Q. At that time did you make a thorough physical examination of him or not? A. I did.

Q. What did you find? A. I found a man in fair general health, a man with a scar over the right

eye about an inch and a quarter long, a jagged scar, a tender scar, slightly adherent to a ridge of bone under the scar, in the same vicinity. I found a scar also, of older age, over the left eye, with an outgrowth of bone over the skull in connection with that. I found a limitation of motion of the left shoulder, not due, however, to anything that I could connect with the bone, attributable to the ligaments in that joint. I found a stiffness of the knee, a limitation of motion, which was also not due to anything wrong with the bone that I could discover, but that also was due to a stiffness or a hardening or tenderness of the ligaments around the knee, possibly connected with a muscular contraction.

Mr. Selser: Objected to, what it is possibly connected with.

By the Court.

Q. What did you attribute it to? A. Which I attributed to the pain he had when I tried to move it. I found he was quite deaf; and while I didn't depend much on the later scientific methods of determining hearing, because you have to depend on what a man says, he is hard of hearing, because I examined him in a way that he wouldn't know that I was examining him, and I know, therefore, that the result is correct.

Q. What do you mean by that? A. I asked questions. There are different ways that he can't tell when you are examining for hearing. I examined hundreds of men during the war for that, and I don't think we made any mistake.

Q. Did you discover any malingering on the part of the subjects? A. No, because they didn't know we were examining them for hearing at that time. We examined twenty-two hundred in this room.

Q. Did you discover anything else? A. I discovered some other injuries due to accidents of some years before.

Q. Were they at the elbow? A. The left elbow, and the thumb was off or something, and the hip was injured; but that was done fifteen or sixteen years ago.

By Mr. Gebhardt.

Q. He told you about those other injuries he had? A. Yes, he told me about them.

Q. Are you still treating him or not? A. He is still under my care.

Q. What are you treating him for now? A. For subacute traumatic rheumatism on the right knee and left shoulder.

Q. What do you mean by traumatic rheumatism? A. Rheumatism that is due to injury as distinguished from rheumatism that is due to a germ.

Q. Assuming that previous to June 22nd, 1925, this man had no trouble with his head, and that on that date he sustained a fracture of the skull, a fracture across the forehead, particularly on the right side, which is a branch of the main fracture extending down in the sphenoid sinus, what relation, if any, in your opinion, is there between the headaches he complains of and the nosebleeds which he had down to two months ago, and since that time a discharge and some blood from his nose? A. I should attribute those symptoms to the fracture.

Q. Can you tell us in a word why you would attribute them to the fracture? A. Because there would be nothing else to attribute them to and because there is reasonable probability that that is what they are due to.

Q. Could you find any physical evidence of any such fracture as I described? A. No. I found an injury to the outer table of the skull, because the ridge you feel there indicates an injury to a part of the bone; you know the periosteum is part of the bone as well as the bone itself; and that injury to the bone caused that ridge.

Q. What ridge? A. The ridge you can feel in the vicinity of that scar on the forehead, below the right eye (indicating).

By Mr. Selser.

Q. You indicate a line across the top of the eye, across the top of the forehead, down towards the temple? A. Yes. There is a natural conformation of the skull there, but I am not referring to that. It's three-quarters of an inch above that.

By Mr. Gebhardt.

Q. What relationship, if any, in your opinion, is there between this deafness that you found and this fracture that he received in this accident? A. Assuming that he had no deafness before, assuming that the deafness followed, I would assume that there was a connection. The deafness in his case I am sure is due to trouble in the inner ear. There are three parts to the ear. The outer part you can see; the middle you can just see the edge of; and then the inner ear. The reason I say that is because this man complains of noises and buzzing and so on in his head.

Q. What connection, in your opinion, is there, if any, between this condition of his shoulder and his knee and the fact that he received in this accident a bruised shoulder and a bruised knee? A.

The present condition of the knee and the shoulder are due to the accident.

Q. Will you tell me, in your opinion, whether or not those conditions are permanent? A. The thickening of some of those ligaments is permanent. Traumatic rheumatism is very slow to respond to treatment. I hope that he gets well some time, but I don't know.

Q. Will it be a long time or short time before he will recover? A. A long time before he is well.

Q. How much improvement has there been since you started to treat him, if any? A. Very slow.

Q. Are you familiar with the duties of a railroad brakeman? A. In a general way.

Q. To what extent, if any, would those injuries that he suffered in this accident interfere with his performing his duties as brakeman? A. It would make it unsafe for him to resume full duties as brakeman. His knee would make it unsafe for him to run on his right leg while a train is in motion. It would be difficult for him to lift up with his left arm, as you would do, to lift up a ladder, to lift himself up.

By the Court.

Q. How much motion has he lost in that shoulder? A. He has lost about 25 per cent. of the part left of that arm.

Q. You tested him for that, did you? A. Yes, sir.

By Mr. Gebhardt.

Q. The condition you found in his head, please state whether or not that would interfere with his duty as brakeman. A. Yes. A brakeman should be able to hear signals of coming trains, of course.

Cross-examination by Mr. Selser.

Q. In your opinion his deafness is due to a condition of the inner ear? A. Yes, it is.

Q. You don't attribute any of his deafness to any injury of the middle ear? A. I couldn't find proof of it.

Q. This condition of the ear is a nerve condition, isn't it? A. The ear has a nervous mechanism.

Q. The inner ear is of extreme nervous mechanism? A. It is a nervous receiver, yes, sir.

Q. So in your opinion the inner condition is a nerve involvement? A. I believe so.

Q. Isn't there a scientific, accurate method of testing the nerve centers, with regard to the responses of the patient? A. Not in the case of hearing. I tested him in a general way, his nervous impulses. I found his knee-jerk was about normal; his rhomboid was about normal. His station test——

By the Court.

Q. Standing up and closing the eyes? A. Yes. I found his pupillary reflexes were normal; and that is nearly all you can do in determining the nervous condition; and you can't tell about the working of the inner ear excepting by how well it operates. You can give some estimation.

By Mr. Selser.

Q. Are you familiar with the Barony-chair test? A. Not by that name.

Q. Are you familiar with the test made in a revolving chair, the patient being seated in a chair with his head held or supported in a brace, the

chair being revolved first to the left and tests made? A. I know of it as a test for aviators, but I haven't had any personal experience with it.

Q. Do you know the effect of the test, in so far as it shows evidence of intracranial nerve injury? A. Not so much injury, but it will test a man's nervous stability.

Q. You didn't make that test? A. No.

Q. Do you know of any other scientific tests for the examination of nerve stability? A. None that we use here.

Q. The fact that you found the pupillary reaction, response, the fact that you found the knee jerks and these other tests made by you, found those to be normal, did that indicate anything to you, with respect to intracranial injury? A. It showed that his co-ordination was perfect, no injuries to the central nervous system.

Q. You did find limitation of motion in the elbow? A. Yes; but I didn't test that much, because it was due to an old injury, and it was beyond any possible cure at this stage.

Q. Did you make a sufficient examination of that condition to apply it to your knowledge of the duties of a brakeman and on his limitation in carrying out those duties? A. No. I didn't bother much about that.

Q. You merely examined the shoulder so far as the limitation of performing his duties was concerned? A. His arm wouldn't go up sufficiently to reach the rung of a ladder to lift himself up.

Q. In addition to the shoulder, there was an elbow injury? A. Yes, sir.

By the Court.

Q. Were the elbow injury and the shoulder injury on the same side? A. I believe not. I didn't

pay much attention to the elbow injury, because it was so long ago I couldn't do anything to cure it.

By Mr. Selser.

Q. His general health is good? A. Generally good health.

Q. Suppose you try this test on my skull. Can you see the scar? A. Yes, sir.

Q. See if you can see the ridge. A. I can detect without the vision a little depression there, but I can't say whether that depression is due to a fissure in which a nerve runs or whether it is due to a fracture; but I can feel it very distinctly.

Q. That may be due to a fracture? A. Well, yes.

Q. Assuming that it was not there when I was born. A. If that wasn't there when you were born, and you had an injury, that was a fracture of the outer table of the skull.

Q. So that assuming certain conditions to exist and finding a ridge upon the skull over the eye, and that not being there before, you are led to believe that is a fracture of the skull and of the other things below? A. This is a groove that I feel on your skull. What I feel on the other man's skull is a raised ridge.

Q. You feel ridges on the side of the groove? A. I feel the groove, and ridges too.

Q. If there was a fractured skull and there was still a groove after the whole thing had healed it indicates a worse condition than if there was no groove at all? A. I wouldn't expect to find a groove. I would expect to find a depression. The groove should be filled up.

Q. If the groove were not filled up it would be indicative of the fact that there was still a separation? A. A separation of the outer table perhaps.

Q. You found no separation in his skull? A. No. I found the ridge.

Q. That ridge, I think you said, was bony matter? A. Yes; and indicates an injury to the outer table of the skull.

Q. You have no way of telling how long it was there, from your physical examination? A. No; I can't tell you.

Q. You found one over the left eye too, didn't you? A. Yes.

Q. So you found one on both sides? A. Yes, but the one over the left eye is older than over the right. I could tell that by an examination of the scars. The one is a ridge and the other is a lump.

Q. What is the difference?

By the Court.

Q. One is spread out and longer? A. Yes.

Dr. EDGAR HUNT, sworn on behalf of the plaintiff.

Direct examination by Mr. Gebhardt.

Q. You are a practicing physician? A. Yes, sir.

Q. In what place? A. Hampton, New Jersey.

Q. How long have you been practicing? A. Forty-eight years.

Q. You are a graduate of what medical school? A. Bellevue Hospital Medical College, New York.

Q. Have you made one or more examinations of Mr. Hendershot for the purpose of testifying in this case? A. Yes, sir.

Q. When did you make that, approximately? A. October 21, 1926, and yesterday.

Q. What did your examination disclose as to the condition of this man's system? A. A scar running from the hair up nearly to the center, an inch and three-quarters long; one scar down on the forehead; that is also a straight scar, 1 inch in length; a small scar over the nose, three-quarters of an inch long; and an abrasive scar on the left cheek; and he also shows a defect in his hearing; and he has a traumatic arthritis in his left shoulder joint and also a traumatic neuritis of the lower nerve and upper dorsal nerve, those are the nerves in the back.

Q. Did you examine his right knee? A. Yes, sir.

Q. What condition, if any, did you find there? A. He complained of soreness and more or less stiffness, and also at the one elbow. He also has a traumatic conjunctivitis, which led up to the thickening of the outer coat of the eye, that is, inflammation of the outer coat of the eye.

Q. What do you mean by traumatic conjunctivitis? A. Due to the injury.

Q. Assuming that prior to June 23rd, 1925, this man had no injury to his head, nothing wrong with his head, and that on that day he met with an accident in which he sustained a linear fracture across the forehead, extending down to the ethmoid sinus, what relation, if any, is there between that condition and his hearing and the bony ridge you found, and scars, and also these nose-bleeds and pains in his head that he complains of? A. That is the strongest evidence you have that this is the cause, due to the injury at that time.

Q. Due to this injury, do you mean? A. Yes, sir.

Q. Why do you say those conditions are due to the injury? A. Simply because they came on at that time. Due to other causes they would be gradual in formation.

Q. What did the fracture have to do, in your opinion, with producing this condition of nose-bleed and pain in the head and discharge from the nose, and so on? A. It is my opinion it was due to that cause.

Q. Did you find on his forehead any bony abnormality? A. Yes, over his left eye, eyebrow, that's a bony deposit. In dimension it would be about three-quarters the size of a dime.

Q. Is that something you can feel? A. Yes, sir, very readily. It can very easily be felt.

Q. What is the relationship between that and this fracture, do you think? A. It would have no connection. It would simply show an injury. A bump there would do it.

Q. Did you find any other bony abnormality on his forehead? A. No, I did not. That's the only one I discovered.

Q. What connection, if any, in your opinion, is there between this condition of the shoulder and knee and the bruise to the left shoulder and right knee that he sustained in this accident? A. It was all caused by the accident.

Q. In your opinion, were those conditions produced by this accident on June 23rd, or not? A. Yes, sir.

Q. What have you to say as to whether or not those conditions are permanent? A. The outcome is very unfavorable, and in many cases they never recover very much.

Q. Are you familiar with the duties of a railroad brakeman? A. Yes, sir.

Q. To what extent, if any, would those duties interfere with his pursuing that occupation? A. He would be wholly incapable of doing that.

Q. Why? A. Because it requires a man of two arms to do it.

By the Court.

Q. Hasn't he two arms? A. Not in active use, not normal.

Q. Which one is not normal? A. The right one.

Q. To what extent? A. If you bring it up to a horizontal position he can't get it any further, and you can't move it backward without pain.

Q. You made a test of that character with him, did you? A. Yes, sir.

By Mr. Gebhardt.

Q. Did you make any test of his hearing, to ascertain whether that was normal or not? A. Yes, sir.

Q. What did you find? A. Abnormal, greatly impaired.

Q. What connection, if any, in your opinion is there between that and this accident? A. In my opinion, it was caused by this accident.

Q. Can you tell me what would be the effect of this eye condition on his vision, if any? A. On account of the inflammation producing this deposit some day he will require an operation for its removal; otherwise he will grow blind.

Q. In the meantime, will it have any effect on his vision? A. Not until it creeps up on his cornea. Being out in the wind and dust that eye will become very irritable, and there will be tears and he will have to close his eyes.

Q. Assuming that he had no trouble with his eyes before the accident and that in the accident he got a lot of cement dust in them, in your opinion is there any relationship between the accident and this condition? A. I think so. I would describe that as wholly the cause, the cement and the irritation produced by it.

Cross-examination by Mr. Selser.

Q. You didn't know Mr. Hendershot prior to October 21st, 1926, did you? A. No, sir.

Q. You never saw him before? A. No, sir.

Q. And your diagnosis of his condition depends upon the history, which you must accept as being true? A. Yes, sir.

Q. You don't know whether or not he had those terregiums upon his eyes prior to the accident? A. No. I only gave the result of my examination of the 21st and yesterday.

Q. You don't know whether or not his hearing was impaired prior to the day of the accident? A. Only from the history of the case.

Q. Have you any way of telling how long these abnormalities of the outer table of the skull existed? A. No, sir.

Q. Are you able to say whether or not the abnormality on the left side is more aged than the one on the right? A. Do you mean on the skull?

Q. Yes. A. No, I can't say as to that, because I didn't examine prior to the accident.

Q. So that you can't tell by feeling the irregularities, the ridges or bumps or whatever they are called, whether one is more aged than the other? A. No.

Q. You didn't examine into his ears to determine whether or not the ear condition was in this middle ear or inner ear, did you? A. It couldn't be in the outer ear.

Q. You did examine as to that? A. Yes.

Q. Are you able to say whether it was the inner or middle ear? A. No, sir; you couldn't tell whether it was in the internal or middle ear.

Q. Did you discover a catarrhal condition in the nasal cavities? A. No. He simply told me he had a discharge from the head, the nostrils.

Q. You didn't make an examination of his nasal cavity? A. No.

Q. You didn't make an examination of the discharge itself? A. No, sir.

Q. Your examination then practically was merely having recited to you the history? A. No, it was not.

Q. What was it in addition to a recital of the history? A. An examination of the scars and of his eyes and of the ear and of the left shoulder joint and of the base of his neck. They are all objective signs.

By the Court.

Q. The Romberg test? A. Yes, sir; reflexes.

By Mr. Selser.

Q. You didn't make a Barony-chair test? A. No.

Q. That was used a great deal during the war? A. Yes, sir.

By the Court.

Q. For the aviators? A. Yes, sir. It would be quite necessary with them.

By Mr. Selser.

Q. Why quite necessary for them? A. Because they are living up in the air, and to have their power of preserving equilibrium, and all that, is important.

Q. And power of preserving equilibrium is what? A. It's a nerve condition.

Q. Preserving one's equilibrium depends upon the health or the lack of health of the equilibratory organ? A. Yes, sir, and the brain structure.

Q. And the equilibratory organ is the nerve center at the base of the skull, at the back, running from the ears, crossing over in the rear, and going up in the brain proper? A. Yes, sir.

Q. So that the equilibratory organ is ordinarily the first organ affected by an intracranial injury? A. Not always.

Q. I say ordinarily. Ordinarily it is so, isn't it? A. I wouldn't say that; no, sir. It is so in some cases, but in many cases not.

Q. Assuming that there was an intracranial injury, traumatic condition, resulting from a fractured skull, over the right eye, of a fracture which extended over also towards the right side of the head above the ear, and assuming that that fracture resulted in an inflamed sinus, with a partial destruction of hearing and partial destruction of sight, and a catarrhal discharge from the nose, would you say that the equilibratory organ in reasonable probability would be disturbed? A. It would in some cases, and in some cases it would not. You see, all those intracranial injuries are dependant upon just what portion of the brain is going to be involved in the injury.

Q. Is it possible that there could be an intracranial injury resulting from a fracture of the skull, destroying the ear, the hearing, either the inner ear or central ear, without having affected the equilibratory organ? A. Yes, sir; it is my opinion that it could, absolutely.

Q. And the equilibratory organ is in the inner ear, isn't it? A. It is supposed to be in the middle blanket.

Q. It runs from the eardrum itself down through the central and inner ear and crosses over and up into the brain? A. Yes, sir; the base of the brain.

Q. If you were to have learned that Mr. Hendershot had these terregiums upon his eyes prior to the accident and that he had customarily worn glasses prior to the accident, would you have changed your opinion as to the condition? A. No, sir; I wouldn't.

Q. That wouldn't have made any difference? A. No.

Q. Did you find anything other than terrgiums? A. Yes. In the eye?

Q. Yes. A. Yes.

Q. What did you find? A. General chronic traumatic conjunctivitis.

By the Court.

Q. What is that? A. Inflammation of the lining member of the lid and the outer coating of the eye up to the cornea.

Q. You found that chronic inflammation then? A. Yes, sir; due to trauma.

Q. Which, in turn, you say, was due to the injury? A. That's the injury, getting this into the eye.

Q. Trauma is the injury? A. Yes, sir.

By Mr. Selser.

Q. Had you any way of telling how long that condition existed? A. Conjunctivitis?

Q. Yes. A. Only from the history of the case.

Q. Isn't it a fact that chronic conjunctivitis results from exposure to winds, dust and general irritation which would result from that kind of exposure? A. No, sir; not when a man has a lot of cement chucked in his eyes.

Q. Eliminate that for the moment. I am asking only as general consideration. A. You can pick out every symptom that this man has and associate it with something else, but you can't take the whole thing in its entirety.

Q. Without regard to the history of the case, taking each symptom by itself, it could be disassociated with this accident entirely? A. I don't see how it can be. It can't be.

Q. I am asking you if it can. A. No.

Q. Conjunctivitis can be? A. Chronic conjunctivitis could be, yes.

Q. The ear could be? A. Deafness could be, yes.

Q. And the ear condition, so far as you were able to determine it, and you were able to determine only deafness, that could be disassociated? A. Yes.

Q. The shoulder condition could be? A. Yes.

Q. Any condition could be? A. Yes, separately, but not in its entirety.

Q. You do know, as a matter of fact, that his left arm was impaired at the elbow? A. Yes, sir.

Q. And also at the shoulder? A. No, sir; not the left one.

Q. You stated that a man to perform the duties of a brakeman must have two arms and you said to his Honor that you mean effective arms? A. In working condition.

Q. Isn't it your opinion that his left elbow impaired the effectiveness of his arm? A. No, sir; not the left one.

Q. It didn't? A. No, sir. I am speaking of his left arm, his inability to perform the duties of a railroader on account of his non-use of his left arm. It was the left shoulder joint and the right elbow.

Q. And in your opinion, the right elbow had nothing whatever to do with his effectively performing his duties as brakeman? A. No, sir.

Q. And that was an old injury, you were told? A. The elbow; but the shoulder was the one that occurred at the time of the accident on June 23rd; 1925.

Q. And those are rheumatic conditions? A. We frequently see rheumatism set in a joint that has been previously injured.

Q. In other words, the rheumatism can set in at a period far removed from the injury? A. Yes.

By Mr. Gebhardt.

Q. In your opinion, are or are not these conditions you found due to this accident or not? A. All due to the accident; yes, sir.

By Mr. Silser.

Q. And that depends on the history partly? A. No, sir.

Q. Without the history, can you determine that fact? A. If he came to me in that way I would say to him, "Man, what has happened to you?" Something must have happened to bring about this condition.

Q. So physical conditions plus history led you to your conclusions? A. Yes, sir.

Mr. Selser: If your Honor please, we have some doctors here as witnesses on behalf of the defense, who are anxious to get away.

The Court: You may call them now, out of order.

Dr. JOSEPH H. WYATT, sworn for the defense.

Direct examination by Mr. Selser.

Q. What is your profession? A. Physician and Roentgenologist.

Q. What is a Roentgenologist? A. A person who has to do with X-rays.

Q. How many years have you been engaged in that profession? A. Eight years, as Roentgenologist.

Q. Are you a graduate of any university? A. Harrison Medical College.

Q. Graduated with what degree? A. M. D.

Q. What institutions have you been associated with, if any? A. I have been associated with the University of Pennsylvania, and with Jefferson, and with the army.

Q. The United States Army? A. Yes, sir. George E. Fehler in Philadelphia, and in Newark.

Q. During that period of service in the army, was that during the war or otherwise? A. During the war.

Q. How many years have you been associated with X-rays and X-ray machines? A. Eight years.

Q. That, is during your entire experience? A. That is my entire experience with X-rays.

Q. What X-ray machine are you using at the present time? A. Victor-Snook, Acme, International, and the Walker.

Q. Did you at my request make some X-ray photographs of Mr. Hendershot, the plaintiff in this case? A. I did.

Q. When were these taken? A. August 3rd, 1926.

Q. I show you Exhibit D-1 for Identification, and I ask you what that is. A. A radiogram showing the right lateral of the skull of Mr. Hendershot.

Q. What does radiogram mean? A. That is a film.

Q. That is the right lateral? A. Yes, sir; with the right side of his head closest to the film.

Q. I show you X-ray plate marked Exhibit P-3. A. That shows a lateral exposure of the skull.

Q. Are you able to say whether it is right or left lateral? A. No, sir. I am unable to tell whether it is right or left side.

Mr. Selser: We offer this X-ray, Exhibit D-1, in evidence.

Mr. Gebhardt: No objection.

Q. What does that X-ray show, if anything? A. This X-ray shows the right lateral of the skull. You can see the outer lines, blood vessels, of the skull, see the mastoid cells. It shows no evidence of fracture of the bones of the skull.

Q. Do you find any indication whatsoever upon that plate of fracture in the vicinity of the skull or suture in the vicinity of the central meningeal artery? A. No, sir; there is not.

Q. Does it show the central meningeal artery? A. Yes, sir.

Q. Does it show the skull suture? A. It does.

Q. I show you another X-ray photograph, which I will ask to have marked Exhibit D-2 for Identification. Those photographs were all taken at the same time? A. Yes, sir.

Q. By the same machine? A. Yes, sir.

Q. By whom were they taken? A. They were taken and developed by myself.

Mr. Selser: We offer Exhibit D-2 in evidence.

Mr. Gebhardt: No objection.

Q. What does Exhibit D-2 show? A. It shows an exposure of the skull, with the back of the head nearest the plate, the tube above the head, with the rays directed down to give a good image of the bone in the back of the head, which we call the occipital bone.

Q. Does or does not that show evidence of fracture? A. It does not.

Q. Does it show the skull suture? A. It does.

Q. Will you describe to the jury from that X-ray what the skull suture is? A. The skull is made up of a great many bones. Where they come together they kind of dovetail in, which gives you what we call the sutures of the skull. That is where they unite.

Q. Do the skull sutures show a shadow on X-rays? A. They do.

By the Court.

Q. Are they sometimes mistaken for fractures? A. They are at times.

Q. Does an X-ray fool you once in a while? A. What do you mean?

Q. Can it be so taken that it does not produce the true situation? In other words, may it fail to disclose a fracture when there is one? A. In case of doubt, we oftentimes take a stereoscopic.

Q. Does it depend somewhat on how the camera is placed and the exterior situation? A. Yes, sir.

Q. In other words, it may not always be accurate? A. If taken right, it is always accurate. If you get a film that is taken right the shadow that

is caused is a clear cut outline; if it is fuzzy there has been motion or the object hasn't been set right.

Q. As, for example, there is sometimes a confounding of an artery or a groove with a fracture? A. There shouldn't be.

By Mr. Selser.

Q. Does yours show any such confoundings? A. No, sir; it does not.

Q. Was this taken properly? A. They were.

By the Court.

Q. You say no fracture whatever is shown on either of these plates? A. There is not.

By Mr. Selser.

Q. I show you another picture, which I will ask to have marked as D-3. There are some marks here in white ink upon the face of the film? A. Right and left. There is only one way of telling the films, and that is by putting the marks on before making the exposure. I made the marks on there.

Q. What position was the head in when that was taken? A. With the top of the head down on the plate, the film above the chin, shooting down. That is a picture of the base of the skull.

Q. Does that show any evidence of fracture? A. It shows no evidence of fracture.

Q. I show you another photograph, which I will have marked Exhibit D-4. The marks in white ink were put here by you on all these? A. By myself.

Mr. Gebhardt: No objection.

Q. What side of the head is that? A. The left lateral of the skull. It shows the suture lines and shows the blood vessels.

Q. Does it show any evidence of fracture? A. It does not.

Q. I show you another one, which I ask to have marked Exhibit D-5.

Mr. Gebhardt: No objection.

Q. What side of the head is that? A. That is a left lateral of the skull, and shows the suture lines, blood vessels, and no evidence of fracture.

Q. I show you another one, which I ask to have marked Exhibit D-6. The white marks on the face are your own marks? A. Yes, sir.

Mr. Gebhardt: No objection.

Q. What is that a picture of? A. This shows the forehead bone, the plate with the tube above the back of the head. It shows a picture of the frontal bone of the forehead, which shows no evidence of fracture.

By the Court.

Q. From the way that picture was taken, the way the camera was placed and so on, if there had been a fracture would it have shown? A. It would; yes, sir.

Q. You keep saying "It shows no evidence of fracture." A. If there had been a fracture there, it would show.

By Mr. Selser.

Q. I show you Exhibit P-3 in evidence, which is a lateral view of the head, and ask you: What is that a picture of? A. A lateral view of the skull.

By the Court.

Q. Whatever it may be, does it show any fracture? A. No, sir; it doesn't show any evidence of fracture.

By Mr. Selser.

Q. I show you some shadows running from the center of the left eye up towards the top of the head, and I ask you what that shadow is. A. That is the middle meningeal artery.

Q. Can you see any shadow of the skull suture on that? A. I can, yes.

Q. Where is that located with respect to the middle meningeal artery? A. Just in front of it.

Q. I show you an exhibit, P-2, and ask you if you can see any evidence of fracture in that photograph? A. No, sir.

Q. I indicate a shadow along the right side, in the direction in which we are now looking at it. A. I can't tell you which is the right side.

Q. In the direction in which we are now looking at it, and ask you just what that shadow is. A. There is the shadow of the frontal bone coming up here.

Q. On the other side there is another shadow? A. That is the frontal bone too, on both sides; and then you have your suture line showing here.

By the Court.

Q. Is there any evidence of fracture on either side? A. There is not.

Cross-examination by Mr. Gebhardt, Sr.

Q. Who employed you to make those X-ray pictures? A. I had this patient referred by Dr. Herb.

Q. You are employed by the railroad company indirectly? A. No. I am not employed by anybody.

Q. Are you doing it for nothing? A. I got this from Dr. Herb and sent the bill to Dr. Herb.

Q. Are you doing this work for nothing? A. No, sir.

Q. Don't you know you are doing it for the railroad company with our consent? A. I never asked. The only thing I did was to send a bill to Dr. Herb, who incorporated it with his bill.

Q. Have you any suspicion that you are doing it for the railroad company and that they will pay you? A. I expect to be paid.

Q. By the railroad company? A. Through Dr. Herb; yes, sir.

Q. You did say in examining the Plaintiff's Exhibit P-3 that you couldn't tell from looking at it which side of the head it was? A. I couldn't say which side of the head it was because this is a duplicated film.

Q. How many pictures did you take altogether? A. Of this man?

Q. Of his head. A. Six.

Q. Is that all you took? A. That's all I took.

Q. You didn't take some others that you haven't here? A. Not that I know of. I took one that wasn't clear. I didn't take any more; I know positively. I took seven.

Q. The seventh one you haven't here? A. There is one there that he hasn't put in evidence.

Q. You took seven? A. Yes, sir.

Redirect examination by Mr. Selser.

Q. I now show you the seventh, which I am going to ask to have marked Exhibit D-7.

Mr. Gebhardt: No objection.

Q. What is that a picture of? A. That is an exhibit of the nasal bone. There is no evidence of fracture.

Dr. Boyd E. Wilkenson, sworn on behalf of the defendant.

Direct examination by Mr. Selser.

Q. What is your profession? A. Physician.

Q. Specializing in what? A. X-ray work.

Q. With whom are you now associated? A. The Paterson General Hospital, the City Hospital.

Q. Where? A. Paterson.

Q. What other one? A. The Good Samaritan Hospital at Suffern, New York.

Q. In what capacity? A. X-ray.

Q. Are you a graduate of any institution? A. The Baltimore Medical College.

Q. What degree? A. M. D.

Q. How many years have you been engaged in X-ray work? A. Exclusively, about eight or nine.

Q. And intermittently, prior to that? A. The first in 1907.

Q. What machines do you use at the present time? A. Walker, Celicet, Snook-Victor, England.

Q. Are they all standard machines? A. Yes, sir.

Q. I show you exhibit marked P-2 in evidence, and ask you if you can tell what that is. A. A plate of the skull, either anterior-posterior or posterior-anterior.

Q. Does it show any evidence of fracture? A. I don't see any.

Q. Look it over carefully. A. I see no evidence of fracture.

Q. I show you exhibit marked P-3 in evidence, and ask you if you can tell what that is. A. A lateral plate of the skull.

Q. Can you tell whether that is left or right lateral? A. No, I cannot.

Q. Does it show any evidence of fracture? A. I don't see any.

Q. I indicate on that a shadow up over the eye-socket. What shadow is that? A. Intracranial groove, blood vessel.

Q. There is another one alongside of it. A. That is probably superimposed from the other side.

Q. Can you find the middle meningeal artery upon that? A. I can't see the meningeal artery. I see the groove of the blood vessel which I presume it is.

Q. Is that in the location of the middle meningeal artery? A. It is.

Q. Upon Exhibit P-2 there are shadows on either side of the skull above the eye-sockets. What, in your opinion, are those shadows? A. Sutures. I would consider those suture lines.

Q. I show you Exhibit D-5 and ask you to tell what that is. A. That is a lateral plate of the skull.

By the Court.

Q. Do you find any evidence of fracture on that plate? A. No, sir.

Q. Is there any evidence of fracture there? A. No, sir. I don't see any.

By Mr. Selser.

Q. I show you Exhibit D-6 and ask you if you can find any evidence of fracture on that. A. No, sir; I do not. That is not a very good plate.

Q. I show you Exhibit D-4. Do you see any

evidence of fracture on that? A. That is a lateral view of the head. I see no evidence of fracture on that.

Q. Is that a good plate or otherwise? A. I would call that a good plate. It has a few scratches on the film, abrasions.

By the Court.

Q. Would they interfere with your discovery of a fracture? A. No, sir. A fracture-line doesn't look like this.

By Mr. Selser.

Q. I show you Exhibit D-1. Is that a good plate? A. Yes, sir.

Q. Can you see any evidence of fracture in that? A. No, I do not.

Q. Would you say there is or is not any evidence of fracture? A. There is no evidence of fracture that I can see.

Q. I show you Exhibit D-2. Is that a good plate? A. Yes, sir; I would call that a fairly good plate.

Q. Can you see any evidence of fracture upon it? A. No, sir.

Q. Would you say there is or is not any evidence of fracture? A. I would say there is none that I can see; I am unable to detect any.

Mr. Selser: You may cross-examine.

Mr. Gebhardt: No questions.

(At this point Court adjourns to 1.15 o'clock of the same day.)

(Pursuant to adjournment, Court convenes Wednesday afternoon, October 27th, 1926, at 1.15 o'clock.)

THOMAS R. ZULICK, sworn for the defense.

Direct examination by Mr. Selser.

Q. Where are you employed? A. At the Paterson General Hospital.

Q. In what capacity? A. Superintendent.

Q. How long have you been superintendent of the hospital? A. Nineteen years.

Q. Are you familiar with the records kept by that institution? A. I am.

Q. I show you a book marked on the outside "Paterson General Hospital, 1925, 64800 to 64999," history docket, containing 100 records of patients in the hospital during the period covered by the book. Does that book show the record of James Hendershot? A. It does.

Q. In June, 1925? A. It does.

Q. By whom was that record made? A. Part of it by Dr. Nighton.

Q. Where is Dr. Nighton at the present time? A. Connected with the Eye and Ear Hospital at Brooklyn.

Q. How do you know that record is made by him? A. I know his handwriting.

Q. What part is made by Dr. Nighton?

Mr. Gebhardt: I don't think there is any use going further into this, because we object to anything not made by this doctor himself, unless they produce the person who made the record.

Mr. Selser: Dr. Nighton is not available for testimony. I am about to prove that

the record was made in the course of the ordinary business at the hospital, and identified by this witness as being in part Dr. Nighton's record; and on that basis I am about to make the offer.

The Court: Isn't that hearsay?

Mr. Selser: I think that is the exception.

The Court: Have you any authority to show it is not?

Mr. Selser: Offhand, I have not, but it is on the same basis as a book account, where an account is made in the ordinary procedure of business and the person who made it is not available.

By the Court.

Q. Do you know Mr. Hendershot? A. I recognize the gentleman from the fact that he was in the hospital.

Q. Do you remember his being there? A. I do; yes, sir.

Q. Did you have any immediate contact with his case, anything to do with it? A. Not with him direct.

Q. Do you know why he was there and for what he was treated? A. I do; yes, sir.

Q. How do you know that? A. Because it was a very unusual accident, this train wreck that he was injured in, and I recall the circumstances very well.

Q. Do you know how long he was there at the hospital? A. Yes, sir.

Q. Do you know what he was treated for? A. Yes, sir.

Q. Do you personally know? A. I remember his face being bandaged at the time.

Q. Are you a doctor? A. No, sir.

Q. What are you? A. Just a layman.

Q. What is your association with the hospital? A. Superintendent.

Mr. Gebhardt: A record of this kind in order to be introduced in evidence must be sworn to by the person who made it. We object to it, and we shall object to the admission of it on the ground that the person who made it is not produced.

The Court: And the doctor's testimony might have been taken by commission, even though he is out of the State?

Mr. Gebhardt: Yes, sir; and there is no evidence that he could not be brought over here.

By Mr. Selser.

Q. When was that record made? A. In June, 1925.

Q. You referred to one page only of that record as having been made by Dr. Nighton.

Mr. Selser: Is there any objection to my stating the title on the printed form?

The Court: You may.

Mr. Selser: The words "Paterson General Hospital, Physical Examination," are on the top of that page.

Mr. Gebhardt: I have no objection to that.

Q. By whom is the next page made? A. A portion by Dr. Nighton and a portion by Dr. Vanerde.

Q. Do you recognize the handwriting of both of those physicians? A. Yes, sir. However, I have not seen as much of Dr. Vanerde's as of Dr. Nighton's.

Q. When was that record made? A. On the 23rd of June, the day the gentleman was admitted to the hospital.

Q. Turn to the next page, the third page, printed at the top "Paterson General Hospital, Graphic Chart." By whom was that made? A. That was made by the nurse.

Q. Where is the nurse? A. I don't know.

Q. Have you any way of telling who the nurse was? A. No. There is very little writing there. It is mostly dots and lines, indicating the man's pulse, respiration and temperature.

Q. Was that or was not that made in the ordinary course of business of the Paterson General Hospital? A. Yes, sir.

Q. And as of what time? A. The 23rd, 24th, 25th, 26th and 27th of June, 1925.

Q. Turn to the next page. Printed at the top is "Paterson General Hospital, Urine and Blood, James Hendershot." By whom was that made? A. The secretary in the pathological laboratory.

Q. Do you know who that secretary is? A. Yes.

Q. Is he or she available at this time? A. Not at this particular moment.

Q. Is she at the hospital? A. She is.

Q. From what was that record prepared, if you know?

The Court: Do you know?

The Witness: I do.

Mr. Gebhardt: I object.

The Court: Mr. Selser, do you propose to offer this record as affirmative proof of what occurred and the condition of this man?

Mr. Selser: I propose to offer it as the record of the Paterson General Hospital as

to reports made in the ordinary course of events of that hospital by various employees of that hospital in this case.

The Court: And as having evidential value as to what those nurses or physicians themselves found with respect to the condition of the plaintiff?

Mr. Selser: Yes, sir.

The Court: The offer of what purports to be, or is claimed to be, evidence of an affirmative character of what the physicians or the nurses did in connection with the case of Mr. Hendershot while he was at the hospital is denied. I am not aware of any authority that would permit a record of this character to be offered as evidence or affirmative proof, and thus deny the plaintiff's counsel to cross-examine the two doctors and the nurse. Under the circumstances the mere production of the record, with whatever it may contain, would put the plaintiff at a disadvantage in the regard just stated. Neither do I think it is one of the exceptions to the hearsay rule. Under these circumstances unless you can show me some authority which makes this evidential I am inclined to rule against you.

Mr. Selser: Your Honor rules it out with respect to the record of the institution made at the time in Mr. Hendershot's case?

The Court: What do you mean by that?

Mr. Selser: Merely a record of the institution as to the time Mr. Hendershot was in the hospital.

The Court: I think there is no objection to that, as to the time he was in the hospital and when he left; and that is admitted, as I recall.

Mr. Gebhardt: That is admitted.

The Court: The record shows he was injured on June 23rd, 1925, and that he left the hospital on June 27th, 1925.

DR. ALBERT VANERDE, sworn for the defense.

Direct examination by Mr. Selser.

Q. What is your profession? A. Physician.

Q. How many years have you been practicing as a physician? A. Nearly fourteen.

Q. You are a graduate of what institution? A. New York University.

Q. Are you associated with any hospital? A. Paterson hospitals.

Q. Have you been associated with any other hospital? A. There are three hospitals in Paterson. I have been in the surgical clinic of both the St. Joseph and Paterson General.

Q. You reside where? A. Hawthorne.

Q. That is in Passaic County? A. About three miles from Paterson.

Q. Are you known as one of the Erie Railroad's or N. Y. S. & W. doctors? A. Yes, sir.

Q. Do you make examinations in injury cases? A. Yes, sir.

Q. Happening within your territory? A. Yes, sir.

Q. Do you treat patients who are taken to the hospitals upon which you are consulting physician? A. Yes, sir.

Q. Do you remember Mr. James Hendershot in June, 1925, at the Paterson General Hospital? A. Yes, sir.

Q. Did you or did you not have his case in charge? A. I had charge of his case.

Q. What examination of him did you make, if any? A. A complete physical examination.

Q. Consisting of what? A. An examination of the head, neck, upper and lower extremities.

Q. Go on and tell us about that. A. My findings at the time were that the man was lying in bed in a prostrate position, with bandages about his head, and bleedings from the nose, that is, old blood could be seen; there wasn't any bleeding at the time. He complained of pains about his body in general, headache, and showed signs of having been injured.

By the Court.

Q. What were they, other than the bleeding which you observed? A. He had a severe laceration of his forehead right over his eyes, and he had pain on moving of his arms or legs. He also complained of headache, and he had a slight laceration on the top of his head.

Q. Did you make any examination with respect to his pulse? A. Yes, indeed.

Q. What was the result of that? A. It was not materially affected.

Q. How about temperature? A. It was not materially altered.

Q. How about blood pressure? A. I just don't recall that.

By the Court.

Q. Did you take it? A. Yes, sir.

By Mr. Selser.

Q. I show you the record, which has already been marked Exhibit D-8, 9 10, 11 and 12 for Identification, and ask you whether or not that record was made by you or under your supervision. A. Yes, sir. These papers I used in his case at the hospital.

By the Court.

Q. Made under your supervision? A. Yes, sir.

Q. Part in your handwriting? A. Yes, sir.

Q. All in your handwriting? A. No, sir.

Q. What is not? A. The address, his age and his occupation, and the entrance to the hospital. He came in at 3 o'clock in the morning, and the interne made some notes.

By Mr. Selser.

Q. Do you know who that interne was? A. Yes, sir; Dr. Snedecker.

By the Court.

Q. When did you arrive at the hospital? A. 9 o'clock in the morning.

Q. From then on it was under your supervision? A. Yes, sir.

Q. It contains the nurse's record, too? A. Yes, sir.

Q. So that part of that record from 9 o'clock is in your handwriting? A. Yes, sir.

Q. And the remainder in that of the nurse? A. Yes, sir.

Q. You had general supervision of this case? A. Yes, indeed.

Q. And you are able to recognize the record as made at or about the time that this case was dealt

with in the hospital? A. Yes, indeed.

Q. That is right? A. Yes, sir.

Q. Is it necessary to refer to the record to refresh your memory, or can you testify without it? A. I can testify without it.

By Mr. Selser.

Q. As to blood pressure and so on? A. Yes, sir.

Q. What was the result of your blood pressure examination? A. I noticed there was no material change in his normal blood pressure.

Q. How about respiration? A. About normal.

Q. Was or was not that condition continuing during the entire period of Mr. Hendershot's stay at the hospital? A. Each day he showed some improvement.

Q. At the time of his discharge from the hospital, what was his condition with respect to those four elements?

The Court: Name them.

Q. Blood pressure, respiration, pulse and temperature. A. They were all in fairly good shape.

By the Court.

Q. Were they normal? A. They approximated the normal.

By Mr. Selser.

Q. Tell us more in detail just what that is. A. His temperature fluctuated between 98 3/5 and 100, and his pulse fluctuated between 72 and 90; blood pressure fluctuated between one hundred and twenty and thirty; and respirations were between 16 and 20.

Q. Did that condition or those conditions upon those four elements indicate anything to you with respect to whether or not Mr. Hendershot had an intracranial injury? A. No, it didn't. It was rather contrary.

Q. Contrary to the existence of such an injury? A. Yes, sir.

Q. Did you have anything to do with Mr. Hendershot's eyes? A. Yes.

Q. What about that? A. We used boric acid solution on them. They were rather inflamed, and a foreign substance got into them.

Q. At the time of his discharge from the hospital what was the condition of his eyes? A. They were, so to speak, inflamed.

By the Court.

Q. Any permanent injury to the eyes? A. No, sir.

By Mr. Selser.

Q. Did that inflammation puncture the eye or was it merely on the surface? A. The surface, superficial.

Q. Did you observe as to whether or not he had terregiums on the eye? A. No, I did not. I didn't see any.

By the Court.

Q. Did you examine his eyes? A. Yes, sir.

Q. Did you look for terregiums? A. Yes, sir. I looked for almost everything you could see about an eye.

Q. And you discovered nothing but inflammation of a superficial character? A. That's all.

By Mr. Selser.

Q. Have you seen Mr. Hendershot after his discharge from the hospital? A. Yes, sir.

Q. How long a time? A. About two months.

Q. How often did you treat him? A. About three times a week the first two weeks, and then after that about once a week.

Q. Where? A. He came to me.

Q. What was his condition when he finally ceased coming to you? A. Very good.

Q. What was his condition with respect to the four elements I referred to before, temperature, respiration, pulse and blood pressure? A. They were all normal for a man of his age.

Q. What was the condition with respect to his eyes? A. He had good eyesight.

Q. What was his condition, with respect to his general physical condition? A. I thought it was very good.

By the Court.

Q. Did you test his hearing? A. Yes, sir.

Q. What did you find about that? A. It was slightly impaired.

By Mr. Selser.

Q. Were you able to tell whether that impairment of hearing was of long standing or otherwise? A. I was led to believe it was of long standing.

By the Court.

Q. What did he say? A. I spoke to him about it.

Q. What did he say? A. He said that he had been slightly hard of hearing for some time.

Q. Did he attribute it to the accident? A. No, sir.

Q. Did you discover any catarrhal infection? A. No, I did not, no acute catarrhal infection.

By Mr. Selser.

Q. Did you discover any chronic catarrhal affection? A. I don't believe I did.

By the Court.

Q. What was the bleeding due to? Do you know? A. I thought it was due to the impact of his face against the ground.

By Mr. Selser.

Q. Was there any bleeding from his nose at the time of his discharge from the hospital? A. No.

Q. How long did that bleeding continue? A. He had ceased when I got there, but I could see evidences of it.

Q. Did it evidence itself again as an active condition while he was under your care? A. No, sir.

By the Court.

Q. Did his nose bleed again? A. No, sir.

Q. He had no nosebleed after that? A. No, sir.

Cross-examination by Mr. Gebhardt.

Q. On the day that you first saw him he was bleeding from the nose? A. He had been.

Q. And was there anything the matter with his nose that you could see? A. A little swollen, and he looked badly bruised.

Q. Would you say his forehead was badly lacerated? A. Yes, sir.

Q. Do you think that when you first saw him he showed signs of injury? A. Yes, indeed.

Q. In four days he was well? A. No, sir. He wanted to leave the hospital and come to my office for treatment.

Q. You don't think there is anything the matter with him now, do you? A. I don't think so. I haven't seen him for some time.

Q. When he quit coming to you there was nothing the matter with him? A. No. He was apparently well. He was well.

Q. Entirely well? A. I would say so.

Q. How do you know he had good eyesight? A. I had charts in my office, and I had him read some of the letters for me.

Q. Has he still got good eyesight? A. I don't know.

Q. Do you know anything about his present condition at all? A. No, sir.

Q. He may have very seriously impaired hearing at this time, as far as you know? A. Absolutely.

Mr. Selser: Objected to as going into the realm of speculation.

By the Court.

Q. Do you know anything about his hearing now? A. Not at all. I haven't seen the gentleman for a year.

By Mr. Gebhardt.

Q. Do you know anything about his eyesight now? A. No, sir.

Q. Do you know anything about his lame shoulder now? A. I haven't seen the gentleman in over one year.

Q. Do you know anything about the trouble with his knee? A. At the present time? No.

Q. You don't say that he hasn't got these things?

The Court: He doesn't say that obviously, because he said he hasn't seen him.

Q. You don't know anything about his present condition? A. No, sir.

DR. J. WALLACE HURFF, sworn for the defense.

Direct examination by Mr. Selser.

Q. What is your profession? A. Medical profession, practicing physician.

Q. Do you specialize in any department? A. I specialize on the head.

Q. How many years have you been practicing? A. Since 1913. Thirteen years.

Q. You are a graduate of what institution? A. Jefferson Medical College.

Q. Are you associated with any other institution? A. I am associated with the Newark Eye and Ear Infirmary, on the staff, and on the staff of the Presbyterian Hospital and St. Michael's, Newark, consultant in the Somerset Hospital in Somerville.

Q. Anything else? Any other institutions? A. That's all.

Q. Were you or were you not associated with the United States Army during the World War? A. I was.

Q. In what capacity? A. As a physician in the army, in the aviation department.

Q. How many years have you been specializing upon the head? A. Since 1915.

By the Court.

Q. How old are you? A. Thirty-six.

By Mr. Selser.

Q. Did you on August 10th, 1926, make an examination of Mr. Hendershot at the request of the Erie Railroad Company? A. I did.

Q. At that time did you make a memorandum of the examination made by you? A. I did. I sent you the original and kept a carbon myself.

Q. I show you three sheets of paper, typewritten matter upon them, and ask you if that is the original memorandum? A. It is.

Q. Do you need that to refresh your recollection to give accurate testimony as to the nature of the examination made by you and your conclusion? A. I think I could be more specific in my testimony if I did that.

Q. Will you refresh your recollection by that statement and tell the Court and jury just what examination you made, and your diagnosis? A. When Mr. Hendershot came I first asked him to give me a brief history of what happened, and he told me about the accident occurring on June 23rd, that he was knocked unconscious for a few minutes and that he was taken to the Paterson General Hospital where he remained as a patient for five days, and then of his gradual convalescence, and then I asked him what he was complaining of, and he told me that he was complaining of dizziness, that he had pain in his head, that he had poor vision, poor hearing; and, I guess, that was about all. I limited my questions entirely to with reference to the head. I didn't take into consideration bodily injuries. I asked him his age, and he said fifty-six; weight and pulse; his pulse was normal, 72. His blood pressure was 90 over 150, practically normal for a man of his age. I noted the cut over his eye, as has been described many times. I then tested him out from a neurological standpoint. He had complained of dizziness. I tested him to see whether he had any inco-ordination of muscles; did the Romberg test, closing the eyes and standing erect with both feet together, and his body didn't sway. I then tested him for what we call muscular co-ordination, to see whether various groups of muscles will co-ordinate together, and his reactions were normal. He had no tremors, no neurological symptoms. I then examined the man's ears, and found he has a catarrhal deafness. The ear is divided into a conductive mechanism and a receptive mechanism. In case of fracture of the skull or intracranial injury the deafness is due to injury to the receptive mechanism, not to the conductive mechanism. In such a case you would have a decided loss in the bone of conduction. In this case his bone of conduction was normal. That is an established positive test to differentiate the difference between deafness due to catarrhal condition and deafness due to an injury such as a fractured skull or other intracranial injuries. To back up that test we also have what is known as the Barony-chair test that originated during the war to test aviators from the standpoint of their muscular co-ordination. Later on we applied it to the test of the auditory nerve. If the auditory nerve is injured it will show in this test.

By the Court.

Q. How? A. If a man is deaf and that deafness is due to an injury to the auditory nerve, the nerve of hearing, it will show in the Barony-chair test.

Q. How? A. We have normal response. In the action, the reaction of turning, is a waving of the eye.

Q. He gets dizzy, in other words? A. Yes, and his response is waving of the eye; and the duration of that in a normal man will range from twenty-three to twenty-eight seconds.

Q. And then he recovers? Then he recovers equilibrium? A. Recovers equilibrium. In case we turn a man and one side is out of commission he will have an astagmas of ten seconds or fifteen seconds; it will never go above. We have another method, which I didn't apply in this case because I got normal reaction in the Barony-chair test. The ear condition, as I said before, was catarrhal deafness. I then examined the man's eyes. The man has reduced vision in both eyes. That vision can be increased to normal vision with the proper application of glasses in the right eye. In the left eye I couldn't improve his vision to normal, due to the fact that there was irregularity in the curvature of the cornea. Potentially the man has good vision. Both pupils reacted to light accommodation. The muscle balance of the eyes was normal. I examined the fields of the eye and found them normal. The man is fifty-six, and has the normal eye for a man of his age. He needs glasses, and can be given good vision if he wears glasses; if he doesn't wear them he can't see. As far as his nose and throat are concerned, he has a sinus infection on the left side, as shown by trans-elimination and

by direct examination of the nerves. There was a lot of pus and mucus coming down out of that sinus. How extensive that is I don't know, but I do know this, that that explains to me the origin of the man's catarrhal condition of his ear, in other words, it explains the origin of the catarrhal deafness.

Q. What is the sinus difficulty due to? A. The history of the sinus cases is a man gets a cold, a sinus cold.

Q. Is it associated with an accident in cases? A. Absolutely not. I have never heard that a fractured skull causes an infected sinus.

By Mr. Selser.

Q. How many fractured skull cases would you say that you have examined in this period of specializing upon heads? A. It would be hard to say. I suppose of late I see about three or four a week. I haven't always seen that many, but I would say I have within the last year or so.

Q. Did Mr. Hendershot tell you whether or not he customarily wore glasses? A. I made no note of that, but I am under the impression that he has reading glasses.

Q. What relation has a sinus infection to rheumatism, if any? A. Any source of infection can cause rheumatism. An infected tonsil is very frequently the case; infected teeth are frequently the cause, or infected sinus.

By the Court.

Q. High living and over-eating? A. Absolutely.

By Mr. Selser.

Q. Is there any treatment or cure for infected sinuses? A. I wouldn't say there is absolutely a cure, but there is a good chance for recovery in the sinus cases. Those cases, as a rule, are all operated on. The sinuses are scraped out and cleaned; and then you generally have a good opportunity of clearing the case up.

By the Court.

Q. Can you get at them? A. They are very accessible. Almost all nose and throat men perform any sinus operation. They are all accessible.

By Mr. Selser.

Q. In your experience have you had many occasions to examine X-rays? A. I examine them for my own practice, but I do not consider myself a specialist. I have never given public opinion on someone else's work. I am not an X-ray specialist, in other words.

Q. You are familiar with the skull itself? A. Fairly so.

Q. Showing you Exhibit P-2 and calling your attention to the shadows on either side of the skull above the eyes, what in your opinion are those shadows? A. May I ask you to put your finger on those shadows?

(Mr. Selser indicates on Exhibit P-2.)

By the Court.

Q. Do you feel qualified to answer that question? A. I don't feel qualified to give an opinion on X-ray plates. I am not an X-ray man.

Cross-examination by Mr. Gebhardt.

Q. You don't know how much his sinuses are affected? A. Yes. I think the man has considerable infection there.

Q. You didn't know him before the accident? A. No. I never saw him before, to my knowledge.

Q. Suppose that he didn't have this sinus affection before the accident but has had it since, and that at the time of the accident there was considerable discharge from his nose, would you, with that information say that this accident had anything to do with the sinus condition? A. As I understood, the discharge from the nose at the time of the accident was a bloody discharge due to a contused nose, or an ordinary bleeding of the nose, as the man fell out of a train. The discharge that I saw was a yellow pussy discharge coming out.

Q. Of this man? A. Yes, sir.

Q. You say that was there in August last? A. It was there when I examined the man.

Q. Is that a serious matter? A. In respect to life or death?

Q. Yes. A. Well, no, not in respect to life and death. Occasionally a man will develop a serious complication as a result of sinus infection. But it leads to a very unsatisfactory condition. There is considerable odor, and it may at any time cause a rheumatic condition or upset the man's health.

Q. And a person with a serious case of affected sinuses suffers a great deal of pain, doesn't he? A. Some do and some do not, depending on whether that pus is held under pressure or not. If drained thoroughly they don't have much pain.

Q. If this man told you that he suffered a great deal of pain you would have no reason to disbelieve him, would you? A. I would not.

Q. From the condition you found him in? A. I would not.

Q. And this sinus condition may affect his hearing? A. Absolutely. I think it does.

Q. Suppose you knew as a matter of fact that both day and night, in fair weather and foul weather, this man, up to the time of this accident, was able to do the work of a brakeman on the railroad without the use of glasses, except glasses merely to keep dust out of his eyes, and from that time to this his eyes have been affected, would you say that the accident had nothing to do with the present condition of his eyes? A. I don't think the accident has had anything to do with the present condition of his eyes.

Mr. Selser: Objected to. There is no evidence to that effect.

A. I don't think there is any doubt but that that irritated the man's eye; but as far as permanent disability is concerned, there is no evidence that the cement has affected them.

Q. Did it affect them at the time? A. It probably did.

Q. Cement isn't good for the eye? A. No.

Q. It hurts, doesn't it? A. It certainly does.

By the Court.

Q. The question is whether there was any permanent injury from the cement that was in the eyes at the time of the accident. A. There is no permanent injury as the result of cement being in the eye. The corneas are both clear. Otherwise it would have caused scars on the cornea.

Q. How about the terregiums? A. I made no note of terregiums. I don't say the man hasn't it,

but I do say unless terregium extends to the cornea itself, out from the pupil, it will not impair a man's vision.

Q. But that is not a normal condition of the eye, is it? A. No.

By Mr. Gebhardt.

Q. You limited your examination to the head? A. That's all, yes, sir.

Redirect examination by Mr. Selser.

Q. What does cause terregiums? A. As was stated before, prolonged exposure. You see it a lot to men exposed to dust, men working in factories where dust pours into the eye. That dust forms a new tissue. It is nature's way of protecting. In some rare cases those terregiums will grow out over the cornea and obstruct vision, but it is unusual.

By the Court.

Q. In other words, doctor, nature excels you men in his work? A. By a long way.

J. J. Potter, sworn on behalf of the plaintiff.

Direct examination by Mr. Gebhardt.

Q. What is your business? A. Locomotive engineer.

Q. Were you such at the time that this accident happened? A. Yes, sir.

Q. Were you on one of these two trains that were involved directly or indirectly in this accident? A. Yes, sir.

Q. Which one were you connected with? A. The first engine.

Q. Of which train? A. Going east.

By the Court.

Q. Is that the train that Mr. Hendershot was on? A. No, sir.

Q. Mr. Hendershot's train was going west? A. Yes, sir.

Q. And you were on the first engine of the train going east? A. Yes, sir.

By Mr. Gebhardt.

Q. I take it then from your answer that there were two engines attached to that train. Is that correct? A. Yes, sir.

Q. Where was it that you stopped up around Green Pond Junction just prior to the happening of this accident? A. We pulled out in back of the train. We were going to pick up cars there.

Q. Green Pond is a junction between what two roads? A. The Wharton and Northern and the Susquehanna.

Q. Do I understand that the Susquehanna at that point is a one-track road? A. Yes, sir.

Q. Can you give us in a general way the nature of this junction? A. Three switches and main line to the Wharton-Northern.

Q. Is there a lead-trap that leads off to the Wharton-Northern or not? A. A switch. We call it a switch, where they put the cars and we pick them up there.

Q. Then this one track separates into how many other tracks? A. There are three switches there.

Q. What are the names of those tracks? A. One is the back track or long switch, and the middle track, and the river switch.

Q. On this occasion what did you do with your train when you arrived at Green Pond Junction? A. Backed it in on the main line of the Wharton-Northern and proceeded to pick up cars that the Wharton-Northern had switched there.

Q. What was done with these two cars that afterwards got away?

By the Court.

Q. Tell us the history of the two cars from the time that you first saw them. A. When I first saw them they were going out of the switch.

Q. That is the first time you saw them? A. Yes, sir.

Q. What did you do after that? A. Notified the conductor that I seen them go, and we got the engine off and I started after them.

Q. Did you catch them? A. No, sir.

By Mr. Gebhardt.

Q. Was it your crew, or what crew was it, that placed those two cars on the track? A. Our crew.

Q. They were placed on which track? A. The back track.

Q. What were they placed there for? A. We were to pick them up, I understand, later on. I suppose they were to be switched somewhere.

Q. Were they to be picked up and taken on by your train? A. Yes, sir.

Q. Do you know what those cars were loaded with? A. Yes. I seen them.

Q. What were they loaded with? A. Cement.

Q. Box cars, were they? A. Yes, sir.

Q. This was at night, of course? A. Yes, sir.
Q. About what time of night?

By the Court.

Q. Three o'clock in the morning, wasn't it? A. Around there somewhere.

By Mr. Gebhardt.

Q. How long after these cars had been placed on the back track by your crew was it that you saw them going? A. I don't know.

Q. Can you give us an idea whether it was an hour or ten minutes? A. I don't know whether it was an hour or ten minutes.

Q. How long were you there before you saw those two cars going away? A. Quite a while. I couldn't say; I don't remember what time we went down there.

Q. What and where, if at any place at this point, this track that you drilled these cars in on, was your derail? A. That works in conjunction with the main-line switch of the Susquehanna.

Q. At the junction of the Susquehanna with this track that led off from it? A. Yes, sir.

Q. Which way did you see the cars going? A. East from the switch, going out the Wharton and Northern on our main line.

Q. This derail that you spoke of, at the time that you saw these two cars going out, going east, starting on that runaway trip, was that derail on or off the track at that moment?

Mr. Selser: Objected to, because it is not in the pleadings. There is no allegation of improper operation of the derail. There is an allegation that we did not provide tracks

with proper derail; and he has shown that there is a derail.

The Court: The objection is overruled.

Mr. Selser: To which we except.

The Court: Exception granted.

A. The derail must have been off if they went out of the switch.

Mr. Selser: I move to strike that out as not responsive.

By the Court.

Q. How could they possibly have gotten out of the switch? Was the derail on or off when they got out of the switch? A. It must have been off.

Q. Could they have gotten out if it was on? A. No, sir.

Mr. Selser: I object to all of this, because it is speculation.

By Mr. Gebhardt.

Q. Did one or two engines chase these cars? A. Two engines.

Q. Your engine and another one? A. Yes, sir.

Q. What speed did you go at as you chased them? A. I don't know that. I went down there pretty lively.

By the Court.

Q. How fast? A. About thirty to thirty-five miles an hour; about thirty.

By Mr. Gebhardt.

Q. Did you go at full speed or half speed or what? A. About the time I got going I had to stop. I didn't dare go further than Kinney Switch.

Q. Did you have any orders then as to where you were to pass this westbound track? Where was that? A. Kinney Switch.

Q. You said you went that far? A. Yes, sir.

Q. Up to that time, did you catch up to the cars or not? A. No. I didn't get any trace of them. I couldn't see them at all.

Q. Do you know the spot where the collision occurred? A. Yes, sir.

Q. How far is that from the Kinney Switch? A. A half a mile or three-quarters, somewhere around there.

Q. How far is it from Green Pond Junction down to the point where the accident occurred, approximately? A. About two or two and a half miles.

Q. How far from Green Pond Junction to Kinney's Switch, where you first stopped? A. About a mile and a half, I guess.

Q. Then what did you do afterwards? You went to Kinney's Switch; then what did you do? A. Went to telephone and get Butler and asked if anything got by there, and they said yes.

Q. What did you do next? A. Got the conductor, and went on down there and found the cars.

Q. And the collision had taken place with the other train; is that correct? A. Yes, sir.

Q. And was this a heavy grade or a low grade between Green Pond Junction and where this accident happened? A. A heavy grade.

Q. And is it down or up as you go east? A. Down.

Cross-examination by Mr. Selser.

Q. This yard where the two box cars were when you first saw them was the yard of the Wharton and Northern? A. I seen them coming out of the switch somewhere.

Q. Was the switch at which you first saw the cars in the Wharton and Northern yard? A. They were coming right out somewheres around the derail.

Q. Had you seen the cars before that at all? A. Not in particular. I happened to see a couple cars standing there.

Q. Those cars, when you saw them standing, were on what track? A. I think they were on the back track, but I didn't pay any more attention, and turned and looked around pretty soon and seen them going out the switch.

Q. You didn't see them put on the back track? A. No, sir.

Q. Was your engine doing the switching work? A. Most of it.

Q. Both engines doing it? A. Yes, sir.

Q. Going back and forth in the yard? A. Yes, sir.

Q. What were the weather conditions? A. I don't remember. It seems to me it was kind of wet. I couldn't say for sure; I don't remember.

Q. In your switching operations in that yard, were you riding back and forth on the main line track in the Wharton and Northern yard, and so on? A. Yes, sir.

Q. That operation was more or less continuous? A. Yes, sir.

EDWARD TICHWORTH, sworn for the plaintiff.

Direct examination by Mr. Gebhardt.

Q. Were you on one of the cars involved in this accident? A. Yes, sir, going west.

Q. On Mr. Hendershot's train? A. Yes, sir.

Q. Were you operating that engine? A. Yes, sir.

Q. Where was Mr. Hendershot at the time? A. Sitting on the left side of the cab.

Q. You were on which side of the cab then? A. The right-hand side of the cab.

Q. Did you receive any orders at Butler, or thereabouts? A. Yes, sir. We received orders to meet extra fifty-six, east of Kinney's Siding.

Q. After you left Butler what happened? A. The first thing we knowed we saw two cars coming down into us.

Q. Were they coming fast or slow, as you looked ahead and saw them? A. I couldn't tell you anything about how fast they were coming. They weren't in our train.

Q. Were they coming fast or slow? A. That didn't concern me at all. We was going in the opposite direction. I couldn't tell you how fast they came.

By the Court.

Q. There was finally a crash? A. Yes, sir.

By Mr. Gebhardt.

Q. How far away were they when you first saw them? A. About three or four car lengths.

Q. How long is an ordinary car? A. About 40 or 50 feet.

Q. When you first saw them, what did you do? A. Hollered, and applied the brakes.

Q. Then what happened? A. I heard the crash.

Q. When you first saw them then you hollered, applied the brakes and then came the crash. Is that right? A. Yes, sir.

Q. Then what happened? A. I heard the crash; that's all.

Q. What happened to your engine? A. It caused the wreck.

By the Court.

Q. Did the engine go off the track and upset? A. I couldn't tell you, because I crawled away and was taken back to the caboose.

By Mr. Gebhardt.

Q. Do you know what happened to Mr. Hendershot? A. They brought him back to the caboose.

Q. Was he conscious? A. No, sir.

Q. They carried him back, didn't they? A. No, sir. They led him back. He was walking around there.

Q. Two men led him back? A. Yes, sir.

Cross-examination by Mr. Selser.

Q. Do you know what conscious means? A. Yes, sir. When you are unconscious you don't know anything whatever.

Q. Was Mr. Hendershot unconscious? A. No, sir, because I was talking with him myself.

By Mr. Gebhardt.

Q. You are referring now to when he got down to the caboose, aren't you? A. Yes, sir.

GEORGE W. CROUPE, sworn for plaintiff.

Direct examination by Mr. Gebhardt.

Q. Where do you live? A. Blairstown.

Q. How long have you know Mr. Hendershot? A. Eighteen or twenty years; probably more.

Q. Is he boarding with you now? A. Yes, sir.

Q. What condition, as it appeared to you, was he in before this accident happened to him on June 23rd, 1925?

Mr. Selser: Objected to. This witness is not qualified to pass upon his condition of health.

The Court: His question can only relate to the objective symptoms, what he saw.

A. All right.

Q. What change, if any, as it appeared to you, has there been in his condition of health since this accident? A. Quite a lot.

Q. For better or worse? A. Worse.

By the Court.

Q. What do you mean by that? A. He is pretty well knocked out.

Q. What is he not able to do now that he did before? A. He don't do anything; I don't think he can.

Q. What makes you think he can't? A. I see him every day. He's got an awful bad head. He complains of his head every day; and he complains of his eyes and his side and his shoulder.

By Mr. Gebhardt.

Q. How was his hearing before this accident, as it appeared to you? A. All right, as far as I have seen; but not since.

Q. Did he complain or not of these things that you have spoken about that he has complained of since the accident, before the accident? A. No, sir.

Q. Have you seen him try to do any work around your place since the accident? A. I only seen him try to split a little kindling once, and the block was about that high (indicating), and he probably split three pieces and he like to fall over; and he said, "Oh my head," and was dizzy like. He carried in probably two little arms full of wood; and that's all I ever seen him do.

Q. How long ago was it that you saw him try to chop this wood? A. I would suppose a month ago.

Q. And before this accident happened, please state how much time he worked, whether he was a man who worked every day or whether he was not. A. Then he worked pretty steady.

Cross-examination by Mr. Selser.

Q. When did Mr. Hendershot start living with you? A. This last time around the 1st of April.

Q. 1926? A. Yes, sir.

Q. You hadn't seen Mr. Hendershot from the day of the accident to April? A. Yes.

Q. Every day? A. Oh, no.

Q. How often? A. I saw him once or twice. I saw him in March that I know of.

Q. March, 1926? A. Yes.

Q. When prior to that? A. I don't know for sure once after he was hurt or the second time. I didn't charge my mind with anything like that.

Q. How long after he was hurt did you see him? A. The first time was either in March or before.

Q. March, 1926? A. Yes, sir.

Q. That is the first you saw him after he was hurt? A. I won't say it was the first. I think he went through there when he was going to Stroudsburg once, and stopped off.

Q. Just stopped for a moment? A. No. He stopped off one train and went on the next train.

Q. How long? A. Probably two or three hours.

Q. And you had a talk with him then? A. Yes. I think that's right.

Q. Sitting in your house? A. Yes, he was in the house.

Q. You sat in the house all the time with him? A. Yes, he was in the house.

Q. You carried on a conversation about general things? A. Yes, in a way.

Q. At the time of his accident he wasn't living with you, was he? A. No, sir.

Q. How long before his accident did he last live with you? A. Around two or three years. He was there six or eight weeks. Then he was on another branch.

Q. So that for two or three years before his accident you saw him for six or eight weeks? A. Yes, sir.

Q. Prior to that time, when had you seen him? A. I saw him every once in a while; not so often.

Q. During the period of eighteen years that you have known him you have had occasional visits from him? A. I would see him right along, because the train laid right over from my place that he was on. I would see him every other day.

Q. When he was going by? A. When he was going by.

Q. Visits when you held conversations were not many? A. No, sir.

Q. Was he living with you when he had his accident some years ago? A. No.

Q. Did you see him after he had that accident? A. Sure.

Q. Every night? A. No, not every night.

Q. You didn't notice any change in his condition after that accident, did you? A. Not that hip.

Q. How about his arm? A. It was all right, as far as I know.

Q. His elbow? A. It was all right, as far as I know.

Q. You never noticed anything wrong with his elbow before this accident? A. No, sir.

Q. You never noticed that he needed glasses before the accident? A. I never took notice of it, no.

Q. You never saw him wearing glasses before this accident? A. I don't think so.

Q. Since the accident have you seen him wearing glasses? A. Yes, when he tried to read.

Q. When he was working on trains you never saw him wear glasses? A. I don't think so.

Q. Aren't you sure? A. I think not.

Q. You are not a relative of his, are you? A. No, sir.

Q. You are not related to him in any way? A. No, sir.

Q. Just a friend? A. Yes, sir.

Q. What kind of place have you, a boarding house? A. No, sir.

Q. Just a private house? A. A farm.

Q. He didn't live with you in January, 1926, did he? A. No, sir.

Q. You don't know anything about what he was doing then? A. No. He said that he was down

around the Y. M. C. A. when he came up to our place.

MRS. EDNA M. CROUPE sworn for plaintiff.

Direct examination by Mr. Gebhardt.

Q. You are the wife of the gentleman who was just on the witness stand? A. Yes, sir.

Q. How long have you known Mr. Hendershot? A. About fifteen to eighteen years.

Q. What condition of health, as it appeared to you, was he in before this accident? A. A well man, I would say.

Mr. Selser: Objected to, and we move to strike it out.

The Court: Strike it out.

By the Court.

Q. As you saw him what was his condition of health, as it appeared to you? A. He was all right as far as I know. He didn't complain to me.

By Mr. Gebhardt.

Q. Did he go about his work as usual? A. He did.

Q. Working every day? A. Yes.

Q. What was his business? A. Brakeman on the dingey.

Q. He worked at that right along? A. He did, over eight weeks. That was three years ago.

Q. He didn't lay off from work on account of sickness? A. Never.

Q. He worked right along? A. Yes, sir.

Q. How many days a week did he work? A. Six days a week.

Q. He ran in the nighttime, didn't he? A. No. It was the dingey branch from Blairstown to Delaware, from nine in the morning to 7.15 at night.

Q. He worked regularly at that every day in the week? A. Yes, sir.

Q. He never had a day's sickness during the time that he boarded with you? A. No, sir.

Q. What change, if any, since the accident, that appears to you since the accident? A. He complains of pain in his head; he doesn't sleep nights; and he is not an active man now.

Q. Have you seen him try to work? A. I didn't see him try to work, no.

Q. Has he attempted no work, as far as you know? A. He was boarding to my place, but I didn't see him attempt to work.

By the Court.

Q. What did he do? A. Nothing; he was just boarding there.

Q. Just sat around? A. Read.

Q. He would read? A. And walk.

Q. Did he use glasses to read? A. He used glasses to read.

By Mr. Gebhardt.

Q. Was there anything wrong with his hearing, as it appeared to you, before this accident? A. Not before.

Q. Did he complain of any of those things that he complains of now, before the accident? A. I never heard him complain before.

Cross-examination by Mr. Selser.

Q. How often did you see Mr. Hendershot before the accident? A. He boarded eight weeks with us, and I would see him as he went by on the train.

Q. He boarded with you at the time he was working on that branch? A. Yes, sir.

Q. When he wasn't boarding with you he was working somewhere else? A. Yes, sir, on the lower end of the road.

Q. So that the only time that you saw him daily was during the eight weeks that he boarded at your house? A. Yes, sir.

Q. And that was about three years before he was hurt? A. Yes, sir; but he was several times to our place in between there.

Q. During that three years, just prior to the time that he was hurt, you would see him occasionally? A. Yes, sir.

Q. He came two or three times to visit you? A. Yes, sir.

Q. Those two or three times he didn't complain? A. No.

Q. You don't know whether or not he was having trouble? A. I didn't ask questions. He seemed all right.

By the Court.

Q. You didn't know what he was keeping to himself? A. No, sir.

Q. But there was no evidence of anything, as far as you could see? A. No, sir.

Q. That is an assumption? A. Yes, sir.

By Mr. Selser.

Q. Didn't you observe that at that time he used glasses? A. At the time that he boarded with us eight weeks?

Q. Yes. A. No; and I won't say that I seen him use glasses to read at that time, because he would come in for meals and would go out. He was an active man. Now he is more around the house reading.

Q. You don't know whether he wore glasses just before he was hurt or not? A. No, I don't, but I am positive that when I saw him before he never had glasses on.

Q. Are you related to him in any way? A. No way.

H. J. Stoll sworn for the plaintiff.

Direct examination by Mr. Gebhardt.

Q. How long have you known Mr. Hendershot? A. Perhaps fifteen years, fifteen to twenty, somewheres there.

Q. What condition of health, as it appeared to you, was he in before this accident? A. So far as I know it was all right.

Q. What change, if any, have you noticed in his condition of health since the accident? A. He don't seem to act like he did before.

By the Court.

Q. How? A. The first that I noticed was when he would come into our store at Blairstown, where

his home is now. He would sit down and be smoking, and the first thing I knew he would be nodding, apparently asleep; but when I spoke to him he was right awake.

Q. This was after the accident? A. Yes, sir.

By Mr. Gebhardt.

Q. This change that you noticed in his condition, was that for better or for worse? A. I don't consider that it was for good. It was for worse. He said that he had so much pain about his head.

By the Court.

Q. You heard him complain about headaches? A. I did, many times, yes, sir.

By Mr. Gebhardt.

Q. Did he complain of any other part of his body besides those headaches? A. Not particular, that I know of.

Cross-examination by Mr. Selser.

Q. How many times did you see Mr. Hendershot before the accident? A. I couldn't tell you.

Q. Would you see him every day? A. No, sir.

Q. Would you see him more than once a year? A. He lived right close. I lived on one side of the street and he on the other.

By the Court.

Q. You were neighbors? A. Yes, sir.

By Mr. Selser.

Q. That was only during the eight weeks that he lived with Mr. and Mrs. Croupe? A. No, sir. That

was when I lived at Newton and he lived at Newton.

Q. How many years ago was that? A. About ten years ago I moved away from Newton.

Q. So that you are talking now about his condition as it existed ten years ago? A. Ten years ago when I lived at Newton, yes, sir.

Q. Had he had that accident which he had some years ago when his hip was injured? A. I am told that. I don't know anything about it. I didn't know anything about it, no, sir.

Redirect examination by Mr. Gebhardt.

Q. Did you see him at all during the last ten years before the accident, after you left Newton? A. Occasionally I would see him here at Blairstown.

JONAS E. BAIR sworn for the plaintiff.

Direct examination by Mr. Gebhardt.

Q. Where do you live? A. Blairstown, New Jersey.

Q. How long have you known Mr. Hendershot? A. About eighteen or twenty years.

Q. What was his condition of health, as it appeared to you, before this accident happened to him? A. Very good.

Q. What change, if any, have you noticed in his condition since the accident? A. Considerable.

Q. For better or worse? A. Worse.

Q. In what respect have you noticed a difference? A. His hearing is very poor, that is, it's im-

paired, and he complains a great deal of pain in his head; and he is very much sick at heart, I think. He seems to be down and out generally.

By the Court.

Q. Do you mean depressed? A. Yes, sir.

By Mr. Gebhardt.

Q. What kind of man was he with respect to work before this accident? A. Always busy, that I know of.

Q. Before the accident happened was he an active man or a slow man in his movements and general characteristics? A. Active. I always thought he was a husky guy, active and muscular.

Q. What change, if any, as it appears to you, has there been since that accident? A. Very much.

Q. Better or worse? A. Worse.

Cross-examination by Mr. Selser.

Q. When did you see Mr. Hendershot before the accident? A. He was employed by the Susquehanna Railroad on the dingey; and I saw him frequently, nearly every day, while he was on that run.

Q. That was three years before the accident, wasn't it? A. Yes, sir.

Q. You haven't seen him between the time that he was employed on the dingey up until the time he came back to live with the Croupses? A. I seen him from time to time. Once in a while he was on a different run and would come to town, and I would hail him as he went by the store, and talk to him.

Q. Just have a few minutes' conversation with him, and you would go on your way and he would go on his? A. Yes.

Mr. Gebhardt: We offer in evidence the table of mortality found in Dickinson's Chancery Precedents, edition of 1894, which, I understand, is the table used in the Court of Chancery. We offer it for the purpose of assisting the jury in arriving at the amount of damages, if any, that they may find the plaintiff is entitled to in this case.

The Court: In other words, indicating the present worth of his salary in connection with the probable duration of life?

Mr. Gebhardt: Yes, sir. It indicates the value of a dollar at his age. The counsel on the other side has said that he would waive formal proof——

Mr. Selser: Only in the respect that Senator Gebhardt tells me that it is now being used in the Court of Chancery for certain purposes. I do not admit that it has any evidential value in this case; I do not admit that it is a correct mortality table and that it has any evidential value in any way.

The Court: I shall tell this jury that if there is any liability at all the measure of damages is such sum as in their sound judgment would compensate him for his pain and suffering and the injury he has experienced, and then for the loss of such salary or earnings as he may have experienced in the past, since the time of the accident, and the probable loss of the future. I cannot see that the table has any materialty at all.

Mr. Gebhardt: The offer is based on the case of Dickenson v. Mutual Grocery Company, which held that the introduction of these tables was admissible, and following another case in 61.

The Court: Was that a death case?

Mr. Gebhardt: The case of Dickenson v. the Mutual Grocery Company was a personal injury case.

The Court: I will allow it in, and will instruct the jury as to the significance of it.

Mr. Selser: To which we accept.

The Court: Exception allowed for the defendant.

Mr. Gebhardt: Plaintiff rests.

Mr. Selser: We move for a nonsuit on the ground that there is no allegation of the complaint that has been proven. In my opening I called attention to the thirteen points of negligence alleged, the first being a point that we carelessly and negligently and unlawfully ran and propelled the westbound train. I contend that there is absolutely no evidence on that point.

The Court: That is conceded.

Mr. Selser: Secondly, that we carelessly, negligently and unlawfully ran said train at a dangerous and excessive rate of speed.

The Court: Conceded.

Mr. Selser: That we ran that train without keeping a lookout for other cars or train on the track.

The Court: There is no evidence of that.

Mr. Selser: The fourth is, without receiving any orders or signals that it was safe to proceed.

The Court: There is no evidence of that.

Mr. Selser: The fifth is, that we carelessly and negligently ran and propelled a locomotive and train of cars on the same track in an easterly direction.

The Court: There is no evidence of that.

Mr. Selser: The sixth is, that we carelessly, negligently and unlawfully allowed and permitted the brakes on two of the cars on the said train to be and remain in an unsafe, inefficient, defective and dangerous condition on the said day and for a long period of time prior thereto. I submit that there is no evidence of that. The seventh is, that we carelessly, negligently and unlawfully failed to provide good and sufficient derailing devices or any such devices whatsoever on the said track on which the said train was running for the purpose of derailing runaway cars. There is no evidence of that.

The Court: That is a question of fact for the jury.

Mr. Selser: The eighth is, that we carelessly, negligently and unlawfully failed to provide any good, safe, proper and lawful signal devices on the said track to warn one train of the approach or presence of another train or car or cars on the said track.

The Court: I understand there is no claim as to that.

Mr. Selser: The ninth is, that we carelessly, negligently and unlawfully detached or uncoupled said cars from the rest of the said train.

The Court: That is a debatable question. It is a question of fact.

Mr. Selser: The tenth point is that we carelessly, negligently and unlawfully detached or uncoupled the said cars from the rest of the said train without properly setting the brakes on the said cars.

The Court: That is a question of fact for the jury.

Mr. Selser: The eleventh point is that we uncoupled these cars from the rest of the train without placing the same in a safe location.

The Court: That also is a question of fact for the jury.

Mr. Selser: The twelfth is "Without having a man in charge thereof."

The Court: That is obvious. There was no man in charge when they came down the track.

Mr. Selser: The thirteenth point is "Without keeping any lookout to see if they started to run away."

The Court: That is also a question of fact for the jury. The motion is denied.

Mr. Selser: To which we except, and ask for an exception on each of the points.

The Court: Exception granted for the defendant.

JOHN WALDRON, sworn for the defense:

Direct examination by Mr. Selser.

Q. By whom are you employed? A. By the N. Y., S. & W. Railroad.

Q. In what capacity? A. Trainmaster.

Q. As trainmaster, are you familiar with the New York, Susquehanna & Western Railroad in the vicinity of Smith Mills and Green Pond Junction? A. Yes, sir.

Q. Do you know the series of tracks at Green Pond Junction known as the river track, the middle track, and the back track, and the main track? A. I do.

Q. Upon whose property are those? A. The Wharton-Northern Railroad.

Q. Particularly with respect to the back track, whose property is that on? A. The Wharton-Northern Railroad.

Q. Do you know anything about this accident, of your own personal knowledge? I mean as to the happening of the accident. You were not present? A. No, I wasn't there.

Cross-examination by Mr. Gebhardt.

Q. Do you know where the accident occurred? A. I do.

Q. You saw evidences of it the next day?

Mr. Selser: Objected to as not cross-examination.

The Court: He may answer.

Mr. Selser: To which we except.

The Court: Exception granted the defendant.

A. I arrived there between 4 and 5 o'clock in the morning, after the accident.

Q. What did you see there?

Mr. Selser: Objected to, and to all this examination, as not cross-examination.

The Court: Overruled.

Mr. Selser: To which we except.

The Court: Exception granted for the defendant.

A. I saw two carloads of cement, which ran into the westbound train.

Q. On what track? A. The main track of the N. Y., S. & W. Railroad.

Q. Where the accident occurred, whose track was that? A. The N. Y., S. & W. Railroad.

Mr. Selser: Is it understood that my objection refers to all of this.

The Court: It is so understood, and exception granted.

Q. That is the New York, Susquehanna & Western Railroad? A. Yes, sir.

By the Court.

Q. Were those cars New York, Susquehanna & Western cars? A. They were not.

Q. Was the crew in charge of that train to which the cars were attached employees of the defendant company?

Mr. Selser: Your Honor is assuming that the cars were attached. They were not. They were on the back track. They were not attached.

Q. In whose employ was the crew of the train that went into this siding? A. The New York, Susquehanna & Western Railroad.

Mr. Selser: The train on which Potter was employed?

The Court: No. I am asking about the other train.

Mr. Selser: He doesn't know. He wasn't there.

By Mr. Selser.

Q. What were the numbers and lines of the cars that collided with the westbound engine? A. One was Me. & C. 35003.

Q. What railroad is that? A. I think it's the Michigan Central.

Q. What was the other car? A. P. & R. 10938.

Q. What railroad is that? A. Pennsylvania Railroad.

By the Court.

Q. Do I understand that the tracks in question, where these cars were supposed to be, were the tracks of some other railroad? A. Yes, sir.

Q. What road? A. Wharton & Northern Railroad.

Cross-examination by Mr. Gebhardt.

Q. Did you make this report? A. I did, yes, sir. That is my report.

Q. Do you know how these two cars that crashed into the westbound train came to be in the yards, wherever they were?

Mr. Selser: Objected to. He has already said he wasn't there.

Q. Were they placed where they were, or whatever track it was, by the crew employed by the New York, Susquehanna & Western Railroad?

Mr. Selser: Objected to.
The Court: If he knows, he may answer.

A. I don't know.

Mr. Gebhardt: My recollection is that we produced the engineer who was employed by the New York, Susquehanna & Western Railroad Company, who said that he placed these two cars with his engine on the track where they were.

Mr. Selser: He didn't say that.

Mr. Gebhardt: If there is any doubt about it, I will ask to be allowed to place a man on the stand who will testify as to that.

The Court: I will allow plaintiff's case to be opened to show that.

Mr. Selser: To which we object.

The Court: The objection is overruled. Exception allowed the defense.

J. J. Potter recalled for plaintiff:

Direct examination by Mr. Gebhardt.

Q. You have already testified that on the night that this accident happened that the train on which you were engineer was eastbound and that you stopped at Green Pond Junction to handle

some cars. At that time you were in the employ of what railroad company? A. New York, Susquehanna & Western.

By the Court.

Q. Were the cars in question attached to your train, the two cars of cement? A. No. We had been switching them; that's all.

Q. Do you know that you had been switching them? A. Not those cars. I know that we had been switching cars; and I understood that they were moved from one switch to another.

Mr. Selser: We move to strike that out.
The Court: Strike it out.

Q. Who was the brakeman in charge? A. A man named Peterson, and another man named Smith.

Q. Are they here? A. Yes, sir.

Benjamin Peterson sworn for the plaintiff:

Direct examination by Mr. Gebhardt.

Q. On the night of this accident were you in the employ of the New York, Susquehanna & Western Railroad Company? A. Yes, sir.

Q. In what capacity? A. Brakeman.

Q. Were you on one of the two trains that were involved in this accident, either the eastbound or westbound train? A. I was working on the eastbound train.

Q. Was that a New York, Susquehanna & Western Railroad train, or not? A. Yes, sir, it was.

Q. What, if anything, did you have to do with the handling of these two cars, the two cars that later got away from the tracks there at Green Pond Junction and went on down and caused this accident? A. We switched them on the back track. We had ten or twelve, and maybe three or four drills there, and first placed the Maine-Central on the back, and put two or three on the middle track, and put the P. & R. on the back, and got them all out of the middle, and shoved back twelve or fourteen cars on the main line.

By the Court.

Q. Did you move the two cars in question? A. Yes, sir.

By Mr. Gebhardt.

Q. Where were they placed the last that you saw them before this accident happened? A. Just in the clear on the back track.

Q. Who placed them there? A. We did.

Q. Your crew? A. Yes, sir.

Q. What was the purpose of their being placed there? A. To drill them in station order. We had cars for all over; and cars for Butler or short cars we drilled ahead.

Q. Did those cars have anything to do with your train, or not? A. They would be on our train before we left there, but they weren't at that time.

By the Court.

Q. You were to pick them up? A. Yes, sir.

Q. And make them part of your train? A. Yes, sir.

By Mr. Gebhardt.

Q. Did you see them get away, or not? A. No, sir.

By the Court.

Q. Who backed the particular two cars of cement? A. I did.

Q. You put the brake on? A. Yes, sir.

Q. Do you know how they got away? A. No, I do not.

Q. When did you first learn that they had gotten away? A. After we shoved back on the main track with twelve or fourteen cars and coupled them fast to the rear end and got the engine off, and when I walked down to the head end, I found that two cars had got away.

Q. Have you any explanation as to how they got away? A. No, I haven't.

Cross-examination by Mr. Selser.

Q. I understand that you yourself applied the brake on the Michigan Central car? A. It was Maine Central.

Q. That is the Me. C.? A. Yes, sir.

By the Court.

Q. Would that be the head car in the direction the two cars ran away? A. No, sir; the west car.

Q. That would be the rear car? A. Yes, sir.

Q. Had those cars been part of your train at all? A. Not yet, no.

Q. But they were to be? A. They were to be.

Q. In other words, you had orders to get them? A. Yes, sir.

By Mr. Selser.

Q. Will you kindly tell us whether or not the brake you applied was apparently an effective brake? A. It was a good brake, in my judgment. By pulling up the wheel you could feel the shoes taking hold of the wheel.

Q. Did you do anything with respect to blocking the car? A. I put a block under the Me. C. myself.

Q. What end? A. East end.

Q. On which end of the car did you apply the brake? A. East end. They were going east. That was the first car we put on the back track, the Maine Central.

By the Court.

Q. You blocked the front wheel of that first car? A. Yes, sir.

Q. And fastened the brake? A. Yes, sir. When he applied the air I put on a couple more notches.

Q. Were the cars connected with the engine? A. Yes.

By Mr. Selser.

Q. Did your engine then disconnect? A. Yes.

Q. Where did your engine go? A. Then we put one or two cars up the main line of the Wharton-Northern.

Q. Did you go with it? A. I did.

Q. Were you drilling back and forth in the yard then? A. Yes.

Q. Running out on the New York, Susquehanna & Western track? A. Yes, sir.

Q. Then back to the yards? A. Yes, sir.

Q. What was the condition of the weather? A. It had been misting, little fine rain; very dark night; slippery; this rail was a little slippery, wet.

By Mr. Gebhardt.

Q. Were these two cars coupled together, or not? A. They were.

Q. And the one was a Maine Central car? A. Yes, sir.

Q. What was the other? A. Philadelphia & Reading, P. & R.

Q. Do you know anything about what brakes, if any, were applied to the Philadelphia & Reading car? A. No brake applied to that, excepting the air brake might apply, but we don't count on that.

Q. The hand brake on the Philadelphia & Reading was not applied? A. No.

Q. This block that you speak of was put on the car nearest to the main line? A. Furtherest away from the main line.

By Mr. Selser.

Q. What is the custom existing in the yard with respect to applying the brake on cars when two cars are coupled together standing in the back track? A. One brake would hold three or four cars there, a good brake; and in my judgment this was a good brake. I believe Conductor Gallagher put a block under this P. & R. himself; he put a block under the Philadelphia & Reading car.

By the Court.

Q. Did you see him do it? A. Yes. He coupled the car fast.

Q. How do you account for these cars getting away? A. After we made this coupling on this first car, whether this brake flew off or not I couldn't say. I didn't look at the brake after that.

Q. Where was that brake? A. On the east end of the car.

Q. That would have been what you call the front? A. Yes, sir.

By Mr. Selser.

Q. In other words, you can't guess as to how it happened? A. No.

By the Court.

Q. How long have you been a railroader? A. Twenty years.

Q. And you have had experience? A. All kinds.

Q. Did you ever have an experience of this kind before? A. No, sir.

Q. Never had? A. Not of this kind, no, sir.

Q. You never had cars to break loose and run away like this? A. Not on my train. I have heard of one some years ago, but not as bad a wreck as this one.

By Mr. Gebhardt.

Q. Did I understand you to say that an efficient hand brake would have held both of these cars? A. Yes. A foot hand brake there on the back track would hold three or four.

By the Court.

Q. Is that a downgrade up the way? A. Yes.

Q. How much of a grade? A. I just couldn't tell you the percentage.

By Mr. Selser.

Q. In your opinion that was an efficient brake? A. Yes, sir.

By Mr. Gebhardt.

Q. I understood you to say in answer to my question that an efficient brake would have held both of those cars? A. In my judgment it was a good hand brake.

Q. Did you testify a moment ago that an efficient hand brake would have held both of these two cars? A. Yes.

Mr. Selser: We move for a nonsuit at this time, now that the plaintiff has reopened his case and put in additional testimony. The testimony of the plaintiff now is that the cars had efficient brakes and that the brake was properly applied.

The Court: The motion is denied. It is a question of fact for the jury to determine.

Mr. Selser: To which we except.

The Court: Exception for the defendant.

(At this point court adjourns to Thursday morning, October 28th, 1926, at 10 o'clock.)

(Pursuant to adjournment court convenes Thursday morning, October 28th, 1926, at 10 o'clock.)

Mr. Selser: I move for a directed verdict on behalf of the defendant on the following grounds: First, there is no evidence to go to the jury upon the allegation in the complaint which reads as follows: "The defendant, its servants and agents, then and there," referring to the day of the accident, "carelessly, negligently and unlawfully ran and propelled a train," referring to the train upon

which Mr. Hendershot was employed, and that "It then and there carelessly, negligently and unlawfully ran and propelled said train at a dangerous and excessive rate of speed, and without keeping any lookout for other cars or trains on the said track, and without receiving any orders or signals that it was safe to proceed"; upon the further ground that there is no evidence to go to the jury upon the allegation in the complaint that "The defendant, its servants and agents, also then and there carelessly and negligently ran and propelled a locomotive and train of cars on the same track in an easterly direction, and then and there carelessly, negligently and unlawfully allowed and permitted the brakes on two cars on the said train to remain in an unsafe and inefficient, defective and dangerous condition on the said day," referring to the day of the accident, "and for a long time prior thereto"; upon the further ground that there is no evidence to go to the jury on the allegation that "The defendant, its servants and agents, then and there carelessly, negligently and unlawfully failed to provide good and sufficient derailing devices, or any such devices whatsoever, on the said track on which the said train was running"; and on the further ground that there is no evidence to go to the jury on the allegation that "The defendant, its servants or agents, carelessly, negligently and unlawfully failed to provide any good, sufficient, proper and lawful signal devices on the said track to warn one train of the approach or presence of another train or car or cars on the said track, and also then and there carelessly, negligently and unlawfully detached or uncoupled the said cars from the rest of the said train, and also then and there carelessly, negligently and unlawfully detached or uncoupled the said cars from the rest of the said

train without properly setting the brakes on the said cars and without placing the same in a safe location and without having a man in charge thereof and without keeping any lookout to see if they started to run away"; on the further ground that there is no evidence to go to the jury from which they can find that any act of the defendant, its servants or agents, was the proximate cause of the accident; on the further ground that there is no evidence to go to the jury upon which they could find that the defendant hauled or permitted to be hauled upon its line any car not equipped with efficient hand brakes, and therefore the Safety Appliance Act, its supplements and amendments, has no application in this case; on the further ground that under the undisputed testimony in this case the two cars were properly braked and blocked, that while the cars were on the back track of the Wharton & Northern Railroad they ran away, out upon the track of the New York, Susquehanna & Western Railroad Company, at which time no agent or servant of the defendant was near them. It is as consistent with sound reason to conclude that the brakes were released and the blocks removed by an employee of the Wharton & Northern Railroad Company, or a tramp, or other person, as that the brakes were inefficient, or negligently applied, or for some other negligent act of the defendant.

The Court: This motion will be denied, inasmuch as the plaintiff is not obliged to prove all of the allegations in his complaint. If it appears that a case of negligence has been made out in regard to some particular allegation of the complaint, such as the failure to properly equip the cars referred to as the runaway cars with efficient brakes, or to properly block the cars and set the brakes, from which as a fact the jury may find that there was

carelessness on the part of the employees not only in setting the brakes and blocking the cars but in the character of the brakes with which the cars were equipped, so far as efficiency is concerned, this presenting an issue of fact for the jury to consider. The case should go to the jury for said reason. Exception allowed.

The Court's Charge.

Ladies and Gentlemen of the Jury:

I take it that you now understand the issue that has been presented to you in this case, involving as it does the very detailed offering of testimony on the part of witnesses both as to the occurrence in question and those witnesses having an expert knowledge as to the condition of the plaintiff with regard to his alleged injuries; and the Court therefore finds it quite unnecessary to rehearse the testimony in the case at any great detail, because counsel themselves, representing the respective parties, have addressed you upon that phase of the case.

It appears that the plaintiff was employed by the defendant railroad company, which is admitted to have been an interstate common carrier at the time of the accident in question, and because of such employment and the nature of the business of the railroad company this action is predicated upon what we know and commonly speak of as the Federal Employers' Liability Act, that is to say, an Act of Congress; and I may say that the general features of that Act may be stated in this way:

"Every common carrier by railroad while engaged in commerce between any of the several states shall be liable in damages to any person suffering

an injury while he is employed by such carrier in such commerce for such injury or death resulting in whole or in part from the negligence of any of the officers, agents or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves or other equipment."

Then again, in the Act in this section:

"That in all actions hereafter brought against such common carrier by railroad under or by virtue of the provisions of this Act to recover damages for personal injury to an employee, or where such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee, provided, however, that no such employee who shall have been injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by any such carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee."

Then again: "That in any action brought against any common carrier under or by virtue of any of the provisions of this Act to recover damages for injury to, or the death of any of its employees, such employee shall not be held to have assumed the risk of his employment in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee."

They, as it appears to me, are the sections of the Act which are applicable to the issue presented to you in this case.

I may say that there is still another Act of Congress, known as the Safety Appliance Act, and, generally, the provision of that is that it is the duty of the common carrier, railroad company, to have the cars used by it equipped (now I am simply speaking of the issue presented to you) with efficient hand brakes, and I refer to the Safety Appliance Act in that respect.

We have been speaking of negligence in this case because the plaintiff charges the employees of the defendant company with negligence, and in our law by that is meant either the omission to do something which a reasonable man, guided by circumstances which ordinarily regulate the conduct of human affairs, would do, or the doing of something which a reasonable and prudent man would not do; and when negligence arises out of an act of commission by one for whose conduct another is responsible it must be with reference to some duty which the responsible person owed to the party injured. I have already read to you the provisions of the Federal Employers' Liability Act which placed the duty or obligation upon the defendant railroad company with regard to its employees and their safety, and you will recall what I read of the statute in that respect, and also the reference to the Safety Appliance Act. In association with this definition of negligence you are also to remember that the damages chargeable to a wrongdoer, in this case it being alleged that the employees of the defendant company were negligent, must be shown to be the natural and proximate effect of such negligence, and the term "natural" imports such as might reasonably have been foreseen, such as occur in the ordinary state of things, and the term "proximate" indicates that there must be no other culpable and efficient agency intervening between the defendant's negligence and the loss. It is said that the proximate cause is that cause which naturally and probably led to and which might have been expected to produce the result of which complaint is made. It is the efficient cause, the one that necessarily sets the other causes in operation.

It may be said with regard to the operation of railroads that a high degree of care is necessary, but our Courts have held that whether it be extraordinary or high degree of care means nothing more or less than that degree of care commensurate with the risk of danger, in some instances being spoken of as high degree of care, in other extraordinary care, or ordinary or reasonable care; and in speaking of reasonable care it has said, "It is not extraordinary care, but such care as ordinarily prudent men would exercise under existing conditions." So you will observe, after all, it is the reasonable care which would be observed in the immediate circumstances involving risk of danger.

They are the general propositions of law that the Court feels called upon to submit to you.

It appears in the case that the plaintiff was employed as a brakeman on a train being operated by the defendant company, running on the track of the company in a westerly direction, that as that train proceeded on its way in the early hours of the morning suddenly around the curve came two detached cars filled with cement, without a brakeman upon them, and apparently loose and running away. You will recall the testimony as to the nature of the grade at that particular point. It appears that these cars came on and collided with one of the engines attached to the train upon which the plaintiff was employed and working as a brakeman.

I do not recall any suggestion in this case that the plaintiff is charged, or could be charged, with

contributory negligence. The defense appears to be (and that is a mere comment of the Court, you will understand) that there was no negligence on the part of the defendant railroad company; but in any event, while the plaintiff in his complaint charges a series of alleged acts of a negligent character on the part of the defendant railroad company, I think that you will find, when you come to consider the case, that the issue narrows down to the question as to whether or not the runaway cars had been properly equipped with efficient hand brakes or whether the employees of the defendant company in moving the cars in the yard of the railroad to which reference has been made, and the name of which I do not now recall, acted negligently and carelessly. So that I submit to you as a proposition of law if you find under the greater weight of the evidence that either the railroad company failed to equip the cars in question or was responsible for the equipment of the cars in question with efficient hand brakes, or the employees of the company acted carelessly so as to bring them within the definition of negligence that I have given to you, then I say to you there can be a recovery in either aspect of the situation, provided the plaintiff has carried the burden of satisfying you under the greater weight of the evidence that the defendant company through its employees was negligent within the definition given you. I take it then that the issue is rather narrow and centers around the incidents with reference to the handling of those two cars or their proper equipment, because if there were inefficient hand brakes, so as to be a violation of the Safety Appliance Act, or the employees of the defendant railroad company acted carelessly and negligently in moving those cars, then I charge you

that you may find (that is no direction, of course; it is a mere comment) that the plaintiff has established his case, assuming it be supported by the greater weight of the evidence.

We have a rule in our State, for example, which it occurs to the Court is pertinent for consideration in this case. Here was a situation where an employee of the defendant company, the plaintiff, was in the performance of his duty apparently, if you believe the testimony, and suddenly two loose cars came around the corner with no one in charge of them, and the collision in question occurred. Whether that circumstance of itself is an evidence of negligence on the part of those responsible it seems to me will be a question for consideration by the jury, because we have this rule: The principle is that when through any instrumentality or agency under the management or control of the defendant or his servants there is an occurrence injurious to the plaintiff, which, in the ordinary course of things, would not take place if the person in control were exercising due care, the occurrence itself in the absence of explanation by the defendant affords prima facie evidence that there was want of due care. That brings me to say this: There is testimony on behalf of the defendant to the effect that the brakes on the cars in question were efficient and that they were properly set, and the cars blocked, but notwithstanding such testimony the proofs tend to indicate that the cars ran away. You may consider whether the mere declaration by the brakeman, produced by the defendant, that the brakes were efficient, is sufficient to satisfy you that they were. May it not be said (and this is a mere comment and suggestion on the part of the Court; you are the judges of the facts in the case) that the declaration on the part

of the employee of the defendant company that the brakes were efficient is not proof that they were? You might say what proof is there in the case that any test had been made of a character which would support the brakeman's declaration that the brakes were efficient? If tests had been made prior to this accident by those qualified either as mechanics in the construction of such equipment for cars or by those who, as the result of years of experience, come here and say, "Yes, the brakes were tested and these cars were set in motion or attached to a train or were moved the day before, or the week before, or within a reasonable time before, and these brakes tested efficiently." It is conceivable that if that sort of evidence were in the case, aside from the mere declaration of the brakeman in question, they might well say that the cars' running away was not due to inefficient brakes. Bear in mind that I am not taking from your consideration at all the testimony of that brakeman in relation to the efficiency of the brakes. It is a question of fact for you to determine in the case, and you must consider all of the evidence offered, whether coming from the plaintiff or the defendant.

In the second place, assuming that the brakes were efficient but that they had not been properly set or the cars blocked, if you ascertain that as a fact, would you then say as an inference of fact that the employees of the defendant company had been careless or negligent in setting the brakes or blocking the cars, because the cars did run away?

It has been suggested to you that since the employees of the company have testified in support of the claim that they were not negligent, that some outside source was responsible for the cars running away; but is there any evidence in the

case that any persons, such as tramps, were seen around these tracks? I am obliged to say to you that positive testimony as against mere negative testimony or the entire absence of testimony on a given subject presents very little difficulty to the jury. In analyzing such classes of testimony I take it that you would be inclined to take the positive testimony, giving consideration to the negative testimony and very little to the absence of any testimony. What testimony is there in this case that any person was around the yard where those cars were at the time of this occurrence other than the employees of the defendant company who were shifting cars, as has been testified? (That again is a mere comment of the Court. You may take it or reject it, as you see fit.) Again the Court reminds you that you are the judges of the facts.

Should you find under the law as the Court has given it to you, both statutory and the appellate authority, that the defendant company was negligent, then you would consider the question of damages to be assessed to the plaintiff, and not until then because if you find that there was no negligence on the part of this railroad company that is the end of this case and your verdict should be "No Cause of Action"; but if you do find negligence within the definition of the law and the authority given you, then you would consider the question of damages. A plaintiff in such a case as this, where damages are found warranted by the jury under the rules of law given you, is entitled to recover a sum which in your sound judgment and discretion will compensate him for the bodily injuries sustained, the effect on the health of the sufferer, according to its degree and its probable duration, whether it is likely to be tem-

porary or permanent, the pain and suffering undergone, the expenses incidental to attempts to cure or to lessen the amount of injury, and the pecuniary loss sustained through inability to attend to the profession or business, which again may be of a temporary character or may be such as to incapacitate the party for the remainder of his life. I may say in passing that I do not recall any evidence of any expense incurred by this plaintiff in and about his cure; if there is any such evidence in the case it has escaped me, such as doctor bills, hospital bills, and so on; and I will ask counsel now if there is any such evidence in the case.

Mr. Gebhardt: There is none.

The Court: You will eliminate that phase from your consideration under this rule. Having passed upon the question of compensation for the personal injuries, I may say again in comment that if you find the injuries are as claimed by the plaintiff and that he has carried the burden of satisfying you under the greater weight of the evidence, then he is entitled to recover a substantial sum therefor. In addition to that he claims a loss of ability to work, and again he must satisfy you under the greater weight of the evidence. It appears that as a brakeman, at which employment he had been engaged for many years, he was receiving at the time of the accident approximately $50 a week; and in estimating his loss therefrom, if there was a loss in that respect, you have the right to resort, as it were, to what we know as the mortality table; it has been so held by the Appellate Court of this State; but in so resorting to the mortality tables you will remember that the purpose would be to ascertain the present worth of his loss from the time of the accident to the

present time and what his probable loss might be in that regard in the future. This table, however, is only a general rule, based upon the average expectation of life, and there are a great many elements which should enter into your consideration thereof. Of course, the plaintiff may live longer than the tables provide; on the other hand, he may be killed in an accident or die of disease at a much shorter period than the average expectation of life; he might suffer an injury whereby his earning power might be greatly depreciated; he might earn more; that is for you to take into consideration. In all those things you must exercise your good judgment. If he was ill he could not earn money. There is no absolutely fixed rule on the question. It is a situation where you must exercise your good judgment and common sense.

If you render a verdict for the plaintiff you must render a verdict in one lump sum for all the elements of damage which I have outlined to you.

Mr. Selser: We take exception to that portion of your Honor's charge wherein your Honor says that if the accident were due to any defect in equipment, and so forth, in the very early part of the charge, that that would be negligence.

To your Honor's reference in the very early part of the charge with respect to whether or not the violation of the Safety Appliance Act in any way contributed to the accident, then there would be negligence and there might be a recovery, or words to that general effect.

To your Honor's statement in the early part of the charge wherein you said that the statutes with respect to the safety of employees had been read by you, "all that are applicable to this case," and further on, in the same thought, "These are the

statutes as I have read them to you which are applicable."

To that portion of your Honor's charge wherein your Honor says that the general duty of the railroad company with respect to the safety of employees, as contained in the Safety Appliance Act, to equip with efficient hand brakes, or words to that general effect.

To that portion of your Honor's charge wherein your Honor said that acts of commission must be a violation of duty, following your Honor's reference to omission. Your Honor said that acts of commission must be a violation of duty, without stating that acts of omission must be a violation of duty, and then followed that statement by saying, "I have already read the statutes as to that duty."

To your Honor's statement in the charge that a railroad company is under a duty to exercise a high degree of care, in some instances high and in some instances extraordinary, and what your Honor said in that connection.

Mr. Gebhardt: We have a suggestion to make there, that what your Honor said about that might confuse the jury, and we suggest that the stenographer now read from what you did say.

The Court: I said high degree of care denotes no more than a degree of care commensurate with the risk of danger. 92 New Jersey Law Reports. Ordinary, reasonable care means not extraordinary care, but such care as an ordinarily prudent man would exercise under existing conditions.

Mr. Gebhardt: Should not you have said in this case that they are required to show, so far as the negligence aspect is concerned, only ordinary care?

Mr. Selser: We take exception to your Honor's reference in the charge; that the defense appears to

be non-negligence, still the complaint charges various allegations of negligence; the issue narrows down to whether the cars were equipped with efficient hand brakes or whether the employees in the yard acted negligently or carelessly, and if you find that the employees of the railroad company acted carelessly, as defined, or the railroad company failed to equip with efficient hand brakes, then there can be a recovery in either aspect; and generally what your Honor said in that connection. What I have given is a very brief summary.

To that portion of your Honor's charge where you later said, "The issues narrow down to the handling of the cars or their equipment within the meaning of the Safety Appliance Act, or whether they were carelessly handled; if you find that, then you may find for the plaintiff."

To that portion of your Honor's charge wherein your Honor said, "The plaintiff was in the employ of the company; suddenly two loose cars came down and crashed into the engine; whether that in itself is evidence of negligence might be considered by the jury; the occurrence is not in the ordinary course of things, and that itself may be lack of due care."

To that portion of your Honor's charge when your Honor said, "The testimony on behalf of the defendant is that the brakes were efficient and the cars were blocked; notwithstanding that there is proof that the cars ran away; you may consider the testimony of the brakeman produced, as to the brakes, and as against that consider the fact that the cars did in fact run away and disregard the proof as given by that brakeman." You then went on and said, "Had there been proof by mechanics who examined the cars, that might be a different story altogether," or words to that general effect.

To that portion of your Honor's charge wherein your Honor said, in speaking of whether the cars were properly set and blocked, that they might consider whether the company was negligent from the fact that the cars ran away. In effect it amounted to your saying that the mere fact that the cars ran away would be sufficient to justify the jury in finding that the cars were not set and blocked.

The Court: I didn't say that. I said that might be evidence of carelessness on the part of employees of the company.

Mr. Selser: To that portion of your Honor's charge where you say that there is a suggestion that the accident may have happened or been caused by some outside source but that you know of no evidence in the case from which that might be inferred. You went on then and spoke of positive testimony as against negative testimony and said that they might disregard entirely the lack of testimony upon that feature.

To that portion of your Honor's charge wherein your Honor said, "If you find the injuries as claimed, he is entitled to a substantial sum." Then to your Honor's statement to the jury that he was making $50 a week.

To that portion of your Honor's charge wherein you said that the jury might resort to the mortality tables for the purpose of ascertaining the present worth of the loss sustained.

The Court: Meaning the loss of service, the loss of income.

Mr. Selser: And what your Honor said in that connection. And a general exception to your Honor's refusal to charge on my requests to charge.

Mr. Gebhardt: We except to that part of your Honor's charge in which your Honor charged that there was evidence that the defendant set the brakes on both cars and that both were efficient, my point being that there was no evidence that the brake on the car nearest to the main line track was either efficient or was in fact put on.

To that part of your Honor's charge in which your Honor said, "If the jury find that there was no negligence on the part of the defendant company that would be the end of the case, and your verdict should be 'No Cause of Action,'" my contention there being that if there was a violation of the Safety Appliance Act with respect to furnishing efficient hand brakes the company would be liable, irrespective of the question of negligence.

Also a general exception to your Honor's refusal to charge on our requests to charge.

The Court: As a result of exceptions taken to the Court's charge by the respective counsel and in order that no misapprehension may be in your minds as to the definition of negligence and the degrees of negligence of which the Court spoke in its charge, I desire to say this to you further: I spoke of extraordinary care, high degree of care and ordinary care. You are not to be misled by those definitions which the Court gave you. The defendant company was charged with ordinary or reasonable care; that is the test here. Reasonable care means not extraordinary care, but such care as ordinarily prudent men would exercise under the existing conditions. So that the rule as to ordinary or reasonable care applies to the present case. Bear that in mind. It is not extraordinary care or a high degree of care but ordinary or reasonable care on the part of the employees of the defendant company that is the issue. That does

not mean that you are obliged to find either way. I am simply giving you that in connection with the definition of negligence, the burden being on the plaintiff always to prove negligence, within such definition of negligence, and the failure of the employees of the defendant company to exercise ordinary or reasonable care.

PLAINTIFF'S REQUESTS TO CHARGE.

1. Inasmuch as both the plaintiff and defendant were engaged in interstate commerce at the time of this accident, the railroad company would be liable to the plaintiff for any injuries resulting in whole or in part from the negligence of any officers, agents, or employees of the defendant, or by reason of any defect or insufficiency due to its negligence in its cars, engines, appliances, machinery, tracks, roadbed, works or other equipment, as a proximate result thereof, subject, of course, to the rules as to contributory negligence and assumption of risks as I have outlined to you. Employers' Liability Act of 1908, Section 1.

2. It was the duty of the defendant company under the Safety Appliance Act to have these two cars in question each equipped with an efficient hand brake. If you find that there was a failure on the part of the defendant company to have these cars equipped with such brakes, and in such condition, and that such failure was the proximate cause of this accident, then the defendant company would be liable to the plaintiff for his injuries received as a proximate result of that accident. Rigsby v. Texas etc. Railroad Company, 241 U. S. 33.

3. If you find that either or both of the two cars in question did not have an efficient hand brake on it at the time of this accident, and that this condition was the proximate cause of this accident, then the defendant would be absolutely liable to the plaintiff for his injuries received as a proximate result thereof, no matter what inspection of the hand brakes the defendant made, or how great diligence the defendant exercised to prevent the hand brakes becoming in this condition. Rigsby v. Texas etc. Railroad Company, 241 U. S. 33.

4. It was the duty of the railroad company to use reasonable care to prevent these two cars from getting away, and if you find that there was a failure on the part of the defendant, its servants and agents, so to do, then this would be evidence of negligence on the part of the defendant. Chicago, etc. Railroad Company v. Wright, 239 U. S. 548.

5. It was the duty of the railroad company to use reasonable care in the conduct of its business and work, that is, such care as a reasonably prudent man would use under such circumstances. If you find that the act of leaving these two cars on this track without having any derailing device on this track to prevent cars from running away, amounted to a failure under all the circumstances in this case to use such a degree of care towards the plaintiff, then this should be evidence of negligence on the part of the railroad company. Wilcznyski v. P. R. R. Co., 90 N. J. L. 178.

6. The Federal Employers' Liability Act provides that

> "No such employee who may be injured or killed shall be held to have been guilty of con-

tributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee."

If, therefore, you find that there was a violation on the part of the railroad company of the provisions of the Safety Appliance Act which I have already referred to with respect to the hand brake on either or both of these two cars which collided with the plaintiff's train, then I charge you that any contrubtory negligence on the part of the plaintiff, if there was any, would not be a bar to recovery in this case in any way whatsoever.

7. If you find there was not violation of the Safety Appliance Act in this case, and if you should further find that the plaintiff, Hendershot, was guilty of contributory negligence which, added to that of any negligence on the part of the railroad company, caused this accident, this would not be a bar to his recovery.

The Federal Statute provides as follows with respect to this:

> "In all actions brought against a common carrier by virtue of the provisions of this Act to recover damages for injury or death the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of the negligence attributable to such employee."

8. The Safety Appliance Act contains the following provision, Section 8:

> "That any employee of any such common carrier who may be injured by any locomotive, car, or train in use contrary to the provisions of this Act shall not be deemed thereby to have assumed the risk thereby occasioned, although continuing in the employment of such carrier after the unlawful use of such locomotive, car, or train had been brought to his knowledge."

If, therefore, you find that there was a violation on the part of the railroad company in this case of the Safety Appliance Act with respect to the hand brake on either or both of the two cars in question, which contributed to the injury of the plaintiff, then I charge you that the plaintiff did not assume the risk of the accident upon which this action is based, and this would not be a bar to his recovery.

9. If you find that the plaintiff's injury was due to an accident which was not caused in whole or in part by any violation of the Safety Appliance Act with respect to the hand brakes of these two cars in question, but was rather the negligence of one or more fellow servants which the plaintiff could not have foreseen or expected, and this was the sole, direct and immediate cause of the injury, then I charge you that the plaintiff did not assume the risk of such injury or accident. Reed v. Director General, 258 U. S. 92; Swank v. P. R. R. Co., 94 N. J. L. 546; Fagan v. C. R. R., 94 N. J. L. 454.

10. You have heard the testimony as to the value, according to the tables, of $1 on the probably length of life, but, of course, that table is only a general rule, based upon the average expectation of life,

and there are a great many elements which enter into your verdict in that respect, or which should enter into it. Of course, Mr. Hendershot might live longer than the tables provide; on the other hand, he might be killed in an accident, or might die of disease at a much shorter period than the average expectation of life. He might suffer some accident whereby his earning capacity would be much further depreciated. He might, of course, earn more, but that is for you to take into consideration. All those things you must exercise your good judgment in determining. If he was ill, of course, he could not earn money. So you see there is no absolutely fixed rule, but it is a question and a situation where you must exercise your very good judgment and common sense, and if you render a verdict for the plaintiff, you must render your verdict in one lump sum for all of these elements of damage which I have outlined to you. Dickerson v. Mutual Grocery Company, 100 N. J. L., at page 122; Camden etc. R. R. Co. v. Williams, 61 N. J. L. 646.

DEFENDANT'S REQUESTS TO CHARGE.

1. There is no evidence in this case that the defendant carelessly, negligently and unlawfully ran and propelled the train upon which Mr. Hendershot was employed at the time of the accident, and you cannot, therefore, find against the defendant upon that allegation of the complaint.

2. There is no evidence in this case that the defendant carelessly, negligently and unlawfully ran and propelled the train upon which Mr. Hendershot was employed at a dangerous and excessive rate of speed and you cannot, therefore, find against

the defendant upon that allegation of the complaint.

3. There is no evidence in this case that the defendant carelessly, negligently and unlawfully ran and propelled the train upon which Mr. Hendershot was employed without keeping any lookout for other cars and train upon the track and you cannot, therefor, find against the defendant upon that allegation.

4. There is no evidence in this case that the defendant carelessly, negligently and unlawfully ran and propelled the train upon which Mr. Hendershot was employed without its having received orders or signals that it was safe to proceed and you cannot, therefore, find against the defendant upon that allegation of the complaint.

5. There is no evidence in this case that the defendant carelessly and negligently ran and propelled a locomotive and train of cars in an easterly direction on the same track along with the train upon which Mr. Hendershot was employed was operated and you cannot, therefore, find against the defendant upon that allegation of the complaint.

6. There is no evidence in this case that the defendant carelessly, negligently and unlawfully allowed and permitted the brakes on two of its cars to be and remain in an unsafe, inefficient, defective and dangerous condition on the day of the accident and for a long time prior thereto and you cannot, therefore, find against the defendant upon that allegation of the complaint.

7. There is no evidence in this case that the defendant carelessly, negligently and unlawfully

failed to provide any good, sufficient, proper and lawful signalling devices on its track to warn one train of the approach or presence of another train or car or cars on the said track and you cannot, therefore, find against the defendant upon that allegation of the complaint.

Plaintiff's Exhibits 1 to 6.

Negative radiograms made by Dr. Sherrer.

Plaintiff's Exhibit 7.

Page of Dickinson's Chancery Precedents, Edition of 1894, showing Table of Mortality.

Defendant's Exhibits 1 to 7.

Negative radiograms made by Dr. Wyatt.

Defendant's Exhibit 1 for Identification.

Negative radiograms made by Dr. Wyatt (later marked D-1 in evidence), enclosed within two sheets of cardboard three thirty-seconds of an inch thick, fourteen inches wide and seventeen inches long, a piece having been cut out of the center of each four inches in width and five inches in length through which the center of the X-ray plate showing side of a skull could be examined.

Judgment.

(Entered Oct. 27, 1926.)

This action was tried before Judge Rulif V. Lawrence, with a jury, on October 26th and 27th, 1926.

The cause having been heard and submitted to the jury they return their verdict as follows:

We find for the plaintiff and assess his damages at the sum of Twelve Thousand Dollars ($12,000).

Whereupon it is adjudged that the plaintiff recover of the defendant the sum of Twelve Thousand Dollars ($12,000.00), and his costs which are taxed at the sum of One Hundred Seventy Dollars and Eight Cents ($170.08), making in the whole the sum of Twelve Thousand One Hundred Seventy Dollars and Eight Cents ($12,170.08).

OPINION OF SUPREME COURT.

Filed July 19, 1927.

NEW JERSEY SUPREME COURT.

No. 72 January Term, 1927.

JAMES HENDERSHOT,
Plaintiff-Respondent,

vs.

NEW YORK, SUSQUEHANNA AND WESTERN RAILROAD COMPANY,
Defendant-Appellant.

Submitted January 29, 1927: Decided July 19, 1927.

On appeal from the Warren County Circuit Court.

Before Gummere, Chief Justice, and Justice Trenchard.

For the appellant, Hobart & Minard (George S. Hobart and John E. Selser of counsel).

For the respondent, William C. Gebhardt & Son (W. Reading Gebhardt of counsel).

Per Curiam:

This is an appeal from the Warren County Circuit Court. The plaintiff had the verdict of a jury, and this is an appeal from the judgment entered upon such verdict.

Plaintiff was injured while in the employ of the defendant as a brakeman, and the suit was based on the Federal Employers' Liability Act and the Safety Appliance Act.

This accident happened at 3 o'clock in the morning, at a point in defendant's road where there is a single track. Plaintiff was the head brakeman of a crew on a freight train going in a westerly direction pulled by two engines, the plaintiff riding in the first of the two engines in the fireman's cab where his duty required him to be for the purpose of throwing the switch for the train at what is known as Kinney's Switch, where his train had orders to pass another train which was en route coming in the easterly direction. There was a heavy descending grade going in an easterly direction down to the place of the accident and there was also a curve in the track. There were no automatic block signals on the line at this point. As the plaintiff sat in the cab of his engine he suddenly saw two freight cars coming down the grade in an easterly direction towards his train at a high speed. They crashed into the engine, the train was wrecked and the plaintiff injured.

The two runaway cars which caused the wreck were loaded with cement, and had gotten away from the crew of the defendant operating another train which was then coming in an easterly direction. This train had orders to pass Hendershot's train at Kinney's Switch, and so the crew was aware that this specific train was coming in an opposite direction. The eastbound train stopped at what is known as Green Pond Junction, and had orders to pick up the two cars of cement there.

The crew handled these two cars and placed them on one of the tracks at this junction with the idea of later attaching them to their train when they were ready, and taking them with them. One of these cars was a Maine Central

car, and the other a Philadelphia & Reading car. They were coupled together, and the hand brake appears to have been set to some extent on the Maine Central car, but it did not hold the cars, and it may be inferred from the evidence that the brake was not in an efficient and proper condition. Moreover, the crew failed to set the hand brake on the Philadelphia & Reading car, despite the fact, as the evidence tended to show, that the rules of the company required that the hand brakes on both of these cars should be set under these circumstances, and it was also the custom so to do. There was some evidence that wooden blocks were placed under these cars but this may be inferred to have been done in a negligent manner, for the blocks were of no avail in preventing the cars getting away. There was a derail on this track between these cars and the main line track of the New York, Susquehanna & Western Railroad, which would have prevented these cars from getting out on the main line track, and would have prevented the accident, but the crew failed to place this derail in position on the track, so, of course, it afforded no protection.

The consequence was that a short time thereafter, one of the engineers of this train saw the two cars going out of the switch and out on the main line track, which was the beginning of their runaway journey. This engineer took his engine, and together with another engine, coupled to it, gave chase to the cars, and although they attained a speed of thirty miles an hour and went a distance of one mile and one-half to Kinney's Switch, they were unable to even catch sight of the runaway cars.

As we read the evidence the defendant made no attempt to give any explanation for the happening of this accident.

1. The defendant contends that its motion for a non-suit and for the direction of a verdict in its favor should have been granted on the ground that the plaintiff had failed to establish any allegations of negligence charged in the complaint.

We think that point is without merit. The complaint was broad and charged negligence in several aspects. We think it is clear that the grounds of negligence which the Court submitted to the jury, namely, failure to equip the cars which ran away with efficient brakes and failure to use reasonable care in the hauling and handling of the cars, were comprehended within the complaint; and in that connection we would say that this case in many of its aspects is very similar to Smith *v.* New York, Susquehanna & Western R. R. Co., 46 N. J. L. 7. In that case the holding of the Court was, as stated in the headnote, as follows: "A railroad company left a loaded car, coupled with two empty cars, standing on a switch which inclined towards their main track, the same being secured by their brakes and a railroad tie placed under the wheels of the loaded car; the cars got upon the main track and thereby an accident occurred, the plaintiff being injured. Held, the company was not irresponsible, as a matter of law, even though the cars could not have got on the main track but for the wrongful act of a stranger."

We think that an examination of that decision, and the reasoning by which it is supported, dispose of many of the points argued in this case against the contention of the defendant.

2. The defendant's next point is that its motion for the direction of a verdict in its favor should have been granted on the ground that defendant's negligence, if any, was not the proximate cause of the accident.

We think this point also is without merit. These two cars had been placed on the side track by the defendant's servants. If they had been placed there in such a manner that they could not run away, the accident could not have occurred. This was not done, and the cars did run away and caused the accident. The plaintiff contends that they ran away because of the inefficient condition of the brakes and because of the negligent manner in which they were placed there and allowed to remain there. Certainly such negligence would be the natural and proximate cause of the cars running away and of the resulting accident. Carey *v.* Deems, 101 N. J. L. 419.

3. The next point is that the evidence showed that the Safety Appliance Act did not apply, and it was therefore error to leave to the jury the question whether the accident was caused by a violation thereof.

We are not impressed with the merit of this point. These cars which got out on the main track of the defendant had been hauled and handled by the defendant company, and we entertain no doubt that the Safety Appliance Act applied to the situation which the evidence disclosed in connection therewith.

4. It is again urged that the trial court erroneously permitted the jury to consider allegations of negligence concerning which there was no proof, and erroneously refused defendant's requests to withdraw such allegations from the jury.

When these requests are examined, we find no error prejudicial to the defendant in the refusal to charge them, in view of the fact, as we believe it to be, that the trial judge limited the charges of negligence to be considered by the jury to failure to properly equip the cars, and carelessness in the hauling and handling of the cars.

5. It is next said that the trial judge erroneously permitted the jury to consider as possible ground of liability on the part of the defendant, a claim of negligence which was not alleged, to wit, carelessness on the part of the defendant's employees in blocking the runaway cars in the freight yard.

We think there is no merit in this point, because, as we think, the complaint was broad enough to comprehend that phase of the proof. And, moreover, this proof was produced in the case apparently without objection at the time it came in. That this was a proper matter for the consideration of the jury, and upon which the judgment for the plaintiff might well have been rested, is illustrated by the case of Smith *v.* New York, Susquehanna & Western R. R. Co., *supra.*

6. The next point is that the judge erroneously charged the jury as to the application of the doctrine of *res ipsa loquitur.*

We have examined the charge in this respect and we believe it was justified in the circumstances disclosed by the evidence. Such we believe to be the effect of our decision in McPherson *v.* Hudson & Manhattan R. R. Co., 100 N. J. L. 262, affd. 101 N. J. L. 410.

7. Again it is urged that the trial court erroneously charged the jury that if they found

the injuries were as claimed by the plaintiff, then he was entitled to recover a substantial sum therefor, thereby removing from the consideration of the jury the question whether the plaintiff had proved any negligence on the part of the defendant or its employees.

This point we think has no substance, as will be seen upon an examination of the entire charge, in which, of course, the trial judge properly, as we think, laid down the rules governing the jury upon the question of the liability of the defendant and the necessity of proving negligence.

8. The defendant also contends that the trial court erroneously admitted evidence as to the alleged custom of using or applying two hand brakes instead of one hand brake on freight cars.

We think that a careful examination of the record will disclose that this contention is not well founded in fact. We think that it appears with reasonable clearness that the question said to be objectionable was with respect to one brake on each car. This, of course, was not only relevant, but of the utmost importance, particularly in view of the fact that it appeared in the case that the brake was set only on one of the cars.

9. The defendant next contends that the trial court erroneously admitted argumentative evidence as to the position and condition of the derail on the switch connecting the tracks of another company with the track of the defendant.

Our examination of the testimony in question results in the conclusion that the testimony was not legally objectionable as argumentative, being rather the testimony of an expert in railroad operation, and we think unobjectionable.

10. It is next said that there was error on the part of the trial judge in the admission and exclusion of evidence relating to the nature and extent of the plaintiff's injuries.

To that we deem it sufficient answer to say that we have examined the testimony admitted, and that excluded, involved in this point, and we find none of it which we deem to be prejudicial to the defendant.

11. Lastly, it is said that the trial judge erroneously admitted in evidence certain mortality tables without adequate proof thereof, and erroneously permitted the jury to take such tables into consideration in determining the pecuniary loss sustained by the plaintiff by reason of the accident.

We believe that contention to be ill founded in law. It appears that the mortality table which was offered in evidence was that found in Dickinson's Chancery Precedents. We think that was not erroneous. Camden & Atlantic City R. R. Co. *v.* Williams, 61 N. J. L. 646; Dickenson *v.* Mutual Grocery Co., 100 N. J. L. 118.

The judgment below will be affirmed, with costs.

RULE FOR JUDGMENT.

Filed August 9, 1927.

This cause having been duly argued at the January, 1927, term of this court, by William C. Gebhardt & Son, counsel for the plaintiff-respondent, and Hobart & Minard, counsel for the defendant-appellant, and the Court having considered the same and finding no error in the record or proceeding in the Warren County Circuit Court:

It Is thereupon Ordered and adjudged that the judgment of the Warren County Circuit Court in this cause be affirmed with costs, and the record be remitted to the Court below to be proceeded with according to law and the practice of said Court.

On motion of

WILLIAM C. GEBHARDT & SON,
Attorneys of Plaintiff-Respondent.

NOTICE AND GROUNDS OF APPEAL.

Filed September 3, 1927.

To William C. Gebhardt & Son, Esqs., attorneys for plaintiff-respondent.

SIRS:

TAKE NOTICE that the defendant-appellant appeals to the Court of Errors & Appeals from the whole of the judgment entered in this cause on the following grounds:

The Supreme Court affirmed the judgment of the Warren County Circuit Court in favor of the plaintiff-respondent, and against the defendant-appellant, whereas said Supreme Court should have reversed said judgment of the Warren County Circuit Court for one or more of the grounds of appeal filed in said Supreme Court.

HOBART & MINARD,
Attorneys for Defendant-Appellant.

Dated September 1, 1927.

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NEW JERSEY

Court of Errors and Appeals

JAMES HENDERSHOT, Plaintiff-Respondent, vs. NEW YORK, SUSQUEHANNA & WESTERN RAILROAD COMPANY, Defendant-Appellant.	On Appeal from Supreme Court.

BRIEF OF HOBART & MINARD IN FAVOR OF THE APPELLANT.

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(1)

Statement of the Case.

This appeal brings up for review a judgment of the New Jersey Supreme Court affirming a judgment entered in the Warren County Circuit Court in a case tried before a jury on October 26 and 27, 1926, wherein a verdict was returned in favor of the plaintiff for the sum of $12,000.

Plaintiff obtained a verdict for personal injuries sustained by him June 23, 1925, while employed by the defendant as a brakeman on a freight car, which, at the time of the accident, was proceeding in a westerly direction on the main line of defendant's single track railroad. Two freight cars that

had been standing in the yard of the Wharton & Northern Railroad Company, for some unexplained reason, started to run away, and after leaving the yard of that railroad proceeded some distance in an easterly direction along defendant's main line and collided with the westbound train on which the plaintiff was riding.

Plaintiff was the head brakeman on the westbound train and was riding on the fireman's side of the first of the two engines by which that train was being hauled. He saw the runaway cars as they "shot around the curve" and attempted to jump but was "struck with something." He claimed that as a result of the accident his skull was fractured and that his eyesight and hearing were impaired.

Motions for nonsuit and for direction of verdict in favor of the defendant were denied and the case was submitted to the jury, with the result above stated.

The defendant appealed from the judgment of the Warren County Circuit Court to the New Jersey Supreme Court; the opinion of that court affirming the judgment was filed July 19, 1927 (Case, pp. 217-224). The opinion is reported in 5 N. J. Misc. 727 and in 138 Atl. 206. After the entry of judgment in the Supreme Court, an appeal was taken to this court.

(2)

Grounds of Appeal.

The Supreme Court affirmed the judgment of the Warren County Circuit Court, whereas said Supreme Court should have reversed said judgment

for one or more of the grounds of appeal filed in said Supreme Court.

The grounds of appeal filed in the Supreme Court, all of which were relied upon in that court, and all of which (except Nos. 8, 10 and 28) are now relied upon in this court, are as follows:

1. The following question was admitted:

   To the plaintiff:

   "Take the condition of your left shoulder. Will that interfere or not?"

2. The following question was admitted:

   To the plaintiff:

   "Let us assume that two cars were put together on a side track and that the hand brake of each of those cars was fastened securely. Will you please tell me whether or not from your experience as a brakeman those cars would be held more or less securely there with two hand brakes instead of just one on each car, than they would be with only one hand brake set on one car."

3. The following questions were overruled:

   To the witness Dr. F. A. Sherrer:

   (a) "Are you able to say from the examination of this document marked D-1 for identification what part of the anatomy it is an X-ray film of?"

   (b) "Now, are you able to tell what portion of the anatomy the film marked D-1 for identification shows?"

   (c) "Can you see any evidence of skull fracture in that?"

4. The following question was admitted:

   To the witness Dr. Frank Wolfe:

"You said you made an examination of Mr. Hendershot. What conditions did you find?"

5. The following question was admitted:

To the witness J. J. Potter:

"This derail that you spoke of, at the time that you saw these two cars going out, going east, starting on that runaway trip, was that derail on or off the track at that moment?"

6. The court refused to strike out the following answer of the witness J. J. Potter to the question recited in Ground No. 5 and refused to rule on the motion to strike out:

"The derail must have been off if they went out of the switch."

7. The court, of its own motion, propounded the following questions to the witness J. J. Potter and permitted the answers thereto to stand notwithstanding an objection on the part of counsel for the defendant:

"How could they possibly have gotten out of the switch? Was the derail on or off when they got out of the switch? A. It must have been off.

"Could they have gotten out if it was on? A. No, sir."

8. (Not relied on in this court.)

9. Defendant's motion for nonsuit after the plaintiff rested was overruled, whereas said motion should have been granted on the following grounds or on some one or more of them:

(a) There is no evidence to prove the allegation of the complaint that the defendant carelessly,

negligently and unlawfully ran and propelled the westbound train.

(b) There is no evidence to prove the allegation in the complaint that the defendant negligently and unlawfully ran said train at a dangerous and excessive rate of speed.

(c) There is no evidence to prove the allegation in the complaint that the defendant ran the train without keeping a lookout for other cars or train on the track.

(d) There is no evidence to prove the allegation in the complaint that the defendant ran the said train without receiving any orders or signals that it was safe to proceed.

(e) There is no evidence to prove the allegation in the complaint that the defendant carelessly and negligently ran and propelled a locomotive and train of cars on the same track in an easterly direction.

(f) There is no evidence to prove the allegation in the complaint that the defendant carelessly, negligently and unlawfully allowed and permitted the brakes on two of the cars on the said train to be and remain in an unsafe, inefficient, defective and dangerous condition on the said day for a long period of time prior thereto.

(g) There is no evidence to prove the allegation in the complaint that the defendant carelessly, negligently and unlawfully failed to provide good and sufficient derailing devices or any such devices whatsoever on the said track on which the said train was running for the purpose of derailing runaway cars.

(h) There is no evidence to prove the allegation in the complaint that the defendant carelessly, neg-

ligently and unlawfully failed to provide any good, safe, proper and lawful signal devices on the said track to warn one train of the approach or presence of another train or car or cars on the said track.

(i) There is no evidence to prove the allegation in the complaint that the defendant carelessly, negligently and unlawfully detached or uncoupled said cars from the rest of the said train.

(j) There is no evidence to prove the allegation in the complaint that the defendant carelessly, negligently and unlawfully detached or uncoupled the said cars from the rest of the said train without properly setting the brakes on the said cars.

(k) There is no evidence to prove the allegation in the complaint that the defendant uncoupled the cars from the rest of the train without placing the same in a safe location.

(l) There is no evidence to prove the allegation in the complaint that the defendant uncoupled the cars from the rest of the train without having a man in charge thereof.

(m) There is no evidence to prove the allegation in the complaint that the defendant uncoupled the cars from the rest of the train without keeping any lookout to see if they started to run away.

10. (Not relied on in this court.)

11. Defendant's motion for nonsuit after the plaintiff had rested for the second time was overruled, whereas said motion should have been granted on one or more of the following grounds:

(a) The testimony shows that the cars referred to by the witnesses in the reopening of the plaintiff's case had efficient brakes.

(b) The testimony shows that the brakes on said cars were properly applied.

12. Defendant's motion for direction of verdict in its favor was overruled, whereas said motion should have been granted, on the following grounds or some one or more of them:

(a) There is no evidence to go to the jury upon the allegation of the complaint, which reads as follows:

> "The defendant, its servants and agents then and there (referring to the day of the accident) carelessly, negligently and unlawfully ran and propelled a train" (referring to the train upon which Mr. Hendershot was employed).

(b) There is no evidence to go to the jury upon the allegation of the complaint which reads that the defendant

> "then and there carelessly, negligently and unlawfully ran and propelled said train at a dangerous and excessive rate of speed, and without keeping any lookout for other cars or trains on the said track, and without receiving any orders or signals that it was safe to proceed."

(c) There is no evidence to go to the jury upon the allegation of the complaint which reads as follows:

> "The defendant, its servants and agents, also then and there carelessly and negligently ran and propelled a locomotive and train of cars on the same track in an easterly direction, and then and there carelessly, negligently and unlawfully allowed and permitted the brakes on two cars on the said train to remain in an unsafe and inefficient, defec-

tive and dangerous condition on the said day" (referring to the day of the accident), "and for a long time prior thereto."

(d) There is no evidence to go to the jury upon the allegation of the complaint which reads as follows:

> "The defendant, its servants and agents, then and there carelessly, negligently and unlawfully failed to provide good and sufficient derailing devices, or any such devices whatsoever, on the said track on which the said train was running."

(e) There is no evidence to go to the jury upon the allegation of the complaint which reads as follows:

> "The defendant, its servants or agents, carelessly, negligently and unlawfully failed to provide any good, sufficient, proper and lawful signal devices on the said track to warn one train of the approach or presence of another train or car or cars on the said track, and also then and there carelessly, negligently and unlawfully detached or uncoupled the said cars from the rest of the said train, and also then and there carelessly, negligently and unlawfully detached or uncoupled the said cars from the rest of the said train without properly setting the brakes on the said cars and without placing the same in a safe location and without having a man in charge thereof and without keeping any lookout to see if they started to run away."

(f) There is no evidence to go to the jury from which they can find that any act of the defendant, its servants or agents, was the proximate cause of the accident.

(g) There is no evidence to go to the jury upon which they could find that the defendant hauled or permitted to be hauled upon its line any car not equipped with efficient hand brakes, and therefore the Safety Appliance Act, its supplements and amendments, has no application in the case.

(h) Under the undisputed testimony the two cars were properly braked and blocked.

(i) The testimony shows that while the cars were on the back track of the Wharton & Northern Railroad they ran away, out upon the track of the defendant, at which time no agent or servant of the defendant was near them.

(j) It is as consistent with sound reason to conclude that the brakes were released and the blocks removed by an employee of the Wharton & Northern Railroad Company, or a tramp, or other person, as that the brakes were inefficient, or negligently applied, or for some other negligent act of the defendant.

13. The court charged the jury:

> "It appears that the plaintiff was employed by the defendant railroad company, which is admitted to have been an inter-state common carrier at the time of the accident in question, and because of such employment and the nature of the business of the railroad company this action is predicated upon what we know and commonly speak of as the Federal Employers' Liability Act, that is to say, an Act of Congress; and I may say that the general features of that Act may be stated in this way:
>
> 'Every common carrier by railroad while engaged in commerce between any of the several states shall be liable in damages to any person suffering an injury while he is

employed by such carrier in such commerce for such injury or death resulting in whole or in part from the negligence of any of the officers, agents or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves or other equipment.'"

14. The court charged the jury:

"Then, again, in the Act in this section:

'That in all actions hereafter brought against such common carrier by railroad under or by virtue of the provisions of this Act to recover damages for personal injury to an employee, or where such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee, provided, however, that no such employee who shall have been injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by any such carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee.'

Then again: 'That in any action brought against any common carrier under or by virtue of any of the provisions of this Act to recover damages for injury to, or the death of any of its employees, such employee shall not be held to have assumed the risk of his employment in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee.'"

15. The court charged the jury:

"They, as it appears to me, are the sections of the Act which are applicable to the issue presented to you in this case."

16. The court charged the jury:

"I may say that there is still another Act of Congress, known as the Safety Appliance Act, and, generally, the provision of that is that it is the duty of the common carrier, railroad company, to have the cars used by it equipped (now I am simply speaking of the issue presented to you) with efficient handbrakes, and I refer to the Safety Appliance Act in that respect."

17. The court charged the jury:

"We have been speaking of negligence in this case because the plaintiff charges the employees of the defendant company with negligence, and in our law by that is meant either the omission to do something which a reasonable man, guided by circumstances which ordinarily regulate the conduct of human affairs, would do, or the doing of something which a reasonable and prudent man would not do; and when negligence arises out of an act of commission by one for whose conduct another is responsible it must be with reference to some duty which the responsible person owed to the party injured. I have already read to you the provisions of the Federal Employers' Liability Act which placed the duty or obligation upon the defendant railroad company with regard to its employees and their safety, and you will recall what I read of the statute in that respect, and also the reference to the Safety Appliance Act."

18. The court charged the jury:

"It may be said with regard to the operation of railroads that a high degree of care is necessary, but our courts have held that whether it be extraordinary or high degree of care means nothing more or less than that degree of care commensurate with the risk

of danger, in some instances being spoken of as high degree of care, in other extraordinary care, or ordinary or reasonable care; and in speaking of reasonable care it has said, 'It is not extraordinary care, but such care as ordinarily prudent men would exercise under existing conditions.' So you will observe, after all, it is the reasonable care which would be observed in the immediate circumstances involving risk of danger."

And after exception was taken by the defendant to that part of the charge, the court thereupon further charged the jury:

"As a result of exceptions taken to the Court's charge by the respective counsel and in order that no misapprehension may be in your minds as to the definition of negligence and the degree of negligence of which the Court spoke in its charge, I desire to say this to you further: I spoke of extraordinary care, high degree of care and ordinary care. You are not to be misled by those definitions which the Court gave you. The defendant company was charged with ordinary or reasonable care; that is the test here. Reasonable care means not extraordinary care, but such care as ordinarily prudent men would exercise under the existing conditions. So that the rule as to ordinary or reasonable care applies to the present case. Bear that in mind. It is not extraordinary care or a high degree of care but ordinary or reasonable care on the part of the employees of the defendant company that is the issue. That does not mean that you are obliged to find either way. I am simply giving you that in connection with the definition of negligence, the burden being on the plaintiff always to prove negligence, within such definition of negligence, and the failure of the employees of the defendant company to exercise ordinary or reasonable care."

19. The court charged the jury:

"The defense appears to be (and that is a mere comment of the Court, you will understand) that there was no negligence on the part of the defendant railroad company; but in any event, while the plaintiff in his complaint charges a series of alleged acts of a negligent character on the part of the defendant railroad company I think that you will find, when you come to consider the case, that the issue narrows down to the question as to whether or not the runaway cars had been properly equipped with efficient hand brakes or whether the employees of the defendant company in moving the cars in the yard of the railroad to which reference has been made, and the name of which I do not now recall, acted negligently and carelessly."

20. The court charged the jury:

"So that I submit to you as a proposition of law if you find under the greater weight of the evidence that either the railroad company failed to equip the cars in question or was responsible for the equipment of the cars in question with efficient hand-brakes, or the employees of the company acted carelessly so as to bring them within the definition of negligence that I have given to you, then I say to you there can be a recovery in either aspect of the situation, provided the plaintiff has carried the burden of satisfying you under the greater weight of the evidence that the defendant company through its employees was negligent within the definition given you."

21. The court charged the jury:

"I take it then that the issue is rather narrow and centers around the incidents with reference to the handling of those two cars or their proper equipment, because if there

were inefficient hand-brakes, so as to be a violation of the Safety Appliance Act, or the employees of the defendant railroad company acted carelessly and negligently in moving those cars, then I charge you that you may find (that is no direction, of course; it is a mere comment) that the plaintiff has established his case, assuming it be supported by the greater weight of the evidence."

22. The court charged the jury:

"We have a rule in our State, for example, which it occurs to the Court is pertinent for consideration in this case. Here was a situation where an employee of the defendant company, the plaintiff, was in the performance of his duty apparently, if you believe the testimony, and suddenly two loose cars came around the corner with no one in charge of them, and the collision in question occurred. Whether that circumstance of itself is an evidence of negligence on the part of those responsible it seems to me will be a question for consideration by the jury, because we have this rule: The principle is that when through any instrumentality or agency under the management or control of the defendant or his servants there is an occurrence injurious to the plaintiff, which, in the ordinary course of things, would not take place if the person in control were exercising due care, the occurrence itself in the absence of explanation by the defendant affords prima facie evidence that there was want of due care."

23. The court charged the jury:

"That brings me to say this: There is testimony on behalf of the defendant to the effect that the brakes on the cars in question were efficient and that they were properly set, and the cars blocked, but notwithstanding such testimony the proofs tend to indicate that the cars ran away. You may consider whether the mere declaration by the brakeman, produced by the defendant, that the brakes were efficient is sufficient to satisfy you that they were. May it not be said (and this is a mere comment and suggestion on the part of the Court; you are the judges of the facts in the case) that the declaration on the part of the employee of the defendant company that the brakes were efficient is not proof that they were? You might say what proof is there in the case that any test had been made of a character which would support the brakeman's declaration that the brakes were efficient?"

24. The court charged the jury:

"If tests had been made prior to this accident by those qualified either as mechanics in the construction of such equipment for cars or by those who, as the result of years of experience, come here and say, 'Yes, the brakes were tested and these cars were set in motion or attached to a train or were moved the day before, the week before, or within a reasonable time before, and these brakes tested efficiently.' It is conceivable that if that sort of evidence were in the case, aside from the mere declaration of the brakemen in question, they might well say that the cars' running away was not due to inefficient brakes. Bear in mind that I am not taking from your consideration at all the testimony of that brakeman in relation to the efficiency of the brakes. It is a question of fact for you to determine in the case, and you must consider all of the evidence offered, whether coming from the plaintiff or the defendant."

25. The court charged the jury:

"In the second place, assuming that the brakes were efficient but that they had not been properly set or the cars blocked, if you

ascertain that as a fact would you then say as an inference of fact that the employees of the defendant company had been careless or negligent in setting the brakes or blocking the cars, because the cars did run away?"

26. The court charged the jury:

"It has been suggested to you that since the employees of the company have testified in support of the claim that they were not negligent that some outside source was responsible for the cars running away; but is there any evidence in the case that any persons, such as tramps, were seen around these tracks? I am obliged to say to you that positive testimony as against mere negative testimony or the entire absence of testimony on a given subject presents very little difficulty to the jury. In analyzing such classes of testimony I take it that you would be inclined to take the positive testimony, giving consideration to the negative testimony and very little to the absence of any testimony. What testimony is there in this case that any person was around the yard where those cars were at the time of this occurrence other than the employees of the defendant company who were shifting cars, as has been testified? (That again is a mere comment of the Court. You may take it or reject it, as you see fit.) Again the Court reminds you that you are the judges of the facts."

27. The court charged the jury:

"Having passed upon the question of compensation for the personal injuries, I may say again in comment that if you find the injuries are as claimed by the plaintiff and that he has carried the burden of satisfying you under the greater weight of the evidence. then he is entitled to recover a substantial sum therefor. In addition to that he claims a loss of ability to work, and again he must

satisfy you under the greater weight of the evidence. It appears that as a brakeman, at which employment he had been engaged for many years, he was receiving at the time of the accident approximately fifty dollars a week."

28. (Not relied on in this court.)

29. The court refused to charge the following request of the defendant:

"There is no evidence in this case that the defendant carelessly, negligently and unlawfully ran and propelled the train upon which Mr. Hendershot was employed at the time of the accident, and you cannot, therefore, find against the defendant upon that allegation of the complaint."

30. The court refused to charge the following request of the defendant:

"There is no evidence in this case that the defendant carelessly, negligently and unlawfully ran and propelled the train upon which Mr. Hendershot was employed at a dangerous and excessive rate of speed and you cannot, therefore, find against the defendant upon that allegation of the complaint."

31. The court refused to charge the following request of the defendant:

"There is no evidence in this case that the defendant carelessly, negligently and unlawfully ran and propelled the train upon which Mr. Hendershot was employed without keeping any lookout for other cars and trains upon the track and you cannot, therefore, find against the defendant upon that allegation."

32. The court refused to charge the following request of the defendant:

> "There is no evidence in this case that the defendant carelessly, negligently and unlawfully ran and propelled the train upon which Mr. Hendershot was employed without its having received orders or signals that it was safe to proceed and you cannot, therefore, find against the defendant upon that allegation of the complaint."

33. The court refused to charge the following request of the defendant:

> "There is no evidence in this case that the defendant carelessly and negligently ran and propelled a locomotive and train of cars in an easterly direction on the same track along which the train upon which Mr. Hendershot was employed was operated and you cannot, therefore, find against the defendant upon that allegation of the complaint."

34. The court refused to charge the following request of the defendant:

> "There is no evidence in this case that the defendant carelessly, negligently and unlawfully allowed and permitted the brakes on two of its cars to be and remain in an unsafe, inefficient, defective and dangerous condition on the day of the accident and for a long time prior thereto and you cannot, therefore, find against the defendant upon that allegation of the complaint."

35. The court refused to charge the following request of the defendant:

> "There is no evidence in this case that the defendant carelessly, negligently and unlawfully failed to provide any good, sufficient, proper and lawful signalling devices on its track to warn one train of the approach or presence of another train or car or cars on the said track and you cannot, therefore, find against the defendant upon that allegation of the complaint."

(3)

Brief of the Argument.

The foregoing grounds of appeal will be discussed under the headings indicated in the index to this brief.

POINT I.

The trial court erroneously permitted the jury to consider allegations of negligence concerning which there was no proof, and erroneously refused defendant's requests to withdraw certain allegations from the jury.

[Grounds 13-21, 23-27, 29-35.]

The complaint charges a multiplicity of alleged negligent acts of omission and commission which may be summarized as follows:

(a) Defendant negligently ran and propelled the said train (referring to the westbound train upon which plaintiff was riding);

(b) Defendant negligently ran said train at a dangerous and excessive rate of speed;

(c) Defendant ran said train without keeping any lookout for other cars or trains on said track (referring to defendant's main line);

(d) Defendant ran said train without receiving any orders or signals that it was safe to proceed.

"All of which was contrary to the statute in such case made and provided" (par. 4 of complaint, p. 21, lines 22-34).

(There is no statute which deals with any of the above charges.)

(e) Defendant negligently ran and propelled a locomotive and train on the same track (referring to defendant's main line) in an easterly direction;

(f) Defendant negligently allowed and permitted the brakes on two of the cars on the said train to be and remain in an unsafe, inefficient, defective and dangerous condition on the day of the accident and for a long time prior thereto.

"All of which was contrary to the statute in such case made and provided" (par. 5 of complaint, p. 21, line 35, to p. 22, line 10).

(There is no statute on any of these points except the Safety Appliance Act, which deals with the question of the *efficiency* of brakes.)

(g) Defendant negligently failed to provide good and sufficient derailing devices, or any such devices, on the said track on which said train was running for the purpose of derailing runaway cars;

(h) Defendant negligently failed to provide any good, sufficient, proper and lawful signal devices on said track to warn one train of the approach or presence of another train or car on said track;

(i) Defendant negligently detached or uncoupled said cars from the rest of said train;

(j) Defendant negligently detached or uncoupled said cars from the rest of said train without properly setting the brakes on said cars;

(k) Defendant uncoupled said cars from the rest of the train without placing the same in a safe location;

(l) Defendant uncoupled said cars from the rest of the train without having a man in charge thereof;

(m) Defendant uncoupled said cars from the rest of the train without keeping any lookout to see if they started to run away (par. 6, p. 22, lines 10-32).

The complaint then charges that as a result of *all* the said carelessness, said cars ran away in an easterly direction at a high rate of speed and collided with the train upon which the plaintiff was riding.

The complaint continues:

"8. This action is based on an Act of Congress of the United States of America entitled, 'An Act relating to the liability of common carriers by railroad to their employees in certain cases,' being a public act and approved April 23, 1908, and the amendment thereof being a public act approved April 5, 1910, and all the other amendments and supplements thereto; and also on the act known as the Safety Appliance Act, and the amendments and supplements thereto, and upon the orders and regulations of the Interstate Commerce Commission based on the said two Acts" (p. 23, lines 18-30).

The case proceeded to trial under this omnibus complaint and at the close of the plaintiff's case motion was made for a nonsuit on the ground that none of the charges of negligence had been sustained (pp. 178-180).

The motion being denied, the defendant proved that the freight yard wherein the two runaway cars had been standing, and the tracks therein, belonged to another railroad known as the Wharton & Northern Railroad (p. 181, lines 10-30; p. 183, line 30).

The defendant also proved that the runaway cars were not its property; one being a Michigan & Central and the other a P. & R. car (p. 183, lines 10-25).

The plaintiff was then permitted to recall one Potter, and to call a new witness, one Peterson. Potter testified that he was employed as an engineer by the defendant in charge of an eastbound freight train, and that the two cars in question were not attached to his train (p. 185, lines 1-25).

Peterson said that he was one of the brakemen of the eastbound freight train and that his crew had placed the two cars in question on the "back track" in order that they might be drilled in "station order" on the eastbound freight train; that they were to be picked up by his train and were not on the train at the time they ran away (p. 186, lines 1-40).

This same brakeman said that he did not know how the cars got away and could give no explanation of it; that the cars were not part of his train at all at the time they broke loose (p. 187, lines 30-40); that he put on the brake (p. 187, line 15), and that it was a "good" brake, in his judgment; that after putting on the brake he placed a block under the front wheel of the Michigan Central car (p. 188, lines 10-20), and the conductor put a block under the other car (p. 189, line 30).

Motion for nonsuit was then renewed on the additional grounds that plaintiff had proved that the cars had efficient brakes and that the same were properly applied (p. 191, lines 10-25). This being denied, motion for direction of verdict was then made. The court denied the motion, saying:

> "This motion will be denied, inasmuch as the plaintiff is not obliged to prove all of the allegations in his complaint. If it appears that a case of negligence has been made out in regard to some particular allegation of the complaint, such as the failure to properly equip the cars referred to as the runaway cars with efficient brakes, or to properly block the cars and set the brakes, from which as a fact the jury may find that there was carelessness on the part of the employees not only in setting the brakes and blocking the cars but in the character of the brakes with which the cars were equipped, so far as efficiency is concerned, this presenting an issue of fact for the jury to consider. The case should go to the jury for said reason. Exception allowed" (p. 193, line 33, to p. 194, line 10).

The defendant then requested the court to remove from the jury certain of the specific allegations of negligence (see Requests 1 to 7, pp. 212-214).

These requests asked for the withdrawal of the following points:

1. Operation of *west*bound train.
2. Speed of westbound train.
3. Lookout on westbound train.
4. Signals to westbound train.
5. Negligent operation of *east*bound train.

6. Defective condition of brakes on the runaway cars.

7. Failure to provide signals warning one train of the approach of another (pp. 212-214).

On the motion to nonsuit, the trial court had held that some of these points were well taken, to wit, Nos. 1, 2, 3, 4, 5 and 7 (p. 178, line 20, to p. 179, line 38).

The point raised by the sixth request, he held, was one of fact for the jury (p. 179, lines 15-30).

The defendant claims that there was no proof of negligence on *any* of the charges alleged in the complaint (see Point IV); but regardless of whether we are correct in that contention, we now urge that as to the points stated in the seven requests to charge, and each of them, respectively, there was no question of negligence for the consideration of the jury; *and the trial court on the motion for nonsuit agreed with this contention on all of said seven points except No. 6, which related to the condition of the brakes.* We do not admit that the trial court was correct in ruling that there was a question of fact even as to this point, but again, regardless of whether we are correct in this contention, the specific allegations stated in requests Nos. 1, 2, 3, 4, 5 and 7 should have been withdrawn from the jury. These requests were important in view of the omnibus complaint which sets forth thirteen separate and distinct claims of negligence.

But the trial court, instead of withdrawing from the jury these specific allegations, all but one of which the court itself on motion for nonsuit ruled were not sustained, left *all* the points of negligence to the jury and one more besides, which is discussed under Point II.

The following parts of the charge permitted the jury to consider these numerous allegations of negligence which were not proved:

The trial court quoted the section of the Federal Employers' Liability Act whereby a common carrier becomes liable for an injury resulting in whole or in part for the negligence of any of its employees or by reason of *any* defect or insufficiency, due to its negligence, in its cars, engines, appliances, etc.; and then quoted the sections of said statute relative to contributory negligence and assumption of risk, and said, "They, as it appears to me, are the sections of the Act which are applicable to the issue presented to you in this case" (p. 195, lines 38-40).

The first criticism of this part of the charge is that the alleged defects in the brakes of the runaway cars or in the tracks in the railroad yard, where the cars had been standing or in the derailing device, were not defects in the *defendant's* cars or tracks. The statute gives the right of recovery for defect in *its* cars, etc.—meaning, of course, the cars of a defendant. *But the two cars did not belong to the defendant and at the time they ran away were not in its possession or control; the railroad tracks where the cars were standing were not the tracks of this defendant, but of another company, and the derailing device was not on the property of this defendant.*

The second criticism of this part of the charge is that the jury were misled into the belief that they had the right to consider *any* defect, due to defendant's negligence, in cars, appliances, or tracks, without regard to whether the same were pleaded and without regard to whether the same were proved.

This was emphasized by a later statement in the charge, where, after defining generally the meaning of the term "negligence," the trial court said:

> "I have already read to you the provisions of the Federal Employers' Liability Act which placed the duty or obligation upon the defendant railroad company with regard to its employees and their safety" (p. 196, lines 25-30).

Later in the charge the court *suggested* to the jury certain specific points, but omitted to *withdraw* from the jury the various points concerning which admittedly there was no proof of negligence. Thus the court said (italics ours):

> "While the plaintiff in his complaint charges *a series of alleged* acts of a negligent character on the part of the defendant railroad company, *I think* that you will find, when you come to consider the case, that the issue narrows down to the question as to whether or not the runaway cars had been properly equipped with efficient hand brakes *or* whether the employees of the defendant coming in *moving the cars in the yard* of the railroad to which reference has been made, and the name of which I do not now recall, *acted negligently and carelessly.* So that I submit to you as a proposition of law if you find under the greater weight of the evidence that either the railroad company failed to equip the cars in question or was responsible for the equipment of the cars in question with efficient hand brakes, *or* the employees of the company *acted carelessly* so as to bring them within the definition of negligence that I have given to you, then I say to you there can be a recovery in either aspect of the situation, provided the plaintiff has carried the burden of satisfying you under the greater weight of the evidence that

> the defendant company through its employees was negligent within the definition given you. I take it then that the issue is rather narrow and centers around the incidents with reference to the *handling of those two cars* or their proper equipment, because if there were inefficient hand brakes, so as to be a violation of the Safety Appliance Act, or the employees of the defendant railroad company *acted carelesly and negligently in moving those cars,* then I charge you that you may find (that is no direction, of course; it is a mere comment) that the plaintiff has established his case, assuming it be supported by the greater weight of the evidence" (pp. 198, 199).

It will be observed that in this part of the charge the trial court permitted the jury to consider not only the point as to the efficiency of the hand brakes, but also the point as to whether the employees of the defendant acted negligently in moving the cars in the yard of the Wharton & Northern Railroad Company.

The complaint alleged a series of negligent acts with respect to the cars in this yard, to wit, among others, failure to place the cars in a safe location, failure to have a man in charge of the cars after they were uncoupled and failure to keep a lookout to see if the cars started to run away (see above summary of complaint, sub-heads (k), (l) and (m); par. 6, p. 22 of Case).

These allegations are entirely separate and disitnct from the allegation in the complaint that the brakes had not been properly set on the runaway cars. Regardless of whether there was a jury question on the last named point, there was no evidence whatever to show that these cars had not been "placed in a safe location," or that any duty rested upon the defendant to place a man in charge there-

of, or to keep a lookout to see if they started to run away while they were standing in the yard of the other railroad company; if such legal duty existed on the part of any company, we submit it rested on the other company with whose property and operations this defendant had nothing whatever to do other than the mere drilling of the cars in its yard.

So far as relates to the movement of the *west*-bound train on which the plaintiff was riding, the trial court should have at least withdrawn from the jury the five points raised by the defendant's requests to charge Nos. 1 to 5, and also the other point raised by the seventh request to charge. The trial court did not do this, and while it is true that he said "I think" that the issue narrows down to certain questions, that is very far from being *equivalent to a direction to the jury that such issues are the only issues to be considered by the jury.*

Hence, the court in effect permitted the jury to consider *all* of the allegations of negligence.

If the evidence failed to show negligence on the part of the defendant as to any one of these points, it was error to permit the jury to consider such point.

Again, later in the charge, the trial court left the door wide open for the jury to find negligence on *any* theory alleged by the complaint regardless of whether there was any proof to sustain it, when he said:

> "Should you find under the law as the court has given it to you, both statutory and the appellate authority, that the defendant company was negligent, then you would consider the damages to be assessed to the plaintiff" (p. 201, lines 25-30).

When the jury were recalled after certain exceptions were taken to the charge, the court again left the door wide open; he stated that the test was ordinary or reasonable care, and then went on to say (italics ours):

> "It is not extraordinary care or a high degree of care but ordinary or reasonable care on the part *of the employees* of the defendant company *that is the issue.* That does not mean that you are obliged to find either way. I am simply giving you that in connection with the definition of negligence, the burden being on the plaintiff always to prove negligence, within such definition of negligence, and the *failure of the employees* of the defendant company to exercise ordinary or reasonable care" (pp. 207-208).

It is apparent from the parts of the charge above quoted that the jury were permitted to consider numerous charges of negligence which were not proved, and that in effect they were permitted to consider *all* the allegations stated in the complaint (not to speak of another one as to the *blocking* of the cars, which was not even mentioned in the complaint).

If it be claimed that one part of the charge was correct even if another part was incorrect, the answer is that the presumption of intelligence on the part of the jury does not extend so far as to enable the court to conclude that the jury had the ability to select the part that was right and reject the part that was wrong.

We respecfully submit that on this phase of the case there was error on the part of the trial court in permitting the jury to consider allegations which were not proved.

If there was no evidence to show negligence on the part of the defendant in these respects, it was

error to permit the jury to consider them at all, and it was like error to refuse the requests to withdraw them.

The legal principles applicable to such a situation are well settled. There are two leading cases in the United States Supreme Court, to wit, *Maryland* v. *Baldwin,* 112 U. S. 490, 28 L. Ed. 822, and *Wilmington Star Co.* v. *Fulton,* 205 U. S. 60, 51 L. Ed. 708. In the former case the court said:

> "On the trial, evidence was introduced bearing upon all the issues, and if any one of the pleas was, in the opinion of the jury, sustained, their verdict was properly rendered, but its generality prevents us from perceiving upon which plea they found. If, therefore, upon any one issue, error was committed, either in the admission of evidence or in the charge of the court, the verdict cannot be upheld, for it may be that by that evidence the jury were controlled under the instructions given."

In the *Fulton* case the trial court was requested to strike out certain counts of the declaration and to instruct the jury that no recovery could be had thereunder "because no evidence had been introduced tending to establish the commission of the particular acts of negligence charged in those counts." The United States Supreme Court reversed the trial court on the ground that it was error to refuse these requests because there was no evidence to sustain the allegations of the counts in question. We quote from the opinion:

> "Such counts, as we have seen, related to the failure to construct crosscuts and stoppings in the mine, and to an alleged defect resulting from the absence of a wheel, and the consequent necessity of using a wrench

> for the purpose of opening a valve to allow condensed steam to escape as a prerequisite to the movement of the ventilating fan. We are constrained to the conclusion that prejudicial error was committed in these particulars. We think it is extremely doubtful whether there was any evidence in the record even tending to establish that, in a longwall mine of the character of the one here in question, crosscuts and stoppings thereof were essential. But be this as it may, certain is it that there is no evidence whatever in the record tending to support the claim that the absence of crosscuts and stoppings in the mine in question was in any wise the cause of the accumulations of gas or the retention of the accumulated gas from the explosion of which Fulton was killed. We are also of opinion that there was nothing in the evidence which would have justified the inference that the absence of the wheel from the valve, forming part of the mechanism to operate the ventilating fan, was the proximate cause of the presence of the gas in the west roadway where Fulton was killed. The uncontradicted testimony showed that but a very brief interval, a minute or two, elapsed before a wrench was obtained, and the distance to the point where the gas had accumulated precludes the possibility of saying that the evidence tended to show that the absence of the wheel could have been the proximate cause of the accident. Under this condition of things we find it impossible to say that prejudicial error did not result. Maryland use of Markley v. Baldwin, 112 U. S. 490, 493, 28 L. ed. 822, 823, 5 Sup. Ct. Rep. 278. And, of course, in a case like the one we are considering, we cannot maintain the verdict, as might be done in a criminal case, upon a general verdict of guilty upon all the counts of an indictment. Goode v. United States, 159 U. S. 663, 40 L. ed. 297, 16 Sup. Ct. Rep. 136."

In commenting on a statute of the state where the action had been brought providing that where an "entire verdict" was given on several counts, the same should not be reversed on the ground of any defective count, if one or more of the counts were sufficient to sustain the verdict, the court further said:

> "This statute, of course, lends no support to the contention here made that where a jury is wrongfully permitted, over the objection of the opposing party, to take into consideration, in reaching a verdict, counts of a declaration which have not been supported by any evidence, and where it is impossible from the record to say upon which of the counts of the declaration the verdict was based, that the judgment entered under such circumstances can be sustained upon the theory that substantial rights of the objecting party had not been invaded."

The same principle has been applied by several of the Federal Circuit Courts of Appeal, as follows:

In *St. Louis, etc., Ry. Co.* v. *Needham,* 63 Fed. 107 (C. C. A., 8th Cir.), the action was to recover damages for the death of a fireman in the employ of the railroad company caused by an accident which was the result of an open switch. It was claimed that the accident was the result of negligence on the part of the conductor in leaving the switch open, and also on the part of the company because of the failure to have a target on the switch. Judgment for plaintiff was reversed on the ground that if the accident was the result of the conductor's negligence, he was a fellow servant of the fireman, and that it was error to permit the jury to base a verdict against the company on the ground of his negligence; in reply to the argument that

this error did not prejudice the defendant in view of the fact that the testimony showed there was no target on the switch, the court said:

> "This position cannot be successfully maintained. The testimony was such that the jury might well have found that the injury was neither caused no contributed to by the absence of the target, and that it resulted solely from the negligence of the conductor, who left the switch open. The defendants in error charged two acts of negligence upon this company—the failure to provide the target; and the failure of the conductor to close the switch. Issues were raised and submitted to the jury to determine whether either of these acts caused or contributed to the injury. The verdict was general, and its generality prevents us from discovering upon which of these acts of negligence charged it was founded. A general verdict cannot be upheld where there are several issues tried, and upon any one of them error is committed, in the admission or rejection of evidence, or in the charge of the court, because it may be that the jury founded their verdict upon the very issue to which the erroneous ruling related, and that they were controlled in their finding by that ruling."

In *Chicago, etc., R. Co.* v. *Kroloff,* 217 Fed. 525 (C. C. A., 8th Cir.), action was brought to recover damages for the death of an employee who was killed by a switch engine while on his way to work. The trial court submitted to the jury four separate allegations of negligence; the defendant had requested that each of these be withdrawn from the consideration of the jury. The appellate court stated the legal principle as follows:

> "A refusal by the court to grant a specific request to withdraw from the jury one of several specific charges of negligence on which the plaintiff is seeking to recover is

> fatal error, if there is no substantial evidence to sustain that charge, although there may be evidence to sustain others, because the presumption is that error produces prejudice, and the appellate court cannot know that it was not upon that baseless charge that the jury founded its verdict" (citing cases).

In *New York Central, etc., R. R. Co.* v. *Banker,* 224 Fed. 351 (C. C. A., 2nd Cir.), the action was to recover damages for the death of an engineer who was killed in an accident which caused the derailment of the engine which he was operating. Two theories of negligence were submitted to the jury: the first, negligence on the part of the towerman in the operation of the track signals; and second, negligence on the part of the company in providing a certain type of derail.

The appellate court held that as to the first question the evidence was sufficient to require the trial court to submit the question of negligence to the jury, but that as to the second allegation the question of the proper type of derail was an "engineering problem" which should not have been left to the jury, and, therefore, reversed the judgment, "because we cannot determine from the verdict which charge of negligence the jury found against defendant."

In *New York Central R. R. Co.* v. *Lloyd,* 258 Fed. 111 (C. C. A., 2nd Cir.), the trial judge submitted four questions of fact on which he said there might be predicated negligence on the part of the defendant's employees. One of these four was that the accident may have been due to negligence on the part of the defendant in failing to provide a sufficient crew for the train whereon the plaintiff was a

passenger at the time of the accident. The appellate court reversed a judgment for the plaintiff on the ground that the verdict was a general one, and that there was no evidence to show any negligence in that particular respect. The court said:

> "It is not known whether the jury found the plaintiff in error negligent in respect of all the claims of negligence submitted to them, or any one or several of them."

Comment on Opinion of Supreme Court and on Plaintiff's Brief Therein.

In disposing of this point the Supreme Court, in its opinion, said:

> "It is again urged that the trial court erroneously permitted the jury to consider allegations of negligence concerning which there was no proof, and erroneously refused defendant's requests to withdraw such allegations from the jury.
>
> When these requests are examined, we find no error prejudicial to the defendant in the refusal to charge them, in view of the fact, as we believe it to be, that the trial judge limited the charges of negligence to be considered by the jury to failure to properly equip the cars, and carelessness in the hauling and handling of the cars" (p. 221, line 35, to p. 222, line 10).

It will be observed that the Supreme Court apparently did not question the soundness of the legal principle which is involved in the present point, but held, in effect, that it did not apply to the case for the reason that the charges of negligence were "limited" by the trial judge to failure to properly equip the cars and to carelessness in the hauling and handling of the cars.

But there is nothing in the complaint which alleges any negligence as to the *equipment* of the cars. The failure to provide equipment, according to the complaint, relates to derailing devices and signal devices on the track; there is no claim of any failure to *equip* the cars with brakes—the only claim being that the defendant uncoupled the said cars from the rest of the said train without properly "setting the brakes" (p. 22, line 25).

It is true that in another paragraph (No. 5) of the complaint it is alleged that the defendant "allowed and permitted the brakes" to be and remain in an "unsafe, inefficient, defective and dangerous condition." But there is a clear distinction between original equipment of proper appliances and the failure to keep the appliances in proper condition after they had been provided. This distinction is of particular importance in this case where there was no claim in the complaint and no proof that any duty rested on the defendant to inspect the brakes or to repair same if they were found to be inefficient or defective; the runaway cars were not the property of this defendant, but belonged to other companies; hence, so far as the equipment of brakes (and other appliances) is concerned, the defendant had nothing to do therewith.

Presumably the Supreme Court had reference to that part of the charge of the trial court wherein he stated, "I think that you will find, when you come to consider the case, that the issue narrows down to the question as to whether or not the runaway cars had been properly equipped with efficient hand brakes." Both courts apparently overlooked the fact that there was no allegation of defective *equipment* with respect to the brakes.

But even if the complaint might be held to be broad enough to permit a verdict on the theory of

failure to properly equip the (runaway) cars, we respectfully urge that the charge of the trial judge did not *limit* the jury's consideration to that claim of negligence—and to "carelesness in the hauling and handling of the cars." On the contrary, as we have attempted to show *supra,* the trial court, at several places in the charge, permitted the jury to consider the "series of alleged acts" which were stated in the complaint, and did *not* expressly withdraw from the jury certain particulars of negligence, which had no support whatever in the evidence and which the plaintiff did not even attempt to prove.

Counsel for plaintiff, in his brief in the Supreme Court, argued (and, we presume, will repeat the argument in this court) that the minds of the jury would have been "confused" if the request of the defendant had been granted to withdraw certain allegations from the jury. We suggest that the confusion, if any, in the application of well-settled principles of law to the undisputed facts of this case has arisen because of the omnibus nature of the complaint, wherein counsel evidently intended to cover every possible point which the evidence might conceivably justify, without having any clear idea as to what the real negligence was on the part of the defendant, if there was any negligence at all—which, of course, we do not admit.

Counsel cites the case of *Smith* v. *Irwin,* 51 N. J. L. 507, but that case merely holds that it is not error to refuse to repeat legal propositions which have already been fully and accurately charged to the jury. The case has no bearing on the point with which we are now concerned.

On the point as to the alleged "negligent handling" of the runaway cars, counsel for plaintiff says that no requests on that point were submitted to the trial court. But it is not necessary to sub-

mit a request in order to entitle a party to object to legal principles as charged.

Counsel also urged that the court should look at the context or at the whole charge in order to determine whether the jury were misled by an alleged error therein. We concede the soundness of this principle, but it is equally well settled that an erroneous instruction followed or accompanied by a correct one is not cured by the latter, unless it is also expressly withdrawn. The reason for this is that the jury is left at liberty to adopt either of the contrary instructions.

State v. *Topack,* 78 N. J. L. 208.
State v. *Erie Railroad,* 84 N. J. L. 661.
Collins v. *Central R. R. Co.,* 90 N. J. L. 593.
Cox v. *Rosenvinge,* 135 Atl. 59.

Counsel also assert that no exception was taken to certain of the parts of the charge complained of. We call attention to the exceptions noted in the record at pages 203 to 206 where the points (among others) which are now urged were called specifically to the question of the trial court by several separate and distinct exceptions. Exception was also taken to the refusal to charge as requested (p. 206, lines 35-40).

POINT II.

The trial court erroneously permitted the jury to consider as a possible ground of liability on the part of the defendant a claim of negligence which was not alleged, and if alleged was not proved, to wit, carelessness on the part of the defendant's employees in blocking the cars in the freight yard.

[Ground 25.]

In the charge to the jury the court referred to the evidence relating to the hand brakes, and after commenting thereon, said (italics ours):

> "In the second place, assuming that the brakes were efficient but that they had not been properly *set or the cars blocked,* if you ascertain that as a fact, would you then say as an inference of fact that the employees of the defendant company had been careless or negligent in setting the brakes or *blocking* the cars, because the cars did run away?" (p. 200, lines 30-35).

It will be observed that under this charge the jury were permitted to find liability *either* because the brakes were not properly set *or* the cars were not blocked.

In all the multitude of allegations in the complaint *there is no reference to any alleged failure to block the runaway cars as they stood in the freight yard.*

The suggestion of negligence in blocking the cars was imported into the case for the first time in the charge of the trial court.

Up to that time the plaintiff not only refrained from making any such claim, *but by his own evi-*

dence proved that both of the cars were in fact blocked as they stood in the freight yard.

Brakeman Peterson said that he put a block under the Michigan Central car at the east end and that he saw conductor Gallagher put a block under the P. & R. car (p. 188, line 15, to p. 189, line 30).

This part of the charge is, therefore, subject to the double criticism, first, that there was no allegation of negligence in the blocking of the car, and second, if there had been such an allegation the plaintiff's own evidence disproved it.

It is material error to leave to the jury a charge of negligence which is not alleged. So held in the following cases:

In *Excelsior Electrict Co.* v. *Sweet,* 59 N. J. L. 441, the testimony of the plaintiff was directed to negligence on the part of the defendant in a certain particular specified in the declaration; the testimony of the defendant tended to disprove this allegation. The trial judge in the charge permitted the jury to find negligence in another respect, which was not alleged in the declaration. The judgment for the plaintiff was reversed and the court refused to permit an amendment setting up the second theory of alleged liability.

In *Partridge* v. *Woodland Steamboat Co.,* 66 N. J. L. 290, the declaration charged that the plaintiff, while a passenger on a boat of the defendant, was injured because of the negligence of the master and crew in making no effort to stop a fight that started among some other passengers; the trial court submitted to the jury the question as to whether the defendant was negligent because it failed to have on the boat a special officer for the protection of passengers. *Held,* that this was outside the issue raised by the complaint and judgment for plaintiff was reversed.

In *Murphy* v. *North Jersey Street Ry. Co.,* 71 N. J. L. 5, the court said: "The defendant is only required to prove that he was not guilty of the negligent act charged against him in the declaration." Judgment for plaintiff was reversed on the ground that the trial judge in the charge permitted the jury to find the defendant liable on a theory which was not alleged in the declaration.

In *Merklinger* v. *Lambert,* 76 N. J. L. 806, the jury rendered a verdict in favor of the defendant. On writ of error by the plaintiff it was urged that there was error in the charge for the reason that the trial court limited the right of recovery to the negligence alleged in the plaintiff's pleading. Judgment for the defendant was affirmed, the court saying:

> "Having alleged a particular act of negligence, in order to maintain his action he (the plaintiff) must prove it as laid. * * * the trial judge made no error in charging the jury that the plaintiff was bound to prove the injuries were sustained in the manner alleged in the declaration."

In *Jordan* v. *Reed,* 77 N. J. L. 584, it was held:

> "(a) Under the Practice act, section 125, there can be permitted no substantial variance between the case declared upon and the case proven, but a recovery must be *secundum allegata et probata;*
>
> (b) when a declaration sets up a contract growing out of commercial paper and entered into by the defendant alone, proof of a contract of a different nature entered into by the defendant and others will not

> sustain the declaration, unamended, for thereby the defendant would be denied an opportunity to plead the nonjoinder in abatement. Neither can the declaration be amended, on error, to conform to the proofs, because thereby the defendant would be bound by a verdict upon a matter which he had not expected or intended to try."

In *Bierman* v. *Stiefel,* 82 N. J. L. 658, the plaintiff sued to recover for rent; the defendant claimed non-performance of a covenant to restore the premises after partial destruction by fire, and the plaintiff replied that the covenant was performed. At the trial plaintiff claimed that under the contract he was not bound to restore the premises as they were at the time of the fire, but only as they were at the time of the date of the demise; the trial court held with the defendant, but submitted to the jury the question of diligence on the part of the defendant in performing the covenant to repair. This was held to be error as that question was not put in issue by the pleadings.

In *Duel* v. *Mansfield Plumbing Co.,* 86 N. J. L. 582, plaintiff sued to recover damages for injuries caused by the fall of a flagstone that was resting against a fence in the front yard of premises where the defendant was making a sewer connection. The trial court permitted the jury to find liability on the ground that the defendant was the owner or occupier of the land, and that the plaintiff was "invited" by the defendant to come upon the premises. Judgment was reversed on the ground that "This error in the charge injuriously affected a substantial right of the appellant which was to have the case against it disposed of upon the issue that had been framed and tried" (p. 586).

In *Gilliard* v. *Public Service Ry. Co.,* 94 N. J. L. 288, the complaint charged that the defendant was negligent in that its employees started a trolley car on which the plaintiff was a passenger while she was in the act of alighting therefrom. Evidence was offered to sustain that allegation and, in addition, other evidence was offered tending to show that the plaintiff was induced by a statement of the conductor to attempt to alight from the car before it had come to a standstill. Both theories of liability were submitted to the consideration of the jury and when the trial court's attention was called to the second theory as not being within the complaint, he refused to correct the charge. The court held that the second theory was not within the allegations of the complaint and the judgment was accordingly reversed.

In *Oaklyn* v. *Rulofson,* 98 N. J. L. 304, the court held:

> "The finding of the jury was based altogether upon the determination of a question which was not within the issue raised by the pleadings; and it is entirely settled that the defendant is only required to meet the case laid against him in the plaintiff's complaint. If he does that, and shows by a preponderance of the evidence that the charge against him is not justified by the fact, he has relieved himself from responsibility so far as the action then being tried is concerned. *Excelsior Electric Co.* v. *Sweet,* 59 N. J. L. 441; *Murphy* v. *North Jersey Street Railway Co.,* 71 Id. 5. The defendant, in the present case, attempted to meet the charge laid in the complaint by evidence that a nuisance did not in fact exist at the time when the board took the action which has been above recited. He was entitled to the finding of the jury upon the question whether

or not he had shown by a preponderance of the evidence that this charge was contrary to the fact; and, if they so found, he was entitled to their verdict. The adjudication against him placed his liability upon a cause of action not set out in the complaint, one which the case did not present, and which, therefore, he was not required to meet.

The judgment under review will be reversed."

In *Garibaldi* v. *Rubenstein,* 99 N. J. L. 223, the action was to recover a commission for the sale of real estate. The complaint alleged an agreement in writing authorizing the plaintiff to sell the premises and agreeing to pay a commission. Judgment for plaintiff was reversed on the ground that a theory of liability was submitted which was not within the complaint, the court saying:

"Various exceptions to the rulings and charge of the trial judge were noted as grounds of appeal during the trial. In the view that we take of the case, one exception only need be discussed, viz., exception to the judge's charge to the jury, in which he said: 'If you find that the principal (i. e., the defendant) deliberately absented himself, so that the broker had no means of meeting such principal in order to conclude the transaction involved in this case,' &c. * * * 'If the absence of the defendant in Europe did not prevent the plaintiff from completing the terms of his contract in finding a purchaser,' &c.

This, we think, is error injurious to the defendant, for which the judgment must be reversed. The record shows the defendant was in Europe between August 5th and September 18th, 1922. This evidence was offered by the plaintiff. The issue thus submitted to the jury was not within the pleadings. It was not within the issue framed.

It was not fairly or fully tried out in the case.

It is a well-settled rule of practice in the trial of civil cases that the questions submitted to the jury should be within the issues raised and framed by the pleadings.

It is error to submit to a jury questions which are not within the issues raised by the pleadings. *Excelsior Electric Co.* v. *Sweet,* 59 N. J. L. 441.

This, it is said, is a cardinal rule, for the control of a trial court, applied and illustrated in many cases in our reports" (citing cases).

In *Lambert* v. *Trenton & Mercer Corp.,* 127 Atl. 674, the Supreme Court, on appeal, reversed a judgment for plaintiff for an erroneous instruction to the jury on the subject of the duty required of a pedestrian while in the act of crossing a street. The court said (italics ours):

"This instruction was delivered in compliance with a request submitted by counsel of the plaintiff. That it had no relevance to the case which the jury was called upon to determine is apparent. That its tendency was to confuse the jury as to the real issue which the case presented is equally apparent. That the verdict of the jury may have resulted to some extent from their attempt to give effect in their finding to this erroneous instruction, we think, is equally clear; for it was their duty to be governed in their finding by the legal rules which the court instructed them were applicable to the case they were to consider. Where an erroneous principle of law is laid down by a trial court, a verdict which may have been the result of the erroneous instruction cannot be supported, and this, we think, is equally true where a principle of law, *which has no bearing upon the issues involved in a litigation, is stated by the trial*

court to the jury as a rule which should govern them in their consideration of the cause."

So in the present case the trial court, we submit, allowed the jury to consider a claim which had no bearing upon the issues raised by the complaint, in that in the part of the charge quoted *supra* he permitted the jury to find the defendant liable if the employees were negligent in *blocking* the cars.

Comment on Opinion and Brief.

The Supreme Court concluded there was "no merit" in this point because the complaint was broad enough to comprehend that phase of the proof and the proof was produced without objection (p. 222, lines 10-30).

The court did not indicate, in its opinion, what part of the complaint was "broad enough," and with the utmost deference we insist that there is nothing therein which either directly or indirectly charges negligence against the defendant by reason of the alleged failure to *block* the (runaway) cars.

We think the soundness of the appellant's argument in this case is demonstrated by a careful study of the complaint (p. 21, line 32, to p. 22, line 35).

The allegations of negligence in the complaint are found in paragraphs 4, 5 and 6 thereof.

Paragraph 4 relates *only* to alleged negligence in the operation of the *west*bound train, and has nothing to do with the eastbound train or with the runaway cars.

The first charge in paragraph 5 relates solely to the operation of the *east*bound train "on the same track," that is, on the track on which the westbound train was approaching. It makes no reference to any cars that were standing *in the yard.*

The second charge in paragraph 5 relates solely to the brakes of two of the cars, alleging that they were inefficient and defective.

In paragraph 6 we have a multitude of charges, but not one of them refers to the two runaway cars, *except* the charge that the defendant negligently "detached or uncoupled" said cars from the rest of the train and negligently did this without properly setting the *brakes* and without placing them in a safe location, and without having a man in charge thereof and without keeping a lookout to see if they started to run away. There is no suggestion in any of these allegations either that there was any *duty* on the part of the defendant to "block" the cars while they were in the yard of the Wharton & Northern Railroad Company, and likewise there is no suggestion of a failure on the part of the defendant to perform said duty.

But in addition to the argument that there was no allegation in the complaint as to the failure to block cars, we urged before the Supreme Court, and we now urge, that *even if there had been such an allegation in the complaint it was not sustained by the proof.* On the contrary, the plaintiff's own evidence proved that the cars were blocked.

One of these cars was described as a Maine Central car; the other was a Philadelphia & Reading car.

Brakeman Peterson, when called as a witness for the plaintiff, testified on this subject as follows:

> "Q. Did you do anything with respect to blocking the car? A. I put a block under the Me. C. myself.
>
> Q. What end? A. East end.
>
> * * * * * *

By the Court.

Q. You blocked the front wheel of that first car? A. Yes, sir" (p. 188, lines 10-22).

* * * * * *

"By Mr. Gebhardt.

Q. Were these two cars coupled together, or not? A. They were.

Q. And the one was a Maine Central car? A. Yes, sir.

Q. What was the other? A. Philadelphia & Reading, P. & R.

* * * * * *

Q. This block that you speak of was put on the car nearest to the main line? A. Furtherest away from the main line.

By Mr. Selser.

Q. What is the custom existing in the yard with respect to applying the brake on cars when two cars are coupled together standing in the back track? A. One brake would hold three or four cars there, a good brake; and in my judgment this was a good brake. I believe Conductor Gallagher put a block under this P. & R. himself; he put a block under the Philadelphia & Reading car.

By the Court.

Q. Did you see him do it? A. Yes. He coupled the car fast" (p. 189, lines 10-36).

The testimony on this subject was called to the attention of the Supreme Court under Point V at page 37 of our brief in that court, but no reference is made to same in the opinion.

The evidence of the brakeman on this point was not contradicted; and, hence, we submit it was error to permit the jury to find the defendant liable by reason of any alleged failure to block the cars,

even if the complaint was broad enough to comprehend such proof.

In answer to the conclusion of the Supreme Court that the proof on this subject was produced without objection, we again urge, with reference, that the Supreme Court was apparently misled by the brief of counsel for the plaintiff in that court, wherein counsel argued that testimony was offered without objection by the defendant that the cars *"should have been blocked,"* and in connection with such argument quoted the testimony of the plaintiff, as follows:

> "Q. Now, will you please tell me what the custom was at the time of the accident on the Susquehanna Railroad with respect to a situation of this kind, where two loaded box cars are left standing on a track—what was the custom at that time with respect to securing those cars by brakes or otherwise?
>
> The Court: If he knows.
>
> Mr. Selser: Within the single period of time stated by counsel.
>
> Mr. W. Reading Gebhardt: Certainly" (p. 45, line 35, to p. 46, line 12).

But this testimony has nothing whatever to do with the question as to whether the cars were in fact blocked.

Even if testimony as to the *custom* of blocking was permissible without an allegation of negligence in that regard, and even if this evidence as to custom was produced without objection (which is the fact), it does nothing more than prove the *custom* of blocking the cars; and even if a violation of that custom may have raised a jury question as to negligence, we have shown from the testimony quoted *supra that this custom was complied with.*

Counsel for plaintiff then argued that the mere fact that the cars ran away is evidence that the cars were not blocked, or, at least, were not "properly" blocked. This argument is not justified in view of the plaintiff's own testimony that the cars were in fact blocked by the conductor. The argument of counsel amounts to this, that the plaintiff, after proving by his own evidence that it is the custom to block cars, and that in fact *both* cars were actually blocked, is nevertheless entitled to go to the jury on the issue as to whether they were "properly" blocked, merely because for some unknown and unexplained reason the cars (not owned or possessed by the defendant), while on the property and in the possession of a company other than the defendant, start to run away. We submit that the statement of the argument demonstrates that it is unsound. If such an argument prevails it is a most extraordinary extension of the doctrine of *res ipsa*—and that, too, in a case where the doctrine does not apply in any event (see Point V).

Finally, on the point whether the complaint is broad enough to permit the issue of negligence as to blocking to go to the jury, counsel argued that if the complaint was not broad enough an amendment could be made on appeal on the theory that the real question in controversy had been "fully and fairly" tried. We do not question this well-settled doctrine, but the difficulty with the application of it to the present case is that the *only* evidence on the subject fails to show any violation of the duty now claimed.

The Supreme Court further stated in dealing with this subject that the judgment for the plaintiff might well have been rested upon the proof as to blocking under the case of *Smith* v. *N. Y. S. & W. R. R. Co.* We reserve the discussion of this case

and the application of same either to this or any other of the allegations of negligence for consideration *infra* under Points IV and V.

POINT III.

The trial court erroneously permitted the jury to consider whether the accident was caused by a violation of the Federal Safety Appliance Act, as the evidence showed the said act did not apply to the circumstances of the case.

[Grounds 12(g), 15, 16, 17, 21, 23, 24, 25.]

In the motion for direction of verdict the defendant included, among the grounds, the point that the Safety Appliance Act had no application (p. 193, line 18). We urge that the Safety Appliance Act had no application for the following reasons:

(a) Because at the time the cars ran away the defendant was not "hauling" or "using" them;

(b) Because at that time the defendant was not hauling or using them "on its line";

(c) Because the duty to equip these cars with efficient brakes was not imposed for the benefit of the plaintiff.

(a)

At the time the cars started to run away the defendant certainly was not "hauling" them; all the defendant had to do with the cars was to switch them to the back track intending to leave them there until its eastbound freight train was ready

to proceed; they were not yet attached to the defendant's train nor on the defendant's property.

Likewise they were not then being "used" by the defendant. Even if it be said that they were in the legal possession of the defendant, merely by reason of the fact that the defendant intended to attach same to its freight train after the drilling of other cars had been completed, the mere possession, as distinguished from the use of a car, is not sufficient to permit the application of the statute.

United States v. *Western, etc., R. Co.,* 297 Fed. 482.

(b)

Admittedly the cars were not on the defendant's "line"; admittedly they were standing in a freight yard which belonged to another company; admittedly they were not being moved by the defendant at the time they ran away, and admittedly they were not then attached to the defendant's engine or train.

(c)

The *plaintiff* had nothing to do with the drilling or placing of the two runaway cars; he was not an employee of the crew of the eastbound freight train by whom the cars were placed on the back track; the westbound freight train on which he was employed had nothing to do with the two cars, nor was there any intention to attach same to that train.

The case in this respect is similar to *St. Louis, etc., R. Co.* v. *Conarty,* 238 U. S. 243, 59 L. Ed. 1290. There a brakeman was injured in a collision between a switch engine and a freight car which had

no coupler or drawbar at one end. The car was about to be placed on a side track for repair and was left near the switch leading to the track while other cars were moved out of the way. A switch engine on which the brakeman was working came along the track on which the car was standing and was killed by the ensuing collision. He was standing on the footboard at the front of the engine and was caught between it and the body of the car at the end from which the coupler was missing. If the coupler had been in place there was evidence to show that the engine and the car would have been kept far enough apart to prevent the injury, but as it was, the engine came in direct contact with the sill of the car. The brakeman was on his way to do some switching at a point beyond the car and was not intending to "haul or use" the car in any way, its movement being in the hands of other employees. The court held that the Safety Appliance Act did not apply, saying:

> "We are of opinion that the deceased, who was not endeavoring to couple or uncouple the car or to handle it in any way, but was riding on the colliding engine, was not in a situation where the absence of the prescribed coupler and drawbar operated as a breach of a duty imposed for his benefit."

Comment on Opinion and Brief.

The opinion of the Supreme Court disposed of this point by the statement, "These cars which got out on the main track of the defendant had been hauled and handled by the defendant company, and we entertain no doubt that the Safety Appliance Act applied to the situation which the evidence disclosed in connection therewith" (p. 221, lines 30-35).

We respectfully submit that in this conclusion the Supreme Court overlooked the effect of the cases cited in our brief in the Supreme Court, to wit, *United States* v. *Western, etc., R. Co., supra,* and *St. Louis, etc., R. R. Co.* v. *Conarty, supra.*

In the former case, suit was brought for a penalty for using cars on which the safety appliances were defective. The defense was that by reason of a strike, inspection and repair of the cars were impossible. The federal court sustained the suit for the penalty notwithstanding the extraordinary circumstances, but in the course of the opinion said (italics by the court):

> "The answer avers that the statute, thus rigidly construed, takes the carrier's property without due process of law, in that a penalty is imposed for the acts of others over whom it has no control, and without the possibility by any diligence or effort on its part to escape. Had the penalty been inflicted for the possession of a defective car, since defects will arise with use, or may be occasioned by the unlawful act of others, there would be force in the contention; but the penalty is laid only on a *use* of the car, and that may be avoided. The very agents of the carrier who use it may, by diligence, inspect it, and are under duty to lay it aside if it be defective."

So, here, while it is true that the cars had been *handled* by the defendant to the extent of drilling them in the yard preparatory to placing them in the eastbound freight train, there is no evidence either that the cars had been *hauled* or that at the time they ran away they were being *used* by the defendant. The Safety Appliance Act does not apply to the *handling* of the cars, but only to the

hauling or use thereof. At no time prior to the moment they started to run away had these cars been on the main line of the defendant, and when they started to run away they were not *then* on its main line, but, on the contrary, were on the property of another company—indeed they were not on any "line" whatever either of this defendant or of any other company, but were in the yard of the other company.

The facts in the *Conarty* case have been discussed *supra,* and by reference thereto it will be observed that the brakeman who was injured was not intending to handle the defective cars. For this reason the United States Supreme Court decided that the Safety Appliance statute did not apply. So, here, the plaintiff, who was riding on the *west*bound train, had nothing whatever to do with the cars in the yard of the Wharton & Northern Railroad Company; the crew of which he was a member had not used or hauled these cars, and had no intention of so doing.

POINT IV.

Defendant's motion for nonsuit or for direction of verdict in its favor should have been granted on the ground that the plaintiff had failed to establish any of the negligence charged in the complaint; and on the further ground that if the evidence did establish any of the negligence charged in the complaint, such negligence was not the proximate cause of the accident.

[Grounds 9, 11.]

Under Point I we have summarized the allegations of the complaint.

We will now consider each of these allegations and will argue that regardless of the question whether *some* of the allegations should have been withdrawn from the jury (as argued under Point I), there was no question of fact for the jury as to *any* of the allegations.

We concede that it is not necessary for the plaintiff to prove all his allegations; on the other hand, if the proof does not sustain any of them, then there should have been a nonsuit or direction of verdict.

We will consider the points in the order alleged in the complaint:

(a) *Negligent operation of westbound train —in general.*

(b) *Speed of westbound train.*

(c) *Lookout for other trains.*

(d) *No signals to proceed.*

(e) *Negligent operation of eastbound train.*

It was conceded that none of these allegations was sustained (p. 178, line 20, to p. 179, line 12).

(f) *Condition of brakes on the two runaway cars.*

The trial court held that this was a question of fact (p. 179, line 28); and submitted to the jury the question (among others) "whether or not the runaway cars had been properly equipped with efficient hand brakes" (p. 198, lines 12-16).

Even if these cars had not been properly equipped with efficient hand brakes, there was no duty on the part of this defendant to see that they were so equipped, nor was this defendant responsible for the failure to so equip them.

Moreover, as shown under Point I, there is no allegation in the complaint that the defendant had not *equipped* the cars with efficient brakes; the only allegation is that the defendant allowed and permitted the brakes to be and remain in an "unsafe, inefficient, defective and dangerous" condition (p. 22, line 3).

However, in view of the conclusion of the Supreme Court that the trial court was correct in permitting the jury to consider the claim that the defendant failed to "properly equip the cars," we will discuss this point further in the light of the statutory provisions on the subject of "efficient brakes."

These provisions, as fixed by the Supplement of April 14, 1910, to the Safety Appliance Act, are as follows:

> "Sec. 2. It shall be unlawful for any common carrier * * * to haul, or permit to be hauled or used on its line any car subject to the provisions of this Act not equipped with appliances provided for in this Act, to wit: All cars must be equipped with secure sill steps and efficient hand brakes; * * * *Provided* that in the loading and hauling of long commodities, requiring more than one car, the hand brakes may be omitted on all save one of the cars while they are thus combined for such purpose."
>
> "Sec. 3. * * * the Interstate Commerce Commission, after hearing, shall designate the number, dimensions, location, and manner of application of the appliances provided for by Sec. 2 of this Act * * *, and thereafter said number, location, dimensions and manner of application as designated by said Commission shall remain as the standards of equipment to be used on all cars subject to the provisions of this Act, unless changed

by an order of said Interstate Commerce Commission, to be made after full hearing and for good cause shown; * * *."

"Sec. 4. Any common carrier subject to this Act using, hauling, or permitting to be used or hauled on its line, any car subject to the requirements of this Act not equipped as provided in this Act, shall be liable to a penalty of $100 for each and every violation * * *."

8 *Federal Statutes Ann.*, pp. 1190-1192.

It will be observed that this defendant had nothing to do with *"hauling"* the two runaway cars; the only thing that this defendant did with the cars was to place them on the back track in the freight yard of another company (not in any way connected with or related to the defendant) where it was intended they should remain until the crew of the defendant's eastbound freight train were ready to shift them to their proper position in said train; at the time the cars started to run away they were standing on this back track and formed no part of the defendant's eastbound train or of any other train.

The evidence not only fails to show that the two cars were being "hauled or used" by the defendant at the time they broke loose, but it likewise fails to show that they were being hauled or used on defendant's "line"; on the contrary, the evidence affirmatively shows that if the cars were being hauled or used at all by the defendant, it was on the line of another railroad company, to wit, Wharton & Northern Railroad Company (granting for the purpose of argument that the word "line" may be construed to include the "back track" of a freight yard).

For these reasons the Safety Appliance Act had no application whatever; but if it did apply, the

plaintiff's own evidence shows, *without dispute,* that there was no violation of the statute; and, on the contrary, shows affirmatively that the hand brakes were in "efficient" operating condition.

The evidence as to these two cars and the condition of the brakes is as follows:

POTTER, engineer of defendant's eastbound freight train (p. 158, lines 1-10).

This train stopped at Green Pond to pick up cars. At that point there is a junction between the railroad of the defendant and of the Wharton & Northern; the tracks of the latter company at that point are three, one known as the back track, or long switch, another as the middle track and another as the river switch (p. 159, lines 1-10).

The engineer backed his train onto the main line of the Wharton & Northern Railroad and proceeded to pick up cars that that company had switched at that point (p. 159, lines 10-15).

When the engineer first saw the two runaway cars they were moving out of the switch and he thereupon notified the conductor and took his engine and tried to catch them (p. 159, lines 20-25). The defendant's crew had placed the two cars on the back track, intending to pick them up later and put them on the eastbound freight train (p. 159, lines 30-35).

This witness could not say how long it was after the cars had been placed on the back track when he saw them moving, except that he said generally that it was "quite a while" (p. 160, lines 10-20).

The cars moved in an easterly direction from the switch, going out the Wharton & Northern on the defendant's main line (p. 160, line 30).

Witness had not paid any particular attention to the cars when they were placed on the back track and did not see them put there; but he could not re-

call the weather conditions except that he said, "It seems to me it was kind of wet" (p. 163, lines 10-30).

For the defendant:

WALDRON, defendant's trainmaster, is familiar with the defendant's railroad at Green Pond Junction and with the various tracks at that point. The river track, the middle track and the back track are on the property of the Wharton & Northern Railroad. Witness had no personal knowledge of the accident as he was not present at the time (p. 181, lines 10-30).

He went to the scene of the accident between 4 and 5 o'clock in the morning after it occurred, and saw the two cars which had run into the westbound train. These cars were not cars of the defendant. One was a Michigan Central and the other a P. & R. (p. 182, line 1, to p. 183, line 20). The tracks where these cars had been were the tracks of the Wharton & Northern Railroad (p. 183, line 30).

Plaintiff was then allowed to reopen his case and recalled engineer Potter, who said, with reference to the two cars, that they were not attached to his train. "We had been switching them; that's all" (p. 185, lines 10-15).

PETERSON, brakeman on defendant's eastbound freight train (p. 185, lines 30-40), testified as follows:

> "Q. What, if anything, did you have to do with the handling of these two cars, the two cars that later got away from the tracks there at Green Pond Junction and went on down and caused this accident? A. We switched them on the back track. We had ten or twelve, and maybe three or four drills

there, and first placed the Maine Central on the back, and put two or three on the middle track, and put the P. & R. on the back, and got them all out of the middle, and shoved back twelve or fourteen cars on the main line.

By the Court.

Q. Did you move the two cars in question? A. Yes, sir.

By Mr. Gebhardt.

Q. Where were they placed the last that you saw them before this accident happened? A. Just in the clear on the back track.

Q. Who placed them there? A. We did.

Q. Your crew? A. Yes, sir.

Q. What was the purpose of their being placed there? A. To drill them in station order. We had cars for all over; and cars for Butler or short cars we drilled ahead.

Q. Did those cars have anything to do with your train, or not? A. They would be on our train before we left there, but they weren't at that time.

By the Court.

Q. You were to pick them up? A. Yes, sir.

Q. And make them part of your train? A. Yes, sir" (p. 186, lines 5-40).

He backed the two cars onto the track and put on the brake. He did not know how they got away and had no explanation (p. 187, lines 10-20).

Witness applied the brake on the Michigan Central car. This was the westerly of the two cars; they had not been part of the train at all, but witness had orders to get them (p. 187, lines 30-40).

As to the condition of the brake he said:

> "Q. Will you kindly tell us whether or not the brake you applied was apparently an effective brake? A. It was a good brake, in my judgment. By pulling up the wheel you could feel the shoes taking hold of the wheel" (p. 188, lines 1-12).
>
> "Q. And fastened the brake? A. Yes, sir. When he applied the air I put on a couple more notches" (p. 188, lines 22-24).

The hand brake on the P. & R. car was not applied (p. 189, line 18). "One brake would hold three or four cars there, a good brake; and in my judgment this was a good brake" (p. 189, lines 25-30). Witness could not account for the cars getting away. He said, "After we made this coupling on this first car, whether this brake flew off or not I couldn't say. I didn't look at the brake after that" (p. 189, line 40).

The brake was at the east or front end of the car (p. 190, lines 1-10). Witness not only applied the brake as above stated, but he placed a block at the front wheel of the east end of the Maine Central car (p. 188, lines 12-20). The conductor put a block under the P. & R. car (p. 189, line 30).

As to the condition of the weather he said, "It had been misting, little fine rain; very dark night; slippery; this rail was a little slippery, wet" (p. 188, lines 40-43).

Witness could not "guess" how the accident happened. He had never had a similar experience himself, but had heard of such an accident some years ago (p. 190, lines 15-25).

A hand brake on the back track would hold three or four cars (p. 190, line 30).

In the opinion of the witness the brake was efficient (p. 190, line 40):

> "In my opinion it was a good hand brake" (p. 191, line 10).

No other witnesses were called as to the circumstances of the accident or as to the cause thereof.

Under this evidence the plaintiff himself proved conclusively not only that the hand brake was a good brake in the judgment of a brakeman who had had twenty years' experience (p. 188, lines 1-10; p. 190, lines 15-20; p. 190, line 40; p. 191, line 10), but he also proved that the brake was in efficient operating condition; *the man who applied the brake said he could feel the shoes taking hold of the wheels* (p. 188, line 10).

The court denied defendant's motion for direction on the theory that it was for the jury to say whether there was a failure to properly equip the runaway cars with efficient brakes, or to properly block the cars and to set the brakes (p. 193, line 32, to p. 194, line 10).

Even if we grant that there was any legal duty on the part of the defendant, under the Safety Appliance Act, to see that cars which were not being hauled on its line, and which had not yet been made a part of its train, were equipped with "efficient" hand brakes, the evidence shows that that duty was fully met.

Whatever may have been the cause of the movement of the runaway cars, after they had been braked and blocked, there is certainly nothing to suggest, and still less to prove, that the hand brake was not efficient; and hence there was no question of fact for the jury on this point.

(g) *Failure to provide sufficient derailing devices.*

The trial court was of the opinion that this point was a question of fact for the jury (p. 179, line 28).

The allegation of the complaint is that the defendant negligently failed to *provide* good and sufficient derailing devices (p. 22, line 12). But the plaintiff himself proved by a witness, whose testimony was not contradicted, that as a matter of fact there was a derail at the junction of the defendant's track with the track of the Wharton & Northern Railroad (p. 160, lines 20-25).

This derail was on the property of the Wharton & Northern Railroad (p. 49, line 38). There was nothing to show that the derail was not "good and sufficient"; *on the contrary, the plaintiff himself said he had worked at that point the week before the accident and that the derail was all right when he saw it* (p. 52, lines 10-25).

Argumentative evidence was erroneously admitted in the attempt to show that the derail must have been off if the cars went out of the switch; but this evidence could not be the basis for a fact question as there was no allegation of any improper *operation* of the derail (p. 160, line 40). Hence, the allegation of failure to *provide* a proper derail was not proven.

(h) *Warning signal devices on track.*

There was no claim of negligence in this respect and the point needs no further discussion (p. 179, line 38).

(i) *Negligent uncoupling of said cars from rest of train.*

(j) *Failure to properly set the brakes.*

(k) *Failure to place cars in a safe location.*

(l) *Failure to have a man in charge of the cars.*

(m) *Failure to keep lookout.*

All of these points were overruled by the trial court on the theory that they were questions of fact for the jury (p. 179, line 38, to p. 180, line 32).

All of them were in effect submitted to the jury in that part of the charge where the court left it to the jury to say whether the defendant's employees in moving the cars in the yard acted negligently and carelessly (p. 198, lines 15-20).

It should first be observed that these points form part of the allegation in paragraph 6 of the complaint that the defendant *"negligently detached or uncoupled* the said cars (referring to the two runaways) from the rest of the said train"; the specific charges of negligence as to the setting of the brakes, the placing of the cars in a safe location, the placing of a man in charge thereof, and the keeping of a lookout, all form part of the allegation that the defendant negligently *"detached or uncoupled"* the cars from the said train.

But the evidence, as above summarized, shows that the two runaway cars never were attached or coupled to the defendant's train.

The two cars certainly were no part of the westbound train on which the plaintiff was riding, and they had not yet been placed in the defendant's eastbound train; all that the defendant's employees had to do with these two cars was to switch them to the back track of the Wharton & Northern Railroad yard. Up to the time they started to run away they were not attached or coupled to the defendant's train and formed no part thereof, and

hence they could not possibly have been "detached or uncoupled" from said train. All of these points should, therefore, have been eliminted as the plaintiff failed to prove the allegations of the complaint with respect thereto.

But if it be urged that the language of the complaint is broad enough to include the moving of the two cars to the back track of the freight yard in preparation for placing them in the eastbound train when that train was ready to proceed, still the evidence fails to sustain any of the specific charges of negligence.

(j) *As to the brakes.*

The evidence of the man who set the brake is uncontradicted that he set the brake properly. Not only did he set it so that he felt the shoes take hold of the wheel, but after the air had been applied from the engine he "put on a couple more notches" (p. 188, lines 1-25).

(k) *As to location.*

There is nothing to show that it was not customary and proper to place cars on the back track of the Wharton & Northern Railroad. It is true there is a grade at that point, although the percentage or length of it was not shown (p. 190, lines 30-35). But if there was anything peculiar or dangerous about the back track, this defendant had nothing to do with it, as the track was on the property of another railroad (p. 191, lines 10-30).

(l) *As to a man in charge of car.*

There is no evidence to show that the location was such as to make it necessary to leave a man in charge of a car or of cars placed on the back

track of the Wharton & Northern Railroad yard. Likewise there is no evidence that it was customary to do so. It cannot be said that the brakeman, Peterson, was negligent because he did not stay by the brake after he had applied it, and after he and the conductor had blocked the cars. The evidence is undisputed that one brake would hold three or four cars at that point (p. 189, lines 25-30).

In his experience of twenty years the brakeman had never before had any runaway cars (p. 190, lines 15-20).

After the brakes were set and the cars were blocked the brakeman then proceeded to assist in the further drilling of cars in the yard and to and from the tracks of the defendant (p. 188, lines 30-40). It was no part of his duty to remain by the two standing cars to guard against the remote possibility that the brakes might slip and that the blocks might fail to hold and that the derailing device might fail to operate. Negligence must be measured by the expectation of what might reasonably happen rather than by an expectation of a combination of unprecedented occurrences.

(m) *As to lookout.*

The charge here is that the defendant uncoupled the cars from the rest of the train without keeping any lookout to see if they started to run away (p. 22, line 30). This is merely another way of charging negligence because of failure to have a man in charge of the cars and for the reasons stated under subhead (l), there was no negligence on the part of the company in this respect and no negligence on the part of any of the crew in failing to keep a lookout to see if the cars started to run away.

The above discussion covers all of the specific charges of negligence stated in the complaint.

We submit that none of these allegations was proved, and that, therefore, the defendant's motion for nonsuit or for direction of verdict in its favor on this ground should have been granted.

Proximate Cause.

Even if there was any proof of negligence on the part of the defendant, or on the part of any of its servants and agents, and even if there was any proof that the Safety Appliance Act applied and that there was a violation thereof, the question of proximate cause still remained.

So far as relates to the alleged negligence on the part of the defendant's employees with respect to the moving or handling of the cars in the yard, there is not the slightest evidence to show any causal connection between such alleged negligence and the accident. Nobody knows why the cars started to run away, and the only person (the brakeman) who was asked to give an opinion on the subject said he could not even "guess" how the accident happened.

So far as relates to the alleged violation of the Safety Appliance Act, while it is not necessary under that statute to prove negligence on the part of the defendant or its employees, unless such violation is *the proximate cause,* then there is no civil liability.

Some of the cases on this point are:

Dodge v. *Chicago etc. R. Co.,* 164 Ia. 627, 146 N. W. 14.
Nauman v. *Payne,* 45 S. D. 484, 189 N. W. 112.
Goneau v. *Minneapolis,* 191 N. W. 279.

Bohn v. *Chicago etc. R. Co.,* 200 N. W. 804.
Philadelphia & R. Ry. Co. v. *Eisenhart,* 280 Fed. 271, at p. 275.
Davis v. *Hand,* 290 Fed. 73, at p. 75.
Spokane etc. R. Co. v. *Campbell,* 241 U. S. 497, 60 L. Ed. 1125.
Lang v. *New York Central R. R.,* 255 U. S. 455, 65 L. Ed. 729.
Davis v. *Wolfe,* 263 U. S. 239, 68 L. Ed. 284.

In the present case there is no evidence to show that the cause of the movement of the cars from the back track of the Wharton & Northern Railroad to the main line of the defendant was the inefficiency of a hand brake.

The undisputed evidence is that the brake was efficient (p. 188, line 10; p. 190, line 40).

Hence, in the language of the *Lang* case, *supra,* there was a failure to show "a causal connection between the fact of the carrier's delinquency under the Federal Safety Appliance Acts and the fact of injury to an employee."

Comment on Opinion and Brief.

The Supreme Court, in disposing of the motion for nonsuit and for direction of verdict, cites the case of *Smith* v. *N. Y. S. & W. R. R. Co.,* 46 N. J. L. 7, and in the opinion says:

> "We think that an examination of that decision and the reasoning by which it is supported, dispose of many of the points argued in this case against the contention of the defendant" (p. 220, lines 35-40).

That case was an action by a *passenger* against the railroad company. The car in which the plain-

tiff was sitting came into collision with a car loaded with stone which stood upon a siding near the track on which the passenger car was running, the passenger car being thereby thrown over and the plaintiff sustaining injures in the collision.

The question in that case arose on the objections of the defendant to the refusal to charge certain requests which were intended to raise the points that the defendant was not liable if the car of stone had been set loose by the application of "external force" or by the act of a stranger, after the brakes had been set and a railroad tie placed beneath the wheels.

The situation and the reasoning in that case are quite different from the present. It may be conceded that in so far as concerns injury to a passenger upon its train a railroad company is chargeable with the duty of explaining such a collision—especially when the freight car and the passenger car are both owned and operated by the same company and are upon the company's property at the time of the collision; in such a case it may well be that the defendant would not be excused from liability if the freight car, after being placed in a safe position upon the side track, moved therefrom into a place of danger. Under such circumstances, the company might properly be held liable in the absence of any explanation as to the course of the movement of the car from the siding to the main line.

But that is not like the present case. It does not involve the duty of the company to its passengers and there is nothing whatever to show any fault on the part of the defendant.

The *Smith* case is discussed and distinguished in the later case of *Haines* v. *Atlantic City R. R. Co.,* 65 N. J. L. 27, where a gateman at a public

crossing lowered the gates for an approaching train; while his back was turned a volunteer, without the knowledge or consent of the gateman, raised the gates, and while the plaintiff was passing under same the volunteer lowered the gates and injured the plaintiff.

After discussing the *Smith* case Depue, C. J., said with reference thereto (italics ours):

> "It will be observed that in that case there was *fault* on the part of the company in leaving *its* loaded car on a switch inclining towards its main track and *liable* to be sent down on the latter track. In the present case, so far as the act of the company and of its servants are concerned, there was no fault in the raising or turning down of these gates."

In the present case, there is no evidence of "fault" on the part of the defendant; on the contrary, the *undisputed* evidence affirmatively shows: First, that both the runaway cars were blocked; second, that the brakes thereon were properly set; third, that a derailing device was provided between the switch and the main line; and, fourth, that neither the cars nor the switch on which they were standing belonged to this defendant.

Negatively, the evidence fails to show any defect in the brakes or any carelessness in the application thereof, or any defect in the derailing device.

The "reasoning" by which the *Smith* case was supported is found in the doctrine of *res ipsa loquitur,* but that doctrine does not apply to the present case. The freight cars ran away from the yards of the Wharton & Northern Railroad Company which were in no way controlled or maintained by the defendant but by a separate and distinct company.

In this respect the present case is similar to *National Sheet Metal Roofing Co.* v. *New York Telephone Co. and the Public Service Electric & Gas Co.,* 137 Atl. Rep. 409, 5 N. J. Misc. 503. A motion was there made for a directed verdict in favor of the Public Service Electric & Gas Company on the ground that the doctrine of *res ipsa* did not apply in view of the fact that the manhole in which the explosion occurred was the property of the New York Telephone Company.

The Supreme Court said (italics ours):

> "We think this ground well taken. The doctrine of res ipsa loquitur did not apply as the court seemed to think. The principle of this doctrine is that, when, through any instrumentality or agency *under the management or control of a defendant or his servants,* there is an occurrence injurious to the plaintiff, which, in the ordinary course of things, would not take place if the person in control were exercising due care, the occurrence itself, in the absence of explanation by the defendant, affords prima facie evidence that there was want of due care. Mumma v. Easton & Amboy R. Co., 73 N. J. Law, 653; 65 A. 208. In the present case, the explosion was in a manhole which was the property of and under the control of the telephone company. The public service company could not be held responsible, under the doctrine of res ipsa loquitur, for an occurrence which happened in or on the property of another. Chalmers v. Paterson, P. & S. Telephone Co., 66 N. J. Law, 41, 48 A. 993."

So, here, neither the runaway cars nor the railroad tracks on which they were standing were under the management or control of this defendant or of its servants; the cars formed no part of any

train of the defendant and the only thing the defendant's servants had to do with them was to place them in a convenient position in the yard of the other railroad company so that at the proper time they might be attached to the defendant's eastbound freight train. When the defendant's servants left them in the yard of the other company, it is undisputed that the cars were blocked and that the brakes were set. Under such circumstances, we submit that the doctrine of *res ipsa* has no application and that, accordingly, the "reasoning" in the *Smith* case does not apply.

POINT V.

The court erroneously charged the jury as to the application of the doctrine of *res ipsa loquitur*.

[Grounds 22, 23 and 24.]

The trial court permitted the jury to consider the application of the doctrine of *res ipsa loquitur,* using the following language (italics ours):

> "We have a rule in our State, for example, which it occurs to the Court is pertinent for consideration in this case. Here was a situation where an employee of the defendant company, the plaintiff, was in the performance of his duty apparently, if you believe the testimony, and suddenly two loose cars came around the corner with no one in charge of them, and the collision in question occurred. Whether that circumstance of itself is an evidence of negligence on the part of those responsible it seems to me will be a question for consideration by the jury, because we have this rule: The principle is that *when through any instrumentality or*

agency under the management or control of the defendant or his servants there is an occurrence injurious to the plaintiff, which, in the ordinary course of things, would not take place if the person in control were exercising due care, the occurrence itself in *the absence of explanation by the defendant* affords prima facie evidence that there was want of due care. That brings me to say this: There is testimony on behalf of the defendant to the effect that the brakes on the cars in question were efficient and that they were properly set, and the cars blocked, but notwithstanding such testimony the proofs tend to indicate that the cars ran away. You may consider whether the mere declaration by the brakeman, produced by the defendant, that the brakes were efficient, is sufficient to satisfy you that they were. May it not be said (and this is a mere comment and suggestion on the part of the Court; you are the judges of the facts in the case) that the declaration on the part of the employee of the defendant company that the brakes were efficient is not proof that they were? You might say what proof is there in the case that any test had been made of a character which would support the brakeman's declaration that the brakes were efficient? If tests had been made prior to this accident by those qualified either as mechanics in the construction of such equipment for cars or by those who, as the result of years of experience, come here and say, 'Yes, the brakes were tested and these cars were set in motion or attached to a train or were moved the day before, or the week before, or within a reasonable time before, and these brakes tested efficiently.' It is conceivable that if that sort of evidence were in the case, aside from the mere declaration of the brakeman in question, they might well say that the cars' running away was not due to inefficient brakes. Bear in mind that

I am not taking from your consideration at all the testimony of that brakeman in relation to the efficiency of the brakes. It is a question of fact for you to determine in the case, and you must consider all of the evidence offered, whether coming from the plaintiff or the defendant" (p. 199, line 5, to p. 200, line 30).

This, we submit, was error. In the first place, the doctrine of *res ipsa* rarely, if ever, applies to a case of master and servant, and, in the second place, the court, in the charge, assumed that there was some duty of explanation on the part of the defendant and that the defendant had failed to explain.

This second assumption is without justification in view of the fact that the plaintiff himself called the members of the train crew of the eastbound train who moved the cars in the yard and who set the brakes and blocked the wheels. It is difficult to imagine what further "explanation" could possibly have been made by the defendant. These witnesses had already testified to all they knew about the subject—and indeed the court went very far in the exercise of its discretion in permitting the plaintiff to reopen his case for the very purpose of going into further detail on this point. The charge of the trial court seems to have been based on the theory that a defendant must explain, at all costs, and that if it cannot do so or does not do so, the mere fact of failing to make the explanation (even though it be impossible to make one) justifies the jury in concluding that there must be some mysterious and unrevealed negligence which caused the accident.

In the present case, the defendant's employees when called by the plaintiff testified fully and frankly on all points, and there is not the slightest

suggestion of any attempt to conceal the facts; on the contrary, one of the crew, when called as a witness by the plaintiff, was asked by the court whether he had any explanation of the accident, and he said that he had not (p. 187, lines 20-25); and after so testifying, the court again asked the same witness if he could account for the accident and he said he couldn't say what caused it (p. 189, line 40); and again, in answer to a question by the court if he had ever had such an experience before, he said that he had never had (p. 190, lines 20-25).

These inquiries were immaterial, as there was no obligation on the part of this witness or on the part of any other witness to speculate as to the cause of the accident; but the error was harmless as the witness was unable to hazard even a guess as to the cause of the accident.

The court, however, in the part of the charge above quoted, in effect penalized the defendant for failing to explain the unexplainable and permitted the jury to guess that simply because the accident was of an unusual nature, it may have been the result of some unspecified and unproved negligence.

In this connection we are also obliged to comment upon that part of the charge where, in dealing with the subject of *res ipsa,* the trial court told the jury that they might consider whether the mere declaration by the brakeman, produced by the *defendant,* that the brakes were efficient, was sufficient to satisfy them that they were (p. 199, line 35). This brakeman was *not* produced by the defendant, but was called as a witness by the plaintiff; and his testimony as to the condition of the brakes was uncontradicted. There was no attempt by the plaintiff to impeach the witness, even if he had the right to do so, having produced him as his own witness, and there is not the slightest suggestion of evasion or concealment on the part of the witness.

It is difficult to imagine what evidence *could* have satisfied the trial court that the brakes were efficient if he expressed a doubt (and permitted the jury to consider it) in regard to the *only* testimony on the subject, given by the plaintiff's own witness. He was the one person and the only person who had any occasion to use the brake shortly before the cars ran away.

The court further suggested to the jury in this connection that there was nothing to show that any test had been made to support the brakeman's declaration (p. 200, lines 1-10). But there was not the slightest suggestion by anybody that it was the custom to make any such test or that anybody had actually made such a test, either before or after the accident. This part of the charge in effect penalizes the defendant because somebody, in its behalf, had not made a test of the brakes on the cars which did not belong to the defendant, which had never actually been used by the defendant, and which at the time were not in the defendant's possession or control. Even assuming that there was any duty on the part of the defendant to test the brakes of foreign cars before hauling them on its line, the cars *were not yet* on its line; and even if they were, what better test could be made of the efficiency of the brake than to actually set it; what more could possible have been done by an expert mechanic or by any other employee of the defendant than what was actually done by this brakeman of twenty years' experience, who said that by pulling up the wheel he could feel the shoes take hold (p. 188, line 10).

Comment on Opinion and Brief.

The Supreme Court disposed of this point as follows:

> "We have examined the charge in this respect and we believe it was justified in the circumstances disclosed by the evidence. Such we believe to be the effect of our decision in McPherson vs. Hudson & Manhattan R. R. Co., 100 N. J. L. 262, affd. 101 N. J. L. 410" (p. 222, ll. 35-40).

The *McPherson* case was an action by a *passenger* who was caught between a sliding door opened by air pressure and the door jamb when the door suddenly closed while she was in the act of passing through same; it was held that the presumption was that the door had been negligently operated. In affirming the judgment of the trial court it was held by the Supreme Court that the doctrine of *res ipsa* applied, the court pointing out that "the plaintiff was a passenger. The defendant was a common carrier. A carrier is bound to use a high degree of care to protect a passenger from danger that foresight can anticipate" (100 N. J. L. 264).

In the Court of Errors and Appeals, although the judgment was affirmed, the opinion was qualified by a memorandum opinion wherein this court, after quoting that part of the opinion of the Supreme Court which dealt with the subject of *res ipsa,* said:

> "In *Hughes* v. *Atlantic City Railroad Co.,* 85 N. J. L. 212, a charge of the trial judge that 'when an accident of this kind happens to some of the means of transportation the law shifts the burden of proof from the plaintiff, as to the explanation or showing the actual cause, to the defendant, and imposes

> upon it the burden of making an explanation exculpating itself from negligence,' was held to place too great a burden on the defendant and the case was reversed. The opinion quotes with approval from Mr. Justice Dixon in *Whalen* v. *Consolidated Traction Co.,* 61 Id. 606, 'that when a passenger shows that he was injured through some defect in the appliances of the carrier, or through some act or omission of the carrier's servant, which might have been prevented by due care, then the jury have the right to infer negligence, unless the carrier proves that due care was exercised,' and the opinion concludes that the 'inference from the mere happening of the accident may be a legal inference in the sense that it is permitted by the law, but it is not a legal inference in the sense that it is required.' It is quite probable that the opinion of the learned justice in the Supreme Court in the present case was intended only to assert that the jury might infer negligence from the mere happening of the accident, but the language being susceptible of a broader significance, attention is called thereto that it may not be understood as modifying the rule laid down by this court in the case cited.
>
> The judgment of the Supreme Court will be affirmed on its opinion, except in so far as that opinion is qualified by this memorandum."

We submit that in the present case it was error for the trial court to permit the jury to find a verdict against the defendant "in the absence of explanation by the defendant."

A similar case is *Hagens* v. *West Englewood Lumber Co.,* 5 N. J. Misc. 825, where it was claimed that the trial court erred in charging the jury as follows:

> "This is an unusual occurrence, and it is for the defendant to explain to your satis-

faction that the defendant or its servant was not guilty of negligence in the manner in which these horses were handled."

Held, that the charge was erroneous, "as it placed upon the defendant the burden of exculpating itself, and this is not the rule even where the doctrine of *res ipsa loquitur* applies" (citing the *Hughes* case, *supra*).

In the brief in the Supreme Court, counsel for plaintiff argue that the mere happening of the accident "speaks" of the negligence of the defendant and requires the case to go to the jury unless the defendant presents a satisfactory explanation of the accident."

If this argument is sound, then in every case (including actions by employees) where the defendant has no direct knowledge or information as to the cause of an accident, but, nevertheless, through its witnesses tells the court and jury all that it has been able to ascertain in regard to the circumstances thereof, it is for the jury to say whether the defendant is negligent. We respectfully submit that this is extending the doctrine far beyond any case that can be found in the reports.

Counsel seem to think that a defendant must be penalized because it is unable to explain the unexplainable. This, in effect, permits the jury to guess both as to the cause of the accident and as to the negligence of the defendant respecting such cause and changes the rule that the burden rests upon the plaintiff to prove both the cause and the negligence.

Furthermore, the doctrine of *res ipsa* does not apply to a case where the "instrumentality or agency" is *not* under the control of the defendant. See *National Sheet Metal Co.* v. *N. Y. Telephone Co., supra.*

We, therefore, urge first, that the doctrine has no application whatever to the present case because the evidence is undisputed that neither the runaway cars, nor the brakes thereon, nor the derailing device between the defendant's main line and the yard of the Wharton & Northern Railroad Company, were under the management or control of the defendant; second, that it was error for the trial court to permit the jury to infer that the "instrumentality or agency" was under the control of the defendant where the undisputed evidence on that subject proved directly the contrary; and third, that if the doctrine did apply, the trial court erroneously charged the jury, in effect, that unless the defendant explained the accident they might find that the defendant was negligent.

POINT VI.

The trial court erroneously charged the jury on the subject of proximate cause.

[Grounds 13, 14, 18, 19, 20, 21.]

If the mere fact that the cars ran away should be considered evidence of inefficiency of the brake, still the trial court erroneously charged the jury on the subject of proximate cause. It is true that in his definition of negligence the trial court stated that the damages must be shown to be the natural and proximate effect of the alleged negligence (p. 196, line 35); but in discussing the specific points of negligence, which the trial court ruled were questions of fact for the jury, the question of proximate cause was not mentioned, and the question of liability was submitted without reference to the

question of proximate cause. Thus the court said (italics ours):

> "So that I submit to you as a proposition of law if you find under the greater weight of the evidence that either the railroad company failed to equip the cars in question or was responsible for the equipment of the cars in question with efficient hand brakes, *or* the employees of the company *acted carelessly* so as to bring them within the definition of negligence that I have given to you, then I say to you there can be a recovery in either aspect of the situation, provided the plaintiff has carried the burden of satisfying you under the greater weight of the evidence that the defendant company through its employees was negligent within the definition given you. I take it then that the issue is rather narrow and centers around the incidents with reference to the *handling of those two cars* or their proper equipment, because if there were inefficient hand brakes, so as to be a violation of the Safety Appliance Act, or the employees of the defendant railroad company *acted carelessly and negligently in moving those cars,* then I charge you that you may find (that is no direction, of course; it is a mere comment) that the plaintiff has established his case, assuming it be supported by the greater weight of the evidence" (p. 198, line 20, to p. 199, line 4).

This charge permitted the jury to find a verdict in favor of the plaintiff if the defendant's employees "acted carelessly," regardless of the question whether such conduct caused the accident.

Comments on Opinion and Brief.

The Supreme Court said:

> "We think this point also is without merit" (citing *Carey* v. *Deems,* 101 N. J. L. 419).

In that case the Supreme Court held that the refusal of requests to charge that the negligence must be a natural and proximate cause of the accident, and to define to the jury the meaning of the words "natural and proximate" was not error because the requests were in fact charged, except as to the definition of the words "natural and proximate," and that the failure to define them did not operate to the injury of the defendant because if the plaintiff's decedent came to his death through a collision of automobiles, which was due to the negligence of the defendant, that negligence was necessarily "the proximate cause of the injuries received by the decedent, and such injuries were the natural result of that negligence."

We respectfully submit that the case has no application to the present point where the criticism of the charge is that in explaining to the jury the possible theories upon which the defendant might be held responsible the trial court omitted to point out that the defendant could not be held liable unless the alleged negligence was the proximate cause of the accident. The question of proximate cause was of special importanct in a case where the plaintiff's chief claim was that there was a failure to comply with the provisions of the Safety Appliance Act. It is the law that while the failure to comply with the statute is enough to hold the company liable without regard to negligence, nevertheless such failure does not entitle the plaintiff to recover *unless* it is the proximate cause of the accident.

It is quite true that the trial court in one part of the charge stated that the damages must be shown to be the natural and proximate effect of the alleged negligence, but in the part of the charge quoted *supra*—where, for the first time, the trial

court indicated to the jury the specific points of negligence upon which the plaintiff relied (including the alleged violation of the Safety Appliance Act)—he failed to point out that the negligence must be the proximate cause of the accident before the plaintiff was entitled to recover by reason thereof.

Hence, the rule applies that an erroneous instruction, though accompanied by a correct one, is not cured by the latter. *State* v. *Topack,* 78 N. J. L. 208, and other cases cited under Point I.

POINT VII.

The trial court erroneously charged the jury that if they found the injuries were as claimed by the plaintiff, then he was entitled to recover a substantial sum therefor, thereby removing from the consideration of the jury the question of whether the plaintiff had proved any negligence on the part of the defendant or of its employees.

[Ground 27.]

After stating various possible grounds on which the defendant might be held liable, the trial court, near the end of the charge said:

> "I may say in passing that I do not recall any evidence of any expense incurred by this plaintiff in and about his cure; if there is any such evidence in the case it has escaped me, such as doctor bills, hospital bills, and so on; and I will ask counsel now if there is any such evidence in the case.
>
> Mr. Gebhardt: There is none.
>
> The Court: You will eliminate that phase from your consideration under this rule.

> Having passed upon the question of compensation for the personal injuries, I may say again in comment that if you find the injuries are as claimed by the plaintiff and that he has carried the burden of satisfying you under the greater weight of the evidence, then he is entitled to recover a substantial sum therefor" (p. 202, lines 12-28).

This was equivalent to a direction of verdict in favor of the plaintiff, leaving to the jury nothing more than a determination of the amount of the damages, together with a direct charge that if the jury found the injuries were as claimed, plaintiff was entitled to recover a substantial sum. Under such a charge the inevitable result was a large verdict for the plaintiff.

It may be claimed that the quoted part of the charge now in question was equivalent to a statement that the plaintiff would be entitled to recover a substantial sum only in the event that he had carried the burden of proving negligence. It is possible that this is what the trial court meant, but that is not what he told the jury. The reference to the weight of the evidence, as the charge reads, applies to the evidence as to the nature and extent of the injuries claimed by the plaintiff and not to the fundamental question as to whether there was any liability on the part of the defendant.

The recent decision of *Cox* v. *Rosenvinge,* 135 Atl. 59, in so far as relates to the objection to the charge now under consideration, is in point, and we quote therefrom as follows (italics ours):

> "One of the grounds relied upon for a reversal of the judgments * * * is directed at the following instruction of the trial judge to the jury:
>
> 'This lady (Mrs. Cox) is entitled to a verdict. She is entitled to a verdict for

> the pain and suffering she endured, for her permanent injuries. * * * Then she is entitled to compensation for any permanent injury that there is. Now, as to Mrs. Rice, if you believe that she suffered any injuries, and any pain and suffering she endured, she is entitled to be compensated for that.'
>
> This instruction was clearly erroneous, and manifestly was harmful to the defendants. *It took from the jury the question of liability on the part of the defendants, or one of them."*

Comment on Opinion and Brief.

The Supreme Court disposed of this point with the statement that it had "no substance" because in "the entire charge" the trial judge properly laid down the rules as to liability in the necessity of proving negligence (p. 223, lines 10-20).

Counsel for plaintiff argued in their brief that this part of the charge related to the subject of damages, and that it was not misleading as the court in other parts of the charge had dealt with the subject of liability.

It is quite true that in other parts of the charge the trial judge did deal with the question of liability; but it is equally true that in the part of the charge that is quoted the trial judge, in referring to the weight of the evidence, was referring *only* to the question of damages. This appears from the very next sentence following the quoted portion wherein he said, "In addition to that (that is, in addition to the claim for injuries) he claims a loss of ability to work, and *again* he must satisfy you under the greater weight of the evidence" (p. 202, line 30); and he then proceeded to point out the evidence which related to the earnings of the plaintiff and his loss thereof (p. 202, line 30, to p. 203, line 20).

It is apparent that the court said that "If you find the *injuries* are as claimed" that then the plaintiff "is entitled to recover a substantial sum therefor." It is possible that the trial judge did not *intend* to give the jury a charge which, in effect, directed them to find a verdict for the plaintiff, nevertheless that is the fair meaning of the words that were used. In the *Cox* case, *supra*, the trial judge, referring to the plaintiff, said, "*If* you believe that he has suffered any injuries * * * he is entitled to be compensated for that."

The charge, which was found erroneous, in that case is in effect the same as in the present case.

It is true that when we examine "the entire charge" there are several portions where the trial judge does not *direct* a verdict for the plaintiff, but that does not alter the fact that in part of the charge now under consideration he did so direct. Here, again, we have a situation where part of the charge is clearly wrong and another part may be right. As pointed out in the decisions cited under Point I, *supra*, the jury cannot be expected to distinguish between the part of the charge that is correct and the part that is erroneous.

POINT VIII.

The trial court erroneously admitted evidence as to the alleged custom of using or applying two hand brakes instead of one hand brake on freight cars.

[Ground 2.]

In the course of the examination of the plaintiff, his counsel asked the following question (italics ours):

> "Let us assume that two cars were put together on a side track and that the hand

> brake of each of those cars was fastened securely. Will you please tell me whether or not from your experience as a brakeman those cars would be held more or less securely there with *two* hand brakes instead of just one on *each* car, than they would be with only *one* hand brake set on *one* car" p. 46, line 35, to p. 47, line 10).

Objection was made to this question on the ground that there was no duty or any rule or regulation which required that two brakes be set. Counsel for plaintiff was thereupon asked by the court if he intended to connect this claim with a "standard order." The question was allowed on the assurance by counsel that he proposed to so connect the point. The court itself thereupon put the question in this form:

> "Which is the safer, two brakes or one?"

and the witness answered:

> "Two brakes" (p. 47, lines 30-35).

It will be observed that the question related to the application of two brakes on *each* car as compared with the application of one brake on each car.

Counsel for plaintiff failed to show any connection between this evidence and any rule or regulation either of the company or of the Interstate Commerce Commission.

The subject is regulated by a specific rule of the Interstate Commerce Commission made pursuant to the Act of April 14, 1910. The order of the Commission, dated March 13, 1911, entitled "In the Matter of designating the number, dimensions, location and manner of application of certain safety appliances," goes into great detail as to the construction and application of various appliances, including hand brakes; not only does the order itself describe the method of construction and application, but attached thereto are various diagrams giving the exact details thereof.

Under the general title "Box and Other House Cars," the order has the following provision:

> "NUMBER: Each box or other house car shall be equipped with an efficient hand-brake which shall operate in harmony with the power-brake thereon.
>
> The hand-brake may be of any efficient design, but must provide the same degree of safety as the design shown on Plate A.
>
> DIMENSIONS: The brake-shaft shall be not less than one and one-fourth (1¼) inches in diameter, of wrought iron or steel without weld.
>
> The brake-wheel may be flat or dished, not less than fifteen (15), preferably sixteen (16) inches in diameter, of maleable iron, wrought iron or steel.
>
> LOCATION: The hand-brake shall be so located that it can be safely operated while car is in motion."
>
> *Thornton Federal Employers' Liability Act* (Third Ed.), p. 614.

It will be observed that this order does *not* require two brakes on each car; on the contrary, it requires each car to be equipped with *an* efficient hand brake. The other parts of the order and the part attached thereto give the dimensions of the brake shaft, the location of the hand brake and other details of construction. Nowhere in the order is there any requirement or even a hint that there shall be more than one hand brake on each car.

In view of the claim by the plaintiff, especially in view of that part of the charge which dealt with the subject of hand brakes and the possible causes of the accident, it is apparent that this evidence affected the substantial rights of the defendant.

The evidence was clearly improper, not only because the plaintiff failed to prove any rule or custom on the part of the defendant to have more than one hand brake on each box car, but also because *it was directly contrary to the regulation of the Interstate Commerce Commission, which would be controlling on all concerned, even if there had been a rule or custom of the defendant to the contrary.*

Comment on Opinion and Brief.

In discussing this point the Supreme Court said (italics ours):

> "We think that a careful examination of the record will disclose that this contention is not well founded *in fact.* We think that it appears with reasonable clearness that the question said to be objectionable was with respect to *one* brake on each car. This, of course, was not only relevant, but *of the utmost importance,* particularly in view of the fact that it appeared in the case that the brake was set only on one of the cars" (p. 223, lines 20-30).

There is one part of the opinion of the court below with which we agree, namely, that the evidence to which objection was made was "of the utmost importance." But the Supreme Court holds that the evidence related to *one* brake on each car. But an examination of the evidence on that subject, we respectfully submit, does not justify any such conclusion. The question to which objection

was made occurred in the direct examination of the plaintiff. His attention was directed to the supposed case of two cars that are hooked together and he was asked what the custom was with respect to the hand brake, whether it would be put on one car or on both cars. He did not answer the question directly, saying that "Some have hand brakes on and some don't and some have got two, and with two cars they are supposed to put both brakes on" (p. 46, lines 20-25). It will be noted that the answer is not clear as to whether the witness meant that both brakes are to be set on those cars that are equipped with *two* brakes.

Then followed the question to which objection was made (p. 46, line 35, to p. 47, line 10).

The question clearly relates to the setting of *two* brakes on each car, in cases where the cars are equipped with two brakes.

In the present case there is no evidence to show whether *either* of the two cars had more than one brake. Peterson said that he applied "the" brake on the Michigan Central car (p. 187, line 30). But it does not follow that there may not have been another brake on the same car which was not applied.

Peterson further said that at the point where these cars were standing a "good" brake would hold three or four cars (p. 189, lines 25-30).

Counsel for plaintiff argue in this connection that the jury are entitled to infer from their own knowledge "that it would have been safer to secure a hand brake on each car instead of on only one of the cars." Of course, the jury must be bound by the evidence rather than by what they know or think they know with respect to train operations. But, in any event, Peterson's testimony shows, without contradiction, that the brake which

he applied to the Maine Central car was sufficient to hold not only the two cars but three or four cars, if there happened to be that many at that point in the Wharton & Northern yard.

POINT IX.

The trial court erroneously admitted argumentative evidence as to the position and condition of the derail on the switch connecting the tracks of another company with the track of the defendant.

[Grounds 5, 6 and 7.]

One Potter, the engineer of one of the engines that was drawing the eastbound freight train, testified that at about 3 o'clock in the morning he saw the two box cars as they were moving out of the switch of the Wharton & Northern Railroad Company on to the main line of the defendant (p. 159, line 20, to p. 160, line 25). His examination then proceeded as follows:

> "Q. This derail that you spoke of, at the time that you saw these two cars going out, going east, starting on that runaway trip, was that derail on or off the track at that moment?
>
> Mr. Selser: Objected to, because it is not in the pleadings. There is no allegation of improper operation of the derail. There is an allegation that we did not provide tracks with proper derail, and he has shown that there is a derail.
>
> The Court: The objection is overruled.
> Mr. Selser: To which we except.
> The Court: Exception granted.
>
> A. The derail must have been off if they went out of the switch.

> Mr. Selser: I move to strike that out as not responsive.
>
> *By the Court.*
>
> Q. How could they possibly have gotten out of the switch? Was the derail on or off when they got out of the switch? A. It must have been off.
>
> Q. Could they have gotten out if it was on? A. No, sir.
>
> Mr. Selser: I object to all of this, because it is speculative" (p. 160, line 32, to p. 161, line 25).

All of the objections stated by counsel to this line of inquiry were sound and should have been sustained.

In the first place there was no proof that the derail itself was not sufficient.

In the next place there was no proof that the defendant was legally responsible either for providing or maintaining the derail.

In the next place the witness did not make a responsive answer to the question—no doubt for the very obvious reason that he did not actually know what the fact was as to whether the derail was on or off.

In the next place the answer that he finally made in response to argumentative questions propounded by the court itself was pure speculation.

This evidence was clearly prejudicial to the defendant—particularly when the court itself participated in the argument with the witness.

Comment on Opinion and Brief.

The Supreme Court held there was no error in permitting this evidence because the testimony was not "argumentative" but was "rather the testimony

of an expert in railroad operation" (p. 223, lines 25-40).

Counsel for plaintiff argued that the testimony was admissible on the theory that the witness Potter was an expert and it was, therefore, proper for him to state a conclusion as to whether the derail was "on or off" at the time the cars ran away.

It should first be observed that Potter did not claim to be an expert and was not called as such. He was a locomotive engineer and was presumably familiar with locomotives—although counsel for plaintiff avoided qualifying him as an expert and did not even undertake to show how long he had been engineer or what experience he had had in operation. His entire testimony will be found at pp. 157 to 163, and 184, 185. There is not a word in his testimony to show any familiarity on his part with derails or the construction or operation thereof.

Furthermore, it should be remembered that there is no claim whatever in the the complaint that the derail did not *operate* properly; the only charge against the defendant in that respect is that it failed to *provide* good and sufficient derailing devices for the purpose of derailing runaway cars (p. 22, lines 10-15). This objection was made as soon as the question on that subject was asked to the witness (p. 160, line 38).

Likewise, there was neither allegation nor proof that the derail was not "good and sufficient."

And, finally, there is no proof that the derail was either on the property of or under the control of this defendant; and neither is there any proof that the defendant was under any legal duty either to provide or maintain the derail.

In short, the testimony to which objection was made was mere speculation by a witness who did

not claim to be an expert on the subject of the inquiry and was not proven to be such expert, and the testimony dealt with a subject which was not put in issue by the complaint; and even if it was one of the issues, the record is barren of evidence to show negligence in that respect.

For all these reasons the evidence was inadmissible and the action of the trial court in permitting the question to be answered (and in asking a similar question of its own motion) was prejudicial.

POINT X.

There was error on the part of the trial court in the admission and exclusion of evidence relating to the nature and extent of the plaintiff's injuries.

[Grounds 4, 1 and 3.]

The complaint alleged in general terms that by reason of the accident the plaintiff was "greatly bruised, wounded and injured" (p. 23, line 1).

The medical evidence on both sides went into elaborate details, and there was a sharp dispute as to the nature and extent of the plaintiff's injury.

The claim of the plaintiff was that he was knocked unconscious and that a hole was cut through his forehead—the cut being above the eye on the right-hand side (p. 32, line 35; p. 33, line 35); also that one or two ribs were broken and that his left shoulder and side and right knee were bruised (p. 34, lines 20-30).

He was in the hospital four days (p. 33, line 30); and at times for a period of three months had nosebleed (p. 34, line 30).

At the time of the trial on October 26, 1926, he claimed that his shoulder and knee were still lame (p. 35, line 40); he also claimed that at the time of the trial he had headaches about every day; that he got dizzy after he walked "a little fast" and had a "rumbling" in his head (p. 36, lines 1-20).

He further claimed that he could not raise his left shoulder and that he had difficulty in walking when he went up the stairs (p. 36, line 30). The ribs "seem to be pretty fair" (p. 36, line 38).

He further claimed that he could not hear as well as before the accident and that he had lost his ambition (p. 37, lines 20-40).

He further claimed that at the time of the accident his eyes were filled with cement and that he does not see as good as he did before the accident (p. 39, lines 1-20).

He has not gone back to his work as a brakeman since the accident as he did not feel able to do so; but has never had an examination as to his ability to do such work (p. 40, line 10; p. 41, line 5).

His wages were about $50 a week.

The principal medical dispute was whether there was a fracture of the plaintiff's skull; plaintiff's doctors claimed that there was a fracture of the frontal parietal region and that this was indicated by certain lines on X-ray pictures (p. 64, lines 10-20).

The defendant's physicians claimed, on the other hand, that the pictures did not show any evidence at all of fracture and that the "lines" were merely arteries (p. 127, lines 20-30; p. 133, line 40; p. 134, line 20).

The defendant further claimed that the vision of the plaintiff was normal for a man of his age (fifty-six years) and that all that he needed to have good vision was a pair of eyeglasses; the

trouble with the nose was due to an infection of the sinus (p. 152).

It, therefore, appears that there was a very sharp issue as to the nature and extent of the plaintiff's injuries and whether the same were caused in whole or in part by the accident.

The defendant claims that in view of this decided difference of opinion there was prejudicial error in the admission and rejection of certain medical testimony, as follows:

(a) *Admission of evidence as to physical condition of plaintiff.*

[Ground 4.]

The plaintiff called as one of his witnesses Dr. Frank Wolfe, who said that he had made two examinations of the plaintiff for the purpose of testifying; both of these were made a few days before the trial (p. 96, line 15). He had practiced medicine in Phillipsburg for fifteen years, the first eight years he did "eye work" and the next seven years he specialized in surgery.

He was asked the following question:

"Q. You said you made an examination of Mr. Hendershot. What condidtions did you find?"

The record then shows the following:

"Mr. Selser: That is objected to. As to what, eyes or what?

Mr. Gebhardt: All conditions he found on examination.

The Court: Objection overruled.

Mr. Selser: To which we except.

The Court: Exception for the defendant" (p. 96, lines 20-30).

The doctor then proceeded to testify as to *all* conditions (including the plaintiff's skull) and said he found the following abnormalties:

1. Scar over the right eye and a "ridge" on palpation (p. 96, line 35).

2. Defective vision caused by terregiums in both eyes (p. 97, line 15).

3. Very defective hearing (p. 97, line 35).

4. Wound over the chest (p. 98, line 15).

5. The twelfth rib on the left side was "protruding" (p. 98, line 16).

6. Limitation of motion in the left shoulder to the extent of loss of about one-third (p. 98, line 20).

7. Loss of about one-half of the function of the left elbow (p. 98, line 35). (Due to a previous injury.)

8. Loss of part of thumb on left hand (p. 98, line 38). (Due to previous injury.)

He then gave his opinion as an expert on the following points:

1. That the "ridge" above the forehead "may be the result of a fracture" (p. 99, line 25).

2. That the nosebleed and headaches came from the fracture (p. 100, lines 10-30).

3. That the vision did not come from the fracture (p. 100, line 18).

4. That the shoulder condition was caused by contraction of the muscles around the shoulder joint (p. 100, line 40), and that this could be the result of a blow (p. 101, line 20).

5. That he believes the conditions are permanent (p. 101, line 25).

6. That the ear condition is probably due to inflammation in the middle ear resulting from the extension of the infection (p. 101, line 30).

7. That the conditions were such that plaintiff would not be able to perform his duties as a brakeman (p. 102, lines 1-25).

It will be observed that this witness testified to many conditions and expressed various opinions as to numerous matters concerning which he was not a specialist and did not claim to be an expert.

It may be that the witness was competent to testify as to the condition of the eyes, as he had been an eye specialist, and also as to the condition of the left shoulder, as he specialized in surgery.

But he was not qualified to testify as to "all conditions" nor to express an opinion based upon the conditions that he found, such as the alleged defective hearing and the alleged fracture of the skull, and the cause of the nosebleed and headaches.

(b) *Admission of evidence as to inability of plaintiff to resume his duties as a brakeman.*

[Ground 1.]

The plaintiff testified that, among other disabilities resulting from the accident, was a bruise of his left shoulder and that the shoulder was still lame. He said that he had not gone back to his work since the accident that he "didn't feel able to go back" (p. 40, line 10). The evidence on this subject then proceeded as follows:

"Q. Why do you say that you are not able to go back and do that work of brakeman?

Mr. Selser: I object.

The Court: Objection sustained.

Mr. W. Reading Gebhardt: May I state my grounds for the question?

The Court: Yes.

Mr. W. Reading Gebhardt: The purpose of asking the question was to permit the witness to explain to the jury how the various disabilities he now complains of interfere with his work, or occupation of brakeman, he having been a brakeman for a long period of years and thoroughly familiar with the duties of a brakeman and knows how these disabilities would interfere with it.

The Court: Do you think it rests with him to say whether he is able to go back or not?

By the Court.

Q. Have you submitted to any examination as whether you are able to go back or not? A. No, sir.

Q. And all you say is you do not feel physically able to go back to work? A. No, sir. When I go back to work I have to do my work, and I do not think I can do it. I do not think my head would let me do it.

Q. You do not feel physically fit, then, to go back? A. No, sir. With my knee I could not jump cars.

By Mr. W. Reading Gebhardt.

Q. How would the condition of the left shoulder—would that interfere any with your occupation of brakeman? A. I could not get up a ladder——

Mr. Selser: I object.

The Court: Well, he has been a brakeman.

Mr. Selser: He does not know whether or not he can do it, because he has not tried.

By the Court.

Q. Have you tried any of these things? A. I have not.

Q. It is just your feeling that you are not physically fit to do it? A. Yes, sir.

The Court: That is the reason. What weight it will have with the jury is for the jury to say.

By Mr. W. Reading Gebhardt.

Q. Take the condition of your left shoulder. Will that interfere or not?

Mr. Selser: I object.

The Court: Objection overruled. You may have an exception.

Q. To what extent, if any, would the condition of your left shoulder interfere with your duties as brakeman? A. I do not think my left shoulder will allow me to pull a switch, either.

The Court: Have you tried it?

The Witness: No.

Q. Have you tried to do other things with it? A. I used to exercise with it, and everything else, hoping it may get better, but it hasn't got better since.

The Court: Have you tried work that would require the strength required to turn a switch?

The Witness: No, sir. I have not touched a switch.

Q. Do you have all the movements of your shoulder that you had before, and that a brakeman would have to have in climbing around cars, and all those things? A. No, I do not think I have.

Q. Why not? A. I do not think I would be able to do it.

The Court: Well, you have not tried?

The Witness: I have not tried it, no, sir.

Q. What is wrong with your shoulder—how does any condition there interfere with the use of it? A. I cannot raise it only up so high.

Q. How would that interfere with your duties of brakeman? A. I would have to be very active to get hold of a ladder and get on a car or on an engine, and I would have to have the use of it.

By the Court.

Q. You say you could not lift that hand to catch a ladder and climb? A. Not quick enough, I couldn't.

Q. What is the matter with your shoulder? A. Well, it is lame; it got hurt in some way. It catches me right in here (indicating).

Q. It does now? A. A little bit, yes, sir" (p. 40, line 18, to p. 43, line 20).

It will be observed that the witness was permitted to express an opinion as to whether the condition interfered with his duties as a brakeman, although it appeared from his own testimony that he had made no actual test to see to what extent, if at all, the condition would so interfere.

One of the principal claims of the plaintiff was for loss of wages in the future because of this alleged inability, and hence the admission of evidence on this point, in the absence of any proof that the condition of the left shoulder would in fact reduce his earning capacity, was clearly prejudicial.

(c) *Exclusion of evidence on cross-examination of one of plaintiff's experts relating to skull fracture as indicated by X-ray pictures.*

[Ground 3.]

Dr. F. A. Sherrer was called by the plaintiff as an expert roentgenologist. He testified that he

took several X-ray pictures of various parts of the plaintiff's body, including two pictures of the skull (marked Plaintiff's Exhibits 2 and 3). These were taken on March 18, 1926 (p. 62, line 20, to p. 63, line 30).

He testified that Exhibit P-2 did not show any abnormality, but that Exhibit P-3 showed a fracture "starting in the frontal region, running downward towards the sinus of the sphenoid bone" (p. 63, line 10; p. 64, line 5).

He then expressed the opinion that the fracture ran into the sinus and was responsible for the nosebleed and other conditions from focal inspections (p. 66, line 20, to p. 67, line 10).

He further said that this infection was largely responsible for the stiffness of the shoulder and of the knee joint; and that there was likewise a connection between this condition and the impairment of the hearing; and likewise that he thought this condition was the cause of the plaintiff's dizziness (p. 67, line 20, to p. 70, line 20).

And finally he expressed the opinion that all of the conditions stated in an assumed question was the result of the accident (p. 72, line 18).

It will, therefore, be observed that according to this witness practically all the disabilities (except impaired vision) from which the plaintiff claimed to be suffering were caused by the alleged fracture of the skull. Hence, the question of whether such fracture actually existed became the principal issue in the case so far as related to the nature and extent of the plaintiff's injuries, and his inability to resume his duties as a brakeman by reason thereof.

On cross-examination the doctor stated that there was no doubt that the plaintiff's X-ray pictures showed a fracture (p. 73, line 40).

He then said that by reference to both Exhibit P-2 and Exhibit P-3 he concluded that there were

two fractures (p. 85, lines 30-40). Thereupon counsel for the defendant produced an X-ray plate (marked D-1 for Identification) and asked the expert to look at part of it through an opening about four inches wide and five inches long in two sheets of cardboard; the exposed part of the X-ray being visible through the hole and the balance of the X-ray being covered by the cardboard (p. 86, lines 1-20; p. 214, lines 30-40).

Exhibit D-1 for Identification was a radiogram showing the right lateral of the skull of the plaintiff as taken by Dr. Wyatt (p. 127, lines 1-10).

Plaintiff's alleged expert said that by looking at the double cardboard with a hole in the center and a black object in the middle, he could say it was an X-ray film (p. 81, lines 10-12). The examination of the witness then proceeded as follows:

"Q. Are you able to say from the examination of this document, marked D-1 for Identification, what part of the anatomy it is an X-ray film of?

Mr. W. Reading Gebhardt: I object to that.

The Court: Objection sustained.

Mr. Selser: I ask an exception.

The Court: You may have an exception. Now, the court will put on the record that counsel for the defendant, in cross-examining a doctor, who is a witness for the plaintiff, produces an X-ray which has not in any way been identified or offered in evidence, and, while he claims the right to cross-examine the doctor by producing it and asking questions about it, the court now rules that, the doctor having already testified that he does not know the method in which it was taken, with what machine, and the X-ray itself is not in evidence, the Court now sustains the

objection to the last question. You may have an exception.

Mr. Selser: May I suggest to your Honor that you undoubtedly misunderstood the witness? He said he was going to be as particular as I was and demand an explanation. The question was an attack on the credibility and general experience.

Mr. W. Reading Gebhardt: May I add, for the purpose of the record, that the X-ray film in question appears to be a film about 14 inches square, surrounded on each side by cardboard, heavy cardboard, through which it is impossible to see, and out of which a hole is cut on each side somewhere in the center, about 3 inches square?

Mr. Selser: That is correct. I will ask that the film itself be marked D-1 for Identification and the other cardboard so marked. Now, we will expose the film.

Q. Now, are you able to tell what portion of the anatomy the film marked D-1 for Identification shows?

Mr. W. Reading Gebhardt: I object to that unless it is shown of whom this picture was taken, under what circumstances it was taken, and of what kind of a skull it was taken, and of whom it was taken. It is entirely incompetent, irrelevant and immaterial unless that is shown and unless such a foundation is laid for the question.

The Court: I will allow the doctor to answer. You may have an exception.

(Last question read.)

A. A skull.

Q. Can you indicate upon the X-ray the shadow of the skull suture? A. Yes, sir.

Mr. W. Reading Gebhardt: We object to that on the same ground.

The Court: The objection is overruled. He may answer.

The Witness: Yes, sir.

Q. Can you indicate upon that film the shadow of the middle meningeal artery? A. Yes, sir.

Q. Will you indicate to the jury— It is not in evidence——

The Court: No. You cannot do that.

Q. Can you see any evidence of skull fracture in that?

Mr. W. Reading Gebhardt: We object to that on the ground it is incompetent, irrelevant and immaterial as far as this case is concerned.

The Court: Yes. Objection sustained.

Mr. Selser: We ask an exception.

The Court: You may have an exception.

Mr. W. Reading Gebhardt: The picture in question is not in evidence.

The Court: It is merely marked for identification.

Mr. Selser: I am not asking him to indicate to the jury, of course" (p. 87, line 12, to p, 89, line 27).

The ruling of the trial court on this line of examination seems to have been based on the theory that the picture to which the expert's attention was called was not yet in evidence; but, of course, that was not a proper reason for overruling such evidence—particularly when the expert himself, before this question was asked him, had recognized the black object in the middle of the cardboard as an X-ray film (p. 87, line 12).

This error was not cured by the statement of the trial court that an answer might be given to the question with the idea that it related solely to a

test of the doctor's ability and that he would allow an answer for that purpose only (p. 90, lines 1-30).

The purpose of the question was not only to test the ability of the doctor as an X-ray expert, but was intended to go further and show that the very picture which he himself recognized as an X-ray film did not in fact show any evidence of skull fracture. The expert himself admitted that the picture in question indicated the shadow of skull suture and also indicated the shadow of an artery (p. 88, line 5, to p. 89, line 12).

We submit that the defendant was entitled to have an answer to that question without any comment or criticism on the part of the court and without any limitation of the purpose of the question, especially in view of *the fact that the film which was shown to the expert was in fact a picture of the plaintiff's skull* as taken by Dr. Wyatt (p. 127, lines 1-10).

An inspection of Exhibit D-1 shows that the name of the plaintiff appears at the lower left-hand corner; and, of course, the purpose of concealing temporarily the name that appeared on the face of the film was to ascertain, if possible, whether the expert was prepared to say if there was any evidence of skull fracture in the film without his knowing that it was in fact an X-ray of the plaintiff's skull.

Of course, when all the film was exposed by counsel (p. 88, lines 16-18), the expert was at once advised of the fact that the name of the plaintiff appeared on it and he could have, if he so desired, shaded his testimony. Hence the suggestion of the trial court (*which was made after the film had been exposed*) was ineffective to cure the previous error in overruling the question as originally propounded.

Comment on Opinion and Brief.

The Supreme Court, in its opinion, disposed of this point by stating:

> "It is next said that there was error on the part of the trial judge in the admission and exclusion of evidence relating to the nature and extent of the plaintiff's injuries.
>
> To that we deem it sufficient answer to say that we have examined the testimony admitted, and that excluded, involved in this point, and we find none of it which we deem to be prejudicial to the defendant" (p. 224, lines 1-13).

The court apparently concedes that some or all of the testimony was inadmissible, but states that none of it was "prejudicial."

Counsel for plaintiff argued that admission of the evidence was harmless because the witness testified "a great length, with respect to the plaintiff's condition in all respects."

If such argument is sound then all that is necessary in order to destroy the effect of a proper objection is to have a medical witness testify "at great length" on part or all of the subject concerning which objection is made.

Counsel apparently think that it was the duty of the defendant's attorney to *qualify* the plaintiff's witness, thereby reversing the usual rule that a party who offers a physician or other witness as an expert must *first* qualify him before his testimony is admissible.

As to the view of the Supreme Court that this testimony was not *prejudicial,* we can only say that it is difficult to understand what could be more prejudicial to the defendant than to permit an alleged expert to testify on conditions with which he was not shown to be familiar.

Counsel apparently think that the defendant is objecting to *all* the evidence of the medical "expert." This, of course is inaccurate. As we pointed out in our brief in the Supreme Court, and have repeated *supra,* this witness (Dr. Wolfe) claimed to be a specialist only in "eye work" and "surgery" (p. 96, line 20). But he testified to numerous conditions which were obviously outside his particular line of practice, especially on the subject of the alleged "fracture" of the skull and the alleged inflammation in the plaintiff's middle ear.

So far as relates to the action of the trial court during the cross-examination of another witness, we have indicated, *supra,* that it was important to defendant to be permitted to show by proper cross-examination that this witness (Dr. Sherrer), although claiming to be an expert on the subject of skull fractures was in fact not familiar with the condition of skulls, as revealed by X-ray photos (including the plaintiff's own skull). One of the principal claims of the plaintiff related to the alleged fracture of the skull, and, hence, the admission of testimony on this subject from an alleged expert who was not as expert as he claimed, was prejudicial.

POINT XI.

For these reasons the judgments of the Supreme Court and of the Warren County Circuit Court should be reversed and a new trial ordered.

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NEW JERSEY
Court of Errors and Appeals

JAMES HENDERSHOT, Plaintiff-Respondent, vs. NEW YORK, SUSQUEHANNA & WESTERN RAILROAD COMPANY, Defendant-Appellant.	**Action At Law.** **On Appeal From the Supreme Court.**

Brief for Plaintiff-Respondent

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Of Counsel.

NEW JERSEY
Court of Errors and Appeals

JAMES HENDERSHOT, Plaintiff-Respondent, vs. NEW YORK, SUSQUEHANNA & WESTERN RAILROAD COMPANY, Defendant-Appellant.	**Action At Law.** **On Appeal From the Supreme Court.**

Brief of Plaintiff-Respondent

STATEMENT OF FACTS.

This is an appeal from the judgment of the Supreme Court which affirmed the judgment of the Warren County Circuit Court entered upon the verdict for the plaintiff in an action instituted by him against the defendant company to recover damages for very serious personal injuries sustained by him while in the employ of the defendant in the capacity of brakeman on June 23, 1925. The action was based on the United States Federal Employers' Liability Act and the Safety Appliance Act. It was admitted that both the plaintiff and the defendant were engaged in interstate commerce at the time of the accident.

The accident happened about three o'clock in the morning, when, of course, it was dark. The defendant's road at the point where this accident occurred,

consists of a single track, and the plaintiff was the head brakeman of the crew of a freight train that was proceeding on a journey from Little Ferry Junction to Beaver Lake, in this State, and which train was going in a westerly direction. The train was pulled by two engines, and the plaintiff was riding on the first of the two engines in the fireman's cab, where his duties required him to be, for the purpose of throwing the switch for his train, at what is known as Kinney's switch, where his train had orders to pass another train of the defendant that was en route and going in an easterly direction. Hendershot's train had not yet arrived at Kinney's switch at the time of the accident.

There was a heavy descending grade at this point going in an easterly direction, all the way from Green Pond Junction down to the place of the accident, and there was also a curve in the track. There were no automatic block signals on the line at this point. As the plaintiff sat in the cab of his engine, he suddenly saw two freight cars coming down the grade in an easterly direction toward his train, at a very high rate of speed. An instant later they crashed into his engine with the inevitable result that the plaintiff's train was wrecked, and the plaintiff was severely injured.

The two runaway cars which caused the wreck were loaded with cement, and had gotten away from the crew of the defendant operating another train which was then coming in an easterly direction. This train had orders to pass Hendershot's train at Kinney's switch, and so, the crew was aware that this specific train was coming in the opposite direction. The east-bound train stopped at what is known as Green Pond Junction, and had orders to pick up the two cars of cement there.

The crew handled these two cars and placed them on one of the tracks at this junction with the idea of

later attaching them to their train when they were ready, and taking them with them. One of these cars was a Maine Central car, and the other a Philadelphia & Reading car. They were coupled together, and the hand brake appears to have been set to some extent on the Maine Central car, but very evidently was not in an efficient and proper condition for it did not hold the cars. Moreover, the crew failed to set the hand brake on the Philadelphia & Reading car, despite the fact that the rules of the company required that the hand brakes on both of these cars should be set under these circumstances, and it was also the custom so to do, (page 46, ll. 18-35). There was some evidence that wooden blocks were placed under these cars but this appears to have been done in a negligent manner, for the blocks were of no avail in preventing the cars getting away. There was a derail on this track between these cars and the main line track of the New York, Susquehanna & Western Railroad, which would have prevented these cars from getting out on the main line track, and would have prevented the accident, (page 48, ll. 29-31), but the crew failed to place this derail in position on the track, so, of course, it afforded no protection.

The consequence was that a short time thereafter, one of the engineers of this train saw the two cars going out of the switch and out on the main line track, which was the beginning of their runaway journey. This engineer took his engine, and together with another engine, coupled to it, gave chase to the cars, and although they attained a speed of thirty miles an hour, and went a distance of one mile and one-half to Kinney's switch, they were unable to even catch sight of the runaway cars.

It is of great importance to note that defendant made absolutely no attempt whatsoever to give any explanation for the happening of this accident.

POINT No. 1.

THE TRIAL COURT CORRECTLY REFUSED TO CHARGE THE DEFENDANT'S REQUESTS TO CHARGE TO WITHDRAW CERTAIN ALLEGATIONS OF NEGLIGENCE FROM THE CONSIDERATION OF THE JURY, AND CORRECTLY SUBMITTED THE CASE TO THE JURY.

The first point taken up by counsel for the defendant in their brief is to the effect that the trial court erroneously refused to charge the defendant's requests to charge withdrawing certain allegations of negligence from the jury, and also allowed the jury to consider allegations of negligence concerning which there was no proof.

A.

We desire to first take up the matter of the action of the trial court in refusing the defendant's requests to withdraw the allegations of negligence from the jury. We insist that the trial court was entirely correct in such action.

The defendant's requests asked the court to withdraw from the consideration of the jury the following points:

1. The negligent operation of the west bound train which was the plaintiff's train.
2. The speed of the west bound train.
3. The failure to keep a lookout on the part of the engineer of the west bound train.
4. The failure on the part of the west bound train to receive orders or signals when it was safe to proceed.
5. The negligent operation of the east bound train.

6. The inefficient and defective condition of the brakes on the two cars which ran away.
7. The failure to provide signals, warning one train of the approach or presence of another train, on the same track.

We contend that the court was entirely correct in refusing to charge these requests to charge, for the court had already in its charge clearly defined what the issues of the case were, and stated to the jury specifically that they consisted of the question of inefficient brakes and the negligent handling of these two runaway cars. The charge was perfectly lucid and unambiguous in this respect, and the jury could not possibly have been misled. We quote the following from the charge (p. 198 l. 3 to p. 199, l. 6).

> "The defense appears to be (and that is a mere comment of the Court, you will understand) that there was no negligence on the part of the defendant railroad company; **but in any event, while the plaintiff in his complaint charges a series of alleged acts of a negligent character on the part of the defendant railroad company, I think that you will find, when you come to consider the case, that the issue narrows down to the question as to whether or not the runaway cars had been properly equipped with efficient hand brakes or whether the employees of the defendant company in moving the cars in the yard of the railroad to which reference has been made, and the name of which I do not now recall, acted negligently and carelessly. So that I submit to you as a proposition of law** if you find under the greater weight of the evidence **that either the railroad company failed to equip the cars in question or was responsible for the equipment of the cars in question with efficient hand brakes, or the employees of the company acted**

carelessly so as to bring them within the definition of negligence that I have given to you, then I say to you there can be a recovery in either aspect of the situation, provided the plaintiff has carried the burden of satisfying you under the greater weight of the evidence that the defendant company through its employees was negligent within the definition given you. **I take it then that the issue is rather narrow and centers around the incidents with reference to the handling of those two cars or their proper equipment, because if there were inefficient hand brakes, so as to be a violation of the Safety Appliance Act, or the employees of the defendant railroad company acted carelessly and negligently in moving those cars, then I charge you that you may find** (that is no direction, of course; it is a mere comment) **that the plaintiff has established his case, assuming it be supported by the greater weight of the evidence."**

The rule is well settled that if the trial court has accurately defined the issues as was done here, not only once but three different times, and in such a clear and unmistakable manner, it is then unnecessary to charge such requests as these, and in fact, to have charged them would only have tended to have confused the minds of the jury after they had had the two simple questions at issue in the case so clearly pointed out to them. It has always been considered sufficient to thus define the issues without going all through the complaint and pointing out the allegations of negligence not to be considered, and this method is obviously conducive to greater clarity in the charge.

Counsel for defendant seem to assume that the trial court had read the whole complaint to the jury, which set up numerous allegations of negligence, and that he thereby in some way misled the jury and gave

them the impression that there was evidence for it to consider on all of these points. **But the court did nothing of this kind whatsoever; on the contrary he clearly limited the issues to be considered by the jury.**

Counsel endeavors to introduce into the practice of this state an entirely new and foreign principle, namely, that where a number of allegations of negligence are set up in the complaint, it is incumbent upon the trial judge to specifically charge the jury that certain allegations of the complaint have not been proved when the jury has not even seen the complaint. There is no more necessity of this being done by the trial judge than there would have been of his charging the jury that it could not consider the allegation of contributory negligence which was set up as a defense, although there was absolutely no evidence of contributory negligence.

Such has never been the practice in this state, and it is highly significant that all the industry of counsel for the defendant has been unable to discover a single case in this state that laid down any such rule, for the obvious reason that our courts have never adopted any such principle.

On the contrary, the Supreme Court (Chief Justice Gummere and Justice Trenchard sitting) in the case at bar, expressly held that so long as the trial court had correctly defined the issues to be considered by the jury, it was not error for the trial court to refuse the Requests. We quote from the opinion of the Supreme Court at page 221, l. 35 to page 222, l. 10.

> "It is again urged that the trial court erroneously permitted the jury to consider allegations of negligence concerning which there was no proof, and erroneously refused defendant's requests to withdraw such allegations from the jury.

When these requests are examined, we find no error prejudicial to the defendant in the refusal to charge them, in view of the fact, as we believe it to be, that the trial judge limited the charges of negligence to be considered by the jury to failure to properly equip the cars, and carelessness in the hauling and handling of the cars."

A somewhat similar situation existed in the case of Smith vs. Irwin, 51 N. J. L. 507. The Court of Errors and Appeals dealt with it in the following language at page 511:

"As to the matters contained in the first, second and fourth requests, the law had been fully, clearly and accurately given to the jury, and it was not error in the court to refuse to repeat the legal propositions which had been so well presented. In fact the jury might have been embarrassed, if not misled, by the mere statement of general rules of law, without a reference to the facts and a repetition of portions of the charge to show how the legal doctrines should be applied. The rules of law which govern the case were so clearly enunciated in the first part of the charge that it cannot be presumed that an intelligent jury could have misapprehended the views of the court, whether the requests to charge were presented before or after the charge was delivered."

A case that is directly applicable to the case at bar is that of Myers vs. Pittsburg Coal Co., 233 U. S. 184. We set forth the facts as they appear in the decision, this being necessary for an adequate understanding of the situation.

"John Myers, at the time of his death, was, and for several months had been, in the employ of the Coal Company as 'snapper' or brake-

man in underground operations, taking part in the movement of cars in and about the mine. It appears that on the morning of the injury, a train of empty coal cars, some thirty or forty in number, was being taken down the main entry and then further down a side entry into the mine, where the cars were to be subsequently distributed in the work. The manner of operation was that empty cars were hauled by a large electric motor car down the main entry to a side entry where a flying switch was made by which the motor car continued in the main entry beyond the junction of the side entry, and the cars ran down the side entry for a considerable distance, then, upon signal from Myers, whose duty it was to ride upon the rear car of the train, by the waving of his cap, which contained a lamp, or by the movement of his head with cap on, the motor car followed on down the entry, the purpose being to overtake the empty cars and distribute them in the mine. Down the side entry, about 157 feet from the main entry, was an automatic switch, which would turn the current into the trolley wire and permit the motor car to proceed farther into the mine. It was not working properly, and the motorman alighted and turned the switch by hand, returned to the motor car, and proceeded. Up to the time the motor car reached the automatic switch Myers had been signaling for the motor car to come on. Some distance further there was a branch of the trolley system running into another entry, and the trolley wire passed over the tracks in the side entry at a distance of about 5 feet, 7½ inches above the rail, making it necessary for one of ordinary height to remain seated in the car or to stoop down. The roof of the entry was

about 9 feet above the rail at this point. There was no light at this switch, nor was the wire guarded in any way. It also appears that because of ineffective carbons the headlight on the motor car was not burning, and had not been burning for several days; that requisition had been made upon the superintendent of the mine for new carbons, but that there were none at the mine. The motorman testified that when the headlight was burning he could see objects on the track clearly at a distance of 25 or 30 yards, and that he could stop his car in about 13 feet. Continuing on from the switch, as we have said, the motor car suddenly ran upon something, was stopped, and it was found that Myers had been run over. He was lying in the middle of the track with his head toward the motor and his cap, upright, with the light still burning, was lying beside the track. Myers' body was badly torn and mangled before the motor car could be stopped. His tongue was found to be moving, but he shortly died from his injuries. It was also shown that Myers was a man of unusual strength and vigor, twenty-nine years of age, and to all appearances in full health and strength shortly before the injury."

A request was made of the trial judge in this case to withdraw from the consideration of the jury one of the possible claims of negligence, as was done in the case at bar, which the trial judge refused to do. The action of the trial judge was upheld by the U. S. Supreme Court in the following language, page 194:

> **"As to the objection that the court erred in failing to give the instruction requested by the defendant concerning the operation of the automatic switch, to the effect that if it did not work on the trip on which the decedent was run**

> **over, and even if it was out of order, those conditions would not contribute to the running over of the decedent by the motor car or to his death, it is sufficient to say that the court in its charge to the jury did not submit a question of negligence specifically concerning this automatic switch and its effect if out of repair, and to have affirmed this point by giving it to the jury would only having served to possibly confuse the jury upon a point immaterial to the plaintiff's recovery, in view of the manner in which the case was given in charge to the jury."**

So in the case of St. Louis &c. R. R. Co. vs. Brown, 241 U. S. 223, the court held that while the judge might have been more explicit, nevertheless the trial court was justified in refusing the request to charge, which would have had a tendency to confuse the jury. We quote from the opinion at page 228.

> "The instruction given is almost in the identical language of the statute, and while definition might have further conduced to an appreciation by the jury of the standard established by the statute, we think there was no error in the charge given, especially as the railroad company made no request for a charge clarifying any obscurity on the subject which it deemed existed. It is true the company made a request on the subject which the court declined to give, but that request, we are of opinion, taken as a whole, instead of clarifying any ambiguity deemed to exist in the instruction which the court gave would have served to obscure it."

We now turn to the various cases cited by counsel for the defendant in their brief used in support of their position that the court should have granted their requests to charge.

In the case of St. Louis, &c. Ry. Co. vs. Needham,

63 Fed. 107 (C. C. A. 8th Cir.), the situation was not even analagous to the one in the case at bar, for in the Needham case the trial court had submitted two allegations of negligence to the jury upon either of which the jury was entitled to find a verdict for the plaintiff. The appellate court took the view that the jury was not entitled to find a verdict on one of these grounds, because that involved the negligence of a fellow servant, for which the defendant was not liable, and since the verdict was a general one, the judgment was reversed. **The case was, therefore, one where the court actually submitted erroneously one of two questions to the jury. It was not one where the court correctly submitted to the jury two issues of negligence as in the case at bar, and merely refused to charge the defendant's requests to withdraw from the jury certain allegations of negligence upon which the court did not instruct the jury a verdict could be found.** The Needham case, therefore, affords no support for the defendant's position on this point, for the situation was not parallel to the one in the instant case.

The same thing is true of the next case cited by the defendant, of Chicago, &c. R. Co. vs. Kroloff, 217 Fed. 525, (C. C. A. 8th Cir.), where the trial court submitted to the jury four separate allegations of negligence. On appeal, the court found that there was no substantial evidence on one of these allegations, and that therefore such allegation should not have been submitted to the jury. The request to charge related to this question that was erroneously submitted to the jury by the trial court, rather than to allegations that the court never submitted to the jury for their consideration at all, as did the defendant's requests in the instant case.

Likewise, in the case of New York Central R. R. Co. vs. Lloyd, 258 Fed. 111, (C. C. A. 2nd Cir.), the trial court allowed the jury to consider four different

grounds of negligence upon any one of which a verdict could be found. It developed on appeal that one of these grounds so submitted was without support in the evidence; therefore it should not have been submitted to the jury. This case likewise has no application to the case at bar.

An examination of the case of Markley vs. Baldwin, 112 U. S. 490, cited by counsel, reveals that it affords no precedent for counsel's contention on this point but merely holds that where several issues are submitted to the jury, and error is committed in the admission or exclusion of evidence with respect to one, then, of course, a judgment based on a general verdict must be reversed.

Counsel for the defendant set great store on the case of Wilmington Star Mining Co. vs. Fulton, 205 U. S. 60, and a long excerpt from the opinion is quoted in their brief. Upon a mere cursory reading of the case, however, it becomes obvious at once that it has no application so the case at bar, **for in the Fulton case, the complaint contained eight different counts, and although there was no evidence of negligence on some of these counts, nevertheless the trial court submitted all of them to the jury and permitted the jury to find a verdict based on any of them. The trial court did not limit the issues to those upon which there was evidence of negligence as was done in the case at bar, but submitted all of them to the jury and it was therefore necessary to reverse the judgment.**

We submit that it is apparent that none of the cases cited by counsel for the defendant form any basis whatsoever for a reversal of the judgment upon this ground.

In the case of Iron Silver Mining Co. vs. Cheeseman, 116 U. S. 529, at page 530, the court said "when the court instructs the jury in a manner sufficiently clear and sound, as to the rules applicable in the case,

it is not bound to give other instructions asked by counsel on the same subject whether they are correct or not." See also Norfolk, etc. Traction Co. vs. Rephan, 188 Fed. 276.

It is therefore respectfully submitted that the court correctly refused to charge the defendant's requests to charge.

B.

We now pass to the second part of the first point urged in defendant's brief, namely, that the court erroneously allowed the jury to consider certain allegations of negligence concerning which there was no proof. Here again, we insist that the court correctly submitted the two issues of negligence to the jury, namely, the inefficient condition of the brakes (which was also a violation of the Safety Appliance Act), and the negligent and careless handling of the two runaway cars.

We have already set forth at length the portion of the Judge's charge dealing with the question of negligence in which he so limits the consideration of the jury to the foregoing two issues, no less than three different times, in a manner that was unequivocal and unsusceptible of misunderstanding.

The defendant complains of the fact that the trial court set forth in general terms the provisions of the Federal Employer's Liability Act upon which the action is based, as he had a right to do, and which is perfectly proper. Of course, if the trial court had done this and then failed afterward to specifically define the allegations of negligence that were in issue, then the defendant might have had some cause for complaint, but when the trial judge took such unusual pains to point out to the jury the questions to be determined by it, such an attack on the charge is hypercritical, to say the least.

It is elementary that the whole charge must be considered. Saper vs. Baker, 91 N. J. L. 713, at pages 714-715; also State vs. Giberson, 99 N. J. L. 85. In the case of Anthony vs. Public Transit Co. 3 Misc. Rep. 1204, at page 1206, the court said, "It is improper to take an isolated portion of the court's charge and from such portion base an argument. The charge must on every point be considered as a whole."

A similar criticism was directed at the Judge's charge in the case of Wilson vs. C. R. R. Co. 88 N. J. L. 342, where the court at the outset charged the general duty of reasonable care on the part of the defendant, and then proceeded to carefully define what the statutory duty of the defendant was, it being a grade crossing case. We quote from the opinion of the Court of Errors and Appeals at page 345.

> "The only other point argued in the appellant's brief relates to an objection taken by counsel for appellant to this language of the court's charge: 'The duty imposed by law upon a railroad, generally speaking, is to use reasonable care.'
>
> The appellant's brief concedes that the defendant was charged with the duty to give either one of the statutory signals, and under the act of 1909, where the statute applied, warning by signal bell, but it is said that the court by charging that the defendant was bound to use reasonable care put an additional burden on the defendant not sanctioned by our cases.
>
> **We do not think that any such inference can be drawn from the charge. For it appears that after making the preliminary statement, as to what, generally speaking, the duty of a railroad company is, the trial judge then proceeded to state accurately the duties which were imposed by law upon the appellant. But if it was meant that the railroad company was bound to use**

reasonable care in the performance of the duties imposed upon it by law, then the declaration made by the court was most favorable to the appellant. A plain reading of the judge's charge negatives the assertion that the negligence of the defendant was predicated upon the non-exercise by it of reasonable care, outside of any duties imposed upon it by statute."

So in the case of Lange vs. N. Y. S. & W. R. R. Co. 89 N. J. L. 604 (a case against this defendant and represented by one of the same counsel), the court charged in a general way, and then afterward limited the consideration of the jury to the two points that were really at issue on the point of liability, and an exception was thereupon taken to this charge on the ground that it was too broad, and allowed the jury to consider issues that were not supported by the evidence. We quote from the opinion of the Court of Errors and Appeals at page 605.

"He further charged:

'So you see, gentlemen, if the deceased, Mr. Lange, had no authority over the driver, and was not negligent himself, and the relation of master and servant or principal and agent or mutual responsibility in a common enterprise did not exist, then it does not make any difference how negligent the boy was, and that negligence could not be imputed to the father.'

Both of these instructions were correct in law. Mittelsdorfer v. West Jersey and Seashore Railroad Co., 77 N. J. L. 698.

But counsel for the plaintiffs argue that it was erroneous to so charge because, as they contend, there was no evidence that the relation of master and servant or principal and agent or mutual responsibility in a common enterprise existed between the driver and the decedent. We should

hesitate before saying as a matter of law that there was no evidence from which a legitimate inference of such relation could be drawn. But we think a sufficient answer is that, if such charge was erroneous at all, no substantial right of the plaintiffs was injuriously affected thereby. It seems that the judge charged in effect that there was no such relation, and refrained from submitting that question to the jury. After referring to the evidence that the son owned the car, that he drove it, that he chose the route they took, the judge charged that the fact that the deceased was a guest did not relieve him from exercising ordinary care. He then referred to the evidence tending to show want of reasonable care upon the part of the decedent himself upon which his countributory negligence depended. **In the last analysis (leaving out of account the question of damages) the trial judge left to the jury two questions, and only two—first, whether the defendant exercised the care which the law cast upon it; secondly, whether negligence of the decedent himself contributed to the injury. Manifestly the jury was not misled."**

Counsel also criticized the charge in this connection on the ground that the two runaway cars were not in the defendant's possession or control at the time and that consequently, the defendant was not liable for the condition of the brakes, and also on the ground that the defendant was not liable for the failure to place the derail on the track. These contentions are without substance, but we will consider the first of them in Point No. 3 and the second in Point No. 4 of our brief. Likewise the points that there was no evidence to go to the jury of the failure to place the cars in a safe location, of the failure to have a man in charge of the cars, of the failure to

keep a lookout to see if the cars ran away, will be discussed under Point No. 4, where we shall contend that there was ample evidence to go to the jury on all of these points.

Finally, counsel pick out certain sentences from the charge on pages 28 and 29 of their Brief and aver that they were calculated to mislead the jury. The rule is well settled, however, that the court will look at the context of such a portion of the charge, and, in fact, at the whole charge, in order to determine such questions. This rule was clearly stated in the case of State vs. Giberson, 99 N. J. L. 85, in which the Court of Errors and Appeals said at page 92:

> "In State v. Timmerari, 96 N. J. L. 442, it was held that if in his charge the judge uses a word or phrase the very opposite of which he intends, and its true intent and meaning are to be gleaned from the other parts of the charge, and if upon the whole charge the jury cannot reasonably be thought to have been misled, there is no error."

It is also important to note that in taking their exceptions to the charge of the Judge, and also in taking their exceptions to the Judge's refusal to charge their requests, counsel did not point out to the trial judge the basis of their objection so that the trial court would have an opportunity to be apprised of the ground of their objection.

The rule with respect to criticism of the trial judge's charge is admirably stated by this court in the case of Kargman v. Carlo, 85 N. J. L. 632, at page 638, as follows:

> **"If counsel notices a slip in judicial language he should call the judge's attention to it. It is solely upon the assumption that this has been done that the right of review rests; appellate courts uniformly refusing to give to an unsuccessful litigant the benefit of a trial error that he himself could have had corrected at the trial for the mere asking.** Benz v. Central Railroad of New Jersey, supra.

With respect to other instructions, said to be erroneous in law and as to assumptions of matters of fact, and to which objections were made at the trial, it is sufficient to say that we have examined them in the light of the entire charge, and find no error in them, when properly tested. **So long as the law is stated correctly and intelligently, the ultimate test of the soundness of instructions is, not what the ingenuity of counsel can, at leisure, work out the instructions to mean, but how and in what sense, under the evidence before them and the circumstances of the trial, would ordinary men and jurors understand the instructions as a whole."**

The cases that are cited by counsel in the brief on page 38, are ones in which there has been an actual mistake made by the trial judge in his charge, and which is not subsequently withdrawn and corrected; whereas, in the case at bar no mistake was made but the trial judge clearly set forth the issues to the jury. This distinction was plainly pointed out by the Court of Errors and Appeals in the case of State vs. Randall, 95 N. J. L. 452, where the court held that while some portion of the charge detached from the rest of it, perhaps did not state the law fully and correctly, the charge as a whole did so, and that was not a situation where a mistake had been made by the court which should have been later corrected.

Upon an examination of the whole charge, it is very apparent it was correct, and served as an excellent guide to the jury in their determination of the case.

Moreover, no exception was taken to that part of

the charge complained of on page 201, ll. 25-30, or to that part on page 207, l. 23 to page 208, l. 11.

It is respectfully submitted, therefore, that the trial court was correct in refusing these requests to charge of the defendant, and that he correctly submitted the questions involved to the jury.

POINT No. 2.

THE COURT COMMITTED NO ERROR IN ALLOWING THE JURY TO CONSIDER THE FAILURE TO PROPERLY BLOCK THE CARS.

Under Point No. 2 the defendant contends that the trial court erred in the following part of the charge, first, because there was no such allegation in the complaint, and second, that there was no evidence of such improper blocking to go to the jury, page 200, ll. 31-36.

> "In the second place, assuming that the brakes were efficient but that they had not been properly set or the cars blocked, if you ascertain that as a fact, would you then say as an inference of fact that the employees of the defendant company had been careless or negligent in setting the brakes or blocking the cars, because the cars did run away?"

A.

The complaint contains the following two allegations of negligence, either one of which is sufficient to cover this act of negligence, page 21 ll. 35-39:

> "The defendant, its servants and agents, also then and there carelessly and negligently ran and propelled a locomotive and train of cars on the same track in an easterly direction."

Also page 22, ll. 21-24:

> ". . . . . and also then and there carelessly, negligently and unlawfully detached or uncoupled the said cars from the rest of the said train."

We submit that it is perfectly plain that where a railroad company detaches or uncouples two cars and leaves them on a track so that they run away, partly at least because of the failure to properly block them, that this obviously is included in the allegation that the company negligently detached or uncoupled these cars and also in the general allegation of the negligent operation of the train.

The proof was that these two runaway cars had been placed where they were by the defendant's crew for the purpose of attaching them to the defendant's east bound train (page 186, ll. 3-40), so they were practically part of the defendant's train and the failure to block the two cars, therefore, could also fairly be included in the first allegation, that the defendant, its servants and agents carelessly and negligently ran and propelled this train.

Furthermore, under the modern practice, even if this court should consider now, that the allegation in the complaint was not broad enough to cover the proof of negligence in this respect, an amendment covering this ground can still be made in this court, although we insist that no such amendment is necessary.

In the case of Levenson Wrecking Co. v. Gatti-McQuade Company, 93 N. J. L. 184, the Court of Errors and Appeals laid down this rule as follows, p. 186:

> "Where, as here, the real question in controversy has been fully and fairly tried, though not precisely pleaded, and the complaining party has not been surprised or injured, this court on appeal has the power to amend the pleadings in

order to support the judgment, and will in such case, in the interest of justice, exercise the power. Chess v. Vockroth, 75 N. J. L. 665; Van Houten v. Van Houten, 89 Id. 301."

Where a similar situation arose in the case of Van Houten vs. Van Houten, 89 N. J. L. 301, this court held that the pleadings should be amended. We quote from page 301.

"The point made is, that the complaint does not state whether the plaintiff was not to go west at that time to live, or not at any time during the grandfather's life, and second, that it does not state for how long a period he was to remain, and third, that the alleged consideration was not sufficient. The criticism that the length of time the plaintiff was to remain with his grandfather was not stated in the complaint seems to be justified, **but the proof brought out by the defendant on cross-examination of plaintiff's witness** shows that the agreement was that the plaintiff was to stay until the grandfather died, the testimony being, 'If you stay here by me until I die why you will get $10,000.' The case was tried upon the theory that this was the contract and we think the complaint should be considered amended to cover the real issue tried, and that the motion to nonsuit upon this ground was properly refused. Redstrake v. Cumberland Insurance Co., 44 N. J. L. 294. The power of amendment extends to this court, and where the issue has been fairly tried and no injury has been done to the party complaining, it is incumbent on this court in the interest of justice to exercise the power. American Life Insurance Co. v. Day, 39 Id. 89."

See Thompson vs. Peppler, 91 N. J. L. 160.

In the case of Jones vs. Cook, 54 N. J. L. 513.

the court laid down the rule as follows at page 517.

"But when it is apparent that the whole controversy has been tried with all the evidence which either party could produce, and the real right appears, then an amendment should be made if no injustice to any party be done thereby."

The same rule was laid down in the case of American Life Insurance Company vs. Day, 39 N. J. L. 89.

Moreover, there was no objection made by counsel for defendant to the admission of the testimony with reference to the blocking of the cars, and, in fact, some of it was brought out by defendant's counsel himself. The testimony with reference to the rule or custom of blocking cars under these circumstances, as set forth in section B of this point, (page 45, l. 35 to page 46, l. 12) infra, came in without objection, and, in fact, there was no objection to any of the testimony on this point.

Then the witness, Benjamin Peterson, testified as follows on cross-examination by Mr. Selser, counsel for the defendant, although up to that point the witness had not been asked anything concerning the blocking on direct examination by plaintiff's counsel. Counsel for defendant undoubtedly brought this out for the purpose of endeavoring to show that the cars were blocked in order to strengthen his defense (page 188, ll. 12-14).

"Q. Did you do anything with respect to blocking the car? A. I put a block under the Me. C. myself."

Mr. Selser, himself, also drew out of the same witness a statement to the effect that a block had been put under the second car, although up to that point the witness had not been asked about any block on the second car by counsel for the plaintiff on direct examination (page 189, ll. 24-32).

Moreover, when counsel for the defendant took his exceptions to the judge's charge with respect to the matter of blocking the cars, he did not in any way whatsoever indicate to the court that the basis of his objection was that he considered that there was no allegation in the complaint which included the failure to block the cars. On the contrary, as will appear from the exceptions set forth below, he gave the trial court to understand that the real point of his objection was that the court was allowing the jury to consider that the fact that the cars ran away would be sufficient to justify the jury in finding that the cars were not properly blocked. We set forth his exceptions to the charge on this point (page 205, l. 30 to page 206, l. 13).

"To that portion of your Honor's charge when your Honor said, 'The testimony on behalf of the defendant is that the brakes were efficient and the cars were blocked; notwithstanding that there is proof that the cars ran away; you may consider the testimony of the brakeman produced, as to the brakes, and as against that consider the fact that the cars did in fact run away and disregard the proof as given by that brakeman.' You then went on and said, 'Had there been proof by mechanics who examined the cars, that might be a different story altogether,' or words to that general effect.

To that portion of your Honor's charge wherein your Honor said, in speaking of whether the cars were properly set and blocked, that they might consider whether the company was negligent from the fact that the cars ran away. **In effect it amounted to your saying that the mere fact that the cars ran away would be sufficient to justify the jury in finding that the cars were not set and blocked."**

In other words, counsel for defendant made no effort upon the admission of this testimony or upon his exceptions to the charge, to apprise the trial court that the basis of his objection was that there was no allegation in the complaint with respect to the failure to block the cars. On the contrary, the first time that counsel raises this point with respect to the judge's charge is when he gets in an appellate court. But the rule is well settled that a timely objection must be made at the time of the admission of the evidence, if variance is to be claimed, so that counsel may have an opportunity to amend his pleading, and that where there is a failure so to do, followed by a failure to point out any such ground in the exceptions to the judge's charge, that then it is too late to raise the question in the appellate court.

This rule is plainly stated by this court in the case of Chess v. Vockroth, 75 N. J. L. 665, at page 671.

> **"At this time, however, the objection does not lie in the mouth of the plaintiff in error. If there were nothing else in the way, this would be—the failure to make distinctly and plainly known to the court below any such ground of objection as we have now suggested. See Bell v. Mecum, ante p. 547 (1907). Furthermore, the objection will not now be regarded e proprio motu by this court. It is well settled that when the real question in dispute has been fairly tried, and the ends of justice will be promoted, the declaration will be amended here in order to support the judgment below.** American Life Insurance Co. v. Day, 10 Vroom 89, 91 (1876); Blackford v. Plainfield Gaslight Co., 14 Id. 438, 441, 442 (1881).

In the case of Blackford v. Plainfield Gaslight Co. 43 N. J. L. 438, the Court of Errors and Appeals laid down the same rule at page 441.

"The objection now made does not seem to have been made below. Nor is there any reason to suppose defendant was prejudiced by the alleged error in the declaration. The evidence relating to the contract as found by the judge was not objected to when offered. Under such circumstances, a mere technical objection of this sort cannot prevail. The act respecting amendments, as expounded by this court in American Popular Life Ins. Co. v. Day, 10 Vroom, 89, permits an amendment even at this stage in the cause. Such an amendment ought to be made, if necessary to show the real question in controversy and actually tried between the parties. That the real question was tried, there can be no doubt. The defendant in error may therefore amend by making the special count of his declaration conform to the contract found by the judge to have been made, or by adding a new count to that effect. The judgment below should then be affirmed."

In the case of Chicago Ter. Trans. Co. vs. Stone, 118 Fed. 19, the court held that **"where testimony is received without objection, a verdict founded upon it will not be disturbed although the evidence is not strictly within the allegation of the complaint, since the pleading could be amended to conform to the proof. The admission of evidence at the trial cannot be reviewed on appeal in the absence of objection at the time the evidence is offered."**

Again in the case of Shepherd vs. Newhall, 54 Fed. 306, the court held that "in an action to recover personal property, an objection that the complaint alleged that the plaintiff was owner thereof, whereas the proof showed that he was entitled to possession under a vendor's lien, cannot be raised for the first time in an appellate court."

Again in the case of Columbia Manufacturing Co. vs. Hastings, 121 Fed. 328, it was held "the objection of variance must be made when the evidence is offered, and the reason of the variance pointed out, so that it if appears that if a variance did occur, the plaintiff may amend his declaration or bill of particulars; otherwise the objection is waived and cannot be raised in the appellate court."

And in the case of Atlantic Coastline R. R. Co. vs. Williams, 284 Fed. 262, it was held that "where no objection on the ground of variance was made to the admission of evidence, and the alleged variance was not called to the attention of the trial court, an assignment of error alleging a variance would not be considered." See also Thompson Starret Co. vs. Fitzgerald, 149 Fed. 721; Pennsylvania R. R. Co. vs. Burgeson, 296 Fed, 311; Twin City Fire Insurance Co. vs. Stockmans National Bank, &c., 261 Fed. 470.

We turn for a moment now to the cases cited by counsel for the defendant in support of this proposition in order to distinguish them from the case at bar.

In the case of Excelsior Electric Co. vs. Sweet, 59 N. J. L. 441, the defendant in taking the exception to the judge's charge on this point, specifically stated the ground, viz: "that the matter was not within the pleading, and was not raised by the plaintiff" (page 442), which, as we have already pointed out, was not done in the case at bar. Moreover, neither party had in mind the allegations of negligence charged by the Judge, whereas in the case at bar, both sides, especially the defendant, had the matter of the blocking of the cars in mind, for plaintiff's counsel carefully attempted to establish that blocks were put under the cars, (improperly done, of course, or the cars would not have run away, as we shall point out later).

The case of Partridge vs. Woodland Steamboat Co. 66 N. J. L. 290, was one in which the court permitted

the jury to find a verdict on the basis of an entirely new allegation of negligence, which the complaint was not broad enough to include, unlike the complaint in the case at bar, which, as counsel for the defendant has pointed out, was an omnibus complaint, and broad enough to include the allegation of the failure to block. Moreover, in the Partridge case, the case was not tried upon that theory; whereas, in the case at bar, the very pith of the whole case was the failure of the defendant to secure these two cars by blocks, brakes, or otherwise, so they could not run away, as they did.

The case of Murphy vs. New Jersey Street Railway Co., 71 N. J. L. 5, was one where the trial judge charged the jury that if it believed that the accident happened in the way testified to by defendant's witnesses, they could find a verdict for the plaintiff, but these witnesses testified to an entirely different version of the accident not included in the plaintiff's complaint—which, of course, presented a situation which is in nowise similar to the one in the instant case. Moreover, this is a Supreme Court case, the opinion of which was written by Chief Justice Gummere, who sat in the case at bar below, and who evidently distinguished the case at bar from the Murphy case.

In the case of Jordan vs. Reed, 77 N. J. L. 584, the declaration set up one contract, made by the defendant alone, and the proof was of a contract of a different nature made by the defendant and others.

In the case of Merklinger vs. Lambert, 76 N. J. L. 806, the court merely held that the trial judge was right in restricting the recovery to the issues raised in the pleadings.

The trial judge in the case of Bierman vs. Stiefel, 82 N. J. L. 658, submitted issues to the jury which the court found were not even in the mind of the parties, which, as we have pointed out, is not a parallel case.

In the case of Duel vs. Mansfield Plumbing Co., 86 N. J. L. 582, the trial court erroneously charged the duty as to the degree of care the defendant owed the plaintiff saying that it was that of the owner of premises to a licensee, rather than that of one licensee to another. This obviously has no application to the case at bar.

In the case of Gilliard vs. Public Service Railway Co. 94 N. J. L. 288, the complaint charged the negligence to be the starting of a trolley car before the plaintiff had an opportunity to alight safely; but the court charged the jury that they could find a verdict based on the negligence of the defendant's conductor in inducing the plaintiff to get off before the car car stopped. These were entirely different allegations of negligence; whereas, in the case at bar the failure to block was merely a part of the negligent handling of these cars, and of the negligent detaching of them so that they later ran away. Moreover, in the Gilliard case this reason was given by counsel when he took his exception to the judge's charge, which was not done in the case at bar.

The situation in the case of Oaklyn vs. Rulofson, 98 N. J. L. 304, was entirely different from the case at bar, for there was a primary question, that it was necessary for the jury to resolve in the plaintiff's favor before they considered the second question, but the trial judge only charged as to the second ground which was, of course, erroneous. The opinion in this case was also written by Chief Justice Gummere.

In the case of Garibaldi vs. Rubenstein, 99 N. J. L. 223, an issue that was not included in the pleadings at all was charged by the Judge and as the court found "not fairly or fully tried out in the case" which obviously is not analagous to the case at bar.

The case of Lambert vs. Trenton, &c., Traction Corp., 127 Atl. 674, likewise has no application to the instant case, for that was a case where the court erroneously charged a request to charge which had no relevancy to the case under consideration.

It is therefore respectfully submitted that the trial court committed no error in submitting to the jury the question of the failure to block the cars on the ground that this allegation was not covered by the complaint.

B.

The second contention made by counsel for the defendant under this point is that there was no evidence to go to the jury of the failure of the defendant's employees to properly block these cars.

But, certainly, the purpose of blocking a car is to prevent its running away, and presumably if these cars had been properly blocked, they would not have run away—**and yet, in fact, they did run away. This very fact is the strongest kind of evidence that they were not properly blocked, and the plaintiff in the very beginning of the case testified without objection by the defendant, that they should have been blocked and, of course, he meant properly blocked, page 45, l. 35 to page 46, l. 12:**

"Q. Now, will you please tell me what the custom was at the time of the accident on the Susquehanna Railroad with respect to a situation of this kind, where two loaded box cars are left standing on a track—what was the custom at that time with respect to securing those cars by brakes or otherwise?

The Court: If he knows.

Mr. Selser: Within the single period of time stated by counsel.

Mr. W. Reading Gebhardt: Certainly.

A. According to the grade in the yard where these cars stood they were supposed to have a brakeman on them. **They were supposed to be blocked."**

Counsel contend that the mere statement by one of the defendant's employees in his testimony that he put a block under one car, and saw the conductor put a block under the other car, is conclusive proof that the cars were **properly** blocked, in the face of the fact that a short time later these two cars started of their own motion and both ran away. No one in the case testified that they were **properly blocked,** or even **blocked in the usual way,** and the jury was not only justified in finding that they were not so blocked from the fact that shortly thereafter they ran away, but such a conclusion is irresistible. The position of counsel for the defendant on this point is manifestly untenable.

The situation is somewhat similar to that in the case of Demarest vs. Bergen County Traction Co., 62 N. J. L. 755, where a train became derailed. Chief Justice Gummere, speaking for this court said as follows page 756:

"In the ordinary operation of the defendant's railroad, its cars would not have left the rails. It is a matter of common knowledge that the roadbed of a street railroad is so built, and the cars so constructed, that, when there is no defect in either, and the cars are run with due care, the latter will remain upon the track; and consequently proof of the derailment of a car, in the absence of evidence to the contrary, justifies the conclusion that it resulted either from improper construction, failure to keep in proper repair or negligence in operation.

Having proved the happening of an accident which raised an implication of negligence on the

part of the defendant, it was not incumbent on the plaintiffs to go further and show what the particular act of negligence was."

So in the case at bar it is obvious that the only purpose that a block would serve would be to prevent cars from running away, and when two blocks did not do so, they could not have been properly placed.

The Supreme Court agreed with our position in their opinion upon this point in the following language: (page 222, ll. 19-29).

"We think there is no merit in this point, because, as we think, the complaint was broad enough to comprehend that phase of the proof. And, moreover, this proof was produced in the case apparently without objection at the time it came in. That this was a proper matter for the consideration of the jury, and upon which the judgment for the plaintiff might well have been rested, is illustrated by the case of Smith v. New York, Susquehanna & Western R. R. Co., supra."

It is therefore respectfully submitted that the trial court committed no error in allowing the jury to consider the failure to properly block the cars.

POINT No. 3.

THE QUESTION OF WHETHER OR NOT THE BRAKES ON THESE TWO CARS WERE IN AN EFFICIENT CONDITION WAS PROPERLY LEFT TO THE JURY.

It is next contended by counsel under Point No. 3 that the court erroneously submitted to the jury the question of whether the hand brakes on the two runaway cars were efficient or not, for three reasons; first, that these two cars were not subject to the Safety Appliance Act; second, that even if they were, there

was no evidence of the inefficiency of the hand brakes; and, third, that the provisions of the statute were not intended for the benefit of the plaintiff, because he was not employed on this train. The first and third points are raised under Point No. 3 of defendant's brief, and the second point under Point No. 4, (pages 56-63). Since all three questions relate to the same matter, they will all be discussed under this point in the order named.

A.

We propose first to discuss the first reason, and we submit that these two cars were subject to the requirements of the Safety Appliance Act beyond any possibility of question.

The Safety Appliance Act provides as follows, Act of April 14, 1910, U. S. Stat. at L. Vol. 36, Chap. 160, p. 298, as amended by Act of March 4, 1911, U. S. Stat. at L. Vol. 36, Chap. 285, p. 1397:

"AN ACT To Supplement 'An Act to promote the safety of employees and travelers upon railroads by compelling **common carriers engaged in interstate commerce to equip their cars** with automatic couplers and continuous brakes and their locomotives with driving-wheel brakes and for other purposes,' and other safety appliance Acts, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, **That the provisions of this Act shall apply to every common carrier and every vehicle** subject to the Act of March second, eighteen hundred and ninety-three, as amended April first, eighteen hundred and ninety-six, and March second, nineteen hundred and three, commonly known as the 'Safety Appliance Acts.'

Sec. 2. That on and after July first, nineteen hundred and eleven, **it shall be unlawful for any common carrier subject to the provisions of this Act to haul, or permit to be hauled or used on its line any car** subject to the provisions of this Act, not equipped with appliances provided for is this Act, to wit: **All cars** must be equipped with secure sill steps and **efficient hand brakes;** all cars requiring secure ladders and secure running boards, shall be equipped with such ladders and running boards, and all cars having ladders shall be equipped with secure hand holds or grab irons on their roofs at the tops of such ladders: Provided, That in the loading and hauling of long commodities, requiring more than one car, the hand brakes may be omitted on all save one of the cars while they are thus combined for such purpose."

The obvious intention of this Act was to provide standard equipment for all railroad cars used on highways of interstate commerce, as the defendant's road admittedly was, for the purpose of increasing the safety to employees with which railroads could be operated.

These two cars had been picked up by the defendant's train and placed on the back track, one at a time, and were left there momentarily to facilitate the arrangement of the cars of this train in station order, and were then to be taken away with this train, as we have already pointed out previously. Certainly this handling of these cars constitutes "hauling" these cars within the meaning of the Act. We think that this is so plain as to admit of no argument.

The strained construction that counsel for the defendant endeavors to put on this statute, namely, that the cars must be hauled or used on the defendant's line to make the defendant liable, is absolutely without support either in reason or authority. There is a comma after the word "haul" which separates this clause from the following clause, "or permit to be hauled or used on its line," and there is no comma preceding the words "on its line," and these words have no reference except to the clause in which they occur.

If counsel's contention were correct, then a railroad company would cease to be liable under the Safety Appliance Act the moment that it went on a private siding which it did not own, to deliver cars, or went upon the tracks of another company, or upon tracks that it leased from another company and an employee who was hurt under these circumstances, would be remediless under the Act. We submit that it is perfectly apparent that Congress never intended the Act to be so construed.

Moreover, there can certainly be no doubt that when these cars got out on the main line of the defendant, that they were then on its line, and that they were on its line when the collision occurred with the plaintiff's train. If these brakes had been efficient, they would have prevented the cars from getting away, and would have stopped them after they were started. We submit that these two cars plainly came within the provisions of the Act.

Furthermore, it has been settled by the courts that a railroad company is bound by the Safety Appliance Act whether the accident occurs on its own lines or the lines of another company. This rule is very well set forth in Roberts on Federal Liabilities of Carriers, Vol. 2, page 1282:

> "Section 6 of the Appliance Act penalizes any carrier using or hauling any of the described vehicles 'on its lines.' A railroad company hauling a defective car over the tracks of another company under a traffic agreement violates

to it and coupled up with it, but the hand brake on the second car was not set, (page 189 ll. 17-18). Then the cars were left there, and a short time later were seen slipping away toward the main track of the defendant.

The same witness, Peterson, also testified that an efficient hand brake would have held both cars where they were. We quote from his testimony on page 190, ll. 27-31.

"Q. Did I understand you to say that an efficient hand brake would have held both of these cars?

A. Yes. A good hand brake there on the back track would hold three or four."

And then he reiterated the statement a moment later on page 191, ll. 11-13.

"Q. Did you testify a moment ago that an efficient hand brake would have held both of these two cars?

A. Yes."

We have, therefore, we submit, the strongest kind of evidence to go to the jury of the inefficiency of this brake. In the first place, there was the fact that although the brake was on, the cars started of their own motion when they were at rest. There is no evidence that they were given any push or shove, or a start in any way. Palpably, the jury was entitled to infer from this fact alone that the brake could not possibly have been efficient, for if it had been, the cars would not have just quietly rolled away without even a screech or a noise of any kind to indicate that the brake was taking hold in any way whatsoever.

Furthermore, we have the positive testimony of Peterson set forth above that an efficient brake would have held these two cars, and yet in spite of this testimony of the defendant's brakeman, who had been a railroader, he says, for twenty years (page 190, ll.

14-15), the fact remains that the two cars did get away. What clearer proof could there possibly be of the utter inefficiency of this brake?

And in addition to this, the jury was entitled to consider the astonishing fact that although two engines promptly gave chase to the cars, and went at a speed of as high as thirty miles per hour for a distance of one and one-half miles, they were unable even to catch a glimple of them, (page 159, ll. 18-25; page 161, ll. 27-35; page 162 ll. 20-22). **How could it possibly be said that this was an efficient hand brake when the cars attained such a momentum that these two engines going under power at this speed, could not catch these cars, which were, of course, just coasting?**

We submit that this was not only some evidence, but proof of the most convincing character to submit to the jury on the question of the inefficiency of the brakes.

It is, of course, obvious, that the function of a brake is to hold or stop a car, or to retard the motion of a car, and that if the statute means anything by requiring that the hand brake shall be efficient, it means that it shall be efficient to hold or stop a car, or to cause it to slow up, none of which things this brake accomplished.

It is important to note that there was no evidence produced by the defendant of any inspection of these brakes as is usually done in these cases, and this was another cogent reason why the case was properly submitted to the jury on this point.

Moreover, it would have made no difference if the brakes had been inspected and found to be in good condition, for the duty to maintain the brakes in an efficient condition under the Safety Appliance Act is absolute and unqualified. This has been settled by a long line of cases in the U. S. Supreme Court. It

has likewise been well established that the mere failure of a brake or a coupler to operate properly when an attempt is made to use it, is sufficient evidence of its non-compliance with the Act, and of the consequent liability of the carrier.

One of the early cases decided by the United States Supreme Court construing the Safety Appliance Act was that of St. Louis I. M. & S. R. Co. vs. Taylor, 210 U. S., 281. This was a case involving the standard height of draw bars as prescribed by the Safety Appliance Act and the orders of the Interstate Commerce Commission. The defendant contended that, since it had furnished draw bars which were originally the standard height, and then having, in addition to the correction by general repair of the tendency on the part of the draw bars to become low by use, also furnished certain devices called "shims" for the employees to use to raise the height of draw bars, it had therefore performed its full duty under the statute. The Court, however, refused to sustain this contention and laid down the rule in no uncertain terms applicable to this situation, which has been consistently followed in numerous other cases. We quote from the opinion of the Court at page 294:

"In the case before us the liability of the defendant does not grow out of the common-law duty of master to servant. The Congress, not satisfied with the common-law duty and its resulting liability, has prescribed and defined the duty by statute. We have nothing to do but to ascertain and declare the meaning of a few simple words in which the duty is described. It is enacted that 'no cars, either loaded or unloaded, shall be used in interstate traffic which do not comply with the standard.' **There is no escape from the meaning of these words. Explanation cannot clarify them, and ought not to**

be employed to confuse them or lessen their significance. The obvious purpose of the legislature was to supplant the qualified duty of the common law with an absolute duty, deemed by it more just. If the railroad does, in point of fact, use cars which do not comply with the standard, it violates the plain prohibitions of the law, and there arises from that violation the liability to make compensation to one who is injured by it. It is urged that this is a harsh construction. To this we reply that, if it be the true construction, its harshness is no concern of the courts. They have no responsibility for the justice or wisdom of legislation, and no duty except to enforce the law as it is written, unless it is clearly beyond the constitutional power of the law-making body. It is said that the liability under the statute, as thus construed, imposes so great a hardship upon the railroad that it ought not to be supposed that Congress intended it. . . . . It is quite conceivable that Congress, contemplating the inevitable hardship of such injuries, and hoping to diminish the economic loss to the community resulting from them, should deem it wise to impose their burdens upon those who could measurably control their causes, instead of upon those who are, in the main, helpless in that regard. Such a policy would be intelligible, and, to say the least, not so unreasonable as to require us to doubt that it was intended, and to seek some unnatural interpretation of common words. We see no error in this part of the case."

We desire to especially call the attention of the Court to the following two cases: first, that of Minneapolis and St. Louis Ry. Co. vs. Gotschall, 244 U. S., 65, where the plaintiff's intestate, a brakeman,

was walking along the top of the cars of a train, when the train separated because of the opening of a coupler on one of the cars, resulting in the brakes going on automatically, which produced a sudden jerk and the deceased was thrown off the train. **The Court held that negligence could be inferred from the mere happening of the accident because of the fact that it is a "positive duty imposed by the statute upon the Railroad to furnish safe appliances for the coupling of cars" although the statute merely provides that cars must be "equipped with couplers coupling automatically by impact and which can be uncoupled without the necessity of men going between the ends of the cars" and does not explicitly cover the situation where couplers part. Nevertheless, the Court held that the statute covered the case in question, because of the intent of the statute to require that the appliances be kept safe.**

The other case is that of Spokane and I. E. R. Co. vs. Campbell, 241, U. S., 497. This is a case in which the failure of a power or air brake on a car was involved. Section 1 of the Safety Appliance Act provides as follows, U. S. Statutes at Large, Vol. 27, page 531, as amended by the Act of April 1st, 1896, U. S. Statutes at Large, Vol. 29, page 85:

> "That from and after the first day of January, eighteen hundred and ninety-eight, it shall be unlawful for a common carrier engaged in interstate commerce by railroad to use on its line any locomotive engine in moving interstate traffic not equipped with a power driving-wheel brake and appliances for operating the train-brake system, or to run any train in such traffic after said date that has not a sufficient number of cars in it so equipped with power or train brakes that the engineer on the locomotive drawing such train can control its speed without requiring

> brakemen to use the common hand brake for that purpose."

It will be noted that the Act does not provide that such power brakes shall be efficient or effective or safe, but nevertheless the Supreme Court in the Campbell case held that the duty to maintain the power brake in a perfect condition so that it would stop the car was absolute, even though before the trip on which the accident occured, the brake had been inspected and found in perfect order and even though the only evidence that the brake was defective was that it "leaked off" when applied in the emergency by the motorman and did not stop the car as quickly as it would have if it had worked right. We quote from the opinion of the Court at 505:

> "It is insisted that there was no evidence that the provision of the safety appliance act respecting train brakes was violated. It is, of course, settled, that if the equipment was in fact defective or out of repair, the question whether this was attributable to the company's negligence is immaterial. St. Louis, I. M. & S. R. Co. v. Taylor, 210 U. S. 281, 294, 52 L. ed. 1061, 1067, 28 Sup. Ct. Rep. 616, 21 Am. Neg. Rep. 464; Chicago, B. & Q. R. Co. v. United States, 220 U. S. 559, 575, 55 L. ed. 582, 588, 31 Sup. Ct. Rep. 612; Texas & P. R. Co. v. Rigsby, 241 U. S. 33, 43, ante, 874, 878, 36 Sup. Ct. Rep. 482. Hence the argument is that, according to all of the evidence, the equipment was not defective or out of repair. It appeared without dispute that it consisted of the Westinghouse standard automatic air brake, such as is in general use throughout the country upon passenger trains. A witness in defendant's employ testified that shortly before Campbell took the train out from Coeur d'Alene on the trip in question he

inspected the air brakes and found them in perfect order. But there was much evidence besides that of Campbell himself, to the effect that when he applied the emergency, the brakes took hold and then leaked off, so as to release the brakes. The jury was warranted in finding from the testimony as a whole that Campbell properly applied the air when 600 feet or more from the place where the collision occurred, and that the brakes refused to work. Expert witnesses called by defendant testified in effect that the train could have been stopped inside of 300 feet if the brakes had been in proper order. The air-brake equipment was wrecked in the collision, so that there was no explanation of the cause of its failure to operate properly; but it was a reasonable inference that there was some defect or want of repair in the valves or packing."

Another case that bears a striking similarity to the case at bar is that of San Antonio etc. Ry. Company vs. Wagner, 241 U. S. 476, from which we quote as follows at page 476:

> "Evidence that the coupling pin on a box car failed to drop as it should have done at the first impact with a locomotive, and required manipulation in preparation for the second impact, and that the drawbar of the engine was so far out of line as to require adjustment in preparation for the second impact, together with the testimony of an experienced brakeman as an expert that when the coupling apparatus of automatic couplers is in proper condition and the couplers are properly connected they couple by impact automatically, is sufficient to sustain a finding that one or both couplers did not measure up to the standard prescribed by the safety

> appliance acts of March 2, 1893 (27 Stat. at L. 531, chap. 196, Comp. Stat, 1913, Par. 8605), and March 2, 1903, (32 Stat. at L. 943, Chap. 976, Comp. Stat. 1913, Par. 8613), viz., couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars."

C.

Finally, it is contended by the defendant that the Safety Appliance Act is not applicable to the plaintiff, and was not intended for his protection. We think that this position is wholly untenable. We desire to remark at the outset, that there is nothing in the statute itself which in any way limits the employees for whose benefit its protection is extended.

The only case that counsel can muster in support of this contention is that of St. Louis, etc. Ry. Co. vs. Conarty, 238 U. S. 243, and that case is not analagous to the instant case. In the Conarty case, the defective equipment was a car without a drawhead, with which the plaintiff's intestate, who was riding on a switch engine, collided. He had no intention of coupling or uncoupling this car, or handling it in any way. It was held that the object of this part of the Safety Appliance Act was to obviate the necessity of men going between cars to couple or uncouple cars, and the possibility of a coupler separating en route, and that Conarty would not come within this class of employees. Moreover, the defective drawbar was the only ground set up for recovery. **It is apparent at a glance, of course, that this is an entirely different situation from the one in the case at bar, for in our case it is obvious that one of the purposes of requiring efficient brakes is to prevent just such an accident as this, so that the lives of employees or passengers would not be endangered by runaway cars**

which got away due to the failure to have efficient brakes on them.

In the case of Louisville, etc. R. R. Co. vs. Layton, 243 U. S. 617, the U. S. Supreme Court overruled to some extent the Conarty case, and laid down the true rule with reference to such cases, namely, that the Safety Appliance Act was intended to apply to all employees, and that if one was injured, regardless of his position, as a proximate result of the Safety Appliance Act, then he could recover. In other words, the sole test is as to whether or not the violation of the Safety Appliance Act was the proximate cause of the accident.

In the Layton case, the facts were as follows: (page 618)

> "A train of many cars standing on a switch was separated by about two car lengths from five cars on the same track loaded with coal. An engine, pushing a stock car ahead of it, came into the switch, and failed in an attempt to couple to the five cars, but struck them with such force, that, although the engine with the car attached stopped within half a car length, the five loaded cars were driven over the two intervening car lengths and struck so violently against the standing train that the plaintiff, who was on one of the five cars for the purpose of releasing the brakes, was thrown to the track, with the result that his right arm was crushed by the wheels and was amputated below the elbow.

The recovery in the case was on the first count of the petition, which alleges that the defendants were carriers of interstate commerce, and that they were negligent, among other things, in permitting the use of the car attached to the engine and of the car to which the attempt was made to couple it, without such cars being equipped with

> automatic couplers, which would couple by impact, as required by law, the claim being that if the cars had coupled when they came together, the five cars of coal would not have run down against the others, causing the shock which threw the plaintiff under the wheels."

The question at issue was whether plaintiff could sustain a recovery based upon the provision of the Safety Appliance Act, with respect to couplers. The defendant contended that there could not be such a recovery, and relied upon the Conarty case. The U. S. Supreme Court affirmed the judgment for the plaintiffs in the following language, (page 621).

> **"While it is undoubtedly true that the immediate occasion for passing the laws requiring automatic couplers was the great number of deaths and injuries caused to employees who were obliged to go between cars to couple and uncouple them, yet these laws as written are by no means confined in their terms to the protection of employees only when so engaged. The language of the acts and the authorities we have cited make it entirely clear that the liability in damages to employees for failure to comply with the law springs from its being made unlawful to use cars not equipped as required,—not from the position the employee may be in, or the work which he may be doing at the moment when he is injured. This effect can be given to the acts and their wise and humane purpose can be accomplished only by holding, as we do, that carriers are liable to employees in damages whenever the failure to obey these Safety Appliance Laws is the proximate cause of the injury to them when engaged in the discharge of duty. The jury found that the plaintiff's case came within this interpretation of the statute, and the judg-**

ment of the Supreme Court of Georgia must be affirmed."

In view of the fact that in the case at bar the judge charged the jury that the negligence of the defendant must be shown to have been the proximate cause of the accident, (page 196, l. 31 to page 197, l. 10), and submitted this question to the jury, it is apparent that under the Layton case the court correctly submitted the question of the violation of the Safety Appliance Act to the jury.

A case that is on all fours with the case at bar is that of Huben vs. L. V. R. R. Co. 10 Fed. (2nd) 78, referred to under Point No. 6 of our brief, under the question of proximate cause. In that case the plaintiff's intestate was employed as a baggage master in a baggage car of a passenger train of the defendant, which was standing at a station of the defendant. A short time previous thereto at another point on the defendant's line, the main pin of another engine of the defendant broke, with the result that the fireman and engineer jumped from the engine, and the engine ran away and crashed into the baggage car in which the decedent was, and killed him. At the close of the plaintiff's case, a motion for non-suit was made by the defendant on several grounds, one of which was that there was no proof of negligence on the part of the defendant, and that there was no liability under the Federal Employer's Liability Act, the Safety Appliance Act, or the Boiler Inspection Act. The Circuit Court of Appeals affirmed the judgment for the plaintiff and answered the defendant's contention on this point in the following language, at page 79.

> "But in the Beltz case this court has decided that the acts of Congress impose an absolute duty upon carriers engaged in interstate commerce to maintain their locomotive engines, when in active service, in a safe condition, and that the liability of the carrier in the discharge of that duty does not depend upon its negligence."

We have already adverted to the case of Minneapolis & St. Louis R. R. Co. vs. Gotschall, 244 U. S. 65 under this point, which furnishes a very strong support for our contention on this phase of the matter also.

It is therefore respectfully submitted that the court properly submitted to the jury all of the questions relating to the violation of the Safety Appliance Act with respect to the inefficient condition of the hand brakes.

POINT No. 4.

IT WAS PROPER FOR THE TRIAL COURT TO DENY THE MOTION FOR A NON-SUIT AND ALSO THE MOTION FOR A DIRECTION OF THE VERDICT.

The fourth point argued by the counsel for the defendant in their brief is that there was no evidence whatsoever of the negligence of the defendant to go to the jury and that therefore either the motion for a nonsuit or the motion for the direction of a verdict should have been granted by the Trial Court.

We submit that there was not only evidence to go to the jury, but that the evidence was exceedingly strong and practically uncontradicted by the defendant, who really put in no defense at all.

The plaintiff's complaint is framed so that it sets forth the negligence of the defendant in general terms and with great particularity and covers a broad field of negligence so that there would be no question but that it was comprehensive enough to include the facts as proved; and we submit that there was overwhelm-

ing proof of the negligence alleged in the complaint on several aspects of the case.

Counsel for the defendant admit that if there was any evidence of negligence under any one or more of the allegations in the complaint, that then the case was properly left to the jury.

The first point which appears to be discussed by counsel for the defendant under this point is that there was no evidence to go to the jury of the inefficient condition of the brakes. We have discussed this under Point No. 3, so will not refer to it further.

A.

It was alleged in the complaint that the defendant, its servants and agents, carelessly failed to provide good and sufficient derailing devices or any such devices whatsoever for the purpose of derailing runaway cars. There was ample evidence to go to the jury on this point.

The plaintiff testified that there was a derail between the lead track, which led out on to the main line track, and the main line track, which meant that there was a derail located between these two cars and the main line track of the defendant that could have been placed in position on the track (page 48, ll. 29-31). Then J. J. Potter, defendant's engineer, testified that the derail must have been off the track at the time that the cars ran away for the very obvious reason that, of course, if the derail had been on the track, it would have derailed the runaway cars and they would not have gotten out on the main line track. That there was, therefore, in fact, a failure on the part of the defendant to provide or place a good and sufficient derailing device on this track is perfectly clear. Either the defendant's employees failed to place the derail on the track or else they

failed to put it on so that it operated properly and performed its duty and derailed these cars and thus prevented the accident. Certainly an allegation that the defendant failed to provide good and sufficient derailing devices or any such devices whatsoever is sufficiently broad to cover the fact that the defendant failed to put the derail on the track.

Moreover, there was the general allegation that the "defendant, its servants and agents, also then and there carelessly and negligently ran and operated a locomotive and train of cars on the said track in an easterly direction" (page 21, ll. 35-38) and also the general allegation that the defendant, its servants and agents, "also then and there carelessly, negligently and unlawfully detached or uncoupled the said cars (referring to the two cars in question) from the rest of the said train." (page 22, ll. 21-24), either of which allegations of negligence are comprehensive enough to cover the failure to properly place the derail on the track.

It is to be noted that the clause in the complaint last referred to appears first in the complaint as set forth above, in general terms, (page 22, ll. 21-24), and occurs again immediately following this clause and sets forth other grounds of negligence (page 22, ll. 24-31), so that the complaint is unusually broad. We set forth both clauses as follows:

> "and also then and there carelessly, negligently and unlawfully detached or uncoupled the said cars from the rest of the said train, and also then and there carelessly, negligently and unlawfully detached or uncoupled the said cars from the rest of the said train without properly setting the brakes on the said cars, and without placing the same in a safe location, and without having a man in charge thereof, and without keeping any lookout to see if they started to run away."

B.

The next criticism of the defendant under this point is that there was no evidence to go to the jury on the following allegations of negligence which are included in Paragraph 6 of the complaint (page 22, ll. 22-31):

(1) That the cars were negligently detached or uncoupled from the rest of the said train.

(2) The failure to properly set the brakes on the said cars.

(3) The failure to place these cars in a safe location.

(4) The failure to have a man in charge of the said cars.

(5) The failure to keep a lookout to see that they did not start to run away.

In this connection, counsel endeavors to take the position that there was no evidence that the cars were detached or uncoupled from the rest of the train. Such a position is highly technical, to say the least, and entirely unwarranted. The testimony was that this crew had orders to pick up these cars (page 187, ll. 40-41); that they first picked up the Maine Central car and placed this on the track called the back track after which they put two or three cars on the middle track and then put the Philadelphia and Reading car on the back track (page 186, ll. 9-15). This was done for the purpose of putting them in station order and when the drilling of these and other cars was finished these cars were to go along.

We submit that it is obvious that each of these cars when it was placed on the back track was attached or coupled to this train and that when they were left there, they were detached or uncoupled from this train. The proof conformed absolutely to the allegations, although under the modern practice,

it is well settled that strict conformity is not required.

That the trial court was entirely justified in submitting the question of the negligence of the defendant on the five points above mentioned, we think is manifest.

There certainly can be no doubt that the two cars got away and it is equally certain that if there had not been some negligence on the part of the defendant, they would not have run away. Otherwise no railroad could be operated with any degree of safety whatsoever, if it is not possible by the exercise of ordinary care to prevent two cars from running away.

It was a dark night and the rails were a little slippery and wet (page 188, ll. 40-42); the crew knew that Hendershot's train was on the way a few miles off, for they had orders to pass it at Kinney's Switch (page 162, ll. 3-5); Peterson the brakeman, likewise knew that the track went down grade toward Kinney's Switch (page 190, ll. 33-35), and doubtless the rest of the crew were aware of this fact.

Under all of these circumstances, it was peculiarly the province of the jury to say whether the defendant's employees exercised reasonable care in the handling of these cars or whether they handled them in a negligent manner; **also whether there was a failure to properly set the brakes on these cars, particularly in view of the fact that one brake was admittedly not set at all.** Likewise, it was a jury question as to whether there was a failure to place these cars in a safe location as, for instance, on a different track that was not down grade or to place the derailing device on the track or to place them where they would be attached to some other cars and so could not run away or in some other location where it would not be so easy for them to slip away out onto the main track and cause this wreck. So it should have been left to the jury to say whether under all these

circumstances, they should have left a man in charge of the cars, as the plaintiff testified that it was the custom so to do (page 45, l. 35 to page 46 l. 12).

"Q. Now, will you please tell me what the custom was at the time of the accident on the Susquehanna Railroad with respect to a situation of this kind, where two loaded box cars are left standing on a track—what was the custom at that time with respect to securing those cars by brakes or otherwise?

The Court: If he knows.

Mr. Selser: Within the single period of time stated by counsel.

Mr. W. Reading Gebhardt: Certainly.

A. **According to the grade in the yard where these cars stood they were supposed to have a brakeman on them. They were supposed to be blocked."**

Likewise, as to the failure to keep a lookout for these cars so that if they started to run away, it would have been discovered more promptly and the accident thus prevented.

If the defendant had taken any one of these simple precautions that suggest themselves even to the mind of the person uninitiated in the possibilities of railroad safety, there would have been no accident. But they failed to take any of them and therefore, it was manifestly a matter for the jury to decide what the defendant should have done in the exercise of reasonable care. The test is not what is usually done or what is done by other railroads, but what should be done in the exercise of reasonable care. Coll vs. L. V. R. R. 3 Misc. Rep. 869, aff. 4 Adv. Rep. 727.

It certainly was a question upon which reasonable minds might well differ, which means that it was a subject for the jury to determine. Ferguson vs. Cen. R. R. Co., 71 N. J. L. 647, p. 651.

Moreover it would have been the duty of the court to submit this case to the jury under the doctrine of **res ipsa loquitur.** This will be discussed more in detail later in the brief. Certainly if there was ever a case that should have been submitted to the jury, this was it.

POINT No. 5.

THERE WAS NO ERROR IN THE COURT'S CHARGE ON THE QUESTION OF RES IPSA LOQUITUR.

In the next point counsel for the defendant attack the charge of the trial court on the question of **res ipsa loquitur,** which was as follows: (page 199, l. 9 to page 200, l. 29.)

"We have a rule in our State, for example, which it occurs to the Court is pertinent for consideration in this case. Here was a situation where an employee of the defendant company, the plaintiff, was in the performance of his duty apparently, if you believe the testimony, and suddenly two loose cars came around the corner with no one in charge of them, and the collision in question occurred. Whether that circumstance of itself is an evidence of negligence on the part of those responsible it seems to me will be a question for consideration by the jury, because we have this rule: The principle is that when through any instrumentality or agency under the management or control of the defendant or his servants there is an occurrence injurious to the plaintiff, which, in the ordinary course of things, would not take place if the person in control were exercising due care, the occurrence itself in the absence of explanation by the de-

fendant affords prima facie evidence that there was want of due care. That brings me to say this: There is testimony on behalf of the defendant to the effect that the brakes on the cars in question were efficient and that they were properly set, and the cars blocked, but notwithstanding such testimony the proofs tend to indicate that the cars ran away. You may consider whether the mere declaration by the brakeman, produced by the defendant, that the brakes were efficient, is sufficient to satisfy you that they were. May it not be said (and this is a mere comment and suggestion on the part of the Court; you are the judges of the facts in the case) that the declaration on the part of the employee of the defendant company that the brakes were efficient is not proof that they were? You might say what proof is there in the case that any test had been made of a character which would support the brakeman's declaration that the brakes were efficient? If tests had been made prior to this accident by those qualified either as mechanics in the construction of such equipment for cars or by those who, as the result of years of experience come here and say, 'Yes, the brakes were tested and these cars were set in motion or attached to a train or were moved the day before, or the week before, or within a reasonable time before, and these brakes tested efficiently.' It is conceivable that if that sort of evidence were in the case, aside from the mere declaration of the brakeman in question, they might well say that the cars' running away was not due to inefficient brakes. Bear in mind that I am not taking from your consideration at all the testimony of that brakeman in relation to the efficiency of the brakes. It is a question of

fact for you to determine in the case, and you must consider all the evidence offered, whether coming from the plaintiff or the defendant."

Counsel do not seem to seriously contend that the doctrine of **res ipsa loquitur** does not apply to this case, but endeavor to take the position that where in a situation of this kind, one or two of the defendant's employees testify that they have no explanation to make of the happening of the accident, that that is sufficient to exculpate the defendant, and to bar the application of the rule, and the submission of the case to the jury on this theory.

That is not, however, the true conception of the doctrine of res ipsa loquitur, which tersely put, is, that where a situation arises which in the ordinary course of things does not happen unless the person (here the defendant) who has charge of the instrumentalities which create that situation has been negligent in the handling of, or dealing with, those instrumentalities, that then the mere happening of the accident speaks for itself the negligence of the defendant, and is sufficient evidence of negligence to go to the jury, unless the defendant, presents a satisfactory explanation of the accident so as to negative the presumption of negligence already raised, to such an extent that it becomes the duty of the court to take away this presumption of negligence from the jury's consideration.

But here, the defendant contends that where, in effect, it throws up its hands and admits that it has **no** explanation of the accident, that then the doctrine should not apply. That position, however, is wholly untenable, either from the standpoint of logic or the authorities. There is no evidence here that any third person had interfered and caused this accident, and no evidence that anybody but the defendant had anything to do with these cars or anything of that

kind, **but the outstanding fact still remains that the cars did run away.**

The comments of the court in the charge with respect to the efficiency of the brakes were mere comments on the facts in the case, and, consequently, the making of them was within the discretion of the court. See Van Sciver vs. Public Service Railway Company, 96 N. J. L. p. 13.

In the case of McPherson vs. Hudson and Manhattan Railroad Co. 100 N. J. L., 262, affirmed 101 N. J. L., 410, the suit was brought for personal injuries sustained by the plaintiff by the closing of one of the automatic doors (the center one) on one of the defendant's cars, upon the plaintiff, so that she was caught between the door and the jam thereof. The defendant offered in explanation of the accident a witness, Eckley, who testified that he was the guard stationed at the front door of the car in question, and that he did not open or close the door, although he could have done so, and that there was no guard at the rear door. Then another of the defendant's employees, Frasco, testified that he saw the center door open and close; that he then ran to the rear of the car and saw a stranger fooling with one of the buttons, which operated this door; that he shouted to him and the man entered the car.

This court held that the happening of the accident raised a presumption of negligence on the part of the defendant, and also held that notwithstanding this elaborate explanation offered by the defendant it was still a jury question. We quote from the opinion of the court at page 266:

> "Was the presumption that the door was opened and closed by the servant of the defendant entirely overcome by the testimony of Eckley, and Frasco, so that it was error to have refused to grant the motion to direct a verdict,

> or was it a question for the jury to determine whether or not the testimony of these two witnesses overcame the presumption of negligent operation arising from the happening of the accident? We incline to the latter view. Eckley knew nothing of the alleged operation of the door by the stranger. Frasco was the only witness who gave testimony as to a stranger pressing a button on the rear platform of the car. Frasco does not testify unequivocally that the stranger pushed the button operating the centre door, although it might be so inferred from his testimony. **On the other hand, the inference might be drawn that the door was opened by Eckley, notwithstanding his denial. The testimony of Frasco is not so clear and convincing that the act of a stranger caused the accident that, in our opinion, the trial court should have directed a verdict for the defendant.** It seems most unusual for one, who is seeking to board a train in the short period of time afforded for doing so, to be examining and pressing buttons. **The probability of the story told by Frasco, and whether or not it outweighed the presumption of the centre door being operated by an employee, were questions for the determination of a jury."**

It is obvious that if that case was properly submitted to the jury, that the case at bar, where no attempt whatsoever to give any satisfactory explanation was made by the defendant, was likewise properly submitted to the jury.

Counsel for defendant endeavor to suggest that this court in affirming the decision of the Supreme Court in the McPherson case, made some radical change in its decision. All that this court did, however, was to define with greater exactness and nicety the rule of

res ipsa loquitur, but did not intimate that there was any doubt that the rule was correctly applied to that case.

Counsel also rather endeavor to convey the impression that the trial judge in the case at bar went too far and said that the burden of proof to exculpate itself, rested upon the defendant as a result of this rule, but counsel are unable to point out any part of the charge as a basis for this, because the trial judge never even intimated anything of this kind. On the contrary, the judge's charge was entirely correct, as the Supreme Court below found. Moreover, there was no request to charge submitted on this point by the defendant.

We quote from the opinion of the Supreme Court at page 222, ll. 30-38.

> "The next point is that the judge erroneously charged the jury as to the application of the doctrine of res ipsa loquitur.
>
> We have examined the charge in this respect and we believe it was justified in the circumstances disclosed by the evidence. Such we believe to be the effect of our decision in McPherson v. Hudson & Manhattan R. R. Co., 100 N. J. L. 262, affd. 101 N. J. L. 410."

See also:

Demarest vs. Bergen County Traction Co.
62 N. J. L. 755.

Mumma vs. Easton & Amboy R. R. Co.
73 N. J. L. 653.

Newark Electric Co. vs. Ruddy, 62 N. J. L. 505.

The Consolidated Traction Co. vs. Thalheimer,
59 N. J. L. 474.

We desire to point out that so far as the brakes are concerned, it makes no difference how many tests the defendant made of them; if they were not efficient to keep these two cars from running away at the time

when they did run away, then obviously they were not efficient, and therefore, the Safety Appliance Act was violated, and the defendant was liable to the plaintiff. As we have already stated under Point No. 3, the duty under the Safety Appliance Act is absolute and unqualified.

We submit, therefore, there was no error in the judge's charge on the question of **res ipsa loquitur.**

POINT No. 6.

THE TRIAL COURT PROPERLY LEFT TO THE JURY THE QUESTION OF THE DEFENDANT'S NEGLIGENCE BEING THE PROXIMATE CAUSE OF THE ACCIDENT.

We now pass to the consideration of the question of whether the court properly left to the jury the question of whether or not the defendant's negligence was the proximate cause of the accident. It is contended under Point No. 4 by the defendant, that there should have been a non-suit or a direction of a verdict on this ground, and in Point No. 6, that the judge's charge on this subject was incorrect.

We think that it is so obvious that there was ample evidence to go to the jury that the defendant's negligence was the proximate cause of the accident, that little need be said on this point.

These two cars had been placed on this track by the defendant's servants. If they had been placed there in such a manner that they could not run away, the accident would not have occurred. This was not done, and the cars did run away and cause the accident. The plaintiff contends that they ran away because of the inefficient condition of the brakes, and because of the negligent manner in which they were placed there, and allowed to remain there. **Certainly**

such negligence would be the natural and proximate cause of the cars getting away, and of the resulting accident.

In the case of Carey vs. Deems, 101 N. J. L. 419, in which the suit was brought for the death of the occupant of an automobile as the result of a collision between it and another automobile, the defendant complained because the court had not defined the meaning of the words "natural and proximate," and had refused to charge a request to charge submitted by the defendant on this point. The court took the view that if the collision was due entirely to the defendant's negligence, his negligence must necessarily have been the proximate cause of the accident. We quote from the opinion of the court at page 1162:

> "In the present case we are unable to perceive that the failure to charge that portion of the request which we have indicated operated in any way to the injury of the defendant, for the reason that if the plaintiff's decedent came to his death through a collision between the car in which he was riding and the car of the defendant, and such collision was due entirely to the negligence of the defendant in the management of his car, that negligence was necessarily the proximate cause of the injuries received by the decedent and such injuries were the natural result of that negligence."

We have already called the attention of the court to the case of Lehigh Valley R. R. Co. vs. Huben, 10 Fed. (2d) 78, under Point No. 3. This case was the one in which the engine ran away and collided with the baggage car and killed the plaintiff's intestate, who was the baggage master in that car. In that case the U. S. Circuit Court of Appeals held that there was "no doubt as to the liability of the defendant, if the man was at the time of his death, actually engaged

in interstate traffic." (Page 79). There was evidently no doubt whatsoever in the court's mind in this case that the defendant's defective engine was the proximate cause of the accident, and exactly the same reasoning is applicable to the case at bar. We submit that the court was entirely justified in submitting the case to the jury on this point.

The defendant further contends under the same point that the trial court erroneously charged the jury on the question of proximate cause. This is not so, but even if it were, there appears to be no exception to this part of the court's charge on this aspect of the case, and no request to charge submitted to the court dealing with this subject, and no ground of appeal covering this point. Under the well settled law, therefore we do not see how this point can be considered by this Court. Kargman vs. Carlo, 85 N. J. L. 632, Van Sciver vs. Public Service Railway Co., 96 N. J. L. 13.

The court's charge on this point was as follows, and we submit that it was entirely correct, page 196, l. 31 to page 197, l. 10:

> "In association with this definition of negligence you are also to remember that the damage chargeable to a wrongdoer, in this case it being alleged that the employees of the defendant company were negligent, must be shown to be the natural and proximate effect of such negligence, and the term "natural" imports such as might reasonably have been foreseen, such as occur in the ordinary state of things, and the term "proximate" indicates that there must be no other culpable and efficient agency intervening between the defendant's negligence and the loss. It is said that the proximate cause is that cause which naturally and probably led to and which might have been expected to produce the

result of which complaint is made. It is the efficient cause, the one that necessarily sets the other causes in operation."

Proximate cause is defined in Cyc. as follows, 29 Cyc. 49:

'It is sufficient if it be the efficient cause which sets in motion the chain of circumstances leading up to the injury, and which in natural continuous sequence unbroken by any new or any independent cause, produced the injury."

See also Zellars vs. Delaney, 80 N. J. L. 452; Batton vs. Public Service Corporation, 75 N. J. L. 857.

We submit that the charge of the court in this respect was entirely correct, and if anything, more favorable to the defendant than it was entitled to.

POINT No. 7.

THE COURT'S CHARGE WITH RESPECT TO THE RECOVERY OF DAMAGES BY THE PLAINTIFF WAS CORRECT.

In Point No. 7 the defendant contends that the following part of the charge of the trial court amounted to a direction of a verdict for the plaintiff: (page 202, ll. 21-8.)

"Having passed upon the question of compensation for the personal injuries, I may say again in comment that if you find the injuries are as claimed by the plaintiff and that he has carried the burden of satisfying you under the greater weight of the evidence, then he is entitled to recover a substantial sum therefor."

The court had already charged the jury fully and accurately on this question of liability, and had definitely passed to the matter of damages, and it is obvious, therefore, that the court merely meant by this

comment that if the plaintiff was entitled to damages at all, that then he was entitled to a substantial sum if they believed that he had sustained his story of the happening of the accident and of his injuries by the greater weight of the evidence.

This is particularly true in view of the fact that the court had already specifically stated to the jury in two or three different ways, as will appear from the following excerpt from the charge, that they must find the defendant liable before they considered the question of damages, and he then devoted the rest of his charge to the matter of damages and it was in the latter part of his charge that the portion complained of is found. We quote from the charge at page 201, ll. 23-34.

"Should you find under the law as the Court has given it to you, both statutory and the appellate authority, that the defendant company was negligent, then you would consider the question of damages to be assessed to the plaintiff, and not until then because if you find that there was no negligence on the part of this railroad company that is the end of this case and your verdict should be 'No Cause of Action'; but if you do find negligence within the definition of the law and the authority given you, then you would consider the question of damages."

Moreover, the very last sentence of the charge again emphasized this by the use of the word **"IF,"** page, 203, ll. 23-4:

"IF you render a verdict for the plaintiff you must render a verdict in one lump sum for all the elements of damage which I have outlined to you."

The court followed the usual custom in charging, first, as to liability, and then, as to damages, and his charge was in no way calculated to mislead the jury

in any respect. The charge must be considered in its entirety and not just some chance phrase or sentence isolated from the rest of the charge. See State vs. Giberson, 99 N. J. L. 85.

The Supreme Court disposed of this point in the following language, (page 222, l. 39 to page 223, l. 16.)

"Again it is urged that the trial court erroneously charged the jury that if they found the injuries were as claimed by the plaintiff, then he was entitled to recover a substantial sum therefor, thereby removing from the consideration of the jury the question whether the plaintiff had proved any negligence on the part of the defendant or its employees.

This point we think has no substance, as will be seen upon an examination of the entire charge, in which, of course, the trial judge properly, as we think, laid down the rules governing the jury upon the question of the liability of the defendant and the necessity of proving negligence."

POINT No. 8.

THERE WAS NO ERROR IN THE ADMISSION OF THE TESTIMONY WITH RESPECT TO THE COMPARATIVE EFFECT OF HAVING THE HAND BRAKE APPLIED ON ONLY ONE OF THE TWO CARS, INSTEAD OF THE HAND BRAKE ON EACH CAR BEING SET.

The question objected to is as follows, (page 46, l. 36 to page 47, l. 9).

"Q. Let us assume that two cars were put together on a sidetrack and that the hand brake of each of those cars was fastened securely—

Mr. Selser: I object—

The Court: Let him finish the question.

Q. —will you please tell me whether or not from your experience as a brakeman those cars would be held more or less securely there with two hand brakes instead of just one on each car than they would be with only one hand brake set on one car?"

Due to the interruption in putting this question, there seems to have been some confusion either on the part of counsel in stating the question, or on the part of the stenographer in getting it down, with the result that it is not entirely clear, but a reading of the context shows clearly that the purpose of the question was to elicit the information that it would have been safer to have the hand brake on each car set, rather than only the hand brake on one car. We quote the questions and answers just before this and the colloquy that followed the question under consideration, (page 46 l. 18 to page 47, l. 35):

"Q. Suppose that two cars are hooked together, what was the custom with respect to the putting on of the hand brake, as to whether it would be put on one car or both cars? A. **Well, there are all kinds of brakes on these cars. Some have hand brakes on and some don't, and some have got two, and with two cars they are supposed to put both brakes on.**

Q. Is there anything in the rules of the company with respect to that? A. Why, yes. There is supposed to be a standing order about the men putting brakes on. They are suppose to be capable men.

Q. What do you mean? In this situation, where two cars are left standing on a sidetrack together, what do the rules require to be done? A. You are supposed to blow the air first and then put the **hand brake on both cars if you are**

going to leave them there. It is supposed to be done.

Q. Let us assume that two cars were put together on a sidetrack and that the hand brake of each of those cars was fastened securely—

Mr. Selser: I object—

The Court: Let him finish the question.

Q. —will you please tell me whether or not from your experience as a brakeman those cars would be held more or less securely there with two hand brakes instead of just one on each car than they would be with only **one hand brake set on one car?**

Mr. Selser: I object to that on the ground there is no duty proved or any rule or regulation requiring that **two brakes be set.** This question is far too general for this case, because there is no comparison between the situation existing where these cars were placed and the general condition that is presented.

The Court: You will have to show, Mr. Gebhardt, that the question is pertinent to the issue, and unless you connect it it is not admissible. If you assure me you are going to connect it I will allow it.

Mr. W. Reading Gebhardt: We intend to do that. **It is admitted by counsel in his opening that these two cars were left on this track with only one hand brake on.**

The Court: You are discussing a standard order. On the assurance that you propose to connect it I will allow it.

Mr. W. Reading Gebhardt: Very well.

Mr. Selser: May I have an exception?

The Court: Yes. **Which is the safer, two brakes or one?**

The Witness: **Two brakes."**

We think that it will clearly appear that the question was with respect to one brake on each car. This was, of course, not only relevant, but of the utmost importance, particularly in view of the fact that it appeared later on in the case that the brake was set on only one of the cars, (page 189, ll. 17-18). Plaintiff's counsel understood that this was what the court meant by connecting up his testimony, namely, by showing that only the hand brake on the one car was actually set, and, of course, this was done.

Furthermore, where this situation exists, and the party is unsuccessful in connecting up the testimony, the proper practice is for the counsel who objects, to move to strike out the testimony at the close of the case, but no such motion was made in this case. See Camden R. R. Co. vs. Williams, 61 N. J. L. 646, at p. 649.

Moreover, the question as put by plaintiff's counsel was not, in fact, answered, but rather the one put by the court as follows, (page 47, ll. 33-6):

"The Court: Yes, which is the safer, two brakes or one?

The Witness: Two brakes."

And the defendant made no objection to this question by the court, and likewise there was no motion to strike out the answer, so under the well settled rule, it is now too late to complain thereof. See Kargman vs. Carlo, 85 N. J. L. 632.

Furthermore, the testimony was obviously harmless because the jury would be entitled to infer from their own general knowledge that it would have been safer to secure the hand brake on each car instead of on only one of the cars. It is well settled that a harmless error is not ground for reversal, even if it was error, which we insist it was not.

POINT No. 9.

THE COURT CORRECTLY ADMITTED THE TESTIMONY OF THE WITNESS, J. J. POTTER.

The action of the trial court in permitting the following question to be answered is criticized under Point No. 9. The question was: (page 160 l. 33, to page 161, l. 13.)

"Q. This derail that you spoke of, at the time that you saw these two cars going out, going east, starting on that runaway trip, was that derail on or off the track at that moment?

Mr. Selser: Objected to, because it is not in the pleadings. There is no allegation of improper operation of the derail. There is an allegation that we did not provide tracks with proper derail; and he has shown that there is a derail.

The Court: The objection is overruled.

Mr. Selser: To which we except.

The Court: Exception granted.

A. The derail must have been off if they went out of the switch.

Mr. Selser: I move to strike that out as not responsive."

The only objection to this question made by counsel was that there was no allegation in the complaint to support it. We have already discussed this under Point No. 4-A of our brief, and pointed out that the complaint was sufficiently broad to cover this proof of negligence.

The answer to this question was, in fact, responsive, for this witness Potter was an experienced railroader, and could therefore properly testify as an expert that the derail could not have been on, for if it had been, its action would have been such as to derail the cars,

which, of course, did not happen, for the cars ran away.

There can be no question but that Potter was an expert railroader; otherwise he would not have been allowed to operate this engine. Moreover, he testified fully as to the lay-out of the tracks at Green Pond Junction, where the two cars in question got away, (page 158, l. 29, to page 159, l. 12), and as to the location of the derail, (page 160, ll. 24-32.)

In the case of Abel vs. Zeek Baking Company, 132 Atl. 245 (N. J.), there occurred the following question and answer, the question being objected to:

"Q. How did this mark look as to appearance? A. It looked as though a machine had run up there."

The admission of this question was held not to be error.

In the case of Prout vs. Prout, 82 N. J. L. 537, this court held that it was proper to ask the question as to whether a man and woman were living together as "man and wife."

In the case of Murphy vs. N. J. Street Railway Co. 81 N. J. L. 706, the court held that it was proper for the plaintiff to testify that he slipped on some material, "that looked like old ice."

Under this point counsel also complains of the following testimony, (page 161, ll. 17-23):

"Q. How could they possibly have gotten out of the switch? Was the derail on or off when they got out of the switch? A. It must have been off.

Q. Could they have gotten out if it was on? A. No, sir.

Mr. Selser: I object to all of this, because it is speculation."

The objection here was that the testimony was speculation, but as we have already pointed out, Pot-

ter knew as an expert, that the derail could not have been on the track, and it was therefore proper for him to testify to this fact as an expert just as a doctor or other expert can testify that in a stated situation certain facts would or would not exist, as, that a person did not have a certain disease because he did not have the symptoms that accompany that disease.

See State vs. Weiner 127 A. p. 582 (N. J.); Prout vs. Prout 82 N. J. L. 537; Murphy vs. N. J. St. Ry. Co. 81 N. J. L. 706.

Moreover, the objection to these two questions was not made until after they were both answered, and therefore under the well settled rule, the objection came too late, for the objection must be timely and before the answer is in. See O'Brien vs. Staiger, 101 N. J. L. 526.

POINT No. 10.

THERE WAS NO ERROR IN THE ADMISSION OR EXCLUSION OF EVIDENCE ON THE PART OF THE TRIAL COURT WITH RESPECT TO QUESTIONS RELATING TO THE PLAINTIFF'S INJURY.

A.

Admission of a Question Put to Dr. Frank A. Wolfe.

The defendant complains of the admission of the following testimony of Dr. Frank A. Wolfe, one of the plaintiff's physicians, (page 96, ll. 26-35):

"Q. You said you made an examination of Mr. Hendershot. What condition did you find?

Mr. Selser: That is objected to. As to what, eyes or what?

Mr. Gebhardt: All conditions he found on examination.

The Court: Objection overruled.

Mr. Selser: To which we except.

The Court: Exception for the defendant."

The reason **now** advanced by counsel for the objection to this question is that Dr. Wolfe was not qualified to testify about all of the physical conditions that the plaintiff had.

He testified that he had been a practicing physician for fifteen years, and was a graduate of Jefferson Medical College, and that he was the Surgeon in Chief of the Warren Hospital, at Phillipsburg, N. J. Certainly this experience would be more that sufficient to qualify him to testify as to conditions that he found as a result of his physical examination of the plaintiff.

Moreover, counsel for the defendant did not state any reason for their objection to this question, and did not intimate in any way to the court that their position was that the doctor was not qualified to testify as an expert, although it was their duty to apprise the trial court of the nature of their objection. Nor did they ask for the right to cross-examine the doctor as to his qualifications, before his testimony was admitted. It is well settled that if counsel objects to a question, he must state his reason for the objection, and if he fails to do so, he cannot take advantage of the objection on the appeal.

This rule was clearly set forth by the court in the case of English vs. Continental Folding Paper Box Co. 98 N. J. L. p. 438, at p. 439:

> "It will be observed that no ground of objection whatever was suggested as to why this question was inadmissible, and it is both a general rule of practice (Semkin v. Hollander, 82 N. J. L. 485) as well as a written rule of court (Supreme Court rule 144), that such an objection, to be available, must point out a precise and definite ground of objection."

Moreover, while an objection was made to the question as it was first put, after it was amplified by counsel for the plaintiff, the defendant's counsel made no objection to the question in its altered form.

Furthermore, it is settled that the qualification of an expert is within the discretion of the trial judge, and the action of the trial court in allowing an expert to testify is not reversible error unless there was an abuse of the trial court's discretion, and there was no evidence of that here. Perth Amboy, etc. R. R. Co. vs. Crawford, 5 Adv. Rep. 154, (E. & A.).

Finally, the doctor testified at great length, both on direct and cross-examination, with respect to the plaintiff's condition in all respects, without objection, and therefore even if this exception was originally good, it is settled that where similar questions are subsequently asked and answered without objection, then the previous objection is waived. See Redhing vs. C. R. R. of N. J., 68 N. J. L. 641.

B.

The Plaintiff Properly Testified As to His Inability to Do the Work of Brakeman.

The next criticism of counsel is based on the first ground of appeal, and is directed to the admission of the following question put to the plaintiff: (page 42, ll. 4-8).

"Q. Take the condition of your left shoulder. Will that interfere or not?

Mr. Selser: I object.

The Court: Objection overruled. You may have an exception."

While counsel in their brief quote a great deal of the testimony of the plaintiff along similar lines, this question is the only one that is included in the first

ground of appeal, or of the kind in any ground of appeal, so, of course, the issue narrows down to the admission of this particular question. The question related to the matter of whether the condition of the plaintiff's shoulder which was injured in the accident, would interfere with his resuming his duties of brakeman.

In the first place, the plaintiff was an expert brakeman, and therefore knew better than any doctor or any one else whether the crippled condition that his shoulder was in would interfere with his performing his duties of brakeman. On this ground the testimony was admissible.

Moreover, as will clearly appear from all the testimony set forth by counsel in their brief under this point, the plaintiff testified at great length about the extent to which his condition interfered with the performance of his duties as brakeman, without objection.

In fact, immediately after this objection was made, the plaintiff went on and testified as to the extent to which his injured shoulder would incapacitate him for the duties of brakeman, and no objection was made by counsel. We quote from page 42, l. 13 to page 43, l. 11.

"Q. To what extent, if any, would the condition of your left shoulder interfere with your duties as brakeman? A. I do not think my left shoulder will allow me to pull a switch, either.

The Court: Have you tried it?

The Witness: No.

Q. Have you tried to do other things with it? A. I used to exercise with it, and everything else, hoping it may get better, but it hasn't got better since.

The Court: Have you tried work that would require the strength required to turn a switch?

The Witness: No, sir. I have not touched a switch.

Q. Do you have all the movements of your shoulder that you had before, and that a brakeman would have to have in climbing around cars, and all those things? A. No, I do not think I have.

Q. Why not? A. I do not think I would be able to do it?

The Court: Well, you have not tried?

The Witness: I have not tried it, no, sir.

Q. What is wrong with your shoulder—how does any condition there interfere with the use of it? A. I cannot raise it only up so high.

Q. How would that interfere with your duties of brakeman? A. I would have to be very active to get hold of a ladder and get on a car or on an engine, and I would have to have the use of it."

We submit that since the very testimony objected to was later admitted without objection on the part of the defendant, that the defendant thereby waived its first objection.

C.

There Was No Error in the Court's Ruling As to Dr. Sherrer's Testimony.

The next point in defendant's brief deals with the third ground of appeal, which criticizes the action of the trial court in overruling the following three questions which we have set forth in capital letters as they occur in the following testimony. These are the only three questions included in this or any other ground of appeal, of Dr. Sherrer's testimony, and therefore the only questions to be considered: (page 87, l. 13 to page 90, l. 35.)

"Q. ARE YOU ABLE TO SAY FROM THE EXAMINATION OF THIS DOCUMENT,

MARKED D-1 FOR IDENTIFICATION, WHAT PART OF THE ANATOMY IT IS AN X-RAY FILM OF?

Mr. W. Reading Gebhardt: I object to that.

The Court: Objection sustained.

Mr. Selser: I ask an exception.

The Court: You may have an exception. Now the Court will put on the record that counsel for the defendant, in cross-examining a doctor, who is a witness for the plaintiff, produces an x-ray which has not in any way been identified or offered in evidence, and, while he claims the right to cross-examine the doctor by producing it and asking questions about it, the Court now rules that, the doctor having already testified that he does not know the method in which it was taken, with what machine, the Court now sustains the objection to the last question. You may have an exception.

Mr. Selser: May I suggest to your Honor that you undoubtedly misunderstood the witness? He said he was going to be as particular as I was and demand an explanation. **The question was an attack on the credibility and general experience.**

Mr. W. Reading Gebhardt: **May I add, for the purpose of the record, that the x-ray film in question appears to be a film about 14 inches square, surrounded on each side by cardboard, heavy cardboard, through which it is impossible to see, and out of which a hole is cut on each side somewhere in the center, about 3 inches square.**

Mr. Selser: **That is correct.** I will ask that the film itself be marked D-1 for identification, and the other carboard so marked. **Now we will expose the film.**

Q. NOW, ARE YOU ABLE TO TELL WHAT PORTION OF THE ANATOMY THE FILM MARKED D-1 FOR IDENTIFICATION SHOWS?

Mr. W. Reading Gebhardt: I object to that unless it is shown of whom this picture was taken, under what circumstances it was taken, and of what kind of a skull it was taken and of whom it was taken. It is entirely incompetent, irrelevant and immaterial unless that is shown and unless such a foundation is laid for the question.

The Court: **I will allow the doctor to answer.** You may have an exception.

(Last question read.)

A. A skull.

Q. Can you indicate upon that x-ray the shadow of the skull suture? A. Yes, sir.

Mr. W. Reading Gebhardt: We object to that on the same ground.

The Court: The objection is overruled. He may answer.

The Witness: Yes, sir.

Q. Can you indicate upon that film the shadow of the middle meningeal artery? A. Yes, sir.

Q. Will you indicate to the jury—It is not in evidence—

The Court: No. You cannot do that.

Q. CAN YOU SEE ANY EVIDENCE OF SKULL FRACTURE IN THAT?

Mr. W. Reading Gebhardt: We object to that on the ground it is incompetent, irrelevant and immaterial as far as this case is concerned.

The Court: Yes. Objection sustained.

Mr. Selser: We ask an exception.

The Court: You may have an exception.

Mr. W. Reading Gebhardt: The picture in question is not in evidence.

The Court: It is merely marked for identification.

Mr. Selser: I am not asking him to indicate to the jury, of course.

Q. Doctor, did you ever determine what this man's condition was in respect to pulse at the time he was in the Paterson General Hospital immediately following the accident? A. No, sir, for I did not see him there.

Q. Did you inquire of him his early history prior to your physical examination? A. I did, of him.

Q. Did you inquire as to the pulse?

The Court: Just a moment. The previous questions relating to the x-ray that was produced and marked for identification I admitted upon the theory that it would test the doctor's competency and ability and that is all. Now I am inclined to reverse myself on that last ruling and allow an answer to that question with the idea that it relates solely to a test of the doctor's ability, that is all, and in that respect I think I will allow an answer, and for that purpose only.

Mr. Selser: If your Honor please, the effect of it has already been destroyed.

The Court: Now, see here. This is not a contest—we are endeavoring to arrive at the truth and that is all and I will not allow any technical pyrotechnics or anything of the sort. We are trying to find out the truth in the matter. I will allow an answer to this question. If you do not want an answer, that is all there is to it. Now, do as you like. This is not a mere contest between counsel as to shrewdness or smartness or

anything of the sort. You must remember where you are.

Mr. Selser: I wish to apologize to your Honor if I have offended.

The Court: If you want your answer to that question, take it. The question was as to the x-ray. Can you see any evidence of fracture?

(Last question read as follows: 'Did you inquire as to the pulse?')

A. I did not."

The first of the three questions was put to the doctor with reference to an x-ray film, which, as the record itself says (page 88, ll. 3-16) was concealed between two heavy opaque pieces of cardboard with a hole cut in the center of each one, about three inches square.

After this question was asked, counsel for the defendant removed the cardboard (page 88, ll. 3-16), and continued his examination with the film fully exposed. **The second and third questions were therefore asked with reference to the film after the cardboard had been removed.**

The second question was exactly the same as the first question, and the witness was allowed to answer this question, and said that the film was a picture of the skull: (page 88, ll. 18-33).

"Q. Now, are you able to tell what portion of the anatomy the film marked D-1 for Identification shows?

Mr. W. Reading Gebhardt: I object to that unless it is shown of whom this picture was taken, under what circumstances it was taken, and of what kind of a skull it was taken and of whom it was taken. It is entirely incompetent, irrelevant and immaterial unless that is shown and unless such a foundation is laid for the question.

The Court. I will allow the doctor to answer. You may have an exception.

(Last question read.)

A. A skull."

It is obvious, therefore, that the overruling of the original question was of no consequence because the same question was afterward put and answered. Moreover, the exclusion of the first question as to the film, the greater part of which was concealed so that not even the whole skull showed—the hole being only three inches square—was obviously proper, and was at least, within the discretion of the trial court, particularly since the doctor had already testified that there were certain facts that he wanted to know about the film in order to testify intelligently concerning it, namely, the machine with which it was made, what film was used, and the age and history of the patient, (page 86, ll. 15-21).

The second question counsel allude to in this ground of appeal (page 88, ll. 18-32), which is set forth in the second paragraph preceding this one, the record shows was actually answered over the plaintiff's objection.

The third question, the trial court originally overruled, **but then afterward, after three more questions had been asked of a different character, withdrew his ruling, and said that he would permit the question to be answered. Counsel for the defendant, however, refused to take advantage of the court's ruling, and did not press the question, so, of course, they cannot now complain of the court's action in this regard. We desire to point out that the question as originally put was after the whole film had been exposed, so that the conditions, when the court changed his ruling were the same.** Up to that time there was no evidence that the film was, in fact, taken by one of the defendant's doctors, or that it was a picture of the plaintiff, and it was

not in evidence, so, of course, the only possible theory on which the doctor could properly be interrogated with reference to it, was to test the doctor's competency and ability, and this was the reason given by counsel for the question (p. 87, ll. 40-41).

We submit that the trial court committed no error in regard to these three questions.

THE JUDGMENT SHOULD BE AFFIRMED.

In conclusion we desire to say that we are thoroughly convinced that an examination of the whole case will prove that the defendant had a fair trial, and that there was no error committed by the trial court, or if the trial court did fall into error, it was not such as to affect the substantial rights of the defendant; and that furthermore it is one of those cases where the facts show that the plaintiff is plainly entitled to recover on one aspect of the case or another, and therefore, the judgment should be affirmed.

We quote from the opinion of the Court of Errors and Appeals in the case of Berkowitz vs. Lyons, 98 N. J. L. 198, at page 254, as follows:

> "It may be finally stated that our examination of the record concerning the alleged errors of procedure, in the light of the requirement of section 27 of the Practice Act of 1912, which requires an affirmance of the judgment, 'unless upon an examination of the whole case it shall appear that the error injuriously affected the substantial rights of the party,' has resulted in the conclusion, that no such error is discoverable, and, therefore, the judgment must be affirmed."

As a matter of fact, the court's charge was much more favorable to the defendant at one point then it was entitled to, for he charged the jury that they could only find for the plaintiff on the ground of negligence, and thus at that point, at least, took from the jury the question of the violation of the Safety Appliance Act under which, of course, the duty of the defendant was absolute, (p. 201, ll. 23-35).

> "Should you find under the law as the Court has given it to you, both statutory and the appellate authority, that the defendant company was negligent, then you would consider the question of damages to be assessed to the plaintiff, and not until then because if you find that there was no negligence on the part of this railroad company that is the end of this case and your verdict should be 'No Cause of Action;' but if you do find negligence within the definition of the law and the authority given you, then you would consider the question of damages."

In the case of State v. Engle, 21 N. J. L. 347, it was held that "where all the facts in a case are before the reviewing court and show that the party in whose favor judgment was rendered is entitled to recover, the judgment will not be reversed because of the admission of improper evidence."

See also Smith v. Clayton, 29 N. J. L. 357.

And in the case of Vliet v. Simanton, 63 N. J. L. 458, it was held that "a judgment will not be reversed for the admission of evidence which could not have affected the verdict."

See also State v. Simon, 71 N. J. L. 142.

In the case of Leport v. Todd, 32 N. J. L. 124, it was held that "the giving of an erroneous instruction is not a ground for reversal at the instance of a party in whose favor there could not be a recovery in any view of the evidence."

Again in the case of Wyckoff v. Runyon, 33 N. J. L., 107, it was held that "where the verdict is right on the merits the judgment will not be reversed on account of errors in the instructions."

Again in the case of Enstice v. Courtright, 61 N. J. L. 653, it was held "that a judgment will not be reversed for an erroneous instruction if appellant was not prejudiced thereby."

And in the case of State v. Hummer, 73 N. J. L. 328, it was held that "an incorrect statement of a legal proposition in the charge of the court to the jury affords no ground for reversal in a criminal case when it is manifest that the error could not have prejudiced the defendant in maintaining his defence upon the merits."

See also Kargman vs. Carlo, 85 N. J. L. 632, at p. 638.

CONCLUSION.

It is respectfully submitted that for the above reasons the judgment of the Supreme Court should be affirmed.

Respectfully submitted,

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