

# New Jersey Supreme Court

SOMERSET COUNTY.

---

JAMES M. SMITH,  
*Plaintiff,*

*against*

DELAWARE, LACKAWANNA & WEST-  
ERN R. R. Co.,  
*Defendants.*

---

10

Somerville, N. J., Feb. 7, 1916.

APPEARANCES :

ARTHUR A. PALMER, ESQ., Attorney for the  
Plaintiff.

FREDERIC B. SCOTT, ESQ., Attorney for the  
Defendant.

20

---

## Motion for Non-Suit.

MR. SCOTT: May it please the Court: I desire 30  
to ask the Court for the direction of non-suit in  
this case. We are called upon to meet two charges  
of negligence. The first charge of negligence is:  
"That the defendant so constructed its roadbed to  
the station platform aforesaid, that by reason of  
the defective, faulty, careless negligence and im-  
proper and unlawful construction of the same."  
and so forth—that is the first charge against us  
as regards construction, and because "the said  
roadbed was constructed without proper regard 40

*Motion for Non-Suit.*

for and in violation of the lawful rights of the defendant's passengers and patrons and this plaintiff, and because of the further negligence and careless and unlawful conduct on the part of the defendant's agents in operating and stopping its trains at a dangerous and improper place," and so forth.

10 The first charge, as I have stated, is the matter of construction, and as regards the matter of construction, I believe that under all of the cases in New Jersey, the plaintiff has clearly failed in his proof, in that it is not shown that the condition up there at the time—and I am assuming that from the nearest rail of the track on which the defendant's train was, to the station platform, was a part of the station premises—in other words, it was a place, under the Keeney case, for passengers to alight.

20 And considering, for the purposes of the argument, that was part of the station platform, there is no proof in this case that the construction was other than that in general use by well-regulated railroad companies, and approved by experience.

30 On the second ground, if that is true, that it was a proper place, under the evidence, I next urge that the proximate cause of the accident was not the negligence of the defendant company, but was the negligence—was the stubbing or the tripping of the plaintiff of his toe against the second rail of the track nearest the station, and that his falling, due to this tripping, was something that happened directly as a result of this tripping.

40 The Court will recognize in railroad construction, I think it must be common knowledge that the rails must be to a certain extent free for the passage of trains, and there is no evidence in this

*Motion for Non-Suit.*

case that this rail, which he says was two and one-half inches higher than the filling in between, was not such as a well-regulated railroad company would put there, and leave there, and maintain there, and which was approved by experience; and therefore I say that the proximate cause of the accident was the plaintiff's stubbing his toe against this second rail, which was not negligently constructed and maintained. 10

I come to the third and last reason for my non-suit, and that is, assuming that the place was properly constructed, and assuming that Mr. Smith fell—and we have to take it that he fell as he says he did; then I urge that there are a certain class of cases, in which, if the person is frightened by the negligence of the defendant, and then their actions mustn't be regulated and tested and held up to the same high degree of fear that they would under normal circumstances, but I claim that in this case, the operation of the train, that there is no evidence of the operation of the train, the Gladstone train—that the defendant was negligent in its operation in stopping it where it did, and in allowing it to make a noise like a train usually does, as the witness has testified, a puffing noise; that there was no negligence in that. and further, that under the evidence, under Mr. Smith's own testimony, there was not produced by the puffing of that engine there, any such fright as any cases in our State or any State that I have been able to look up, where the courts have said that that was a real danger or an imminent danger, or an apparently imminent danger. The case has been very short, and I do not desire to point out the testimony of the plaintiff, which your Honor still undoubtedly has fresh in your mind. 20 30

THE COURT: Who do you think ought to deter- 40

*Motion for Non-Suit.*

mine whether it was an apparently imminent danger?

MR. SCOTT: I think the plaintiff has determined for us the apparently imminent danger by his testimony. The plaintiff has told us how dangerous this was. He says he was a little confused. He says, "I was confused for my family," and yet  
 10 they all testified that the train was standing still.

THE COURT: Yes, but he didn't know when it was going to move.

MR. SCOTT: His wife said it was standing still, and the little girl says it was standing still.

THE COURT: Do you think a man, with his wife and child, alighting from a train, and seeing a puffing engine in close proximity, would have to assume that that train isn't going to move, or  
 20 might not move?

MR. SCOTT: I don't desire to put the question as your Honor puts it. My examination of all the cases in the State, starting with the Tuttle case, I think in 66 New Jersey Law—in all the cases that I have, up to the ninetieth Atlantic, all the cases were where there were objects which people tried to escape and get away from, they were moving objects. In some of those cases they were automobiles, and in some cases they were wagons, but  
 30 in every case the object from which they tried to escape was a moving object, an automobile coming down, a wagon running fast. I found two cases that were quite similar in the facts, in other States. In the case of *Chicago and Rock Island Railroad Company*, in 128 Illinois, at 458, a passenger train stopped on account of a snowdrift. Some of the passengers were alarmed by the approach from the rear of that train around a curve on an adjoining track of a snowplow. At the time the snowplow  
 40 approached, their train blew a loud alarm whistle.

*Motion for Non-Suit.*

The plaintiff endeavored to escape from the car in which he was riding, and it appeared that the snowplow was on the adjoining track, or the track like in this case, between the station. He jumped out of the car and ran down, and as he ran down, ran across this track, the snowplow hit him, and the Court held that there was no evidence of the purpose of the whistle, for whom it was intended, 10 the result that it was expected to produce, or that it was unnecessarily given, and so in this case here, the mere fact that a train was standing there, I don't think is in itself negligence.

THE COURT: No, but the very fact that somebody was hit in that case, and as we know in other cases, where engines do sometimes run past stations, would lead the ordinary prudent man to be on the lookout for any engine that was as close as that, wouldn't it? 20

MR. SCOTT: The results in this case showed that is what Mr. Smith evidently knew. He said the train was standing still; the little girl was not frightened; every passenger that got off of that train;—in the cases that I have found, the Courts have allowed evidence as to what the other passengers did, and I inquired of Mr. Smith about the other passengers. All those passengers got off safely and went about their business.

There is another case of *Gulf Railroad Company* 30 *against Whalen*. There a train was seen approaching the one in which the plaintiff was riding, and that train was on the same track. It was running slowly, and it was under control. The plaintiff in that case got out and was hurt. The Court said that no one left the train but the plaintiff, on his own conception of the danger. There was evidence as to what the speed of the train was at four hundred yards before it slowed down to make a full stop. 40

*Motion for Non-Suit.*

THE COURT: That is not the law in New Jersey, is it, Mr. Scott?

MR. SCOTT: The law in New Jersey is that you must so regulate your trains as not to run your trains by.

10 THE COURT: Not where persons believe themselves to be in imminent danger of being injured, he had a right to exercise the judgment which he has.

MR. SCOTT: Under the circumstances.

THE COURT: It is your duty to provide a safe place for passengers to alight and leave trains. There is no doubt about that, is there?

MR. SCOTT: No, sir.

20 THE COURT: Now, then, if a station is erected where there are tracks and obstacles over which a man may stumble if he is confused, and you have another engine right over there, it is for the jury to say whether he has a reasonable ground to believe that he ought to hurry to get out of a situation that might be dangerous—isn't that for the jury?

MR. SCOTT: If Mr. Smith had wanted to go that far, undoubtedly he could have made it a jury question, but Mr. Smith and his witnesses, all honest people, I believe—refused to go that far.  
30 The little girl wasn't frightened; Mrs. Smith wasn't frightened. Mr. Smith, he says he was a little bit confused. There is no evidence that there was a really imminent danger or an apparent imminent danger.

THE COURT: He was confused. What confused him? What do you think confused him, Mr. Scott? If there had been no locomotives there, he would have had nothing to have had confused him.

MR. SCOTT: Then, may it please the Court,  
40 there must be something—he must go farther; the

*Motion for Non-Suit.*

mere fact that he was a little confused doesn't make a case, unless he shows why he was confused.

THE COURT: I know, but he has told the surrounding circumstances. Here is a man with his wife and child and two packages, and an exit from that train in which there are obstacles. Now, there is a train a short distance away, coming in the other direction, puffing and making a noise, and he is not certain that that train is not going to move at any moment and kill him and his wife and children, and he says he is confused. What do you think confused him? 10

MR. SCOTT: I don't think there is anything in the plaintiff's case that would warrant any reasonable man in saying that his actions, as narrated by himself, were due to any danger imminent or apparently imminent. 20

THE COURT: Suppose the jury thinks it was, then what?

MR. SCOTT: I defer to their judgment always, sir.

THE COURT: It strikes me it is a fair case. Of course, it may have been his fault, but it is for the jury to say.

MR. SCOTT: Your Honor refuses the direction of a non-suit? I can shorten this case considerably if your Honor will rule specifically on the grounds which we may be called on to present. On the first, was there any proof of negligence in construction? 30

THE COURT: I am not going to hold, Mr. Scott, that this was negligent construction, but I hold that under the circumstances that have been produced here, it is for the jury to say whether you provided a reasonably safe place for this passenger to alight and leave the train. I will allow you an exception. 40

### Motion for Direction of Verdict.

**THE COURT:** I suppose you renew your motion that you made before and ask for the direction of a verdict?

**MR. SCOTT:** Yes; on the grounds that there has been no negligence shown on the part of the defendant, and on the second ground that the proximate cause of the accident was a condition  
**10** in which no negligence of the defendant company contributed to the cause.

**THE COURT:** The motion will be denied and you will be allowed an exception.

**20**

**30**

**40**

## New Jersey Court of Errors and Appeals

JAMES H. SMITH, <i>Respondent,</i>	}	Action at Law.	10
<i>vs.</i>			
THE DELAWARE, LACKAWANNA & WESTERN RAILROAD COMPANY, <i>Appellant.</i>			

### **BRIEF OF DEFENDANT APPELLANT.**

#### **Statement.**

20

This is an appeal from the entry of a judgment in Somerset Circuit entered on February 7, 1916. The action which forms the basis of the judgment occurred at Bernardsville, New Jersey, on January 6, 1915, the circumstances of which were as follows:

Bernardsville, New Jersey, is a station on the Passaic & Delaware Branch of the appellant, which branch is a single track line with turnouts or sidings at various locations, and runs from Summit, New Jersey, west to Gladstone. 30

At Bernardsville the appellant maintains a station, the station building of which is to the north as one approaches it from Hoboken via Summit. The station building being erected upon a concrete base which runs the entire length of the station premises.

In front of the station building and running parallel with it the appellant maintains two 40

tracks, the one nearest being known as the "main track" and the other, further away from the station platform, known as the "turnout, switch or siding," which turnout also runs beyond the station premises both to the east and west of it and connects with the main track at points both east and west of the station platform.

10 The distance of the nearest rail of the siding or turnout track to the nearest rail of the main track in front of the station platform was 7 feet, 6 inches (p. 28, ll. 25-29), which place was plat-  
formed or filled with fine ground stone or screen-  
ings (p. 27, ll. 20-23). The ties between the rails of the main track next adjoining the station plat-  
form were uncovered, the distance between the rails of said track being 4 feet, 8 inches.

20 From the rail of the main track nearest to the concrete station platform, where the ends of the ties too were also left uncovered, was distance of 10 inches.

The rail of the main track nearest to the turn-  
out or side-track for operating purposes was left clear of ballast to the height of  $2\frac{1}{2}$  inches (p. 28, ll. 34-40). From the top of the rails inside of the main track to the partially exposed ties upon which they were laid was a distance of 5 inches (p. 29, ll. 22-29).

30 The appellant's train service, as shown by the plaintiff's Exhibit P-1 (printed at p. 62), shows that train No. 315 from New York was scheduled to arrive at Bernardsville at 1.38 P. M. and that train No. 324 from Gladstone to Hoboken was scheduled also to arrive at 1.38 P. M.

40 On the day in question the plaintiff with his wife and daughter became passengers on the ap-  
pellant's train No. 315 at Hoboken, New Jersey, the make-up of which train from the junction-  
point at Summit, New Jersey, consisted of an engine, smoking and baggage combination car and

one passenger coach. Just prior to the arrival of the plaintiff and his family at Bernardsville they were seated in the rear or passenger coach of the train in question. On approaching the Bernardsville station from the east the appellant's train took and entered upon the turnout or siding which brought the train up to and in front of the station building and platform, at which place it stopped to discharge passengers.

After several passengers had alighted from the coach in which the plaintiff and his family were riding (p. 22, ll. 30-40), the plaintiff, encumbered with a dress-suit case in one hand and a lot of bundles in the other hand (p. 26, ll. 15-40), proceeded to make his exit from the coach in which he was riding by going to the front door, followed by his wife and daughter. As the respondent got out upon the platform of the coach, looking to the west, and to the station building he observed the engine of train No. 324, which has been designated as the "Gladstone train," standing still, near the station building on the main track (p. 23, ll. 33-4). The respondent then proceeded down the steps of the coach (p. 25, ll. 14-18), then upon a footstool placed for his convenience by the conductor (p. 25, ll. 18-30), and then upon the ground (p. 25, ll. 35-37), during each of which movements he still observed the Gladstone train standing still where he first saw it (p. 24, ll. 17-18, p. 25, l. 18, p. 25, ll. 36-8). At the time the respondent first observed the Gladstone train and during his progress down to the ground or screening platform between the turnout track and the main track, the respondent observed that the Gladstone engine was making "some noise like engines do when they stand still" (p. 24, ll. 17-25).

After the respondent landed on the screening platform he waited at the bottom of the steps for about a half a minute to take charge of his wife

and child (p. 25, ll. 26-30), the Gladstone engine continuing to make the same kind of noise an engine usually makes when standing still.

The cause and description of the accident which thereafter happened to the respondent are best given in his own words:

10 "There was a train coming from Gladstone puffing and making considerable noise and my family was behind me and I was anxious to know they were safe and was a little confused, walking there across the track and I stumbled on the second track from the platform walking in a diagonal direction facing Bernardsville, and I stumbled and threw myself heavily against the platform and caught by arm right here" (p. 8, ll. 27-35),

and

20 "Well, I was anxious to get out of the way and I was walking rapidly and I slipped, caught my foot in this rail and pitched across the rail and fell on to the platform" (p. 10, ll. 23-27).

30 It appeared from the plaintiff's case that the passengers who preceded the respondent and his family out of the coach and down the steps of the coach in which the respondent was riding alighted in safety (p. 22, ll. 30-32), and that also the passengers leaving the smoking car ahead of the passenger coach left the train in safety and without confusion (p. 24, ll. 30-37). In fact, the entire case is devoid of any evidence whatsoever with respect to any confusion being caused on account of the Gladstone train.

40 When the respondent's wife alighted from the train she handed her grip over to the respondent, who "simply took the grip and started" (p. 36, ll. 13-14), after which the respondent "tripped on the second rail and fell in a slanting position against the stone coping of the platform" (p. 35, ll. 23-27), the Gladstone locomotive at the time

being stationary (p. 37, ll. 35-6). The respondent's daughter also told how the accident happened in the following words:

"He was walking slanting; he did not walk straight; he walked towards Bernardsville. \* \* \* He stubbed his toe on the second rail and fell against the coping of the station (p. 40, ll. 24-30), the Gladstone train at the time remaining stationary" (p. 41, ll. 1-8).

The appellant's evidence confirmed the plaintiff's evidence that the Gladstone train was standing still at the time of the accident and showed that the noise that the Gladstone train was making was the "exhaust of the airpump discharging steam" (p. 49, ll. 11-12), and the further fact that the actual distance between the points where the plaintiff alighted and the front of the Gladstone engine was a distance of 130 feet (p. 46, ll. 10, etc.). 10

The negligence charged against the appellant as set forth in the complaint was to the effect that its roadbed to the station platform was defectively, faultily, carelessly, negligently and improperly constructed and further that the appellant negligently operated and stopped its trains at a dangerous and improper place to discharge its passengers, whereupon the plaintiff was violently thrown upon the defendant's rails and platform (p. 3 of complaint, lines 14, et seq.), which allegations were denied by the appellant. 20 30

During the progress of the trial it developed that the respondent's theory of his case was that together with the faulty construction of the appellant's premises, the sight of the Gladstone train had placed the respondent in such peril as to cause his injury while endeavoring to escape it.

At the the end of the plaintiff's case the appellant moved for a non-suit on the grounds that no faulty construction had been shown and secondly that the proximate cause of the acci- 40

dent was not due to the negligence of the Company, which non-suit however, was denied.

As has been heretofore pointed out, the proof offered on behalf of the appellant in no way made the questions presented to the Court on the application for a non-suit disputed questions of fact and therefore the appellant at the close of its case, moved for a direction of a verdict upon the same grounds as its motion for a non-suit,  
 10 to-wit:

“That there has been no negligence shown on the part of the defendant and on the second ground that the proximate cause of the accident was due to a condition in which no negligence of the defendant Company contributed and was a cause” (p. 55, ll. 29-35).

The questions, therefore, involved in this appeal present to this Court the Trial Court's refusal to  
 20 grant the appellant's motion for non-suit and to direct a verdict in its favor, besides a further alleged error upon the part of the Trial Court in leaving to the consideration of the jury for their determination the matter of the construction of the appellant's station premises, in view of the fact that the Trial Court charges the jury the appellant's requests to charge which covered the facts with respect to the construction of the station premises, and the Court's declaration that  
 30 said construction was proper.

Objection having been made to the appellant's State of Case with respect to the fact that it did not embody the colloquy between the Court and the appellant's counsel at the time the appellant made its motion for non-suit, this appellant, while in no way admitting that said colloquy is a part of the record proper, has deemed it wise to have the colloquy printed at length and the same appears in Case Book No. 2, filed with its main  
 40 State of Case.

### Argument.

In view of the fact that there was no proof offered by the respondent that in the construction of its roadbed and station platform the appellant had done aught than what was done by well regulated railroad companies and that the type of the construction was in conformity to a common and approved type, that negligence charged against the appellant is eliminated from the case and leaves for the consideration of the Court the sole and single question as to whether the train operations of the appellant were such as to create such an appearance of imminent danger in the mind of the respondent as to leave him no time for deliberation and whether his evidence warranted the Trial Court in allowing the jury to find that the alleged danger was the proximate cause of his injury, because, if the plaintiff's act resulted from a rash apprehension of danger which did not exist and his injury was sustained or can be attributed to such rashness and imprudence, he is not entitled to a recovery.

### POINT I.

The evidence in the case is uncontradicted that the Gladstone engine was stationary from the time it was first observed by the respondent (p. 24, ll. 1-2), until it drew up to the station platform proper some two minutes after the happening of the accident (p. 50, ll. 13-14); that the noise that the engine was making at the time it remained stationary was the usual noise locomotives make when standing still (p. 24, ll. 20-25; p. 41, ll. 4-5; p. 49, ll. 10-12); that all of the passengers preceding the respondent and his family alighted from either the passenger coach or smoking car in safety and without confusion and went about their business unannoyed (p. 24, ll. 30-40), and it is significant that the respondent

makes no direct charge that the stubbing of his toe on the rail of the main track was due to any apprehended danger.

In an analysis of the rule of law by which the respondent seeks to hold the appellant liable there have been deduced three principles, the application of each or all of which, when made to the instant case, show conclusively that the respondent cannot hold the appellant.

10 1. It is essential that the peril or alarm must have been caused by the negligence of one against whom indemnity is sought.

2. It must appear that the apprehension of peril from the standpoint of the injured party must have been reasonable, and

3. The appearance of the danger must have been imminent, leaving no time for deliberation.

20 With regard to the first principle of this rule, that the peril must have been caused by the negligence of one against whom indemnity is sought, the evidence merely shows the situation of a locomotive, making a noise such as standing engines usually do, standing some 130 feet away from an alighting passenger, the said passenger being protected by the conductor who had placed a footstool for him to alight.

30 Applying the second principle that the apprehension of peril from the standpoint of the injured person must have been reasonable, we have the situation presented of the respondent continuously observing the Gladstone engine remaining stationary during the entire time of the exit of the passengers of the train on which he was riding, and of other passengers departing from the train without the slightest apprehension.

40 With the respect to the third principle, that the appearance of the danger must have been imminent, leaving no time for deliberation, the Court will note that after the respondent in his

deliberate movements out of the car and down the steps to the ground had alighted on the ground, he waited at least a half minute before turning toward the station platform; that at no time does he give expression to any fear or alarm with respect to the Gladstone train, and that his method of locomotion as described throughout both his testimony and the testimony of his wife and daughter was characterized as walking, showing a deliberateness which precludes the idea of the necessity for the exercise of an immediate judgment and action on his part. 10

As a result of the appellant's investigation of the cases bearing upon the case bar, it can safely say that no cases can be cited where the apprehended danger was caused by such a stationary object such as the Gladstone locomotive in question.

In the case of *Tuttle v. Atlantic City R. R. Co.*, 66 N. J. L., 327, it appears that Mrs. Tuttle was on the sidewalk of a street in Camden and while walking observed one of the railroad cars derailed and dash across the street over two curb stones and two trolley tracks and she, becoming frightened at the noise (and sight of car?) started to run and when some distance away, fell and was injured. The Court in upholding the motion denying the non-suit in this case said:— 20

“The real question at issue in the case and to be determined by the jury was whether the plaintiff Mrs. Tuttle, seeing the car approach *at great speed across the street* was justified in running to escape from what she supposed was an imminent danger” (p. 329). 30

And further in the same opinion the Court referred to Sherman and Redfield on “Negligence”, calling attention to the law there cited, that the position one must be in to obtain the benefit of the rule invoked by the respondent is that he must 40

be compelled to "choose instantly" in the face of grave and apparent peril (p. 330).

Again in the case of *Buchanan v. West Jersey R. R. Co.*, 52 N. J. L., 265, it appeared that the plaintiff was lawfully on the station platform the railroad company when she was obliged to throw herself on the platform on account of a piece of timber projecting from one of the cars of a train passing the station.

10 In *Westcoat v. Decker*, 85 N. J. L., 716, it appeared that the defendant's automobile was being negligently driven down upon the deceased at a great speed while she was upon a public crossing, the deceased having stepped back to permit the automobile to pass and then stepped forward again immediately in front of the automobile. Justice White, writing the opinion for the Court of Errors and Appeals, with respect to this situation said:—

20 "If this testimony were true, the woman was clearly in imminent danger from the onrushing automobile charging down upon her when she looked up and stepped first backward and then forward \* \* \*. If so her action may have resulted from natural uncertainty in a moment of extreme danger as to just what was best to do in order to escape" (pp. 717-718).

30 In *Staines v. Central R. R. of N. J.*, 72 N. J. L., 268, it appeared that the plaintiff was injured by jumping from a train which was at a standstill and while the plaintiff was in the act of alighting and had gone down two steps of the coach, when a servant of the defendant company told her to hurry and said that the train was in motion and told her to jump down. The plaintiff testified that she got excited—that the train was in motion—that she thought she would be killed and jumped to save herself. Justice Swayze, writing

the opinion for this Court, speaking with reference to the conduct of the plaintiff, said:

“Whether her conduct was negligent and whether that negligence contributed to the injury *must depend upon the actual situation and not her surmises*” (p. 270).

The learned Justice also adverts to the fact that the

“plaintiff was very much excited by the alarm given by the conductor” (p. 271). 10

There being no divergence in the testimony relative to the circumstances under which the accident happened, the Court should have either granted a non-suit or directed the requested verdict. (*Weston v. P. R. R.*, 74 N. J. L. 485.)

Outside of the State of New Jersey situations have arisen wherein the rule herein referred to has been applied.

In *Mitchell v. Southern Pacific Rwy. Co.*, 11 L. R. A., 130, it appeared that the plaintiff was riding on the platform of a smoking car at the time of the accident; that he had gone out upon the platform immediately before the accident in consequence of the fear that some disaster would occur to which his attention had been directed by reason of the speed of the train as it passed over the top of a grade and began to descend; that the great and unusual speed at which the train was travelling, taken in connection with the fact that the road was new and temporary, led him to believe that an accident would occur and that he went out upon the platform intending to jump therefrom to the sand where he believed he would escape with less injury than if he remained on the car, and that no sooner had he reached the platform than the car was overturned and he was thrown upon the ground, the railroad company's contention being that it was relieved 20  
30  
40

of responsibility from him because of the provisions of the Civil Code which provided against the use of car platforms by passengers.

“Such conduct,” said the Court, “under the circumstances related, was not negligent.”

10 In *Ballo v. U. S. Express Co.*, 14 L. R. A., 743, it appears that the plaintiff was proceeding along the sidewalk of a street when a trunk thrown from an express wagon into the highway suddenly put the plaintiff in such a position of peril that he fell over another trunk lying on the sidewalk and was injured. The Court there held that where the plaintiff was so suddenly put in peril as to leave no time for his consideration of the way of escape, it was natural and probable that he would instinctively retreat in the direction of the other obstruction placed by the defendant on the sidewalk, having his eyes fixed on the danger from which he was fleeing, because the peril was suddenly precipitated upon the plaintiff and left him no time for voluntary action.

20

Of course, the foregoing argument has been addressed to this Court on the assumption by the appellant, for the purpose of the argument, that the standing of the Gladstone locomotive where it was at and prior to the time of the accident, was in itself negligence, and while the appellant does not concede that to be a fact, to secure the benefit of the rule the respondent seeks to invoke to hold the appellant, the negligence of the appellant with respect to the Gladstone engine must necessarily constitute a major premise of his argument. (*Graetz v. McKenzie*, 9 Washington, 696, Pacific; and *Mobile O. R. Co. v. Klein*, 43 Illinois Appeal, 63.)

30

The situation that the respondent found himself in after alighting from the train at Bernardsville not having been caused by the negligence of the

40

appellant, the apprehension of peril, if any apprehension there was, from the standpoint of the respondent, not having been shown to have been reasonable and the appearance of danger, if any danger there was, not having been imminent or leaving no time for deliberation, the respondent cannot hold the appellant for stubbing his toe over the rail of a track which the case shows to be concededly properly constructed. To allow the jury to so find was to gauge the liability of the defendant not by the quality of its conduct, but by the accident itself. (*Mason v. Erie*, 75 N. J. L.; *Collins v. West Jersey Express Co.*, 72 N. J. L., 231.) 10

## POINT II.

The third ground of appeal set forth by the appellant (p. 2) alleged error because the Trial Court, after having charged the requests of the defendant relative to the construction of the defendant's premises, nevertheless left the matter of said construction for the determination of the jury. This ground of appeal is founded on the objection made after the charge of the Court and was specifically called to the Court's attention (p. 61, ll. 37-40). 20

As a part of the Court's charge the Court charged the jury the defendant's requests that negligence with respect to the construction of the railroad company's roadbed and station platform could only be shown by showing that the construction was of such a design that reasonably careful judgment would disapprove of as likely to cause an accident to passengers using it as a way to and from the trains. (p. 20, ll. 24, etc.) 30

And again that there was no proof that the platform had ever proved unsafe and that there was no negligence proven against the defendant because it did not fill in between the rails of the main track. (p. 69, ll. 12-20.) 40



# INDEX.

	Page.
Notice of Appeal .....	1
Summons .....	2
Answer .....	5
Reply .....	6
Judgment .....	6

## TESTIMONY.

### FOR PLAINTIFF:

#### JAMES M. SMITH:

Direct .....	8
Cross .....	22
Re-Direct .....	32

#### JENNIE SMITH:

Direct .....	35
Cross .....	38

#### FLORENCE SMITH:

Direct .....	40
Cross .....	41
Direction for non-suit .....	42

### FOR DEFENDANT:

#### JACOB K. THOMPSON:

Direct .....	45
--------------	----

#### JOHN T. DRAKE:

Direct .....	46
--------------	----

#### ARTHUR D. ALLEN:

Direct .....	47
--------------	----

#### CHARLES S. EMMONS:

Direct .....	48
Cross .....	50

	Page.
Charge .....	56
Requests to charge .....	60

PLAINTIFF'S EXHIBITS :

P-1—Timetable. Admitted in evidence at page  
11 printed at ..... 62

P-2—Bill. Admitted in evidence at page 12  
not printed.

P-3—Bill. Admitted in evidence at page 12  
not printed.

DEFENDANT'S EXHIBITS.

Ex. A.—Photograph of station. Admitted in  
evidence at page 48 not printed.

# New Jersey Supreme Court.

## Notice of Appeal.

(Filed, March 14, 1916.)

10

---

JAMES M. SMITH,

*Plaintiff,*

*against*

THE DELAWARE, LACKAWANNA &  
WESTERN RAILROAD COMPANY,

*Defendant.*

---

Action  
at Law.

20

To Arthur A. Palmer, Esq.,

Attorney of above plaintiff.

SIR:

YOU WILL PLEASE TO TAKE NOTICE, that the above defendant appeals from the whole and every part of the judgment entered upon the verdict rendered in the above case on February 7, 1916, by the Court of Errors and Appeals in and for the State of New Jersey, and that the said defendant hereby sets down and specifies the following to be its grounds and reasons of appeal: 30

1. Because the Trial Court refused the request of the above defendant to non-suit the said plaintiff at the end of the plaintiff's case for the reasons set forth at length to said Court.

2. Because the said Trial Court refused to direct a verdict against the plaintiff and in favor of the defendant for the reasons that no negligence had been shown upon the part of the defendant and that the proximate cause of the 40

accident to the plaintiff was due to a condition in which no negligence of the defendant in any way contributed.

3. Because the Trial Court after having charged the requests of the defendant relative to the construction of the defendant's premises, nevertheless left the matter of said construction for the determination of the jury.

Yours truly,

10

FREDERIC B. SCOTT,  
Attorney of Defendant.

Dated, March 13, 1916.

**Summons.**

(Issued, Aug. 21, 1915.)

**NEW JERSEY SUPREME COURT.**

SOMERSET COUNTY.

20

JAMES M. SMITH,

*Plaintiff,*

*against*

THE DELAWARE, LACKAWANNA &  
WESTERN RAILROAD COMPANY,

*Defendant.*

Judgment  
Record.  
On Postea.

30 Delaware, Lackawanna & Western Railroad Co., the defendant in this cause, was summoned to answer unto James M. Smith, the plaintiff therein, in an action at law upon the following complaint:

The plaintiff, who resides in Bernardsville, in the Township of Bernards, Somerset County and State of New Jersey, by Arthur A. Palmer, his attorney, respectfully shows this court and says that:

40

*Summons.*

1. The defendant is a domestic corporation with its principal place of business in the City of Hoboken, in the County of Hudson and State of New Jersey, and is engaged in the business of a common carrier operating a railroad from Hoboken, New Jersey to Gladstone, New Jersey.

2. On or about the sixth day of January, 1915, the plaintiff herein was a passenger upon and lawfully in and upon the defendant's cars and property at the station in Bernardsville, Township, County, and State aforesaid. 10

3. On said date and at the said place, the plaintiff, at the special instance and invitation of the defendant's agents and servants, alighted from the train of the defendant and stepped upon the road bed made and maintained by the defendant for a crossing to the station platform for its passengers, and that in so doing and while crossing defendant's said road bed to the station platform aforesaid, by reason of the defective, faulty, careless, negligent, improper, and unlawful construction of the same, and because the said road bed was constructed without a proper regard for and in violation of the lawful rights of the defendant's passengers and patrons, and this plaintiff; and because of the further negligent, careless and unlawful conduct on the part of the defendant's agents and servants in operating and stopping its trains at a dangerous, improper and unlawful place to discharge its passengers and patrons at said station, plaintiff was thrown violently upon the defendant's rails and platform, sustaining a fracture of his left arm at or near the shoulder, and also other and divers wounds, contusions and abrasions in and about his body and head. 20 30

4. The plaintiff herein in no way whatsoever contributed through his own fault or negligence 40

*Summons.*

or lack of proper care to the said trespass, injuries and damages; but the conduct of the defendant, its servants and agents was entirely the proximate cause of the said trespass, injuries and damages.

5. By reason of, and in consequence of the said negligent and unlawful conduct of the defendant, its agents and servants, the plaintiff herein became and was rendered, and still is, and will continue to be suffering, sick, sore, shocked, and disordered, both mentally and physically, and deprived of the proper use of his head, body and limbs for a long period of time, and has been and will continue to be hindered, delayed and prevented from pursuing, and deprived of the benefits of his business.

6. By reason of, and in consequence of the said negligent and unlawful conduct of the defendant, its agents and servants, the plaintiff herein since the said injuries has spent, is still spending, and for a long time will continue to spend large sums of money for physicians' and surgeons' services, medicines, nursing attendance, and other incidental charges.

WHEREFORE, plaintiff demands \$1500 damages.

Dated, Bernardsville, New Jersey, August 21, 1915.

ARTHUR A. PALMER,  
Attorney for the Plaintiff,  
Bernardsville, N. J.

**Answer.**

(Filed, Aug. 30, 1915.)

The above defendant, answering the allegations contained in the plaintiff's complaint, says:

1. That it denies the allegations contained in the first paragraph of the plaintiff's complaint, but admits that it is a corporation of the State of Pennsylvania, duly authorized to do business in the State of New Jersey, with its principal place of business in the City of Hoboken, County of Hudson, State of New Jersey, and that it is engaged in the business of a common carrier operating a railroad from Hoboken, New Jersey to Gladstone, New Jersey. 10

2. That it has no knowledge or information sufficient to form a belief so as to enable it to answer the allegations contained in the second paragraph of the plaintiff's complaint. 20

3. That it denies the allegations contained in the third, fourth, fifth and sixth paragraphs of the plaintiff's complaint.

And for a separate and distinct defense to the cause of action pleaded by said plaintiff, the defendant says:

That if said plaintiff was a passenger of this defendant as set forth and alleged in his complaint, he was guilty of contributory negligence in that he failed to use due and reasonable care after he alighted from the defendant's train in his progress from said train to, from and out of the station premises of this defendant. 30

WHEREFORE, it prays that the above suit be dismissed with its taxed costs.

FREDERIC B. SCOTT,  
Attorney of Defendant.

**Reply.**

(Filed, Sept. 8, 1915.)

The plaintiff denies all the matters and things contained in the separate and distinct defense contained in the defendant's answer herein.

ARTHUR A. PALMER,  
Attorney for the Plaintiff,  
Bernardsville, N. J.

10

**Judgment.**

(Entered, Feb. 25, 1916.)

This case was tried before Judge George S. Silzer, with a jury at the Somerset County Circuit, on February 7th, 1916.

The jury rendered a general verdict against the defendant and in favor of the plaintiff for \$800.00.

20 WHEREUPON, it is adjudged that the plaintiff recover of the defendant the sum of eight hundred dollars and his costs, which are taxed at the sum of forty eight dollars and thirty eight cents, making in the whole the sum of eight hundred and forty eight dollars and thirty eight cents.

\$800.00

48.38

---

 \$848.38

Judgment entered February 25, 1916.

WM. S. GUMMERE, C. J.

30

40

## NEW JERSEY SUPREME COURT.

SOMERSET COUNTY.

---

<p>JAMES M. SMITH,</p> <p style="text-align: right;"><i>Plaintiff,</i></p> <p style="text-align: center;"><i>against</i></p> <p>DELAWARE, LACKAWANNA &amp; WEST- ERN R. R. Co.,</p> <p style="text-align: right;"><i>Defendant.</i></p>	}	10
---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	---	----

---

Before

Hon. GEORGE S. SILZER,  
Justice,

And a Jury.

Somerville, N. J. February 7, 1916.

## A P P E A R A N C E S :

20

ARTHUR A. PALMER, Esq.,  
Attorney for the Plaintiff.

FREDERIC B. SCOTT, Esq.,  
Attorney for the Defendant.

MR. SCOTT: I would like to amend my answer to the effect that Mr. Smith was a passenger, a fact that we did not know at the time; I know now he was a passenger.

THE COURT: Let it be made.

MR. PALMER: I presume you will admit 30  
the time table?

MR. SCOTT: You have the time table for that time?

MR. PALMER: The time tables were not printed for that month, but I have one just previous, and one just later; they are all the same time, I would say.

MR. SCOTT: I will admit the one previous

40

*James M. Smith—Direct.*

and stipulate that the time, the schedule of the trains was the same as shown on the earlier one.

10 JAMES M. SMITH, the plaintiff herein, called as a witness in his own behalf, being first duly sworn testified as follows:

## DIRECT EXAMINATION BY MR. PALMER:

Q. Mr. Smith, do you recall January 6, 1915?

A. Yes.

Q. And will you tell the jury, please, in a very distinct voice, just about what transpired when you arrived at Bernardsville on the train? A. Well, the train that I came up in arrived from New York about 1:38.

20 Q. Did you buy a ticket? A. Bought a ticket. I had my wife and little daughter with me, and the train was stopped at the switch at Bernardsville. The conductor had a little stool that he put down at the foot of the steps and we all got down very nicely.

30 Q. Speak a little louder. A. There was a train coming from Gladstone, puffing and making considerable noise, and my family was behind me, and I was anxious to know they were safe, and was a little confused, walking there across the track, and I stumbled on the second track from the platform, walking in a diagonal direction, facing towards Bernardsville, and I stumbled and threw myself heavily against the platform, and caught my arm right here (indicating). I collapsed at that point, and I guess I did not know much until I was carried into the station and laid down on the settee. That is what happened.

*James M. Smith—Direct.*

Q. Now, Mr. Smith, as you stepped off the train on this little step that the conductor, you say, put there, and started to walk did you notice anything? A. Notice anything.

Q. Yes. What did you notice? A. Why, I didn't notice anything in particular.

Q. Well, what did you see there at the station? A. I saw the train coming in from Gladstone. 10

Q. In the opposite direction from which you came? A. Yes, sir; I saw that.

Q. Where was the locomotive in relation to the locomotive on your train, that you came in on? A. It had passed our locomotive.

Q. So the two trains were passing? A. Yes, sir.

Q. Your locomotive was in what relation to the other locomotive, on the other train? A. Our locomotive was further towards Gladstone, that is, further West. 20

Q. About how far was the locomotive on the Gladstone train when you alighted from your train? A. I should imagine it was about thirty feet—thirty-five feet.

Q. Well, did you notice the locomotive? A. Yes.

Q. What happened? A. It was puffing and blowing—I didn't know whether it was backing up or coming ahead, and that is what made me anxious about my family, who were following me up. 30

Q. Did you turn to find your family? A. I looked around.

Q. To have them come so you would take care of them? A. Yes, sir.

Q. Escort them across the track? A. Yes, sir.

Q. And how high is the rail, the first rail—the south rail of the north track that the Gladstone 40

*James M. Smith—Direct.*

train was on—how high is that from the road bed, do you know? A. Between the rail and the platform where I got off, or, rather, the train I got off, and the first rail I struck, is about two and one-half inches.

Q. And how far is that rail from the train you got off? A. About seven feet six.

10 Q. And then is the road bed filled in between there and the next rail, the north rail of the north track? A. No; there is five inches inside, and it is four foot eight to the center of the rail to the center of the other rail.

Q. And then is the road bed filled in between there and the platform? A. It is not.

Q. How deep is that? A. About the same thing, six or seven inches.

Q. Then how high is the railroad platform?  
20 A. Ten inches.

Q. And that isn't filled in? A. No.

Q. And when you fell over the south rail of the north track, how did you fall? A. Well, I was anxious to get out of the way, and I was walking rapidly, and I slipped, caught my foot in this rail and pitched across the rail and fell onto the platform.

Q. Where did you strike the platform? A. Right here (indicating).

30 Q. Did you break your shoulder? A. Broke my arm.

Q. Were you taken care of then? A. I was taken care of by my wife and daughter and some assistants.

Q. By a physician? A. Oh, yes.

Q. By whom? A. Sent immediately for Dr. Meigh.

Q. Did Dr. Meigh attend you? A. Right there then.

*James M. Smith—Direct.*

Q. Well, I ask you to look at this time table, Mr. Smith, and state what time that train arrives—that is, the train you came on, and also the arrival of the train from Gladstone.

MR. SCOTT: I object. I think the time table speaks for itself.

THE COURT: Yes; you can offer the time table. 10

MR. PALMER: I offer the time table; this is one just prior; there are three time tables here, but they are all the same.

THE COURT: Whichever one you offer.

MR. PALMER: I offer all three of them.

MR. SCOTT: I consent to the first one.

MR. PALMER: Well, the time table shows—

THE COURT: Which is the one you offer?

MR. PALMER: The one of November 8th, 1914. 20

THE COURT: Let the stenographer mark that.

MR. SCOTT: I admit that that schedule was in effect at the time of the accident.

(Said time table was received in evidence and marked Plaintiff's Exhibit 1.)

Q. Now, Mr. Smith, you say you were attended by the surgeon there, Dr. Meigh, and went to the hospital, did you? A. No, immediately I was sent home. 30

Q. Well, did you go to the hospital later? A. Two days later.

Q. Which hospital? A. Summit.

Q. And there you were treated? A. I was put under an X-ray treatment.

Q. Mr. Smith, you say you had an X-ray treatment? A. Yes, sir.

MR. PALMER: Mr. Scott, I ask you to please produce the X-ray negatives. 40

*James M. Smith—Direct.*

MR. SCOTT: Unfortunately we had an accident on the auto, and they were broken, and the remnants of them are in the car, but I will have them explained on the witness stand. We admit that Mr. Smith had a fracture of the shoulder.

10 MR. PALMER: I expect to use Dr. Lawrence as my witness; I am perfectly willing to use the railroad's doctor.

Q. Now, Mr. Smith, now, you went more than once to the hospital to have your arm treated?

A. I did; twice.

Q. And you were treated by the hospital, and paid a bill, did you? A. I did.

Q. Is that the bill (handing witness a paper)? A. That is the bill, Eighteen dollars.

20 Q. Eighteen dollars for the two X-ray pictures, and the treatment while there? A. Yes, sir.

MR. PALMER: I offer that.

THE COURT: Let it be received.

(The paper referred to was received in evidence and marked Plaintiff's Exhibit 2.)

Q. And did you also pay Dr. Meigh for his services? A. I did.

Q. How much did you pay Dr. Meigh? A. I think it was \$38.

30 MR. PALMER: I also offer this in evidence. Said paper was received in evidence and marked Plaintiff's Exhibit 3.

Q. Now, did you have any other expenses connected with the injury, Mr. Smith? A. Expense of being laid up; that is, I had to employ help to do certain work that I was anticipating doing.

40 Q. What has been your business? A. I have been an organist. I came out to Bernardsville to do some farm work, and unfortunately I was

*James M. Smith—Direct.*

incapacitated for that work, and in order to go ahead with it, I was obliged to hire help.

Q. Did you actually hire a man to take your place to do the work you had been doing? A. Yes, sir.

Q. How much did you pay him? A. Five months and a half, at \$40 a month.

Q. What does that aggregate? A. \$220. **10**

Q. And did you have any other expenses? A. Medicine and one thing and another, about \$15.

Q. And had you been engaged as an organist here? A. Yes, sir.

Q. And did you lose that position?

MR. SCOTT: I don't object, but I would like to ask Mr. Smith a few preliminary questions about this engagement, to see whether or not it should go in.

THE COURT: Yes. **20**

BY MR. SCOTT:

Q. Mr. Smith, you went out to Bernardsville, for the purpose of your health? A. No, sir.

Q. I mean when you originally went there? A. Not for my health, no.

Q. You went up there for the purpose of farming? A. I went there for the purpose of making some money.

Q. Wasn't it your intention, as you first testified, that you went up there to farm? A. Yes, sir. **30**

Q. And you went up there in January of the year previous to the accident, or September? A. Yes, sir.

Q. Previous to the accident, and you did the farming at that time? A. Yes.

Q. Up to the time of the accident? A. I had to hire help.

*James M. Smith—Direct.*

Q. You had to hire help. From the time you went up there, after you got straightened out on your place, up to the time of the accident, were you actively engaged in farming? A. Cleaning up and getting ready for the winter.

Q. Cleaning up and getting ready for the winter, and did that occupy all your time? A. All  
10 there was to do; there was no employment to be had there.

Q. And from January—September, when you first went up there, until January, the time of the accident, that was your main employment, was it not? A. At that time.

Q. Did you have any contract with anybody prior to the accident, relative to the position of organist at any church? A. No, sir.

MR. SCOTT: I object, may it please the  
20 Court, on the ground that there is no proof that the loss of the position of organist was proximately caused by the accident.

BY MR. PALMER:

Q. You were negotiating, were you, Mr. Smith, for this organist's position? A. I was getting acquainted with the different churches, and I found a number where I could work in.

Q. Did you substitute there? A. Yes, sir; I  
30 have.

Q. And you were negotiating for a regular position as organist? A. Yes, sir.

Q. Had been promised one? A. Yes, sir.

Q. And were just about to take it?

MR. SCOTT: I object to Mr. Palmer leading this witness.

THE COURT: Don't lead the witness, Mr. Palmer.

40 Q. What stage were the proceedings at when

*James M. Smith—Direct.*

you were injured. Where were you in relation to these negotiations, in relation to the organist's position? A. I was told that I could have the position, and I was anticipating it when this accident occurred.

BY THE COURT:

Q. Did you expect to take it? A. Yes, sir.

10

BY MR. PALMER:

Q. Well, what was the hindrance to your taking it after you were injured; did you try? A. I tried, and I played for some time, a couple of Sundays, I think.

Q. Played for two Sundays? A. Yes, and I found the strain too great on my arm, and I couldn't do justice to my work.

Q. Could you reach all the keys, to do all the work? A. When I first struck the organ—they were anxious I should take charge of it, and I went down there incapacitated—

20

Q. What church was that? A. This was the Bernardsville Episcopal Church, and I tried,—I could work on the lower bank, and in order to go to the second bank, I was obliged to take my hand and place it there; I was in a very weak condition.

Q. Show the jury; lift your arm. What is the capacity of your arm now?

30

(The Witness showed jury the extent to which he could raise his arm.)

Q. And you just dropped it? A. Yes, sir.

Q. Is that as high as you can move your arm?  
A. Without terrible pain, if I go any farther.

Q. And you say you are unable to reach the second bank of the organ? A. At that time.

Q. Can you now? A. Yes, sir.

40

*James M. Smith—Direct.*

Q. Can you play? A. At times I can; I couldn't play for the whole service through without being tired.

Q. So it incapacitates you from doing that work? A. I couldn't do it.

BY THE COURT:

10 Q. Have you a position now, a regular position? A. I have not.

BY MR. PALMER:

Q. What was the usual salary they paid there?

MR. SCOTT: I object.

A. I anticipated that that position would pay \$600; that is what I was told.

BY MR. PALMER:

20 Q. Now, Mr. Smith, we will go back to this—

MR. SCOTT: Are you through examining on the contract?

MR. PALMER: You mean in relation to the organist's position?

MR. SCOTT: In relation to the position as organist?

MR. PALMER: Yes, I think so.

MR. SCOTT: All of this matter relative to this position as organist is objected to.

30

BY MR. SCOTT:

Q. Mr. Smith, all this matter relative to this position as organist was a matter of anticipation; nothing had been definitely, finally arranged as to the terms of the contract and the amount you were to receive? A. During the time of my sickness there?

Q. No, I mean prior to your illness, or prior to the accident? A. Oh, yes, it was anticipated.

40

Q. It was all anticipated? A. Yes, sir.

*James M. Smith—Direct.*

Q. And nothing had been definitely formulated as to the terms of any contract or the salary you were to receive? A. No.

MR. SCOTT: I renew my objection.

BY MR. PALMER:

Q. Have you held positions before in New York and other places? A. I have; twelve years in one church. 10

Q. And that was the understanding when you entered into the negotiation, that you had held that position, and that you were to take the same position? A. Yes.

BY THE COURT:

Q. What certainty was there that you would get this place, that they might not change their minds the next day? A. They called on me when I was in a position that I couldn't do anything, and urged me to hurry up and get on my feet and get well so I could go ahead with the work. 20

Q. When you did get well, what did you do about it? A. I went to it.

Q. And did you keep on with it? A. No, I had to give it up; I couldn't stand the strain.

Q. How long did you continue? A. About two Sundays.

Q. At that time, was there a definite arrangement made? A. I hadn't entered into a settlement yet. 30

Q. So you were able to leave at any time you wanted to, and they were able to let you go? A. Yes, sir.

Q. And then you played two Sundays and found you couldn't do it? A. Substituted for somebody else.

Q. And then no definite contract was made? A. Not at that time. 40

*James M. Smith—Direct.*

Q. At any other time? A. No.

THE COURT: It seems to me a little uncertain, Mr. Palmer.

MR. PALMER: It is relevant to show the cause—I think the negotiations have gone far enough to show with reasonable certainty, that the position could be accepted.

10 THE COURT: They might change their mind, and he might change his.

MR. PALMER: He says they did urge him to come, but after he tried two Sundays, by reason of his injury, he was unable to fulfill it.

BY MR. PALMER:

Q. Was it the understanding Mr. Smith, that you were to have the position if you could stand the strain?

20 MR. SCOTT: I object to his leading, and I object to it as immaterial to the matter now before the Court, inasmuch as it assumes a condition after the accident, to stand a strain. He is bringing in the question of standing a strain. I suppose Mr. Palmer is talking about after the accident.

MR. PALMER: He has testified he held such a position.

30 THE COURT: You mean after the accident? You both agree on that, I understand, that he couldn't stand the strain after the accident.

Q. Is that right, Mr. Smith? A. Yes, sir.

Q. And then there was an understanding that you were to have the position if you could stand the strain? A. Yes, sir.

Q. In fact, you did try it for two Sundays? A. Yes, sir.

40

*James M. Smith—Direct.*

MR. SCOTT: I don't like to object, but I would like to have the counsel instructed not to lead the witness.

MR. PALMER: He doesn't understand the legal interpretation of the force of a contract. I think that it is perfectly plain that his negotiations had gone far enough that he could have had the position if he could have delivered the goods. 10

THE COURT: The fact is that they never made any agreement, Mr. Palmer. He didn't lose \$600 that year.

MR. PALMER: When may we understand that a contract of that kind is executed?

THE COURT: When the minds of the parties had met.

MR. PALMER: He says they did, as far as he was concerned, but that he couldn't deliver the goods. 20

THE COURT: He says he could break it at any time, and so might the church. There was no definite agreement which bound him or the church.

BY MR. PALMER:

Q. Was it or was it not understood that you were to go on that job, if you could play? A. That is as I understood it. 30

BY THE COURT:

Q. What did you mean a few moments ago when you said that you could have backed out any time? A. There was no contract written; I was confused a moment ago. I didn't sign any contract.

*James M. Smith—Direct.*

BY MR. PALMER:

Q. As a matter of fact, you don't sign any contract; you just go there and play? A. No, sir.

Q. And was it the understanding, if you could play, and reach the keys, and stand the strain, that you could have the position?

10 MR. SCOTT: Objected to as leading.

A. Yes.

Q. Now, what was the understanding; now, tell us plainly and finally, what was the understanding? A. The understanding was if I could fill the bill that I would get a contract for \$600 a year.

BY THE COURT:

20 Q. Did they ever determine whether you could fill it or not? A. I told them I could not; I found that out myself.

BY MR. PALMER:

Q. You told them you were unable to go ahead? A. Yes, sir.

30 MR. PALMER: Now, if your Honor please, I don't think it is possible to say at what point the contract was executed here, other than to say that if he had been able to deliver, he would have been able to execute the contract. Therefore, I think it is certainly relevant.

THE COURT: Now, I think that part of it in which he tells that he was incapacitated and couldn't reach the banks of the keys, that he had to give up the place, is relevant, but on the question of damages, I don't think it is.

40 MR. PALMER: Will it be left to the jury, the amount of the damages?

*James M. Smith—Direct.*

THE COURT: The jury can consider, if it is in the pleadings, if the man is incapacitated, they can consider to what extent.

BY MR. PALMER:

Q. Now, Mr. Smith, in relation to the accident itself, when you alighted from the train, did you observe any fence or any other guards there, to keep you from walking on the tracks? A. No. 10

Q. It is all open there? A. Yes, sir.

Q. Did the conductor say anything to you about being careful of the train, or anything? A. No, sir.

MR. SCOTT: I object to that as leading.

Q. What was going on there? A. It was puffing and blowing, and I couldn't tell which way it was going, whether it was going to back up or coming ahead. 20

Q. It had been moving? A. I couldn't tell.

Q. How far away from the point were you? A. About thirty feet, I think.

Q. In relation to the station platform, how was this locomotive coming from Gladstone? A. It was coming right alongside of the platform.

Q. That is, in front of the platform? A. Yes, sir.

Q. In front of the ticket office? A. Where it could deliver the passengers properly. 30

Q. What did you say? A. The train from Gladstone.

Q. Won't you speak a little louder? A. I say the train from Gladstone was coming along here by the platform where it could deliver passengers properly.

Q. Your train was also delivering passengers? A. Yes, sir; on the switch.

*James M. Smith.—Cross.*

Q. Now, will you tell us why you didn't see that rail there, Mr. Smith, the rail that you stepped over that was raised three inches? A. I told you I was confused, and probably looked around for my family following me.

## CROSS EXAMINATION BY MR. SCOTT:

10 Q. You got on the train at Hoboken? A. Yes, sir.

Q. With your wife and little girl? A. Yes, sir.

Q. And you rode up to Bernardsville? A. Yes, sir.

Q. And were there other passengers on that train? A. Oh, yes.

Q. Many? A. I cannot remember now.

20 Q. Were there many passengers on the train when you arrived at your destination? A. I imagine there must have been quite a number; I think so.

Q. Men, women and children? A. I couldn't say that.

Q. Can't you tell—what is the best of your recollection as to the number of passengers in the coach in which you were, that got out at Bernardsville, prior to the accident? A. It was an old, regular day coach, and was pretty well filled; half a dozen, or a dozen, maybe more.

30 Q. Well, with respect to the time when you got out of the coach, were you the first passenger to alight? A. No.

Q. Or were you the last, or sort of intermediate? A. Several people got off before I got off.

Q. Several got off before you did? A. Yes, sir.

Q. And do you remember whether they were men or women? A. No, I don't remember.

40 Q. At least two or three persons got off ahead of you? A. Yes.

*James M. Smith—Cross.*

Q. And did you see any children get off? A. I don't remember them.

Q. But you do recollect several persons getting off ahead of you? A. Yes.

Q. And when you talk about these several persons getting off ahead of you, you mean from the coach in which you had been riding? A. That is right.

10

Q. Now, there was a coach ahead of the coach in which you were riding, was there not, Mr. Smith? A. Yes.

Q. And did you see any passengers get off of that coach? A. That was the smoking car.

Q. That was the smoking car? A. Yes.

Q. Did you see any passengers get off of the rear platform of that car? A. I think I did.

Q. How many would you say, four or five persons get off of that platform? A. Really, I don't know; I didn't count them.

20

Q. Well, what is your best recollection? A. I couldn't tell you.

Q. But you do know there were some persons; your recollection is that there were some other persons? A. I know there were some people on the platform.

Q. When you came out, you came out and were followed by your wife and little girl? A. Yes.

Q. And you started to go down the steps of the train? A. I was the first one down.

30

Q. The first one of your party? A. Yes.

Q. When you got out on the platform of this train, was the train standing still? A. Yes.

Q. And before you started to go down the steps of the coach, could you see the locomotive that you have been talking about, of the other train? A. Why, certainly.

Q. You could see the locomotive? A. Yes.

40

*James M. Smith—Cross.*

Q. That was while you were standing still on the platform of the coach? A. Yes.

Q. And was that locomotive stationary at that time? A. Well, now, I don't know.

Q. Where was it that you first—where was this locomotive when you first saw it from the platform? A. As soon as I got down off the cars.

10 Q. Perhaps you misunderstand me, sir. You came out of the coach, out of the body of the car, and went on the platform of the train; before you went down the steps of the car, did you see the locomotive which we have designated as coming from Gladstone? A. I could see it; yes.

Q. You could see it? A. Yes.

Q. Was it moving or standing still? A. Apparently was standing still; it was making some noise.

20 Q. It was making some noise? A. Yes.

Q. Making a terrific noise, or just the usual puffing noise? A. You know how they will puff and blow.

Q. Like engines do when they stand still? A. Yes, sir.

Q. How long did you stand on the platform of the coach before you went down the steps of the car? A. Perhaps long enough to let one or two ahead of me get off.

30 Q. Long enough to let one or two ahead of you get off. And did you observe what those persons did when they got down? A. No, sir.

Q. Did they holler? Did anybody holler; those persons that got down ahead of you? A. I didn't hear any noise of that kind.

Q. Was there any excitement created by those persons who got down ahead of you? A. No.

Q. Was there any excitement caused by those persons getting down from the steps of the smok-

*James M. Smith—Cross.*

ing car, the car ahead of the one which you were leaving? A. I didn't hear anything.

Q. When you went down, did you proceed leisurely, or did you go down the steps quickly?

A. Got down in the usual way.

Q. Slowly? A. Yes.

Q. And during the time you were going down the steps, did you keep your eye on this locomotive? A. No; I was looking at the conductor, to see that I was getting down properly on the ground. **10**

Q. But during your progress from the platform of the coach, down the steps, and before you put your feet upon the stool which was there, did you notice the locomotive? A. I did.

Q. Was it still standing? A. Still standing.

Q. And then you stepped on the step or stool? A. Yes. **20**

Q. Did the conductor assist you off? A. No.

Q. You had no difficulty in getting off? A. Not a bit.

Q. You didn't fall on account of the stool? A. No.

Q. How closely after you were you followed by your wife and child? A. I waited for them at the bottom of the steps, and took charge of them.

Q. How long did you wait, do you think, about a minute or a half a minute? A. About that. **30**

Q. About a half a minute. And during this time that you were waiting for your wife and child, did you observe the locomotive? A. I probably had my back to the locomotive at that time; I was looking at my child and my wife.

Q. And before your wife and child came down, do you know whether it moved or not? A. No; I couldn't say.

Q. Did it make any violent noise, blowing a whistle? A. The same noise it had been making. **40**

*James M. Smith—Cross.*

Q. The same thing, the noise of a train that it usually makes when it is puffing and standing still? A. Yes, sir.

Q. You are sure of that? A. Quite sure.

Q. Did you start to go over to the station platform before your wife and child had got off the steps of the car? A. No.

10 Q. You waited until they came down the steps of the car? A. Yes.

Q. And then you waited until they came down on the stool? A. Yes.

Q. And both your wife and child? A. Both.

Q. At the time when you came out of the coach and went down the steps and off the stool to the platform between the two tracks, did you have any bundles with you? A. I did.

Q. A dress suit case? A. One.

20 Q. And any other bundles? A. A lot of bundles in both hands.

Q. Both hands full? A. Yes, sir.

Q. Was the dress suit case heavy? A. Not very.

Q. Generally—I don't want to be too personal—but generally, what did it contain? A. A few belongings, belonging to the family.

Q. Clothes and things like that? A. Yes, sir.

30 Q. And what was in your other bundle? A. I know one thing that was in it.

Q. Just give me an idea—was it a heavy bundle, or an awkward bundle, or what kind of a bundle was it? A. It was an ordinary bundle, tied with a string.

Q. Tied properly with a string? A. Very easy to handle.

Q. How large a bundle was that? A. A bundle that long (indicating).

40 Q. About a foot long? A. And about that wide (indicating).

*James M. Smith—Cross.*

Q. And what did that weigh, about, four or five pounds? A. Not over that.

Q. And did your dress suit case weigh more,—the dress suit case, filled as it was, weigh more than the bundle you were carrying in your hand? A. Very little.

Q. It did weigh more than the bundle? A. I couldn't say; it was larger in bulk, and I should 10 imagine it might weigh more.

Q. You think it did weigh more? A. Within a pound, maybe.

Q. Now, you have stated that this train that you came on, stopped at what was known as the switch? A. Yes.

Q. And between the switch where your train did stop and the concrete platform, part of the station premises, there was no train? A. Yes.

Q. Between the rails of the track on which 20 your train arrived and stopped, and the nearest rail, to that train, and the track nearest the station, that was filled in with cinders or something? A. It was higher there between the point and the train that I got off to the following track, a little higher.

Q. That was filled in, then? A. Really was two inches higher than the filling in.

Q. I am coming to that in a moment. I show 30 you a photograph—

MR. PALMER: Let me look at that, will you please?

Photograph handed to Plaintiff's attorney.

BY MR. SCOTT:

Q. I show you a photograph, Mr. Smith, and ask you if that correctly represents the general situation of the fixed objects; that is, the station and the platform and the tracks as they existed 40

*James M. Smith—Cross.*

at the time you were hurt, generally? A. That is correct.

Q. That is correct? A. Yes.

MR. SCOTT: I would like that to be marked for identification.

Whereupon, photograph referred to was marked Defendant's Exhibit A for identification.

10 Q. Now, the track,—the second track from the concrete platform, is the track in which your train arrived and stopped? A. That is right.

Q. And between that track and the track next to the station, it was filled in, as shown in this photograph, Defendant's Exhibit A for identification? A. That is a fairly good picture of it.

20 Q. That is a fairly good picture of it. Have you any criticisms to make of the picture, Mr. Smith? A. Nothing, only the railing is two inches higher there—

Q. We will come to the actual distances. A. All right.

Q. Now, can you tell us how far it was from the rail of the track, or the nearest rail to the station platform on the track on which your train was, and the nearest rail of the track next to the station, next to your train? A. Seven feet six.

30 Q. That was seven feet, six inches? A. Yes, sir; I measured it.

Q. I have marked on the photograph "seven feet six inches", and that covers that distance in between the rails? A. That is right.

Q. Now, will you tell us how high the top of the rail of the main track, or track next to the station, was above this concrete filling nearest— A. Nearest this rail? About two and one-half inches (indicating).

*James M. Smith—Cross.*

Q. Two and a half inches, as I have marked?

A. Yes; that is this side (indicating).

Q. That is as indicated? A. Yes, sir.

Q. This side was two and a half inches (indicating)? A. Yes, sir.

Q. Did you measure that, Mr. Smith? A. Yes, sir.

Q. After the accident? A. Yes, sir; as soon as I was able to be out. 10

Q. And when you measured it as soon as you were able to be out, it looked to you to be in the same condition as it was at the time of the accident? A. The same today.

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

Q. Now, between the rails of the track nearest the station, there was no filling in? A. No.

Q. That was as shown in this photograph, Defendant's Exhibit A for identification? A. Yes, sir. 20

Q. At the time of the accident? A. Yes, sir.

Q. And from the top of this rail nearest the depot and the rail of the main track, nearest your train, how great a drop was it down to the ground, between the main tracks? A. Two and a half inches on that side, and five or six inches here (indicating), the other side of the rail.

Q. Between five and six inches? A. Yes, sir.

Q. As I have also indicated? A. That is right. 30

Q. And that is uniform throughout? A. I should imagine so.

Q. On this track? A. Yes, sir.

Q. The place where you stubbed your toe, Mr. Smith, was the rail of the main track nearest to the track on which your train was? A. It was the second rail from the platform.

Q. And will you indicate on this photograph (handing witness the photograph)? A. This is the platform (indicating). This is the first rail, and this is the second (indicating). 40

*James M. Smith—Cross.*

Q. This here is the second rail (indicating)?  
A. Yes.

Q. And that is the rail on which you stubbed your toe? A. That is where I started to stumble.

Q. That is where you started? A. No, sir; that is where I stumbled.

10 Q. Was the stubbing of your toe a violent stubbing? A. It was.

Q. Did you lose your balance? A. Yes, sir.

Q. And did you ever regain your complete balance? A. Not until I arrived at the platform.

Q. Well, you didn't regain your balance after you arrived at the platform? A. I staggered all the way across that track.

Q. You stubbed your toe on what is designated as the second rail? A. Yes, sir.

Q. And lost your balance? A. Yes, sir.

20 Q. And never recovered it and came up with your shoulder on the concrete platform? A. Yes, sir.

Q. When you fell, Mr. Smith, did your shoulder—will you show the jury, if you can, and I will assist you, where your shoulder hit? A. Right here (indicating). I was walking on a diagonal point from the track, to the platform, and I came down and collapsed right on to the platform like that, full force (indicating).

30 Q. You hit two or three inches from the top of your shoulder? A. Yes, right here; right in there (indicating).

Q. That is a couple of inches down? A. Yes.

MR. SCOTT: That is a couple of inches down, Mr. Palmer; we will agree on that?

MR. PALMER: Yes.

Q. And you lay there prostrated? A. My head dropped on the platform.

40 Q. Your head dropped on the platform? A. I fainted away, I suppose.

*James M. Smith—Cross.*

Q. As you lay there, sir, your body partly extended over the rail of the track nearest? A. Yes, I suppose so; I collapsed. It is two feet, eight inches, between that platform—

Q. I say, part of your body was—your body or your legs evidently were over the rail of the track nearest the station? A. They may have been.

Q. Do you recollect? A. No, sir. 10

Q. You have no recollection? A. No, sir.

Q. Does your recollection cease from the time you started to stumble? A. No.

Q. Do you recollect at all ever being in between the rails of the track nearest the station? A. No.

Q. You don't recollect it? A. Why, I remember I stumbled; I recollect stumbling.

Q. You recollect being in between? A. Yes, 20  
sir.

Q. And at the time that you recollect being in between the rails of the two tracks, you were still off your balance? A. Yes, sir.

Q. And you came up with a crash against the edge of the platform? A. Yes, sir.

Q. Do you have any recollection of where your feet were as your shoulder hit the platform? A. That was the last shock; I wasn't bothered. I think, about my feet. 30

Q. You have no recollection, I say? A. No.

Q. You don't know whether you landed in a heap after you lost your balance—A. I did land in a heap; I know that.

Q. You lay sort of spread out? A. Yes, sir.

Q. You lay there with your shoulder on the platform? A. I collapsed after I struck the platform.

Q. When you went up there in September, before the accident, you say you started to do farm 40

*James M. Smith—Re-Direct.*

work, or to get the farm in shape? A. Get ready for it.

Q. And you employed some man there at that time? A. No.

Q. You didn't employ any at that time? A. No.

Q. You did the work yourself? A. I was  
10 getting ready to pass the winter there.

Q. And prior to the accident, did you hire anybody—did you have anybody help at all? A. No.

Q. No man? A. No, sir.

Q. And it wasn't until after the accident that you had anybody to help you? A. Yes; hired a man.

MR. SCOTT: That is all.

MR. PALMER: There are two or three  
20 things in relation to this track here that I want to make plain to the jury (referring to photograph).

MR. SCOTT: It hasn't been offered in evidence.

## RE-DIRECT EXAMINATION BY MR. PALMER:

Q. You have testified that the south rail of the  
30 north track is about two and one-half inches across. That is, where you stubbed your toe. Did you also pitch or did you do both, into the opening? A. As soon as I stubbed—

MR. SCOTT: I object.

Q. The other foot went in the opening between the rails of the north track? A. Some three inches.

Q. And how deep is that? A. That is five or six inches.

Q. So you pitched as well as stubbed your toe?  
40 A. Yes.

*James M. Smith—Re-Direct.*

Q. When you stubbed your toe, you pitched in the open track part? A. Yes, sir.

Q. That was occasioned by the impetus given you—

THE COURT: Mr. Palmer, you are doing a lot of testifying. Let him do it.

MR. PALMER: I beg your pardon; I want to get the facts. 10

THE WITNESS: I stubbed my toe on the first track, and that was two inches and a half, and I naturally went down deeper in between the tracks and that gave me impetus to go ahead.

Q. Then you will state, will you not, or will you, whether it was the stubbing of your toe or the pitching that gave you the momentum, or was it both?

MR. SCOTT: I object. 20

THE COURT: I allow that.

THE WITNESS: I think we will combine the two, the stubbing of my toe started it, and getting down to a deeper rut helped it along.

Q. Then the space between the two rails of the north track is lower, is it, than the space between the track that your train came on and the first rail? A. It is three inches.

Q. So there was inequality there, was there? 30  
A. Yes, sir.

Q. And you testified that that was filled in, that space between the track that your train came in on, and the north track on which the Gladstone train was standing. What did you mean by filled in? A. Well, it was concrete and filled in, two inches and a half.

Q. Then it was not all filled in, was it? A. Not up to the track.

Q. Not level with the track, just filled in a 40

*James M. Smith—Re-Direct.*

little more than the space between the rails of the other track? A. Yes, sir.

Q. The space between the rails of the north track were not filled in, so that the ties were exposed, were they? A. Yes.

MR. SCOTT: What track do you mean?

MR. PALMER: The north track.

10 MR. SCOTT: The track next to the station?

MR. PALMER: Yes, as shown by the photograph.

THE WITNESS: Yes, sir.

Q. Then you have testified that the north rail of the north track is raised about five inches above the roadbed? A. Yes, sir.

Q. And how far is the station platform, then, raised above the roadbed? A. Ten inches from  
20 the platform, from the ground.

Q. That is not filled in, you say? A. No; it is not.

Q. That also leaves the ties exposed, does it? A. Yes, sir.

Q. Mr. Smith, how old are you? A. Sixty-five my last birthday.

(Witness excused.)

---

30

40

*Jennie Smith—Direct.*

JENNIE SMITH, called as a witness on behalf of the plaintiff, having been first duly sworn, testified as follows:

## DIRECT EXAMINATION BY MR. PALMER:

Q. Mrs. Smith, you are the wife of Mr. James Smith, the plaintiff in this action? A. Yes, sir.

Q. Do you recall January 6th, 1915? A. I do. 10

Q. Tell the Court and the gentlemen of the jury what transpired on that day, as near as you can recollect? A. Well, we started from New York—

Q. Speak a little louder. A. —And we took a train which was due at Barnardsville at 1:38. The train stopped, and Mr. Smith took my grip, my grip satchel, and a parcel—

THE COURT: Speak out loud so all the jurymen can hear you. 20

A. (Continuing.) We stepped down, with the help of the conductor, on the stool, and we started to cross, Mr. Smith having the two bundles, and he tripped on the second rail and fell in a slanting position against the stone coping of the platform, and he was helped up and taken into the depot, at which time he fainted, and I telephoned for a physician, and he had a physician's medical aid, and he was taken home, and I don't think he knew very much until he got home. 30

Q. Now, Mr. Smith, tell us something more about the exact situation at the train there. Did you notice anything else when you got off the train? A. Well, I noticed the incoming train from Gladstone.

Q. Where was that in relation to where you were, where you alighted? A. That was about—the locomotives were about even, the locomotive 40

*Jennie Smith—Direct.*

of the train which we came in on, and the one coming down.

Q. Where was the locomotive—was that locomotive making any noise? A. Yes; puffing off steam, as a locomotive usually does.

Q. What did you do when you alighted from the train? A. I handed my grip over to my  
10 husband.

Q. Did you see him turn to you? A. Yes, sir.

Q. Did he say anything to you? A. No; he didn't say anything; he simply took the grip and he started.

Q. Was he looking at the train from Gladstone?

MR. SCOTT: I object.

A. Yes; I guess he is—

20 MR. PALMER: She can say whether she saw him.

MR. SCOTT: All right; I withdraw the objection.

Q. Did you see Mr. Smith looking at the locomotive from Gladstone? A. Well, I think he understood that it was there.

## EXAMINATION BY THE COURT:

30 Q. The question is, Mrs. Smith, whether you saw him look at it? A. Well, I don't know whether I saw him looking or not.

BY MR. PALMER:

Q. What about this space between the rail of the track where the train that you arrived on was located, and the south rail of the north track? Was that space filled in there? A. No; it was not.

*Jennie Smith—Direct.*

Q. Well, about how much higher was the rail than the filling, the road bed? A. I think two and a half inches.

Q. Then how about in between the rails of the north track; is that filled in? A. No.

Q. Are the ties exposed there? A. Yes.

Q. About how high are the rails there? A. I think five inches.

10

Q. The regular height of a rail, is it? A. Yes.

Q. And then is the space between that north rail and the station platform—is that filled in? A. No.

Q. And about how is the station platform above the roadbed there at that point? A. Ten inches.

Q. How much? A. Ten inches.

Q. That is where Mr. Smith struck? A. Yes. 20

Q. And did you see him stop and pitch? A. Yes.

Q. Describe just the position he was in when he fell, and how his body was carried—can you explain that? A. He stumbled on the track, he stumbled over the second rail and fell in a diagonal position against the stone coping, and I suppose his shoulder was jarred.

Q. Did you see him fall in the space between the south and north rail of the north track; did you see him fall in that? A. I saw him tumble, and he pitched toward the depot. 30

Q. You say this locomotive had steam up and was exhausting, was it? A. Yes.

Q. And was it moving at that time? A. No; it wasn't moving.

Q. How far away would you say, in feet, from where you crossed, was this locomotive of the Gladstone train? A. Well, it might have been thirty feet.

40

*Jennie Smith—Cross.*

Q. And in relation to the station itself, where was that locomotive on the other train? A. Why, even with the locomotive of the train which we came in on.

Q. Not in relation to your train; in relation to the station, where was it? A. Oh, I think about the north end of the station, the end toward  
10 Gladstone.

Q. Near the ticket office? A. Yes.

Q. Right in front of the station, then was it?  
A. Yes.

Q. How long is the station platform there? A. How long is the station?

Q. Yes. A. I don't know; I cannot think; a number of feet.

Q. Well, it extended beyond where the end of the train was? A. Oh, yes.

Q. Where was the train from Gladstone in relation to the station platform; was it in or was it not? A. The train was near the end of the station, the incoming train was near the end of the station.  
20

Q. Well, was it in the station or not? A. Yes, it touched the station, I think.

Q. I mean, was it in the station platform, or was it opposite the station? A. Yes.

Q. It was in the station platform? A. Yes, it  
30 was.

MR. PALMER: That is all.

## CROSS-EXAMINATION BY MR. SCOTT:

Q. Would you say, Mrs. Smith, that the two locomotives were about even, the locomotive from Gladstone, was about opposite the locomotive on your train? A. Yes.

Q. And the distance, you have also told us that

*Jennie Smith—Cross.*

the distance that the locomotive was away, was about thirty feet? A. I think so.

Q. You didn't make any accurate measurements at that time, did you? A. No.

Q. And the actual distance that the locomotive—the Gladstone locomotive was away from the place your accident was the length of the locomotive and the tender, and part of the coach ahead; that was about the distance? A. Yes. 10

Q. Now, do you remember anybody else getting off of the train at the time you did? A. There were very few passengers that day.

Q. Do you remember seeing anybody get off the train ahead of you or ahead of your husband? A. Yes.

Q. Were they men or women or children? A. Well, I don't remember; I think there were about a half a dozen got off, men and women. 20

Q. Men and women? A. Yes.

Q. What became of them? A. I don't know; they went about their way.

Q. They went over to the station? A. Yes.

Q. You recollect that, do you not? A. Yes.

Q. Did any of those persons holler to you or to Mr. Smith about anything; was there any great excitement there at the time created by those passengers? A. No.

(Witness excused.) 30

*Florence Smith—Direct.*

FLORENCE SMITH, called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

## DIRECT EXAMINATION BY MR. PALMER:

Q. Florence, you remember January 6th, 1915, last year? A. Yes.

10 Q. Did you come up on the train, your father and mother did, that day? A. I did.

Q. And where did you get off the train? A. What did you say?

Q. Where did you get off the train? A. At Bernardsville.

Q. And what did you see your father do; did you see your father go down on the car platform? A. Yes.

20 Q. Did you see him cross to the station? A. Yes.

Q. Well, what happened? A. When he got to the station he fell, and his shoulder landed against the curb.

Q. Well, tell us how he fell. A. He was walking slanting; he didn't walk straight; he walked towards Bernardsville.

Q. In a slanting direction, you mean, diagonal? A. Yes; and he stubbed his toe on the second rail, and he fell against the coping of the station.

30 Q. Did he fall in between the rails of the north track, did you see? A. I don't know.

Q. You say he stubbed his toe over the second rail? A. Yes.

Q. How high is that rail above the ground there? A. Well, I don't just remember.

Q. What is that? A. I don't remember.

Q. Is it raised above the ground? A. Yes.

Q. And did you see anything else there at that time? A. There was a locomotive.

40 Q. A locomotive? A. Yes.

*Florence Smith—Cross.*

Q. Was that very near there? A. From Gladstone, it was coming about the station.

Q. Right by the station door? A. Yes.

Q. Was it making a noise, blowing out steam? A. Yes.

Q. And did you see whether it was moving or not? A. I don't believe it was moving.

Q. And near the ticket office, the middle of the station, was it? A. It wasn't quite to the ticket office. 10

Q. It was over near it, was it? A. Yes.

Q. How near; how near from the center of the station? A. Well, I don't just know; it was about touching the end of the station; it wasn't quite to the ticket office.

Q. You say you didn't see that locomotive moving? A. No.

Q. The one from Gladstone? A. No. 20

Q. What did you do when you stepped down off the car from New York? A. I went toward the platform.

Q. Were you just behind your father, or how far away were you? A. Not very far behind.

## CROSS EXAMINATION BY MR. SCOTT:

Q. I wonder if you could tell us whether that picture looked like the situation up there where the accident happened (handing witness photograph)? A. Yes. 30

Q. You told the gentlemen of the jury about your father stumbling on the second rail. Which rail was that? A. That one there (indicating).

Q. Do you go to school? A. Yes.

Q. And I have marked "second" on this picture? A. Yes.

Q. That is the rail, the second rail, where your father stubbed his toe? A. Yes. 40

*Direction for Non-Suit.*

MR. PALMER: We will admit that is a good picture, Mr. Scott.

\* \* \* \* \*

---

 PLAINTIFF RESTS.
 

---

## Defendant's Case.

10

MR. SCOTT: May it please the Court.

I desire to ask the Court for the direction of a non-suit in this case. We are called upon to meet two charges of negligence.

20

The first charge of negligence is: "That the defendant so constructed its roadbed to the station platform aforesaid, that by reason of the defective, faulty careless negligence and improper and unlawful construction of the same," and so forth—that is the first charge against us as regards construction, and because "The said roadbed was constructed without proper regard for and in violation of the lawful rights of the defendant's passengers and patrons and this plaintiff, and because of the further negligence and careless and unlawful conduct on the part of the defendant's agents in operating and stopping its trains at a dangerous and improper place," and so forth.

30

The first charge, as I have stated, is the matter of construction, and as regards the matter of construction, I believe that under all of the cases in New Jersey, the plaintiff has clearly failed in his proof, in that it is not shown that the condition up there at the time—and I am assuming that from the nearest rail of the track on which the plaintiff's train was, to the station platform, was a part of the station premises—in other words, it was

40

*Direction for Non-Suit.*

a proper place, under the Keeney case, for passengers to alight.

And considering, for the purposes of the argument, that was part of the station platform there is no proof in this case that the construction was other than that in general use by well regulated railroad companies, and approved by experience.

10

On the second ground, if that is true, that it was a proper platform, under the evidence, I next urge that the proximate cause of the accident, was not the negligence of the defendant company, but was the stubbing or the tripping of the plaintiff of his toe against the second rail of the track nearest the station, and that his falling, due to this tripping, was something that happened directly as a result of this tripping.

20

The Court will recognize in railroad construction, I think it must be common knowledge that the rails must be to a certain extent free for the passage of trains, and there is no evidence in this case that this rail, which he says was two and one-half inches higher than the filling in between, was not such as a well-regulated railroad company would put there, and leave there, and maintain there, and which was approved by experience; and therefore I say that the proximate cause of the accident was the plaintiff's stubbing his toe against this second rail, which was not negligently constructed and maintained.

30

I come to the third and last reason for my non-suit, and that is, assuming that the place was properly constructed, and assuming that Mr. Smith fell—and we have to take it that he fell as he says he did—then I urge that

40

*Direction for Non-Suit.*

there are a certain class of cases, in which if the person is frightened by the negligence of the defendant, that then their actions mustn't be regulated and tested and viewed in the light of that degree of fear, that they would be under normal circumstances, but I claim that in this case, the operation of the train, that there is no evidence of the operation of the train, the Gladstone train--that the defendant was negligent in its operation in stopping it where it did, and in allowing it to make a noise like a train usually does, as the witness has testified, a puffing noise; that there was no negligence in that, and further, that under the evidence, under Mr. Smith's own testimony, there was not produced by the puffing of that engine there, any such fright as any cases in our state or any state that I have been able to look up, where the courts have said that that was a real danger or an imminent danger, or an apparently imminent danger. The case has been very short, and I do not desire to point out the testimony of the plaintiff, which your Honor still undoubtedly has fresh in your mind.

THE COURT: It strikes me it is a fair case. Of course, it may have been his fault, but it is for the jury to say.

MR. SCOTT: Your Honor refuses the direction of a non-suit? I can shorten this case considerably if your Honor will rule specifically on the grounds which we may be called on to present. On the first, was there any proof of negligence in construction?

THE COURT: I am not going to hold, Mr. Scott, that this was negligent construction, but I hold that under all the circumstances

*Jacob K. Thompson—Direct.*

that have been produced here, it is for the jury to say whether you provided a reasonably safe place for this passenger to alight and leave the train. I will allow you an exception.

Whereupon a recess was taken at 12:20 o'clock P. M. until 1:30 o'clock P. M., of the same day.

10

---

 Afternoon Session.
 

---

JACOB K. THOMPSON, called as a witness on behalf of the defendant, having been first duly sworn, testified as follows:

## DIRECT EXAMINATION BY MR. SCOTT:

Q. Mr. Thompson, you know Mr. Smith, the plaintiff in case? A. Not personally, no.

20

Q. You saw him? A. Yes; I saw him.

Q. At Bernardsville? A. Yes, sir; at Bernardsville.

Q. On the date of the accident he has testified to? A. Yes, sir.

Q. How many cars did you have in your train?  
A. Two.

THE COURT: Is this conductor?

30

MR. SCOTT: Yes.

Q. Two? A. Two, the combine car and one day coach.

Q. Do you know what engine you had? A. No. 944.

Q. 944? A. Yes.

Q. What car was next to the engine, or what kind of a car? A. Why, a combine car.

40

*John T. Drake—Direct.*

Q. Combine car; you mean by that combination?  
A. Combination car, yes, sir; baggage and part smoker.

MR. SCOTT: That is all.

MR. PALMER: No cross examination.

---

10 JOHN T. DRAKE, called as a witness on behalf of the defendant, being first duly sworn, testified as follows.

DIRECT EXAMINATION BY MR. SCOTT:

Q. Mr. Drake, you are a civil engineer employed by the Lackawanna Railroad? A. Yes, sir.

Q. Are you familiar with the length of engines of the 944 class?

20 MR. PALMER: I object.

MR. SCOTT: I asked was he familiar with the length.

MR. PALMER: I object. I don't see what connection that has with this train or this place or accident or anything of the kind; I don't know what the purpose of the testimony is. Evidently it isn't very well connected at the present time.

30 THE COURT: The question will be admitted.

A. About fifty-five feet.

Q. And are you familiar with the length of the combination smoking baggage and passenger cars?

MR. PALMER: I must insist that your Honor rule on my objection.

THE COURT: You have shown the conditions around that station.

MR. PALMER: This witness is not testifying as to any fact of any kind, is he?

40

*Arthur D. Allen—Direct.*

THE COURT: Oh, yes, he is.

MR. PALMER: He isn't testifying to any conditions on January 6th, or in connection with it, as I understand.

THE COURT: I will admit it.

MR. PALMER: I would like to see the connection.

MR. SCOTT: You will see it shortly. 10

MR. PALMER: It may be connected later.

THE COURT: Why of course.

A. About sixty-five feet.

---

(No cross examination.)

---

ARTHUR D. ALLEN, called as a witness on behalf of the defendant, being first duly sworn, testified as follows: 20

DIRECT EXAMINATION BY MR. SCOTT:

Q. What is your business? A. Photographer.

Q. And where are you in business? A. I am staff photographer for the Newark Evening News, at the present time.

Q. At the request of the defendant company, did you take a photograph at Bernardsville in January of 1915? A. Yes, sir, 1915. 30

Q. I show you a photograph and ask you if that is a photograph that you took at that time?

A. It is; yes, sir.

Q. What is the date? A. The 22nd of January.

Q. What year? A. 1915; about three-thirty in the afternoon.

Q. I presume—does that correctly represent the situation as regards the fixed object at the time you took that photograph? A. Yes, sir. 40

*Charles S. Emmons—Direct.*

MR. SCOTT: That is all.

MR. PALMER: No questions. I think that is a good photograph, myself.

MR. SCOTT: I offer that photograph in evidence.

THE COURT: It will be admitted.

10 Whereupon said photograph which has been previously marked Defendant's Exhibit A for identification was received in evidence and marked Defendant's Exhibit A.

---

CHARLES S. EMMONS, called as a witness in behalf of the defendant, being first duly sworn, testified as follows:

DIRECT EXAMINATION BY MR. SCOTT:

20 Q. Mr. Emmons, what was your business on January 6th 1915? A. Locomotive engineer.

Q. And on the afternoon of that day were you in the neighborhood of Bernardsville? A. Yes, sir.

Q. Do you remember seeing Mr. Smith, the gentleman who testified as plaintiff in this case?

A. I remember seeing him get off the train 3:15.

Q. Off of train 3.15? A. Yes, sir.

30 Q. With reference to the locomotive of train 3.15, where was your locomotive? A. Right on the east bound track; about opposite each other, the forward part of the engine would be.

BY THE COURT:

Q. The engine that you were engineer of was the one that we have been calling from Gladstone?

A. Yes; I was running the train from Gladstone. #334.

*Charles S. Emmons—Direct.*

BY MR. PALMER:

Q. You weren't the engineer on the train that Mr. Smith arrived on? A. No, I met train 3.15.

BY MR. SCOTT:

Q. At the time you saw Mr. Smith, was your train moving? A. No, sir.

Q. Will you tell the jury what kind of a noise, 10  
if any, your train was making. A. Nothing; only the exhaust of the air pump discharging off steam.

Q. Through what kind of a size of pipe does that air exhaust? A. Well, it charges first from the air pipe to the discharge pipe of the engine, through an inch and a quarter pipe, and then it discharges through to the stack, through a three and one quarter inch inside tube on this discharge pipe.

Q. Did you see the accident to Mr. Smith? A. 20  
Yes, sir.

Q. And how long after the accident to Mr. Smith was it that your train moved forward and went east? A. I unloaded about six passengers afterwards.

BY THE COURT:

Q. What did you say? A. I unloaded about six pasengers afterwards.

BY MR. SCOTT: 30

Q. Were you unloading at the place where you were standing still? A. No, sir.

Q. When Mr. Smith left the train your train was standing still? A. Yes, sir. I waited until I get the signal to go ahead to the station; I get that from 3.15.

Q. Then you drew up to the station to discharge those six passengers?

*Charles S. Emmons—Cross.*

MR. PALMER: He didn't say that. He answered in the affirmative if your Honor please.

Q. The question was, how long after you saw the accident was it that you started to move your train from where you were to the station to unload the passengers. A. Do you want the minutes?

10 Q. No, give us your best recollection. A. When the conductor on train 3.15 has his passengers unloaded.

Q. Approximately how long? A. That would be from two or three minutes; two minutes about.

Q. You pulled up practically two or three minutes after the man fell? A. Yes, sir.

MR. SCOTT: That is all.

CROSS EXAMINATION BY MR. PALMER:

20 Q. The time table shows the time you arrive there, does it not? A. Yes, sir.

Q. And it also shows that you leave there at 1.38, which is the same time that you arrive there?

A. It shows that I am supposed to leave there at 1.38.

Q. And your train gets there at 1.38? A. Yes, sir.

30 Q. Then you were a little out of order in answering two or three minutes after unloading your passengers? A. No, sir.

Q. A little delay? A. No, sir.

Q. Isn't it against the rules of the company to start behind time after you are on time when you arrive? A. Yes, sir.

Q. Do you mean to say that you were two or three minutes? A. Yes, sir.

Q. You were late then when you started? A. Yes, sir.

*Charles S. Emmons—Cross.*

Q. Is that usual? A. It is usual when I come in there and train number 315 is discharging passengers, then I wait.

Q. You wait until the passengers are discharged? A. Yes, sir.

Q. Where was your engine exactly, if you know, in relation to the station, when Mr. Smith fell?

A. Why, about across the baggage room part; that was near the west end of the platform. **10**

Q. That is part of the station building proper?

A. Yes.

Q. Right in front of the station, is it not?

A. No, sir.

Q. Right in front of the station building, isn't it, a part of the building? A. No.

Q. You said it was the baggage room part; that is part of the building. As a matter of fact isn't it right in front of the building? A. That is the west end of the building. **20**

Q. It is a part of the building? A. It is the west end.

Q. But the baggage room is apart of the station building, is it not? A. Yes, sir.

Q. And if you were standing in front of that you were standing in front of the station, were you not? A. No, my engine was not directly in front of the station. **30**

Q. The door of the baggage room is part of the station building, is it not? A. Yes.

Q. You were standing in front of the door of the baggage room, were you not? A. Yes.

Q. Therefore, you were standing in front of the station building, were you not?

MR. SCOTT: I object. It is for the jury to determine where he was.

MR. PALMER: I want to find out. **40**

*Charles S. Emmons—Cross.*

THE COURT: It is quite evident where he was.

MR. PALMER: I want the witness to answer that.

THE COURT: It speaks for itself. He was in front of that part of the building which contains the door to the baggage room.

10 THE WITNESS: Yes; and the station part is at the upper end.

Q. Part of your train was covering part of the platform, was it not? A. Yes, from the west end.

Q. You had already passed part of the train that had come from New York? A. No, sir.

Q. Where were you in relation to that train? A. The engines were about across from each other.

Q. You were opposite? A. I didn't pull down by that engine at all.

20 BY THE COURT:

Q. Was the westbound train in the station when you arrived there? A. It came right there and stopped; they stopped and I stopped at about the same time.

BY MR. PALMER:

Q. You are scheduled to arrive at exactly the same time? A. Yes, sir.

30 Q. And as a matter of fact you did arrive that day, at the same time, did you not? A. The other train arrived there first.

BY THE COURT:

Q. Then the westbound train, being in the station, that is, covering more of the station than you, had the preference? A. It always has the preference.

*Charles S. Emmons—Cross.*

BY MR. PALMER:

Q. Now, as a matter of fact, Mr. Emmons, you were crawling into that station, were you not? A. No, sir.

Q. Well, you certainly pulled in there when the other train was there? A. We got there and stopped.

Q. There is no fence there between the two trains? A. No, sir. **10**

BY THE COURT:

Q. Who gives you the signal to start after the other train has discharged passengers? A. The conductor of 315.

BY MR. PALMER:

Q. That is your own train? A. No.

Q. The other train? A. Yes, sir. **20**

Q. Well, you have to be right there to get the signal, don't you? A. No.

Q. You say you get the signal from the other conductor? A. That is a strict rule; you dassen't go between the station and the train without a signal from the conductor to do so.

Q. As a matter of fact you were between the train and the station, weren't you? A. No, sir.

Q. To a small degree? A. I told you my engine stopped—I didn't go up far enough to cut that engine off. **30**

Q. As a matter of fact you were a certain number of feet by the engine, weren't you? A. No, sir.

Q. Now, where was the engine of the train from New York in relation to the station—where was that? A. The train from New York?

Q. Yes. A. It was on the passenger side.

Q. Where was it in relation to the station,—in front of the station, was it? A. It was in **40**

*Charles S. Emmons—Cross.*

front of the station, discharging the passengers.

Q. The west end or the east end? A. The west end.

Q. It was as far as possible, was it not, on that switch? A. Yes.

Q. And that switch extends west, and where your engine was several hundred feet? A. In  
10 one point.

Q. About how many feet? A. He stopped about here (indicating).

Q. That switch is about several hundred feet to the west of where your engine stopped, isn't it? A. No, sir.

Q. How far? A. It wasn't west of my engine.

Q. How far? A. They was across from my engine, about.

Q. How far was the switch of the west bound  
20 track from where your engine stopped?

MR. SCOTT: Ask him to explain in what switch he means; he don't know what switch he is talking about.

THE COURT: He said the switch on the west bound track

MR. PALMER: I mean the one on the west bound track.

A. Well, which do you mean?

30 Q. I mean the switch on that track; the switch of the west bound track.

THE COURT: What the witness wants to know is whether you mean the switch that runs from the east bound track to the west, or the one from the west bound track to the next one.

THE WITNESS: If your Honor please, he is not stating which he means.

40 MR. PALMER: I will point it out on this. (indicating).

*Charles S. Emmons—Cross.*

Q. Now, then, how far is this switch of the west bound track west of where your engine stopped; how many feet? A. This one here (indicating)?

Q. Yes. A. That ain't the switch I am talking about; that one there, but not this one down here (indicating).

Q. You say the engine was directly inside that switch? A. Yes; that man stops there at that switch there. **10**

Q. How far from the point where your engine stopped? A. Right across from it.

BY THE COURT:

Q. What part of the west bound train was opposite your cowcatcher? A. We was right opposite each other.

Q. I mean your cowcatcher was near the tender or the first car? A. No, right across from his cowcatcher. **20**

Q. The two cowcatchers were about opposite each other? A. Yes, sir.

MR. SCOTT: That is the defendant's case.

THE COURT: I suppose you renew your motion that you made before and ask for the direction of a verdict?

MR. SCOTT: Yes; on the grounds that there has been no negligence shown on the part of the defendant, and on the second ground that the proximate cause of the accident was due to a condition in which no negligence of the defendant's company contributed was the cause. **30**

THE COURT: The motion will be denied and you will be allowed an exception.

MR. PALMER: Summed up on behalf of the plaintiff.

MR. SCOTT: Summed up on behalf of the defendant. **40**

### Judge's Charge.

GENTLEMEN OF THE JURY: The plaintiff in this case, Mr. Smith, with his family was a passenger on the train from New York to Bernardsville, and when he alighted from the train at Bernardsville he stumbled over the second track from the station and so was precipitated forward, fell  
 10 against the platform and broke his shoulder, and this action is brought to recover damages for such injury.

I think I ought to say to you first, gentlemen, that you ought not to allow yourselves to be prejudiced by the fact that the plaintiff in this case is an individual and the defendant a railroad company, because everybody in this court, both the court and jury is entitled to an honest verdict, free from bias of any kind; you must  
 20 hold the scales fairly and honestly, irrespective of who the litigants are.

The law in cases of this kind, gentlemen, has been expressed by our courts in this way: "The duty of a railroad carrier of passengers does not end when the passenger is safely carried to the place of his destination; the company must also provide safe means for access to and from its station for the use of passengers, and passengers have a right to assume that the means  
 30 of access provided are reasonably safe."

That is the law in this case, gentlemen, that when the passenger gets from the car, it is the added duty of the company to provide a reasonably safe place for him to leave the train and get to the station, and from there to the public highway.

Now, the contention of the plaintiff is that there was no such reasonably safe place, and  
 40

*Judge's Charge.*

that is really the question that you will have to determine; whether, under the evidence there was or was not. The railroad company says that this was a safe place; they contend it was a safe place, that the tracks were not built in any unusual way, but was the ordinary sort of a station and track, and that I think is not disputed in the evidence, and it may be, gentlemen, that you may find that so far as the construction itself was concerned, that there was nothing for which you could find negligence. 10 :

The railroad company also had a perfect right to bring this second train, the eastbound train, to the station and have it stand there. The fact is that was probably its duty in that station, not to run a train from which passengers were getting out of the station, so the railroad company contends on its side did nothing except which it had a perfect right to do, and which it was called upon to do; namely, that the tracks were properly constructed, and the train was properly stopped at that station. It is for you to say, gentlemen, whether even if either one of these actions would be safe in itself, whether, when both conditions existed, namely, certain tracks standing up between a train that had come to a stop in the station, and another train coming to the end of the station and waiting to come in, whether that produced a situation there which called for greater care on the part of the company. If you think that that was a reasonably safe condition to exist there, then there can be no recovery by the plaintiff. If you find that that was not a reasonably safe place of access from the train to the station, under all of the circumstances that existed there then, you may 20 :  
30 :  
40 :

*Judge's Charge.*

find that there was negligence on the part of the company.

But you must determine first, gentlemen, how the accident happened and what caused it. You see, if all the conditions were reasonably safe there, or even if they weren't reasonably safe, if this accident happened simply because Mr. Smith  
 10 himself was not careful enough and stumbled when he wouldn't have stumbled if he had exercised care on his part, then of course the railroad company cannot be charged with negligence. In other words, if Mr. Smith himself was careless, nobody else can be called upon to pay for his own carelessness.

So you see, you must determine primarily what caused this accident; whether it was Mr. Smith's  
 20 own action, his own carelessness, in walking and stumbling over this track, or whether it was due to the failure of the company to provide reasonably safe conditions and means of access to the station at that point.

If you find that there was no negligence on the part of the company, then your verdict will be no cause of action. If you find they were negligent, and Mr. Smith was also negligent,—  
 30 both of them negligent, then there will be no cause of action. If you find that the railroad company was negligent and Mr. Smith was not, then you will take up the question of damages.

In that connection, gentlemen, you can bear in mind that Mr. Smith is sixty-five years of age; that his years are not as long as some men who are younger. If you find that he is entitled to recovery, you may consider the pain and suffering he has undergone, the physical injuries he has  
 40 sustained, the sums of money which he has expended in endeavoring to cure himself of this

*Judge's Charge.*

injury, and any loss of business that he may have had, if you find that there is evidence in this case to justify it; and such else as you may find that he may have had in being obliged to hire somebody else to do the work which he was then called upon to do.

But I want to say to you, in connection with that, gentlemen, that there can be no recovery **10** in this case for the loss, which was attempted to be proven here, that he lost a position at the church because the Court instructs you that there was no definite, binding contract made between the parties.

So take the case, gentlemen, and apply your good, common sense to it, and determine whether there was any liability upon the company, and if there was liability upon the company, what would be the reasonable and fair compensation to make **20** to Mr. Smith under the circumstances.

I have a number of requests, gentlemen, from the defendant.

“Negligence must be proved, and as to the negligent construction of the railroad company’s road bed and station platform, that can only be done by showing that the construction of the roadbed and the station platform is of a design that reasonably careful judgment would disapprove of as likely to **30** cause an accident to passengers using it as a way to and from trains.”

I so charge.

“The defendant is not required to use infallible judgment in its construction of the roadbed and station platform; it is enough if its method of construction accords with that in general use by well-regulated railroad companies, and which is approved by experience.”

*Request to Charge.*

I so charge you.

“Conformity to a common and approved type of railroad construction may absolve a company from the charge of negligence, but non-conformity to such type cannot alone charge it with negligence. The test is whether the railroad has used due skill and care in the selection of the appliance and its up-keep; if it has, it is not negligent.”

10

I so charge you.

“There is no proof that the platform had ever proved unsafe for man, woman or child, healthy or infirm.”

I so charge you; I don't recall any such proof.

“There is no negligence proven against the defendant merely because it did not fill in between the rails of the track nearest to the station.”

20

I so charge you.

“Merely to say something frightened one, and as a consequence of such fright, one so acted that he was injured, is not enough to charge the defendant with liability. The fright to be a cause to base liability upon, must be such cause, negligently created by the defendant, as would frighten a reasonably prudent man, under all the circumstances as they existed at the time.”

30

I so charge you gentlemen.

“Before you can allow the plaintiff any damages on account of his alleged loss of a position as organist of a church, you must be satisfied by a preponderance of evidence that this loss was so closely resultant as to have been the proximate consequence of his injury.”

40

*Request to Charge.*

I so charge you.

“An injury which could not have been foreseen or reasonably anticipated as a natural and probable result of an act of negligence, is not actionable, because it is not the proximate cause, but either the remote cause or no cause whatever of such injury.”

I so charge you.

10

“The position from which escape is sought must be one of imminent or apparently imminent danger, such as admits of no delay in taking action, and such as would, in like circumstances, naturally arouse the fears of a person of ordinary prudence and self-possession.”

I so charge you.

“There is no proof of permanent injury to the plaintiff.”

20

I think, Mr. Scott, one man said that there was about ten per cent., the first doctor. But, gentlemen, you will use your own recollection about that; whether there was any proof of permanent injury to the plaintiff. If you find that there was, you may allow; if there wasn't you may not.

“There is no proof that in the construction of the defendant's roadbed, tracks and station platform, it did not accord with that in general use by well-regulated railroad companies, and that was approved by experience.”

30

I so charge you.

Are there any corrections before the jury retires?

MR. SCOTT: There is only one objection I want to take your Honor's instructions, and that is in leaving the matters of construction to the jury.

40

THE COURT: An exception will be allowed.

### Plaintiff's Exhibit 1.

#### PASSAIC AND DELAWARE BRANCH.

STATIONS.	FROM NEW YORK.				WEEK-DAYS.
	303	307	313	315	
		y			
New York .....Lv.	A M	A M	A M	P M	
West 23d Street .....	4 30	7 10	9 00	12t00	
Barclay Street .....	4 30	7 15	9 00	12t00	
Christopher Street ....	4 30	7 10	9 00	12t00	
Hoboken .....	4 45	7 30	9 15	12t15	
Newark .....	5 10	7 46	9 30	12t32	
Summit .....	5 52	8 32	10 00	1t05	
West Summit .....	5f56	8 38	10 05	1t09	
Murray Hill .....	6 00	8 42	10 10	1t13	
Berkeley Heights .....	6f04	8 47	10f15	1t17	
<b>10</b> Gillette .....	6f07	8 51	10f18	1t20	
Stirling .....	6f10	8 53	10 22	1t23	
Millington .....	6f13	9 00	10 26	1t27	
Lyons .....	6f16	9f04	10f30	1t31	
Basking Ridge .....	6f20	9 09	10 34	1t35	
Bernardsville .....	6 24	9 14	10 37	1t38	
Mine Brook .....	6f30	9f19	10f42	1t44	
Far Hills .....	6 38	9 24	10 45	1t48	
Peapack .....	6f46	9 30	10 51	1t54	
Gladstone .....Ar.	6 48	9 32	10 53	1t57	

#### PASSAIC AND DELAWARE BRANCH.

STATIONS.	TO NEW YORK.					WEEK-DAYS.		
	302	304	306	310	312	NB 316	320	324 y
	A M	A M	A M	A M	A M	A M	A M	P M
Gladstone .....Lv.	5 00	6 30	6*58	7 20	8*00	8 55	11 10	1 20
Peapack .....	5f02	6 32	7*00	7 22	8*02	8 57	11f12	1 22
Far Hills .....	5f06	6 38	7*06	7 27	8*07	9 03	11 17	1 27
Mine Brook .....	5f09	6f41	....	7f30	....	9f 06	11f20	1f31
Bernardsville .....	5 15	6 48	7*15	7 37	8*18	9 14	11 26	1 38
Basking Ridge .....	5 17	6 51	7*18	7 40	....	9 17	11 29	1 41
Lyons .....	5f21	6 55	....	7f44	....	9 21	11f33	....
Millington .....	5f24	6 59	7*23	7 48	....	9 25	11 37	1 52
Stirling .....	5f27	7 03	7*26	7 52	....	9 28	11 41	1 55
Gillette .....	5f30	7 07	7*29	7 55	....	9 31	11f45	1 59
Berkeley Heights .....	5f33	7 11	....	7 59	....	9 35	11 49	2 03
Murray Hill .....	5f37	7 18	7*36	8 03	....	9 40	11 52	2 08
West Summit .....	5f40	7 22	7*40	8 07	....	9 44	11 59	2 13
Summit .....	5 50	7 27	....	8 15	....	9 52	12 06	2 20
Newark .....	6 31	7 49	8*08	8 39	8*59	10 14	12 45	2 57
Hoboken .....	6 48	8 04	8*22	8 53	9*12	10 27	1 00	3 12
New York .....Ar.								
Christopher Street ....	7 05	8 25	8*35	9 05	9*25	10 46	1 22	3 34
Barclay Street .....	7 00	8 18	8*40	9 10	9*45	10 40	1 16	3 28
West 23d Street .....	7 05	8 25	8*35	9 15	9*25	10 40	1 25	3 25

30

\*—Will not run Holidays. (See page 1.)

f—Stops on signal or on notice to conductor.

s—Saturday only.

t—Except Saturday.

y—Denotes change from last issue.

Trains marked "N. B." Will Not Carry Baggage.

40



