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Testimony.

New Jersey Court of Errors & Appeals

HUDSON COUNTY CIRCUIT COURT.

THOMAS COYNE, *Plaintiff,* vs. ERIE RAILROAD COMPANY, a corporation, *Defendant.*	*Action at Law. Notice and Grounds of Appeal.*

NOTICE AND GROUNDS OF APPEAL.

To:

Collins & Corbin, Esqs.,
Attorneys for Defendant.

Sirs:

PLEASE TAKE NOTICE, that the plaintiff appeals to the New Jersey Court of Errors and Appeals from the whole of the judgment entered in this cause, on the following grounds:

Because the trial court granted a non-suit against the plaintiff and in favor of the defendant, whereas the Court should have submitted the issues in the said cause to the jury for decision.

Dated: May 7th, 1929.

Yours, etc.,

ALEXANDER SIMPSON,
Attorney for Plaintiff.

Summons.

Service of the within Notice and Grounds of Appeal is hereby acknowledged this 8th day of May, 1929.

COLLINS & CORBIN,
Attorneys for Defendant.

Filed Clerk's Office
May 8, 1929
Hudson County, N. J.
John J. McGovern,
Clerk.

SUMMONS.

The State of New Jersey to Erie Railroad Company, a corporation:

(Seal)

YOU ARE SUMMONED to answer the annexed complaint of Thomas Coyne, in an action at law in the Circuit Court of the County of Hudson. And take notice that unless you file your answer to said complaint with the Clerk of said Court, within 20 days after the service upon you of this writ and the annexed complaint, the plaintiff may proceed in the suit and judgment may be entered against you.

Witness, Frank L. Cleary, Judge of the Circuit Court of the County of Hudson, at Jersey City, this 25th day of August, 1927.

JOHN J. McGOVERN,
Clerk.

ALEXANDER SIMPSON,
Attorney.

COMPLAINT.

HUDSON COUNTY CIRCUIT COURT.

THOMAS COYNE, *Plaintiff,* vs. ERIE RAILROAD COMPANY, a corporation, *Defendant.*	*Action at Law.* *Complaint.*

Plaintiff residing at No. 22 Clark street, in the City of Jersey City, in the County of Hudson, State of New Jersey, says that:

1. Defendant is now and was at all times hereinafter mentioned, a corporation of the State of New York, and a common carrier by railroad.

2. Defendant was at all times hereinafter mentioned transporting as a common carrier by railroad freight into this State from other States, and from this State to other States, and so engaged in interstate commerce.

3. Plaintiff, at all times hereinafter mentioned, was employed by the defendant, in said interstate commerce.

4. Plaintiff, was employed by the defendant on the 20th day of August, 1927, at Croxton Yards, in the City of Jersey City, County of Hudson, and State of New Jersey, and was engaged by the defendant to haul, and was at the time hauling out of the cars freight which had been brought into

the State of New Jersey from the State of New York by the defendant as a common carrier, and freight which was to be taken out of the State of New Jersey into the State of New York or any other State in the United States.

5. Plaintiff, while engaged in said interstate commerce was injured through the negligence of the defendant.

6. The negligence of the defendant consisted in this:

That the defendant failed to use reasonable care to supply the plaintiff with proper instrumentalities for his work, but on the contrary supplied him with a certain defective hand truck and also defective equipment as to certain cars, such as defective aprons, doorways, thresholds, and apparatuses, and while the plaintiff, in the exercise of reasonable care, was pulling a truck loaded with freight for the defendant, which said freight as aforesaid, had come into the State, as described in paragraph three (3), the said hand truck, because of the negligence of the defendant aforesaid, caught in the said apron or doorway, and forced the load of the said truck and said truck, over and against the plaintiff's body and seriously injured him.

7. By reason of said negligence, the plaintiff sustained a rupture and other internal injuries, and suffered severe nervous shock.

8. Plaintiff was at all times in the exercise of due care for his safety.

9. By reason of said negligence, the plaintiff has been compelled to expend money for medical expenses and has lost earnings he otherwise would have made.

Plaintiff demands $25,000.00.

ALEX. SIMPSON,
Attorney for Plaintiff.

I Hereby deputize Frank Halligan to serve the within Writ. Witness my hand and Seal this 25th day of Aug., 1927.

JOHN J. COPPINGER,
Sheriff.
By THOMAS J. PRIOR,
Under Sheriff.

Served within Summons and Complaint August 26th, 1927 on the defendant Erie Railroad Company (a corp.) by delivering a true copy thereof to Frank M. Sportelly, Asst. Chief Clerk of the said defendant Company.

JOHN J. COPPINGER,
Sheriff.
By FRANK HALLIGAN,
S. D. S.

Filed Clerk's Office
Aug. 26, 1927
Hudson County, N. J.
John J. McGovern,
Clerk.

ANSWER.

HUDSON COUNTY CIRCUIT COURT.

THOMAS COINE, *Plaintiff,* vs. ERIE RAILROAD COMPANY, a corporation, *Defendant.*	*Action at Law. Answer.*

The defendant, a corporation of the State of New York, duly authorized to transact business in the State of New Jersey, with its principal office in New Jersey at the foot of Pavonia avenue, Jersey City, Hudson County, New Jersey, says that:

FIRST DEFENSE.

1. It admits paragraph 1.

2. It admits paragraph 2 and further says that it was also at various times engaged wholly in intra-state commerce within the State of New Jersey.

3. It denies paragraph 3.

4. It denies paragraph 4.

5. It denies paragraph 5.

6. It denies paragraph 6.

7. It denies paragraph 7.

8. It denies paragraph 8.

9. It denies paragraph 9.

SECOND DEFENSE.

The alleged accident set forth in the complaint was due to one of the risks of injury assumed by the plaintiff as part of the terms of his contract of employment with the defendant.

THIRD DEFENSE.

The alleged accident set forth in the complaint was due to contributory negligence on the part of the plaintiff and the damages, if any, must therefore be diminished in proportion to the amount of such contributory negligence attributable to the plaintiff.

FOURTH DEFENSE.

The alleged accident set forth in the complaint was due solely to the negligence of the plaintiff and therefore he cannot recover.

COLLINS & CORBIN,
Attorneys of Defendant.

Filed Clerk's Office
Sept. 2, 1927.
Hudson County, N. J.
John J. McGovern,
Clerk.

REPLY.

HUDSON COUNTY CIRCUIT COURT.

THOMAS COYNE, *Plaintiff,* vs. ERIE RAILROAD COMPANY, a corporation, *Defendant.*	*Action at Law. Reply.*

Plaintiff denies the matters set up in the Second Defense in the answer of the defendant.

ALEX. SIMPSON,
Attorney for Plaintiff.

Filed Clerk's Office
Sept. 7, 1927
Hudson County, N. J.
John J. McGovern,
Clerk.

NOTICE OF TRIAL.

HUDSON COUNTY CIRCUIT COURT.

THOMAS COYNE, *Plaintiff,* vs. ERIE RAILROAD COMPANY, a corporation, *Defendant.*	*Action at Law.* *Notice of Trial.*

Sir:

PLEASE TO TAKE NOTICE, that the trial of the issue joined in this cause will be moved before said Court, in the presence of such Judge or Justice thereof as shall then be holding said Court, on the third Tuesday of September, A. D. 1927, at the Court House, in Jersey City in and for the County of Hudson at ten o'clock in the forenoon, or as soon thereafter as the said Court can attend to the same.

Dated: Sept. 6, A. D. 1927.

Your obedient servant,

ALEX. SIMPSON,
Attorney of Plaintiff.

To Collins & Corbin, Esqs.,
Attorneys of Defendant.

Rule for Judgment.

Service of the within Notice of Trial is hereby acknowledged this 8th day of September, A. D. 1927.

COLLINS & CORBIN,
Attorneys for Defendant.

Filed Clerk's Office
Sept. 9, 1927
Hudson County, N. J.
John J. McGovern,
Clerk.

RULE FOR JUDGMENT.

HUDSON COUNTY CIRCUIT COURT.

THOMAS COYNE, *Plaintiff,* vs. ERIE RAILROAD COMPANY, a corporation, *Defendant.*	*Action at Law. Rule for Judgment.*

This action was tried before Judge Dayton A. Oliphant with a jury, in the Hudson County Circuit Court on May 1, 1929.

The parties having appeared with their respective attorneys, and the plaintiff having submitted his evidence the defendant moved for a non-suit

on the ground that there was not sufficient evidence to entitle the plaintiff to have his cause submitted to the jury, which motion was granted.

Whereupon it is adjudged that the complaint of the plaintiff be dismissed and for nothing holden, and the defendant recover of the plaintiff its costs to be taxed.

.....

On motion of
Collins & Corbin
Attorneys of Defendant
Rule actually entered this
4th day of May, 1929.

JUDGMENT.

HUDSON COUNTY CIRCUIT COURT.

THOMAS COYNE, *Plaintiff,* ad vs. ERIE RAILROAD COMPANY, a corporation, *Defendant.*	*Judgment entered May 4, 1929.* Damages Non-Suit Costs $47.62 Total 47.62 Collins & Corbin, Attorneys of Defendant.

Judgment On Verdict (Non-Suit) in the above entitled cause was entered in this Court on the

4th day of May in the year of our Lord One Thousand Nine Hundred and twenty-nine in favor of the defendant Erie Railroad Company, a corporation and against the plaintiff Thomas Coyne in a plea of action at law for the sum of non-suit damages and Forty-seven Dollars Sixty-two Cents costs of suit.

Judgment entered and signed this 4th day of May, 1929.

A. DAYTON OLIPHANT,
Judge.

TESTIMONY.

HUDSON COUNTY CIRCUIT COURT.

THOMAS COYNE,
Plaintiff,
vs.
ERIE RAILROAD COMPANY, a corporation,
Defendant.

Before : HON. A. DAYTON OLIPHANT, Judge, and a jury.

Jersey City, N. J., May 1, 1929.

Appearances:

For the Plaintiff:

Alexander Simpson, Esq., by John J. Cuneo, Esq., and Louis Steisel, Esq.

For the Defendant:

Collins & Corbin, Esqs., by Chas. W. Broadhurst, Esq.

Jury impanelled, accepted and sworn.

Mr. Cuneo: I understand Mr. Broadhurst stipulates that the plaintiff, Thomas Coyne, was engaged in interstate commerce on the day he was injured, August 20th, 1927.

Mr. Broadhurst: That is correct.

Mr. Cuneo opened to the jury.

Mr. Broadhurst opened to the jury.

THOMAS COYNE, sworn.

Direct Examination by Mr. Cuneo:

Q. Mr. Coyne, where do you reside? A. 22 Clark avenue, Jersey City.

Q. How old were you at the time of this accident? A. Forty-nine.

Q. Do you remember what happened on August 20, 1927? A. Yes, sir.

Q. Will you tell the court and jury what happened? A. Yes.

Q. Were you employed by the Erie on that day? A. Yes.

Q. At what time? A. About one o'clock.

Q. About one o'clock? A. Yes.

Q. What were your duties there, what were you supposed to do, what kind of work? A. Pulling a truck.

Q. What kind of truck? A. Hand truck.

Q. These small hand trucks, with two wheels on them? A. Yes.

Q. And you were loading freight from one car to another, is that it? A. Yes.

Q. On this day, August 20th, will you tell the court and jury what happened while you were in the course of pushing this truck with freight on it from one car to another car? A. I was pulling a truck out of one car to another car, and on the way out the truck caught on the apron, giving a sudden jar, and I could feel the truck make kind of a slip as though the apron skipped, causing it to slip, and the whole weight of the truck load came right down on my hands, putting a strain through my whole body and breaking my hand-hold, and dropping on the gangway, and in the meantime part of the load rolled off and hit me on the back.

Q. Now, Mr. Coyne, your testimony is that this truck—you say your hand-hold was broken? A. Yes.

Q. What do you mean? A. The hands of the truck, you know, dropped on the gangway, the weight.

Q. Did you leave go of it or what? A. No, I held on to it.

Q. What caused that? A. The weight of the load coming right down so sudden.

Q. How did you get into this freight train when you come down the platform? A. I shove the empty truck in ahead of me.

Q. In ahead of you? A. In ahead of me.

Q. And when you got inside the freight car or train there, what happened? A. A stevedore there to load up the truck.

Q. Do you know what kind of packages or freight was loaded on that truck? A. Well, some of them were heavy and some light.

Q. Have you any idea as to the weight of them? A. Oh, about three hundred and fifty or something like that.

Q. Now, as I understand you, when that truck was loaded you proceeded to pull it out of there? A. Yes.

Q. So that the truck was behind you? A. Yes.

Q. When you came out near this apron the truck seemed to touch on the edge—

Mr. Broadhurst: Suppose we let the witness testify?

The Court: Yes, let the witness testify.

A. Caught on the apron.

Q. What happened when you pulled it out, Mr. Coyne? A. Caught on the apron and caused a sudden jar, and I could feel both hands of the truck—by the hands of the truck that the apron must have slipped and put the whole weight of the truckload right down on to my hands, putting a strain through my whole body, and then breaking my hand-hold, and then the handles dropped on the gangway.

Q. Did any of these packages fall on you? A. No, in the meantime—

Q. Answer my question. Did any of these freights or boxes fall on you? A. Yes, they fell on me, hit me on the back.

Q. What did you do after that? A. Then I straightened up and I sat there for a minute or two, and I started to feel pains all over my body and the lower part of my abdomen.

Q. What did you do then? A. Then I met the timekeeper, the man that hired me, and I told him about the accident, and he says, "You want to go to the hospital?" I says, "Well, I don't know. Wait until I see, maybe I ain't hurt very bad;" and then I started to walk a couple of more feet away from him, and I felt the pains getting worse, so I turned back and he said, "Well, come in the office and I will write you out a letter and you can go to the St. Francis Hospital and be examined by the doctor."

Q. Did he write you a letter to go to the St. Francis Hospital? A. Yes, to be examined by the doctor.

Q. You didn't leave the platform— A. Didn't leave the platform.

Q. —at any time? A. No.

Q. Mr. Broadhurst, in his opening, said something about— A. Yes, he said—

The Court: Wait until the question is asked.

Q. Mr. Broadhurst, in his opening, said that when you went there you practically pleaded for this job. Did you or did you not? A. No, sir, I did not.

Q. You went there how, just like an ordinary person would go there for a job? A. Just sit around and wait for the job, to be put on.

Q. What time of day did this accident happen? A. At 3 P. M. in the afternoon.

Q. At 3 P. M. in the afternoon? A. Yes.

Q. How long had you been working there? A. Two hours.

Q. After this happened, this accident, you went immediately to the timekeeper, is that it? A. Yes.

Q. And you told him that you didn't think that you were hurt? A. Yes.

Q. And you came back again and proceeded with your work? A. Oh, no.

Q. What did you do? A. I came back and told him I had better go to the hospital and be examined.

Q. What gave you that idea? A. Feeling pains and sick, and weak.

Q. Did you get sick at your stomach? A. I got sick at my stomach, yes.

Q. And you went back to him and he gave you this letter? A. He gave me this letter.

Q. And from the Erie Railroad Company, the Croxton yards there, where did you go? A. To the hospital.

Q. What hospital? A. St. Francis.

Q. That is in Jersey City? A. That is in Jersey City.

Q. Where did you go in the hospital; who examined you? A. I went in the front entrance, and the assistants sent me around to the clinic, and in a short time a doctor come and examined me.

Q. Do you remember the doctor that examined you? A. No, I don't remember the name.

Q. Would you recognize him if you saw him? A. Yes.

Q. Is he in court here now? A. Yes.

Mr. Broadhurst: Who is it?

Mr. Cuneo: Stand up there, Doctor, please.

Q. Is that the doctor? A. Yes.

Mr. Cuneo: Dr. Sullivan.

Q. And what did the doctor do? A. He examined me, and he said—

Mr. Broadhurst: I object to what he said.

The Court: Objection sustained.

CROSS EXAMINATION by Mr. Broadhurst:

Q. Mr. Coyne, this car which you were taking the freight from was located on the second track from the platform, wasn't it? A. Yes.

Q. And in order to go from the platform to this car with your truck you would go over a race piece from the platform to the first car? A. Yes.

Q. Through the first car? A. Yes.

Q. And then over a race piece from the first car into the second car? A. Yes.

Q. Now these race pieces that you would travel over were made of iron, were they not, or steel? A. Sheet iron.

Q. And are they straight or are they slightly curved? A. They don't fit properly on—

Q. That isn't what I asked you.

The Court: Answer the question.

Q. Is the iron itself, the race piece, is it a curved piece of metal, or is it straight like the piece of paper is now, or is it slightly curved? A. It is slightly curved.

The Court: Is it curved that way?

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

Q. Something like the piece of paper that I hold now, one side on the car and one side on the platform with the slight curve up? A. Yes, a little bit.

Q. And about how big are these pieces of iron? How long are they, and how wide? A. I couldn't say that.

Q. Well, the space between the two cars would be perhaps four feet, wouldn't it? A. Oh, no, about five or six inches, I think between both wheels of the truck.

Q. What I am trying to find out is how big is the piece of steel that goes from one car to the other. That would be three or four feet long, wouldn't it? A. Probably, yes.

Q. To span from one track to the other? A. (No answer.)

The Court: There is a three or four foot space between the cars, isn't there, Mr. Coyne?

The Witness: No, sir. There is about five or six inches, I think.

Q. Between the cars? A. Yes.

Mr. Broadhurst: There would be some overhang of the cars, your Honor.

Q. Now, how big do you think the race piece

was, itself, the piece of metal? Can you show us with your hands how wide it would be, and how long? A. Something like that.

Q. That would be perhaps three or four feet? A. Yes.

Q. And how wide would it be from one side to the other, that is, where it rested in the car, the full width of the door, or just part of it? A. Part of it.

Q. How much, about three foot? A. About that, yes.

Q. Did you ever work for the company before this? A. Not for the Erie, no.

Q. Never worked for the Erie? A. No.

Q. Didn't you work about a week or ten days previously, about four or five hours? A. Where?

Q. At Croxton? A. Yes.

Q. You did? A. Yes.

Q. And at that time you worked about four or five hours, didn't you? A. Yes.

Q. Then you quit and got your money? A. Yes.

Q. Now when you worked at that time did you do the same kind of work? A. Same kind.

Q. Trucking? A. Yes.

Q. And you say on this occasion you had been working about two hours when this happened? A. Yes.

Q. Was this the first car that you unloaded this afternoon? A. No. We got finished up on the first car, and that was next to the platform.

Q. You finished up on the car that was next

to the platform and started in on this second car? A. Started on the second car.

Q. About how many trips had you taken out of this second car before this happened? A. It was the first trip.

Q. First trip? A. First trip, and I guess I was the first load.

Q. First trip, and first load? A. The first load, I guess, that was taken out of the car.

Q. You mean it was the first load that anybody took out? A. Yes.

Q. Are you sure of that, Mr. Coyne? A. Yes.

Q. About how high are the handles of this truck above the ground, that is, how long is the truck? Have you got any idea, if it was standing right straight up? About how high up would the handles come if it was standing right straight up? A. Well, I should say about six foot.

Q. Six foot. That would be higher than you are? A. Yes.

Q. You say that the load that you had on it was about three hundred and fifty pounds? A. Yes.

Q. And what did that load consist of? You mentioned it as being boxes. What kind of boxes were they? A. There were some boxes, and—

Q. They were cartons, weren't they? Cardboard boxes? A. Some of them were, and some of them were other kinds.

Q. The boxes you had on toward the top of this load were the cardboard cartons, weren't they? A. Part of them, yes.

Q. About how far from the doorway were you when you started with the truck after it had been loaded? A. Well, about eight or ten feet, I guess.

Q. Down in the car? A. Yes.

Q. Did you have to make a turn when you got to the doorway? A. Yes.

Q. Which way, do you recollect, you turned, right or left? A. Left, I guess.

Q. Now, Mr. Coyne, the fact that you were down some ten feet in the car when you started with that load, doesn't that indicate to you that that part of the car must have been unloaded before that time? A. Eight or ten feet?

Q. Yes. A. No, I think that was the first load.

Q. And you say that when you made your turn and came up to the race piece the wheels of your truck hit against the place where the race piece rests on the floor of the car? A. No.

Q. What did the wheels of your truck hit against? A. Right on the apron, right in the center of the apron.

Q. The wheels of your truck hit against the rise in the apron? A. Right on the apron.

Q. Let me see if I can get it straight. At the time you say your wheels hit against something, where were your wheels? Were they still in the car or had they got up on the apron? A. No, they were still in the car at the end of the apron.

Q. Now, about how much space, Mr. Coyne, was there between the floor of the car, where the apron rested on it, and the top of the apron? That is, how much space did the apron take up, or how

thick was it? Do you understand what I mean? A. Yes.

Q. How much space was there between the top of the apron and the floor of the car? In other words, how thick was the apron at that point? A. Oh, about half an inch or an inch.

The Court: That is what your truck struck against? A. Yes.

Q. Now, when your truck struck against that, you say that you felt the weight of the load onto your hands? A. Throwed the whole weight of the load down onto my hands.

Q. And when the weight of the load went down the handles went out of your hands and fell down to the race piece, is that right? A. Broke my hand-hold, yes.

Q. Now, when the wheels of your truck hit against the edge of the race piece, you were then on the apron yourself, weren't you? A. I was on the—

Q. You were on the race piece? A. I was on the apron.

Q. When the handles of the truck fell down were you still on the apron? A. Part of the load was rolling off and caught me on the back.

Q. That is, part of the load that was on your truck rolled off the truck and went between the cars; is that what you mean? Fell down between the cars? A. Hit me on the back and fell down on the platform.

Q. When you say platform you mean apron? A. Well, around the apron, yes.

Q. In other words, you were between the two cars at the time, weren't you, on this race piece?

A. I was on the other side of the apron, you see.

The Court: Were you in the other car?

The Witness: I was into the other car.

Q. All right. And whereabouts on your back did the package, or whatever it was that fell off the truck, strike you? Will you show us? A. There were about half a dozen hit me.

Q. Where did they hit you? A. Right here.

Q. Will you stand up, put your hand there?

Mr. Broadhurst: Indicating the small of the back.

Q. And did you fall down? A. No, I didn't fall.

Q. You say that you stood there then for a minute or so? A. For a minute or so, yes.

Q. And then did you pick the truck up after that? A. No, I didn't touch the truck.

Q. As I get it the truck was then resting with the wheels in the car that you were coming out of, and the handles were on the apron? A. Handles on the apron.

The Court: Is this apron the same kind of apron that you had used before?

The Witness: Yes, the same kind. It looked the same to me.

Q. Did anybody speak to you then about going on with the work, or did you just walk up from there to the foreman? A. Somebody I think said, "Are you going to try it again?" or something like that, and I said, "No, I am through."

Q. Now, the man you spoke to when you got off the platform, was that Mr. McMahon, the man you spoke to about going to the hospital?

Mr. Broadhurst: Stand up, Mr. McMahon.

A. No, not him. It is the timekeeper. It is not him.

Q. All right. That is all.

RE-DIRECT EXAMINATION by Mr. Cuneo:

Q. Mr. Coyne, had you done any work in any other cars that night? A. Yes—

The Court: He said he started to work at one o'clock and worked until three.

Q. Did you go over any other apron similar to the one on which the accident happened? A. That was the first load.

Q. No, I mean, during the course of your work did you at any time go over an apron of the freight car— A. Yes.

Q. Prior to the one on which this accident happened? A. Yes.

Q. The same kind of apron? A. Yes, it looked the same to me.

Q. This truck, you say, was loaded with cartons?

The Court: He said part.

A. Part cartons, different freight.

Q. What was near the top of the load? A. Some of them looked like cartons to me.

Q. And what did the others look like? A. The others were heavy freight that was put on the bottom of the truck, on the first part of the load. There was heavy freight on there.

Q. Do you know which parcels struck you? A. Oh, there was half a dozen, must have been; they all came down in a bunch.

The Court: Why didn't you keep on running when you felt the thing slip?

The Witness: I didn't have time. I wasn't straightened up even. It bent me down when the weight of the truck came down on my hands, and by that time the whole load was coming down on me, and I didn't have time to get anywhere it came so sudden.

Q. Did you ever pull any heavier loads than this, do you know? Was this considered the average load?

Mr. Broadhurst: Objected to.

The Court: Objection sustained.

Q. You didn't have anything to do with loading this truck, did you? A. No. Stevedores loaded them trucks, and they go to work and sling back anything in a careless way.

Mr. Broadhurst: I object to that and ask that it be stricken out.

The Court: Strike it out.

Q. Did you have anything to do with the setting of these aprons down? A. No.

Q. When you went in this car did you see anything wrong with this apron? Did it look all right to you? A. I didn't know anything wrong when I shoved the truck ahead of me.

Q. So when you went in there your truck was in front of you? You pushed it into the car? A. Yes.

Q. And when you came out you came out the opposite way, and the truck was behind you? A. Yes.

DR. DANIEL SULLIVAN, sworn:

Direct Examination by Mr. Cuneo:

Q. Dr. Sullivan, you are a practicing physician and surgeon of this state? A. I am.

Q. And where do you reside? A. 2771 Boulevard.

Q. What hospital are you connected with?

Mr. Broadhurst: I admit Dr. Sullivan's qualifications.

Q. All right. On August 20, 1927, Doctor, you were connected with what hospital? A. St. Francis Hospital.

Q. In the clinic? A. Yes.

Q. Do you remember this gentleman, Mr. Thomas Coyne, coming to you? A. No, I don't remember him to see him.

The Court: I suppose the Doctor has the record of it.

Q. Have you any record of it? A. Here is the only record I have, the record of St. Francis Hospital, that this man was admitted to the clinic on August 20, 1927, and the diagnosis at that time was a strain of the back, contusion of the abdominal muscles, and hernia of the left side.

Q. You examined this man, though, didn't you, Doctor? A. Yes.

Q. Did you advise any treatment for Mr. Coyne? A. I don't remember whether I did or not.

Q. Did you give him any prescription? A. No.

Q. Now, from the facts related to you about Mr. Coyne's condition, could you tell whether he had had a hernia prior to this?

Mr. Broadhurst: I think—we are trying—

The Court: I don't think the Doctor, so far as we know, has had any of the facts, and if he did have any facts they should be related.

Q. Doctor, assuming that a gentleman like Mr. Coyne, around the age of forty-nine, had been pushing a hand truck over a race piece or apron between a freight car and the platform, and had been pulling a weight of about three hundred and fifty pounds, and that these packages fell and struck him in the back, and immediately after that he complained of regurgitation and weakness, and so forth, would that in your opinion, be symptoms of hernia?

Mr. Broadhurst: I don't think he testified to regurgitating. He testified to feeling sick.

Mr. Cuneo: I thought he did. However, we won't argue about it.

Q. Would those symptoms, Doctor, indicate anything to you?

Mr. Broadhurst: That is an ambiguous way to put it. I think what counsel wants is the Doctor's opinion as to whether hernia was produced by that accident.

The Witness: From this record here the contusion of the abdominal muscles, and the fact that he has a hernia would be sug-

gestive, but there is nothing to say that it was caused by that.

Q. Could it be caused by that?

Mr. Broadhurst: Objection.

The Court: Objection sustained. The only thing we can deal with is probabilities, not possibilities. Ask him the probability. We can't conjecture.

Q. Would that be probable, Doctor? A. Yes, from this record here it would be probable.

CROSS EXAMINATION by Mr. Broadhurst:

Q. Doctor, hernia is,—so that we will all have an idea,—hernia is what? A. A hernia is a protrusion of any viscus through the wall of the cavity in which it is contained.

Q. In other words, what kind of hernia did this man have? A. This is an inguinal hernia.

Q. An inguinal hernia, that is down in the groin? A. Yes.

Q. Then I take it that the protrusion was through one of the rings that are down there? A. Yes.

Q. And a hernia may, of course, come from many causes that are not due to a blow, may they not? A. Yes.

Q. In other words, it is a condition which the doctor says is congenital, or a weakness exists in the rings from birth? A. Yes.

Q. And the constant lifting of heavy loads, and straining which causes the contents of the abdomen to come down against this weakened ring, that is what gradually forces the contents of the ab-

domen down through the ring and makes a hernia? A. That is so.

Q. Now, Doctor, in a case of true traumatic hernia, where a blow has caused the descent of the inner organs through the ring, that is accompanied, is it not, with immediate and severe pain? A. Yes.

Q. In other words, if the ring was normal and the force was sufficient to force it down at one time through that ring the result on the person that received that would be practically prostration, wouldn't it, temporarily? A. Yes.

Q. Do you believe that it would be reasonably probable, if this man received this hernia from this accident solely, that he would be able to walk from the place where he was over to his foreman, and from there walk out of the yards and get over to the St. Francis Hospital, and walk in without— A. No. I don't know whether he did that or not, but if he did receive the hernia that way it would not be possible for him to do it.

Q. Did you in this examination observe whether he had a hernia on the other side? A. I must have.

Q. Do your notes show whether you observed a hernia on the other side? A. The notes show there was a hernia on the left side. I always examine both sides.

Q. So at that time you didn't observe any on the right side? A. I don't suppose I did.

Q. All right. I am just trying to find out what the fact was. Do your records show how long he stayed there at that time, whether you treated him

for anything, gave him any medication? A. He returned on the 22nd of August. Now, I don't know whether I saw him on the 22nd of August, or not.

Q. And your records show that he came on the 20th and again on the 22nd. You saw him on the 20th and you are not sure whether you saw him on the 22nd or not? A. No.

By the Court:

Q. Can you get a hernia of this type from lifting, Doctor, lifting weights? A. Yes. The history in this case, as I remember it, was that there was an excessive weight thrown on the abdomen, and that this produced afterwards. Now I have no way of telling that.

Q. But you have testified, Doctor, that if the hernia was produced in that fashion that there would be practical prostration? A. I saw him at the hospital.

Q. Yes, but suppose that it was produced in the fashion that the history shows, then, as I understand you, there would be practical prostration, is that so? A. Yes.

THOMAS COYNE, re-called:

Direct Examination by Mr. Cuneo:

Q. Mr. Coyne, when you went to St. Francis Hospital, did you walk over? A. No, sir, I took a car.

Q. What did you do? A. Took a car to the hospital.

Q. What symptoms did you have, Mr. Coyne; right immediately after this accident happened? A. I went to work and I took sick at my stomach.

Q. Anything else? A. And I had to go to work and sit down for about five minutes. I got kind of weak and everything else, and I sat there for about five minutes until I come to myself again, and then I got up and I took the car.

By the Court:

Q. Now when did you walk from this stringpiece, or racepiece—when did you go from the racepiece to the timekeeper? A. About probably ten minutes after two, or something like that.

Q. You were injured at three o'clock, you say? A. Or three o'clock. Three o'clock.

Q. What did you do immediately after you were injured? A. Then I went to the timekeeper and reported the accident.

Q. You walked from the stringpiece to the timekeeper? A. Yes.

Q. Where was the timekeeper? A. On the platform.

Q. How far from where you were injured? A. About ten or fifteen yards, I guess, something like that.

Q. And then what did you do? A. I reported the accident to him, and told him that I had kind of pains, and I says, maybe it probably wouldn't amount to anything, and then I started to walk I walked a little ways away from him on the platform, but I didn't leave the platform yet.

T. Coyne, re-called for Pltf., Cross, Re-direct, Re-cross.

Q. How far did you walk? A. Maybe ten or twelve feet, and I come back and I says, "The pain seems to be getting worse; I had better go to the hospital to be examined." He took me in the office and wrote me out a letter to the St. Francis Hospital to be examined by the doctors.

Q. And you went to the St. Francis Hospital on a trolley car? A. A trolley car, yes.

By Mr. Broadhurst:

Q. What trolley car did you take? A. I had to take two. I took a Newark avenue car and a Pavonia car.

Q. You took a Newark avenue car? A. I took a Newark avenue car and then Pavonia.

Q. If you took the Newark avenue car you walked from the Croxton transfer platform to the Tonnele avenue bridge, didn't you? A. After resting up a couple of times, yes.

Q. After resting a few minutes you walked from there to the Tonnele avenue bridge, and you walked from the Tonnele avenue bridge to Newark avenue? A. That is five or six blocks.

Q. Half a mile, isn't it? A. No, it is five or six blocks, maybe not that far.

RE-DIRECT EXAMINATION by Mr. Cuneo:

Q. Do you wear a truss now, Mr. Coyne? A. Yes.

RE-CROSS EXAMINATION by Mr. Broadhurst:

Q. Do you wear a single truss or a double truss? A. Double truss.

T. Coyne, re-called for Pltf., Re-direct. Motion for Nonsuit.

RE-DIRECT EXAMINATION by Mr. Cuneo:

Q. You haven't been treated by any other doctor, have you, Mr. Coyne? A. No.

Q. Just at the St. Francis Hospital down there? A. That is all.

Q. Are you able to work now? A. No, I haven't worked since. I was 170 pounds when I went to work for the Erie, and I am only 135 pounds now, and I am losing weight, and my nerves are all gone on me.

Mr. Broadhurst: Do you expect to connect this up, about his nerves?

Mr. Cuneo: No.

Mr. Broadhurst: Then I object to that testimony.

The Court: Objection sustained. Strike it out.

Plaintiff rests.

Mr. Broadhurst: If your Honor please, I desire to make a motion on behalf of the defendant in this case for a nonsuit on the following grounds:

First: On the ground there is no evidence of any negligence having been proved which was the proximate cause of the accident and the injuries to the plaintiff.

Second: On the ground that there is indisputable evidence in the case that the plaintiff assumed whatever risk there was on account of his truck being jarred or joused by coming in contact with the race piece or apron; and

Third: That there is no competent evidence in the case that the hernia he had was sustained in this accident.

(Argument.)

The Court: I think in the first place there is no evidence of negligence. It was a clear assumption of risk, and whatever injuries the man suffered, if he suffered any, were too remote and speculative.

Motion granted.

Mr. Cuneo: Exception.

The Court: You may have an exception.

Case closed.

Clerk's Certificate.

STATE OF NEW JERSEY

Hudson County, ss.:

I, JOHN J. McGOVERN, Clerk of the County of Hudson aforesaid and also Clerk of the Circuit Court and Court of Common Pleas, holden therein

DO HEREBY CERTIFY, That the foregoing is a true and correct copy of Summons and Complaint, Answer, Reply, Notice of Trial, Rule for Judgment, Judgment, Record and Notice and Grounds of Appeal in the case of Thomas Coyne vs. Erie Railroad Company, a corporation, as the same is taken from and compared with the original as filed and recorded in my office. This cer-

tificate is issued so that the said cause may be removed to the Court of Errors and Appeals of the last resort of all causes at Trenton, N. J. for Adjudicature according to law.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Courts and County, at Jersey City this twenty-eighth day of May, 1929.

JOHN J. McGOVERN,
Clerk

(Seal)

New Jersey Court of Errors and Appeals

THOMAS COYNE, *Plaintiff-Appellant,* vs. ERIE RAILROAD COMPANY, *Defendant-Respondent.*	On Appeal.

BRIEF OF PLAINTIFF-APPELLANT.

Statement of Facts.

This is an appeal from a non-suit entered in the Hudson County Circuit Court by Judge A. Dayton Oliphant. The suit was brought under the Federal Employees Interstate Commerce Act and the facts were that Coyne who was undoubtedly employed in Interstate Commerce of which there was no dispute, while unloading a freight car, and while pulling a hand truck out of the car, the hand truck caught in the apron, the apron slipped and the entire load was put upon Coyne.

The trial Judge charged that there was no evidence of negligence and non-suited.

POINT 1.

There was evidence of negligence. This testimony is found on pages 14 and 15 of the State of Case, which is as follows:

"Q. On this day, August 20th, will you tell the Court and jury what happened while you were in the course of pushing this truck with freight on it from one car to another car? A. I was pulling a truck out of one car to another car, and on the way out the truck caught on the apron, giving a sudden jar, and I could feel the truck make kind of a slip as though the apron skipped, causing it to slip, and the whole weight of the truck load came right down on my hands, putting a strain through my whole body and breaking my handhold, and dropping on the gangway, and in the meantime part of the load rolled off and hit me on the back.

Q. Now, Mr. Coyne, your testimony is that this truck—you say your handhold was broken? A. Yes.

Q. What do you mean? A. The hands of the truck, you know, dropped on the gangway, the weight.

Q. Did you leave go of it or what? A. No, I held on to it.

Q. What caused that? A. The weight of the load coming right down so sudden.

Q. How did you get into this freight train when you come down the platform? A. I shove the empty truck in ahead of me.

Q. In ahead of you? A. In ahead of me.

Q. And when you got inside the freight car or train there, what happened? A. A stevedore there to load up the truck.

Q. Do you know what kind of packages or freight was loaded on that truck? A. Well, some of them were heavy and some light.

Q. Have you any idea as to the weight of them? A. Oh, about three hundred and fifty or something like that.

Q. Now, as I understand you, when that truck was loaded you proceeded to pull it out of there? A. Yes.

Q. So that the truck was behind you? A. Yes.

Q. When you came out near this apron the truck seemed to touch on the edge— A. Caught on the apron.

Q. What happened when you pulled it out, Mr. Coyne? A. Caught on the apron and caused a sudden jar, and I could feel both hands of the truck—by the hands of the truck that the apron must have slipped and put the whole weight of the truckload right down on to my hands, putting a strain through my whole body, and then breaking my handhold, and then the handles dropped on the gangway.

Q. Did any of these packages fall on you? A. No, in the meantime—

Q. Answer my question. Did any of these freights or boxes fall on you? A. Yes, they fell on me, hit me on the back."

The Court in directing a non-suit said on page 35 of the State of Case:

"I think in the first place there is no evidence of negligence. It was a clear assumption of risk, and whatever injuries the man

suffered, if he suffered any, were too remote and speculative."

The Judge gives three reasons for non-suit, all of which the appellant argues were wrong. As to the first, that there was no evidence of negligence. Here, the matter already recited shows that instruments in the contract of the defendant acted improperly and that was sufficient to take the case to the jury in the absence of any explanation by the defendant.

When the Judge decided there was no evidence of negligence, he decided to a pure question of facts for reasonable men could infer, under the cases herein cited that if the truck being pulled in an ordinary way over the apron caught with a sudden jar it was pulled out of the hands of the plaintiff then that was evidence that either the apron or the step was in unproper condition and unfit to use. See the following cases:

The rule of the Federal Court governs as this is a case under the Federal Statute and the leading case is Sweeney vs. Erving, 228 Law., page 233, which says:

> "The general rule in actions of negligence is that the mere proof of an 'accident' (using the word in the loose and popular sense) does not raise any presumption of negligence, but in the application of this rule, it is recognized that there is a class of cases where the circumstances of the occurrence that has caused the injury are of a character to give ground for a reasonable inference that if due care had been employed by the party charged with care in the premises, the thing that happened amiss would not have happened. In

such cases it is said, res ipsa loquitur,—the thing speaks for itself, that is to say, if there is nothing to explain or rebut the inference that arises from the way in which the thing happened, it may fairly be found to have been occasioned by negligence.

The doctrine has been so often invoked to sustain the refusal by trial Courts to nonsuit the plaintiff or direct a verdict in favor of the defendant, that the application of the rule, where it does apply, in raising a question for the jury, and thus making it incumbent upon the defendant to adduce proof if he desires to do so, has sometimes been erroneously confused with the question of the burden of proof. But in the requested instruction now under consideration the matter was presented in no equivocal form. Plaintiff's insistence was not merely that the evidence of the occurrence of the injury under the circumstances was evidential of negligence on defendant's part, so as to make it incumbent upon him to present his proofs, the contention was that it made it necessary for him to prove by a preponderance of the evidence that there was an absence of negligence on his part."

The proof that the hand truck acted in a way it would not act normally was sufficient to raise the assumption under the doctrine of "res ipsa loquitur" that the hand truck and apron were out of order. At least it can be said under the doctrine of Bien vs. Unger, 64 N. J. L., 596, even if res ipsa loquitur applied not that the plaintiff having offered all the evidence it had and it be-

ing apparent that the defective condition of the apparatus might be due to the negligence of the master, and whether it was or not was within the knowledge of the master, at least called upon the master for an explanation as to the occurrence, and the Judge should not have nonsuited without requiring the defendant to put in evidence. See notes to Connor vs. Topeka & Santa Fe Railroad, 22 A. L. R. notes, beginning 1462. Full discussion of this principle is found in Cook vs. American Smelting & Refining Company, 122 At., 743. The facts here were that a hand truck which in normal operation passed safely over the apron did not do so, but stuck. Unexplained this was evidence of negligence.

In Central Railroad of New Jersey vs. Peluso, 286 Fed., 661, certiorari denied. Advance Sheets, April 2-23, page 415. In this case there was simply a breaking of a boom which cannot be distinguished from the catching of a hand truck on an apron. Point I of the Syl. says:

> "All that the rule of 'res ipsa loquitur' means is that the circumstances involved in or connected with an accident may be of such unusual character as to justify, in the absence of any other evidence bearing upon the subject, the inference that the accident was due to the negligence of the one having possession or control of the article or thing which caused the injury, in the absence of explanation this is the only fair and reasonable conclusion."

See also (3) of the Text:

> "Since the Patton Case, the marked trend of legislation has been to afford greater pro-

tection to the employee; and the Courts, while endeavoring to do justice as between employer and employee, having recognized the practical difficulties which arise in a case of injury or death because of defective appliances or equipment where there is no other explanation of the occurrence. Of this practical difficulty, the case at bar is a perfect illustration. The plaintiff, in such circumstances, has either no means or no adequate means of ascertaining either what led to the unusual defect of the appliance or equipment or as to what inspection was made or what care, if any, was used on the part of the employer."

The Court in this case says:

"In Payne vs. Bucher, 270 Fed., 38, so far as we can gather from the opinion, the Court gave the case to the jury on the one issue of negligence as to whether the defendant through his servant had so carelessly adjusted hooks to a bucket that they slipped off and brought about the accident resulting in Bucher's death, whereas there was no evidence that defendant's servant carelessly fixed the hooks, and, presumably, the Court had failed to charge res ipsa loquitur correctly and had confined the jury to a consideration of an act of defendant in respect of which there was no evidence."

In Mumma vs. Easton and Amboy Railroad Co., et al., 73 N. J. L., 653, the Court said (a):

"The maxim 'res ipsa loquitur,' as defined in our courts, considered and applied; (b)

the rule that, where fair-minded men might honestly differ as to the conclusions to be drawn from facts, whether controverted or uncontroverted, the question at issue should go to the jury, stated and applied.''

A complete discussion of this subject is found in the note to case of Glowacki vs. Northwestern Ohio R. & P. Co., 53 H. L. R., page 1494:

''Unquestionably, the mere fact that an injury has been sustained will not give rise to a presumption that it was due to negligence; but often the inherent nature and character of the act which causes an injury may give rise to what is loosely termed 'a presumption of negligence,' or be sufficient to establish, prima facie, that there was negligence. 'Res ipsa loquitur' is the maxim that symbolizes such a situation. This literally means, 'The thing speaks for itself.' Some authorities have limited the application of the maxim to cases where the relation of carrier and passenger exists, or where there is a contractual relation between the parties to the transaction producing the injury, but the weight of authority is otherwise, and there would justify the limitation of the rule, 'res ipsa loquitur,' to special relations, for it originates from the nature of the act done, rather than from the relation existing between the parties to the act; more precisely, the doctrine asserts 'that whenever a thing which produced an injury is shown to have been under the control and management of the defendant, and the occurrence is such as in the ordinary

course of events does not happen if due care has been exercised, the fact of injury itself will be deemed to afford sufficient evidence to support a recovery, in the absence of any explanation by the defendant tending to show that the injury was not due to his want of care.' This maxim is applied in negligence cases on the theory that the accident, in the light of the surrounding circumstances, is of such a character as itself to raise a presumption of negligence, and on the further theory that the injured party is not in a position to explain the cause, while the party charged, having more favorable opportunity, is in a position to explain and show himself free from negligence if such be the case; if the plaintiff has equal knowledge or superior means of information, the doctrine does not apply.

The doctrine of 'res ipsa loquitur' has been evolved in comparatively recent times, but is one that is most frequently resorted to in negligence cases. The decisions, however, reflect considerable confusion and conflict with respect to the question as to when the rule will apply; the courts have had difficulty, also, in determining whether a plaintiff who has pleaded specific acts of negligence may rely on the rule. And notwithstanding the innumerable cases in which the doctrine of 'res ipsa loquitur' has been asserted and applied, very little consideration has been given the essential character of the rule; the judges speak loosely in this class of cases of 'presumptions,' 'presumptions of negligence,' 'prima facie cases,' 'prima facie evidence,'

'inference of negligence,' that are made out by proof of facts that gives rise to the maxim 'res ipsa loquitur,' using these various terms as synonymous, without intending to be understood as laying down a technical definition of the character of the rule.'

The U. S. Supreme Court in Sweeney vs. Erving, 228 U. S., 223, dealt with this subject at length. Hughes vs. Atlantic City Railway, 85 N. J. Law, 212, is cited in this note. Under the modern doctrine plaintiff insists that the cases require that on this evidence there was a question to be submitted to the jury. See especially subtitle III of this note.

In the case of Gray vs. Baltimore & Ohio R. R., being reported in 59 A. L. R. in note at 471, it is said:

"The distinction may be illustrated concretely by a case where a passenger or employee is injured by the derailment of a train. If nothing more appears than the bare fact of the derailment, it is necessary, in order to make a prima facie case for the plaintiff, to invoke the rule res ipsa loquitur in its strict and distinctive sense, since upon the present hypothesis there is nothing in the case to indicate negligence except as the postulate of common experience is invoked, that railroad trains are not commonly derailed in the absence of negligence, or at least in the absence of the breach of the high duty that a carrier owes to a passenger."

See also cases of Southern Railway v Bennett, U. S. Supreme Court, 233. United States 80; and Minneapolis & St. Paul v Gotschall; 244 U. S. 66.

POINT 2.

Assumption of risk was a question for the jury. There was no evidence that the defendant saw or could have seen the defect or condition which caused the accident. It was not a risk incident to his employment. Therefore, if the defendant was to be charged with assuming it, it must be obvious to him. There was no evidence whatever that the condition was obvious to him. Certainly, the fact that the truck was pulled out of his hand by reason of the defective apron or defective truck was not a risk. The United States Supreme Court says the following as to risk:

In the trial Judge's opinion, "It was a clear assumption of risk." What is risk? Risk is what is apparent to the senses or what is incident to the employment. In this case there is no proof whatever that the defect which caused the accident was physically apparent or known to the injured man. The doctrine of risk is that applied in the Federal Courts. There was no proof in this case that the injured man knew of the condition or had opportunity to learn of the condition. In the case of New York Central vs. White, 243 U. S., : "The risks taken by its servant were simply the risks ordinarily incident to a railroad operation of which the accident was not one." Gila Valley R. R. vs. Hall, 232 U. S., 94. Central Vermont Railroad vs. White, 238 U. S., 507, this was clearly erroneous to non-suit on the ground that the servant assumed the risk.

At best that was a jury question.

POINT 3.

Damages were a question for the jury. If there was evidence of negligence and if the question of risk to be decided by the jury, then the Court had no right to say the damages were too remote. There was some injury, however slight, and the Court should have submitted the case to the jury, and its charge limited the recovery, the amount of the damages, but it could not take the case entirely from the jury on a question of damages. That would be denying the plaintiff to the right of trial by jury.

The last ground of his non-suit was "and whatever injuries the man suffered, if he suffered any, were too remote and speculative." This took away from the jury the entire question of damages. If there was evidence of negligence and if the risk were not assumption as a matter of law, the mere fact that the plaintiff was struck by a part of the truck called for the submission of the question of damages to the jury if only nominal damages, and the withdrawal of the question of damages from the jury was a decision of fact by the Judge, which was a denial of a trial by jury. See Parker's Digest, Volume 4, Column 7614. It is respectfully submitted that the judgment below should be reversed.

Respectfully submitted, judgment herein should be reversed.

ALEX. SIMPSON,
Attorney of Plaintiff.

New Jersey Court of Errors and Appeals

THOMAS COYNE,
Plaintiff-Appellant,

v.

ERIE RAILROAD COMPANY,
Defendant-Respondent.

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

BRIEF OF COLLINS & CORBIN IN BEHALF OF RESPONDENT.

(1)

Statement of the Case.

This appeal brings before this Court for review, a judgment of the Hudson County Circuit Court in favor of the defendant-respondent (hereinafter referred to as the defendant), and against the plaintiff-appellant (hereinafter referred to as the plaintiff). The action was brought under what is commonly known and designated as "The Federal Employers' Liability Act." The complaint alleged that on August 20, 1927, the plaintiff was employed by the defendant to haul freight from freight cars to an unloading platform. While so engaged, due to the negligence of the defendant, he was injured. The negligence alleged was (1) the furnishing of the plaintiff with a defective hand truck; (2) having defective equipment in the car such as defective aprons, doorways and thresholds. It alleged that because of the negligence, the truck while being pulled from the car, caught in the apron or

doorway, forcing the load on the truck against the plaintiff, causing his injuries (pp. 3-4).

At the conclusion of the plaintiff's case, the defendant moved for a nonsuit, which was granted (p. 34, line 30; p. 35, line 20). Judgment of nonsuit was entered by the defendant (pp. 10-11).

(2)

Grounds of Appeal.

The only ground of appeal specified and argued is that the Trial Court erred in granting the defendant's motion for a nonsuit.

(3)

BRIEF OF THE ARGUMENT.

I.

The Trial Court did not err in granting the defendant's motion for nonsuit.

The plaintiff, 49 years of age, was employed a few hours before the accident occurred on August 20, 1927, by the defendant, as a laborer, to pull a hand truck (p. 13, lines 20-40). He had been working about two hours when the accident occurred (p. 17, lines 1-10). He had worked about a week previously for the defendant at the same kind of work at the same place for some four or five hours (p. 20, lines 15-30). The work was to move packages of freight from a box car to a platform adjacent thereto. The box car was on the second track from the platform and in order to get from it to the platform, it was necessary to pass over the space between the second and first tracks, through a box car that stood on the first

track, and then over the space between the first car and the platform. These two spaces were gapped by means of what was called a racepiece or apron. It was made of a piece of curved sheet iron some three or four feet long (p. 18, line 20; p. 19, line 30). It was about three feet wide (p. 20, lines 10-15). When placed over the gap, the ends rested on the floor of the cars. The racepiece or apron was about a half inch or an inch thick, and where it rested on the floor of the car, it was, of course, about a half inch to an inch higher than the floor of the car (p. 23, lines 1-10). The plaintiff had his truck loaded in the car with a load of about 350 pounds (p. 15, lines 10-15). The truck he was using was one with two wheels at the bottom end and two long handles about six feet in length, which he would hold to support and move the load (p. 21, lines 10-30). After his truck had been loaded in the car, some eight or ten feet from the door, he started toward the door holding on to the handles of the truck with his back toward the load. When he got to the doorway, he turned left to go through it and over the racepiece. When the wheels of his truck struck against the end of the racepiece, which was lying on the floor of the car, the weight of the load on the handles caused him to let go of them and the handles of the truck fell on to the racepiece. He was standing on the apron or racepiece itself at the time. Some of the load rolled off the truck between the cars and a piece of it struck against his back (p. 22, line 30; p. 23, line 40). He did not fall down, but stood there a minute or two and then walked into the other car and on to the platform (p. 24, lines 10-30).

There was absolutely no evidence in the case that the hand truck was in anywise defective and the plaintiff himself testified that he looked at the

racepiece prior to the accident and there was nothing the matter with it (p. 25, lines 10-30). There was absolutely no evidence in the case that there was anything defective about the racepiece. As we have pointed out, the racepiece did not move or fall, because the plaintiff was standing on it when the wheels of his truck came in contact with it. He let go of the handles of the truck and they fell and rested upon the racepiece and the plaintiff continued to stand there.

The Trial Court conceived that there was no negligence on the part of the defendant, and we cannot see anything in the testimony which would indicate that the defendant was negligent in the least respect. The plaintiff in the brief in this Court, states that the apron slipped and the entire load was put upon the plaintiff, thereby inferring that the racepiece fell out of the car, or something of that character. There is no evidence to justify any such claim. The plaintiff's own testimony indicates quite clearly that the accident was caused by his inability to pull the load up on the apron and hold the load when the wheels came against the apron at the point where it rested on the car floor. He testified as follows:

> "Q. How much was there between the top of the apron and the floor of the car? In other words, how thick was the apron at that point? A. About half an inch or an inch.
>
> "The Court: That is what your truck struck against?
>
> "A. Yes.
>
> "Q. Now, when your truck struck against that, you say that you felt the weight of the load on to your hands? A. Throwed the whole weight of the load down on to my hands.
>
> "Q. And when the weight of the load went down the handles went out of your hands and

fell down to the racepiece, is that right? A. Broke my hand hold, yes.

"Q. Now, when the wheels of your truck hit against the edge of the racepiece, you were then on the apron yourself, weren't you? A. I was on the—

"Q. You were on the racepiece? A. I was on the apron" (p. 23, lines 1-30).

The appellant in this case, realizing that there is no actual proof of negligence on the part of the defendant in the record, refers to a great many cases dealing with the question of *res ipsa loquitur* and contends that this is a case coming under that theory. Not one of the cases cited is applicable to the facts in the case at bar, and it is a novel contention that where the instrumentalities that are being used by a servant are of a simple kind and nature entirely within his control, the doctrine applies.

In *Sweeney* v. *Erving,* 228 U. S. 233, cited and quoted from in the appellant's brief, the suit was brought by the plaintiff to recover for X-ray burns she received due to the defendant's negligence in manipulating his X-ray machine so as to take pictures of her back. The United States Supreme Court did not pass on the question of whether or not it was *res ipsa loquitur.* In fact, the contention of the plaintiff that it was *res ipsa loquitur* was based on the theory that the machine was an agency within the defendant's exclusive management and control.

The case of *Bien* v. *Unger,* 64 N. J. L. 596, is cited by the appellant. In that case the plaintiff, an employee of the defendant, had his hand injured when the trip hammer of a machine which should have remained suspended upon a die until released by a treadle descended without apparent cause while the plaintiff was in the act of feeding metal to the die. A judgment was recovered for

the plaintiff. The judgment was reversed by this Court and Justice GARRISON in writing the opinion held that it was not a case in which *res ipsa loquitur* applied. If working about a machine such as that which acted abnormally when the plaintiff received his injury does not constitute *res ipsa loquitur,* how can it possibly be contended it applies in the case at bar where the plaintiff was using a simple tool managing and controlling it entirely himself?

The appellant cites *Connor* v. *Topeka & Sante Fe R. R.,* 22 A. L. R. 1462, and note. We are unable to find any note attached to the case. The opinion is reported in that volume, and held that where an employee was injured due to the collapse of a railroad bridge, the doctrine of *res ipsa loquitur* applied. The California Supreme Court in writing the opinion says:

> "The *res ipsa loquitur* doctrine is based in part upon the theory that the defendant *in charge of the instrumentality* which causes the injury either knows the cause of the accident or has the best opportunity of ascertaining it, and that the plaintiff has no such knowledge."

In the case of *Central Railroad Co.* v. *Peluso,* 286 Fed. 661, cited by the appellant, it appeared that the plaintiff was injured due to the breaking of a boom on a crane. It was held to come under the doctrine of *res ipsa loquitur* for substantially the same reasons as the case last above mentioned.

Cook v. *American Smelting and Refining Co.,* 132 Atl. 743; 99 N. J. L. 81, is cited by the appellant. In that case the plaintiff was injured due to the explosion of a steam boiler in one of the defendant's buildings. The plaintiff was employed by the defendant. This Court held that there being no proof of anything wrong with the instrumen-

talities, a direction of verdict for the defendant below was proper. We do not quite see how this case is to be considered as in favor of the plaintiff and warranting a reversal of nonsuit in the case at bar, because *res ipsa loquitur* was not applied.

Payne v. *Bucher,* 270 Fed. 38, is cited. In that case, the plaintiff was injured by the falling of a heavy bucket moved by a crane. It appeared that the bucket came in contact with a pile of trench rails. The Appellate Court reversed the judgment in favor of the plaintiff. The case had been submitted to them on the theory of *res ipsa loquitur.*

In *Mumma* v. *Eastern & Amboy R. R. Co.,* 76 N. J. L. 653, cited by the appellant, the defendant was held liable where its servants and agents blew a locomotive whistle loud and constantly while standing under a highway bridge, causing the plaintiff's horse to be frightened and run away. We can see no analogy between that and the case at bar.

The plaintiff, in conclusion, cites two cases in the United States Supreme Court, namely, *Southern R. R. Co.* v. *Bennett,* 233 U. S. 80, where the plaintiff was killed by the locomotive engine he was operating falling through a trestle due to rotten or defective condition of the same. The other, *Minneapolis & St. Louis Ry.* v. *Gotschall,* is a safety appliance violation where the cars of a train parted due to defective couplers. In the first of these two cases *res ipsa loquitur* is of no importance due to the fact that the bridge was rotten and it was the defendant's duty to keep it in repair; and in the second place, the parting of the couplers under the Safety Appliance Act makes the defendant liable and *res ipsa loquitur* is never applied to them.

Not only was there no evidence of negligence on the part of the defendant, but it is clear that

the risk of such an injury as the plaintiff sustained was part of the terms of his contract of employment. The judgment of nonsuit was rested on this ground as well as on the ground that there was no negligence. No authorities are required for the proposition that if the judgment of the Court can be sustained on either ground, it will not be reversed. There is absolutely no evidence that the work was being conducted in any way different than that always used. The instruments that were being used in the work, namely, the racepiece and the hand truck, were simple tools. The risk that the wheels of the hand truck in striking against the edge of the racepiece where it rested on the floor of the car, so as to cause a jarring of the load on the truck, was a risk that was visible and obvious to the plaintiff. In fact, the degree of the jolt or jar would depend on the speed with which he rolled the truck on to the racepiece.

In *D. L. & W. R. R. Co.* v. *Koske,* 73 L. Ed. 234, the plaintiff rode on an engine to about sixty feet from a coal chute where he worked. The engine stopped and he jumped from it into a small hole that was in the yard. This hole, it appeared, was a drain that was used to drain the yard. The Court said:

> "The court takes judicial notice of the fact that for some weeks immediately before the accident the sun rose and it was light for some time before plaintiff's quitting hour. He worked in daylight for some time every morning during the spring and summer months, and during one year he worked days. There was nothing obscure or of recent origin about the place where he was injured. The conditions were constant and of long standing. The evidence requires a finding that he had long known the location of the drain and its condition at the place in question. The dangers attending jumping from engines in the vicinity

of the drain, especially in the dark, were obvious. Plaintiff must be held to have fully understood and appreciated the risk. It was the duty of the judge presiding at the trial to direct the jury to return a verdict in favor of the defendant."

II.

CONCLUSION.

For these reasons we respectfully submit that the judgment of the Hudson County Circuit Court should be affirmed.

October Term, 1929.

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