

INDEX.

	PAGE
Notice of Appeal.....	1
Complaint.....	2
Answer.....	4
Judgment Record.....	6

TESTIMONY.

PLAINTIFF'S.

Henry Meyer—	
Direct.....	8
Cross.....	12
Nicholas Regan—	
Direct.....	17
Cross.....	22
Redirect.....	26
Recalled:	
Direct.....	54
Cross.....	55
James O'Donnell—	
Direct.....	29
Charles Cadmus—	
Direct.....	29
Cross.....	32
Richard M. Johnson—	
Direct.....	34
Cross.....	36
Andrew J. Collins—	
Direct.....	36
Cross.....	46

II

	PAGE
C. Herbert Wallser—	
Direct	51
Cross	52
William P. O'Rourke—	
Direct	53
Recalled:	
Direct	55
Herman Bush—	
Direct.....	56
Cross.....	59
Redirect.....	63
Motion for Nonsuit.....	64
Motion for direction of Verdict.....	64
Charge	65
Exceptions.....	70
Grounds of Appeal.....	74

Notice of Appeal.

Filed Oct. 26, 1916.

Essex County Circuit Court. 10

ANDREW J. COLLINS
Plaintiff-Respondent

vs.

THE CENTRAL RAILROAD COM-
PANY OF NEW JERSEY,
Defendant-Appellant.

} Notice of Appeal.

} 20

To C. HERBERT WALKER, ESQ.,
Attorney of Plaintiff-Respondent.

TAKE NOTICE that the defendant appeals from the
whole of the judgement entered in this cause to the
Court of Errors and Appeals.

CHARLES E. MILLER 30
Attorney of Defendant-Appellant.

40

Complaint.

Filed Feb. 4, 1916.

ESSEX COUNTY CIRCUIT COURT.

10	ANDREW J. COLLINS, Plaintiff, vs. CENTRAL RAILROAD COMPANY OF NEW JERSEY, a corpora- tion, NEWARK WAREHOUSE COMPANY, a corporation, Defendants.	}	Action at Law. Complaint.
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20 1. Andrew J. Collins, the plaintiff, resides at Number 183 Walnut Street in the City of Newark, County of Essex and State of New Jersey.

2. Defendants before and on the twenty-first day of October, Nineteen hundred and fifteen, was and still are corporations organized and existing under the laws of the State of New Jersey engaged and had the possession and control of a certain warehouse located at Ward and Mechanic Streets,
 30 Newark, New Jersey, where goods were received for shipment and delivery.

3. On the Twenty-first day of October, Nineteen hundred and fifteen, the plaintiff, an employee of M. Straus & Sons, was sent to the above described premises to secure a load of chicken manure, and after receiving certain memorandum and proper instructions from the employees, agents or servants of said defendants, was sent to Section S of the afore-
 40 said warehouse.

Complaint.

4. While plaintiff was about to load aforesaid on wagon of M. Straus & Sons and was lawfully in and upon said premises walking in the warehouse of the said defendant companies as aforesaid, the defendants by their servants, agents or employees carelessly, negligently placed or allowed to remain a certain unprotected radiator on the aforesaid premises in a passageway provided for walking and without any notice to the plaintiff, fell over and struck with 10 great force the said plaintiff to the floor of cement or concrete, seriously, painfully and permanently injuring plaintiff, necessitating plaintiff to undergo an operation or operations, whereby plaintiff has lost a part of his right foot.

5. Plaintiff in no way contributed to his injuries and his injury was occasioned entirely by the defendant's negligence as aforesaid.

6. By reason of said injuries sustained as aforesaid, the said Andrew J. Collins became sick, sore, lame and disabled and will remain so in the future, and has been confined to his bed and in the future will be confined to his home and suffered and underwent and in the future will suffer and undergo great pain and suffering, and was put to great expense for hospital and medical services and medicine and will in the future be put to great expense.

7. Plaintiff Andrew J. Collins claims damages to the extent of Twenty-five thousand dollars.

C. HERBERT WALKER
Attorney for Plaintiff.

**Answer of the Central Railroad Com-
pany of New Jersey.**

Filed Feb. 19, 1916.

ESSEX COUNTY CIRCUIT COURT.

10

ANDREW J. COLLINS
Plaintiff

VS

THE CENTRAL RAILROAD COM-
PANY OF NEW JERSEY, a cor-
poration, NEWARK WARE-
HOUSE COMPANY, a corpora-
tion,

20

Defendants

Action at Law.
Answer

The answer of The Central Railroad Company, of New Jersey, a corporation of the State of New Jersey, having its principal office for the transaction of business in the City of Jersey City, County of Hudson and State of New Jersey, says:

1. It has no knowledge or information sufficient
30 to form a belief as to the matters and things set out
in Paragraph One of the complaint.

2. It admits that on or before the twenty-first day
of October, nineteen hundred and fifteen, it was,
and still is, a corporation organized and existing
under the laws of the State of New Jersey. It de-
nies that it was engaged and had the possession and
control of a warehouse located at Ward and Mechanic
Streets, Newark, New Jersey where goods were re-
40 ceived for shipment and delivery.

Answer of the Central Railroad Company of New
Jersey.

3. It has no knowledge or information sufficient to form a belief as to whom plaintiff was employed by on October twenty-first, nineteen hundred and fifteen, or as to whether or not he was sent to the premises described in the complaint or as to the purpose for which he was sent to said premises, if sent. It denies that he received any memorandum and proper instructions from its employees, agents or servants, and it denies that he was sent to Section S of the warehouse mentioned in the complaint, by any of its employees, agents or servants. 10

4. It has no knowledge or information sufficient to form a belief as to whether or not plaintiff was injured in the manner mentioned in the complaint at the place therein mentioned. It denies that its servants, agents or employees carelessly, negligently placed or allowed to remain a certain unprotected radiator on the premises mentioned in the complaint, alleging that its servants, agents and employees had nothing to do in any way with the premises mentioned in the complaint. 20

5. It has no knowledge or information sufficient to form a belief as to the matters and things alleged in Paragraphs Five and Six of the complaint.

CHARLES E. MILLER 30
Attorney of Defendant, The Central
Railroad Company of New Jersey

Judgment in Favor of Plaintiff.

Entered Oct. 19, 1916.

ESSEX COUNTY CIRCUIT COURT.

28893

10	<p style="text-align: center;">ANDREW J. COLLINS, Plaintiff</p> <p style="text-align: center;">VS.</p> <p style="text-align: center;">CENTRAL RAILROAD CO. OF N. J. Defendant</p>	<p style="text-align: center;">Action at Law.</p> <p>Verdict by a Jury Judgment for Plaintiff Amount \$2000.00 Costs 65.93 Total \$2065.93</p>
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C. HERBERT WALKER, Atty. of Plaintiff

20 This action was tried before Judge Willard W. Cutler with a jury at the Essex County Circuit on October 19th, 1916.

The cause having been heard and submitted to the jury, they return their verdict as follows:

They find in favor of the plaintiff Andrew J. Collins and assess the damages against the defendant Central R. R. Co. of N. J. at the sum of Two thousand dollars.

30 Whereupon it is adjudged that the plaintiff recover of defendant the sum of Two thousand dollars and costs which are taxed at the sum of sixty five dollars and ninety three cents, making in the whole the sum of Two thousand, sixty five dollars and ninety three cents.

Judgment entered and signed October 19th A. D. 1916.

WM. S. GUMMERE
Judge

40 Book 93—page 565

Case.

 ESSEX CIRCUIT COURT.

ANDREW J. COLLINS vs. CENTRAL RAILROAD COMPANY OF NEW JERSEY <i>et al.</i>	}	Action at Law	10
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TRANSCRIPT of shorthand notes of testimony, and so forth, taken in the above stated cause, upon the trial thereof, at the Court House, Newark, N. J., Wednesday, October 18, 1916, before Hon. Willard W. Cutler, Judge, and a Jury.

C. HERBERT WALKER for plaintiff.

CHARLES E. MILLER for Central Railroad Com- 20
pany; JOHN W. BISHOP, Jr., for the Newark
Warehouse Company.

Mr. Walker opened for plaintiff.

Mr. Miller opened for the Central Railroad Com-
pany.

Mr. Bishop opened for the Newark Warehouse
Company.

Mr. Bishop: I would like to ask counsel 30
whether he is really serious in joining the
warehouse company?

Mr. Walker: I have joined the Newark Ware-
house Company and the railroad company in
order to be absolutely safe in joining the proper
party. If counsel for the defendant corporation,
the Central Railroad Company, as he has just
now admitted, says that the accident occurred
in a part of the warehouse that has been leased
by the Newark Warehouse Company to the 40

Henry Meyer—Direct.

Central Railroad Company, that is not a fact that I knew until I came into the court this afternoon.

Mr. Miller: That is a fact. There is not the slightest doubt about it.

10 Mr. Walker: If he further admits that the employees who were employed in that section were the employees of the Central Railroad Company I will be willing to discontinue as to the Newark Warehouse Company.

Mr. Miller: This was our freight-station that we have leased, and the men there were the employees of the Central Railroad Company.

Mr. Walker: That is all I want. I am perfectly willing to discontinue as to the Newark Warehouse Company.

20 The Court: A nonsuit will be granted as to the Newark Warehouse Company.

Mr. Walker: I will consent that a nonsuit be granted as to the warehouse company.

HENRY MEYER, sworn in behalf of plaintiff.

DIRECT-EXAMINATION by Mr. Walker:

Q. Mr. Meyer, where are you now employed? A. D. Osborne & Company.

Q. How long have you been employed there, Mr. Meyer? A. About two months.

30 Q. Where were you employed before that? A. Central Railroad Company.

Q. How long have you been employed by them? A. Close onto four years.

Q. Mr. Meyer, are you acquainted with the interior of the Newark warehouse? A. Pretty well.

Mr. Miller: Let us call it the Central Railroad delivery station.

40 Q. Are you acquainted with the Central Railroad delivery station? A. Yes, sir.

Henry Meyer—Direct.

Q. I ask you if you have been on section S of the Central Railroad delivery station. A. No, sir—
Have I been on section S?

Q. Yes, have you been in section S? A. Oh, yes.

Q. About how big a section is that? A. Well, I couldn't exactly just tell you how big. How do you mean, deep or what?

Q. Is it located in the center, or in the corner of the building, or what? A. No; it is on the end, down near Ward street. ¹⁰

Q. On the corner? A. Yes, on the corner.

Q. It is a corner section, then? A. Yes.

Q. It is sort of a triangle section?

Mr. Miller: I object. Let him tell what it is.

(Question withdrawn.)

Q. Describe what kind of a section it is. A. 20
Something like a figure L.

Q. What would be the dimensions of the section? A. About 25 feet square.

Q. 25 feet both ways? A. Both ways.

Q. I am asking you about the two ends of the L. How long are they? A. I don't know what you mean.

Q. Well, how long is one end of the section? A. It is about 25 feet from the driveway to the wall.

Q. How long is the other end? A. About 10 feet 30 wide.

Q. Then that one end is 25 feet by 10 feet in width. Now, on the other end of the L? A. About 50 feet.

Q. 50 feet in length? How wide is that end? Would that be more than 10 feet or less than 10 feet?

A. I couldn't exactly tell you that.

Q. Can you tell me approximately? A. I don't know.

Q. Can you tell me whether it is wider at that end 40

Henry Meyer—Direct.

than you have already given me the dimensions of?
 A. I cannot. I was not well acquainted with the end section, not so much.

Mr. Miller: How wide do you say it is? If you know, state it, and if it agrees with my recollection of the station I will concede it.

Mr. Walker: I will say it is 10 feet wide.

10 Mr. Miller: All right; I will say it is 10 feet wide; that is about right.

Q. Were you in section S on October 21, 1915? A. I was.

Q. What time of the day were you in section S? A. Around four o'clock or so.

Q. About four o'clock. How did it come that you went into section S at four o'clock? A. I was working up at the elevator there and I had to come down
 20 with a case to the end section.

Q. This was around four o'clock? A. Yes.

Q. What did you see when you when you went down to section S? A. When I passed down Mr. Collins—I happened to see him sitting down there and I went right along and delivered the case down to the S, and came back. This is the first I knew the gentleman was hurt.

Q. Where was Mr. Collins sitting at that time?

A. Sitting right near the bags.

30 Q. Did you see a radiator in section S at that time?

A. Yes.

Mr. Miller: I concede that he was injured on section S, on this day, by a radiator falling on him. I don't raise any question about that. The only question I raise is who is to blame.

Q. Where was the radiator located at the time you saw it in section S? A. About 3 feet away from the wall, 2 or 3 feet.

40 Q. How long a radiator was it or how wide? Can

Henry Meyer—Direct.

you give us the dimensions? A. About 3 feet long and about 2-1/2 feet wide.

Q. 3 feet long and how wide? A. About 2-1/2 feet wide.

Q. You mean the height? A. The height was 3 feet.

Q. (By Mr. Miller) And 2-1/2 feet wide? A. 2-1/2 feet wide. 10

Q. (By Mr. Walker.) Well, now, Mr. Meyer, can you state how that radiator was located? Was it standing up or was it lying down, or how was it located? A. After the accident?

Q. Yes. A. Lying down.

Q. Well, now, where were the legs of the radiator located, in front of the wall or away from the wall? A. I couldn't tell you.

Q. Did you see anyone move the radiator before Mr. Collins came to section S? A. No, sir. 20

Q. Were you in section S prior to this time you speak of on October 21st? A. Why, I went in there often.

Q. Where did you find the lot of chicken feed located on October 21st, for M. Straus & Company?

A. That was piled up against the wall.

Q. Chicken manure, up against the wall? A. Yes.

Q. Were the bags of manure lying right plumb against the wall? A. Yes, sir.

Q. Were they resting against the wall? A. The 30 first pile was; then they piled right up from the wall.

Q. How many feet from the wall did they cover? A. Well, I should judge about 4 feet.

Q. And how wide? How much space? A. About 2 feet.

A. Had you seen this radiator in section S prior to October 21st? A. I had seen it the day before.

Q. Had you seen it any other time before that? A. No, sir. 40

Henry Meyer—Cross.

CROSS-EXAMINATION BY MR. MILLER:

Q. Will you describe to us this delivery platform?

A. Why, it is narrow, almost like—about 10 feet wide, I should judge, and about 25 feet long.

Q. You mean the section S or the whole platform?

A. No, section S.

10 Q. How long was the whole platform, would you say? A. It runs almost from Lawrence street down to Ward street.

Q. Almost a block long? A. Almost from Lawrence street down to Ward street.

Q. Is it closed in on all sides, walled in? A. Yes, sir; except the front doors.

Q. Is there a place for trucks to go up to? A. Yes.

Q. Where is that? A. Right in section S, between
20 section S and section M.

Q. And what do you mean by section S and section M? A. Section S is down near Ward street.

Q. Why are they divided? What is the difference between section S and section M? A. All goods that are marked for a certain party, like Smith, or Steele, his goods go to section S.

Q. Anybody who has a last name beginning with S, is in section S, and so on down through the alphabet? A. Yes, sir.

30 Q. Are there any walls between the various sections? A. No, sir.

Q. All open? A. Yes, sir.

Q. Is there any light in there? A. Plenty of it.

Q. On the day of the accident, was there? A. Yes.

Q. What kind? A. Electric light.

Q. Is there any daylight gets in there? A. Yes.

Q. Do you remember whether it was lighted up on the day of the accident? A. Yes, sir.

40 Q. Now, you have said that the day before this

Henry Meyer—Cross.

accident occurred you saw this radiator which subsequently fell over on Mr. Collins? A. Yes, sir.

Q. Where was it that you saw it? A. Against the wall.

Q. Can you just illustrate to the jury how it was. Take this wall here (indicating) and let this be the platform. Just hold it off. Say one book is chicken manure and this black book is the radiator. Show how it was. 10

(Witness illustrates with books.)

Q. Is that (indicating) the chicken manure? A. Yes, sir.

Q. How much space would you say there was between the bags of chicken manure and the radiator.

Q. (By Mr. Walker.) Well, which is the chicken manure and which the radiator? A. The white is the chicken manure and the black is the radiator. 20

Q. (By Mr. Miller.) Is that it? A. Yes.

Q. How far apart was the radiator and the chicken manure when you saw them up against the rear wall in section S? A. About a couple of inches.

Q. Did you see the radiator between the time you saw it before, the day before, and the time you saw it lying on the ground, after it hit Mr. Collins? A. I don't know what you mean.

Q. Had you seen it, had you noticed the radiator, between the time you saw it before, the day before, 30 and the time you saw it on the ground as it hit Mr. Collins? A. I had seen it on the day before, that is all.

Q. But between the day before the day and the time you saw it lying on the ground, on Mr. Collins, after, had you seen it? A. No, sir.

Q. How far away was it from the place you had seen it the day before, when you did see it lying on the ground, after the accident? A. After the accident? 40

Henry Meyer—Cross.

Q. Yes. A. About three feet away from the wall.

Q. You mean it had toppled over like this (illustrating)? A. Yes, sir.

Q. Just show to me how you saw it lying after the accident.

(Witness illustrates.)

10 Q. Out further from the wall? A. Yes, sir.

Q. Did you see anybody move it? A. No, sir.

Q. Would there be any reason for the railroad company people to move that? A. No, sir.

Q. Are there other people who go in there? A. Oh, yes, sir.

Q. Who are they? A. Truck drivers.

Q. People getting deliveries of their stuff? A. Getting deliveries.

Q. You don't work for the railroad company now?

20 A. No, sir.

Q. When you saw it standing against the wall the day before was there any danger of that radiator falling down? A. No, sir.

Q. Do you know how long that radiator had been in the warehouse, or in the station? A. I couldn't tell you. All I know, it had been there two days.

Q. Are you sure of that? A. Yes; I have seen it.

Q. You mean the day before the day of the accident and the day of the accident? A. That is all I

30 seen.

Q. What kind of a looking radiator was it? What did it look like? A. Like an ordinary radiator.

Q. Did it have a base at the bottom? A. No, sir.

Q. No base? A. No, sir.

Q. Could you make a little diagram of what it looked like if I gave you a sheet of paper? A. Why, yes.

Q. All right, suppose we try that. (Hands witness a piece of paper.) Make a little diagram of
40 what it looked like, just the front side, as you stood

Henry Meyer—Cross.

looking at it? A. That is hand drawing (witness draws on piece of paper).

Q. That is very good. Will you mark that with your initials, please? (Witness complies.)

Mr. Miller: I ask that it be marked for identification.

Marked P-1 for identification. 10

Q. Just indicate where the floor is. Just mark that "Floor."

(Witness complies.)

Mr. Miller: I understand you object to the jury seeing that now?

Mr. Walker: Until I ask him some questions.

By Mr. Walker: 20

Q. Mr. Meyer, where are the goods taken after they are shipped to the Central Railroad Company and prior to their being delivered in the different sections? A. They are checked out of the car upstairs.

Q. After they are checked out of the car upstairs how do they reach the different sections? A. They are put on elevators and put down on the ground floor, the next floor. 30

Q. After being brought down to the ground floor how do they reach section S? A. They have three or four truckers around the elevator taking goods away.

Q. What do you call them? A. Truckers.

Q. Are those truckers employees of the Central Railroad? A. Yes, sir.

Q. Well, now, for a load of chicken manure to reach section S, from the elevator, would it be necessary for a trucker to take it on the truck, or 40

Henry Meyer—Cross.

some vehicle, to get to section S? A. Why, they do. They meet cars further down there.

Q. Well, now, after a trucker gets a load of chicken manure to section S does he unload it or does he leave it standing on the vehicle? A. He unloads it.

Q. That is part of his duty, is it? A. Yes, sir.

Mr. Miller: Now, I ask that it be marked in evidence.

10

Marked Exhibit P-1.

By Mr. Miller:

Q. Mr. Meyer, I notice that you draw the legs of the radiator. Is that intended to be a square leg or a round leg at the bottom? A. That is square. Of course, they come square and round, if I am not mistaken.

Q. How did the radiator that you saw on October 20 21st go? Did it have round legs or square legs? A. I couldn't tell you; I didn't notice the legs.

Q. Did you make an examination of the radiator after the accident? A. No, sir.

Q. Well, now, do you recall what position the legs were in after the accident? A. No, sir, I do not.

Q. As I understand, you saw the radiator after the chicken manure had been loaded on the floor in Section S? A. Yes.

30 Q. You said, when I examined you a little while ago that the truckers who were employed on the railroad company had no reason to move the radiator or the chicken manure after it once got to the place? A. Yes.

Q. Their job was done then? A. Yes, sir.

By Mr. Walker:

Q. Well, Mr. Meyer, isn't it true that on October 40 21st you saw the radiator in a different place in

Nicholas Regan—Direct.

Section S, than when you saw it on October 20th?

A. Yes, sir.

Mr. Miller: He said so a couple of times.

Q. Isn't it true that in order to unload that chicken manure on October 21st it would have been necessary to move the radiator? A. No, sir. 10

Q. Isn't it true that the radiator was standing, on October 20th, the same place that the chicken manure was standing on October 21st? A. No, sir.

Q. Was there very much stuff in Section S on October 21st? A. No, sir.

NICHOLAS REGAN, sworn in behalf of plaintiff.

DIRECT-EXAMINATION BY MR. WALKER:

Q. Mr. Regan, where do you work? A. Central 20
Railroad of New Jersey.

Q. In the railroad section of the Newark warehouse? A. Yes, sir.

Q. What is your line of employment there? A. Delivery clerk.

Q. What section do you work in? A. S section.

Q. Were you working in section S on October 21, 1915? A. Yes, sir.

Q. Do you know Mr. Collins? A. I do.

Q. Do you remember seeing Mr. Collins on October 21st? A. I do, yes. 30

Q. Do you remember seeing Mr. Collins about four o'clock on October 21, 1915, with reference to a lot of chicken manure? A. Yes, sir; somewheres around that time.

Q. Will you kindly tell the jury what Mr. Collins said to you before this accident.

Mr. Miller: I object, on the ground of incompetency.

The Court: How is it material? How is it competent? 40

Nicholas Regan—Direct.

Mr. Walker: I think we have a right to show that this plaintiff, Mr. Collins, went to Mr. Regan and inquired for his lot of chicken manure, and that he had a perfect right on the premises.

10 Mr. Miller: I agree to that. The objection to this question is that Mr. Collins came there to get some chicken manure. He had a perfect right there. We do not dispute that.

Q. Mr. Regan, on October 21st did you see a radiator on section S? A. Yes, sir.

Q. Did you see this radiator on October 20th, the day before the accident? A. I believe about two days, I saw it there.

Q. On October 19th did you see it there? A. The 19th or 20th, I don't exactly recall the date, but I know I saw it there about a day or two before that.

20 Q. Are you positive that you saw it on October 19th? A. No, I am not positive.

Q. Where was this radiator when you first saw it? A. Up against the wall.

Q. Where was the lot of chicken manure placed in section S? A. Right in about the center of the dyke, what we call the dyke.

Q. A 10 foot wide section? A. A 10 foot platform from the dyke.

Mr. Miller: Tell him to tell what it is.

30 Q. Was the dyke a 10 foot section of platform?

Mr. Miller: I object to that as leading. Let him tell what it was.

Q. What was the dimensions of that dyke? A. From the platform or dyke in front of it—

The Court: You had better find out what a dyke is. The jury don't know.

40 Q. What do you call a dyke? A. What we call a dyke, where the platform is raised up, where the

Nicholas Regan—Direct.

wagons drive in to load their stuff on. In front of that platform, we call that the dyke, where the wagons drive in from the outside.

Q. That is in front of section S? A. Yes.

Q. How wide is this part you call the dyke?

Q. (By Mr. Miller.) As I understand, the dyke has a perpendicular dimension, hasn't it? A. You mean where the wagons drive into it?

Q. (By Mr. Walker.) Yes. A. I should judge¹⁰ about 50 feet.

Q. Well, how wide is the platform where this chicken manure is placed? A. I should think about 10 feet.

Q. Where was this chicken manure on October 21, 1915? A. Right in the center of the platform.

Q. Where were the bags piled? A. Piled right up against the wall.

Q. Where was the radiator, as compared to the bags, located, on October 21st? A. Why, when I²⁰ saw the radiator the day before that it was up against the wall, just above where the bags were.

Q. Did you see the radiator on October 21st, prior to the accident? A. I did that morning, I believe.

Q. Are you sure you saw it that morning? A. Yes, quite positive.

Q. This accident happened in the afternoon? A. Yes, sir.

Q. Do you recall seeing the radiator on the after-³⁰noon of the accident? A. No, I do not.

Q. When did the lot of chicken manure arrive in section S? A. That I could not recall.

Mr. Miller: I have the record here if you want it. There you are (hands paper to Mr. Walker). Arrived on the 18th.

Q. Then you are positive that you didn't see the radiator on the afternoon of October 21st, prior to the accident? A. Positive.

Nicholas Regan—Direct.

Q. Mr. Regan, did you see the radiator after the accident? A. Yes, sir.

Q. On October 21st? A. Yes, sir.

Q. Where was the radiator located after the accident? A. Lying right alongside of the bags when I first noticed it.

Q. Alongside of the bags? A. Yes, partly in front of it.

10 Q. I give you a piece of paper and I want you to indicate on that paper the location of the bags and the radiator after the accident. A. (Hands witness pencil and paper.) A. Here are the bags lying around here (indicating). Is that what you want?

Q. Yes. Indicate the wall. A. This would be the wall along here (indicating).

By Mr. Miller:

20 Q. Is that the wall? A. That is the wall. There would be the bags piled up here (indicating).

Q. Now mark the walls "W" and the bags "B". (Witness complies.) Mark the radiator "R" where you saw it lying on the ground. Mark it with an "R".

(Witness complies.)

By Mr. Walker:

30 Q. Now, Mr. Regan, how far from the wall was the nearest bag to Mr. Collins's wagon? A. You mean the end of the bags here to the wagon?

Q. Yes. A. I should judge maybe that would be 3 or 4 feet.

Q. How far from the wall was the end bag? A. You mean the hind end of the bags or the head end?

Q. The head end. A. From the wall to here (indicating).

Q. Yes. A. Well, I should judge, about 5 feet it would run out—guessing at it.

40 Q. And this radiator—did the radiator lie slightly

Nicholas Regan—Direct.

beyond the bags? A. I think it did. I was excited at the time. I went to help Mr. Collins.

Q. I see. A. I don't just recall but that is my idea of it.

Q. Well, can you tell me how many feet it was from the end of the bags to the outermost point of the radiator? A. No.

Q. You cannot? A. No.

Mr. Walker: Just sign your name to this. 10
Put your initials to it.

(Witness complies.)

Mr. Walker: Is there any objection to my indicating the number of feet it is?

Mr. Miller: Not at all.

Q. Just indicate the number of feet from here to here (indicating) that you have stated. A. From one end of the platform to the other.

Q. From the front of the bags to the wall you 20
said was 5 feet and from the end of the bags to the wagon was 4 feet? A. Yes.

Mr. Walker: I offer this in evidence.

Marked Ex. P2.

Adjourned to Thursday, October 19, 1916.

SECOND DAY

30

THURSDAY, October 19, 1916.

Met pursuant to adjournment.

Present, counsel as before stated.

NICHOLAS REGAN resumes the stand in behalf of plaintiff.

DIRECT-EXAMINATION (CONTINUED) BY MR. WALKER:

Q. Mr. Regan, after the accident had happened what did you see in regard to the position of Mr. 40

Nicholas Regan—Cross.

Collins and the position of the radiator? A. I cannot recall the position of the radiator; I can recall Mr. Collins sitting down on a bag and holding his foot and telling me that he had smashed his foot.

Q. What did you do with the radiator after it had fallen on Mr. Collins's foot?

Mr. Miller: Is that material?

10 The Court: I don't see how it could be material. Unless they want to show something about its position afterwards. I do not think it is competent.

(Question withdrawn.)

Q. Mr. Regan, how long have you been clerk of section S? A. About four years and a half.

Q. Are there one or two windows in section S, fronting on the street? A. There are three windows fronting on Ward street.

20 Q. Did the accident happen on the Ward street end of the section or on the other end of the section? A. It happened about in the center of it, I should judge.

Q. How far is the center of the section from Ward street in feet? A. I should judge about 45 feet.

Q. Is the nearest window on Ward street 45 feet from where this accident happened? A. I should think so.

30 CROSS-EXAMINATION BY MR. MILLER:

Q. Mr. Regan, how long have you known Mr. Collins?

Mr. Walker: I object. I do not think that is material.

The Court: I will allow the question.

A. Well, I have known him, I guess, pretty near as long as I have worked there.

40 Q. About four years? A. I think so.

Nicholas Regan—Cross.

Q. After the accident you went up to Mr. Collins's house? A. Yes, sir.

Q. That was on the evening of the accident? A. Yes, sir.

Q. Have you talked with Mr. Collins since that accident? A. Yes, sir; just a few minutes.

Q. Or talked with his lawyer since the accident? A. A few minutes, outside here.

Q. About the case? A. No, nothing particular. 10

Q. In general, about the case? A. Well, he just asked me a few questions about it, no more than what I told here now.

Q. You told him what you told here now? A. Well, some parts of it, yes.

Q. Now, last night you drew us a diagram, showing the position of the radiator, and then, this morning, I understood you to say that you could not recall the position of the radiator. What do you mean by that? A. Well, I was excited at the 20 time the radiator was lying there.

Q. Do you know where the radiator was? A. Not exactly, no.

Q. Well, you drew a diagram here? A. Well, I know I did. At the time, I was excited.

Q. When do you mean you were excited? I don't quite get that. A. I was excited here yesterday and I was excited down there at the time of the accident.

Q. Well, now, what I want to get at is exactly 30 what you know about where this radiator was? A. Well, I couldn't tell you.

Q. Yesterday you drew this diagram, P2, and said this (indicating) was the wall and this (indicating) was the chicken manure, and this (indicating) was the radiator— A. I drew that. Mr. Collins sat right here. At a glance I thought I saw the radiator lying there. I couldn't tell how close or how far away it was to him.

Q. Well, now, had you seen this radiator prior to 40

Nicholas Regan—Cross.

this accident at any time out in front of this chicken manure? A. No, sir.

Q. Were you there? A. I was there every day.

Q. Were you there that day? A. Yes, sir.

Q. How long had you been there that day? A. All day.

Q. Had you been right in this one section S? A. Yes, sir.

10 Q. Mr. Regan, if this radiator had been out in front of these bags wouldn't you have seen it? A. Well, I naturally would; but time and again a person might go by it and not see it; but I naturally would see it if it was there.

Q. But you didn't see it, I understand, in front? A. No, sir.

Q. You had seen it on the morning of the accident? A. Yes, sir.

Q. Where was it then? A. Against the wall.

20 Q. Where were the bags of chicken manure? A. Alongside of it.

Q. How far apart were the two? A. I couldn't tell you that.

Q. Well, were they very far apart? A. No; they weren't very far apart, no.

Q. Can you give us some idea how far apart they were? A. I wouldn't think they were over a foot or so.

Q. Close together, you mean? A. Yes.

30 Q. Do you know what time of day that was? A. That the accident happened?

Q. No; when you last saw this radiator. A. About eight or nine o'clock, I should think. I was going by there and naturally I thought—

Q. Now, why was it that you could see it at this one time in the morning and couldn't see it later on in the day? A. I looked for the name of it, who it was for.

40 Q. Do you remember who it was for? A. Simons Pipe Bending Company.

Nicholas Regan—Cross.

Q. Do you remember whether the radiator came in before or after the chicken manure came in? A. I think it came in after the chicken manure.

Q. Now, Mr. Collins, I understood you to say yesterday that after the accident this radiator was lying alongside of the chicken manure. First, how wide was the pile of chicken manure? How wide was the front of that chicken manure? A. I should say about 5 feet. 10

Q. Wide? A. Yes, sir.

Q. And extended back to the rear wall of the freight station there? A. Yes, sir.

Q. You state it was about 5 feet back from the front to the wall? A. How do you mean, where the pile lay?

Q. Yes, the pile there. A. To the front of the bags, yes.

Q. Then you think it was about 5 feet wide also? A. Yes, sir; about that; I didn't measure it, of course. 20

Q. You said yesterday, as I have it here—maybe I am wrong—you said after the accident the radiator was lying right alongside of the bags. What I want to find out is, whether, as you remember it, the radiator was in front of this pile of bags or alongside of this pile of bags?

Mr. Walker: I object to this question. The witness has drawn a diagram and I would ask that the diagram be referred to. 30

The Court: Counsel may proceed with the cross-examination in his own way.

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

Exception noted as ground of appeal.

Q. Do you remember saying that yesterday, that the radiator was right alongside of the bags after it fell down? A. Yes, sir. 40

Nicholas Regan—Redirect.

Q. Does that mean alongside of the bags or out in front of the bags? A. The bags were here (indicating) and I just took a glance at it. I think that the radiator was right here (indicating) right on the side of the bags.

Q. Was it between the bags and the place where Mr. Collins's truck was? A. No, I don't think it was; I think it was right on the side where it tipped over.

Q. Let us get at that this way. (Counsel draws on black-board.) Suppose this (indicating) was the wall along here, the black is the radiator, and the white is the chicken manure, and suppose this is the platform (indicating) and that I am Mr. Collins's truck. Will you just show us about how it looked to you, as you saw it? A. As I saw it it was about like that.

Q. Which is the radiator? A. The black.

Q. In other words, the radiator was not out in front of the bags, but alongside of them, after you saw it fall down? A. Yes.

Q. After you saw it had fallen down? A. Yes, sir.

Q. And as I understand it you didn't take any particular notice of the radiator? You were interested in helping Mr. Collins out? A. Yes.

Q. You did help him, and finally send him home? A. Yes, I did as much as I could do.

REDIRECT-EXAMINATION BY MR. WALKER:

Q. Mr. Regan, will you kindly state on which side the pile of chicken manure this radiator stood before the accident?

Mr. Miller: I object. How is that redirect.

Mr. Walker: You have gone into it to show the position of the radiator.

The Court: I suppose it is part of your case.

Nicholas Regan—Redirect.

If you think you have not put it in you may put it in now.

Q. Mr. Regan, the black book represents the radiator and the white or gray book represents the pile of manure, and this (indicating) is the wall of the warehouse. Will you kindly indicate to the jury on which side—

Mr. Miller: Let him place the book. 10

A. If I am not mistaken this is the chicken manure side right like that (indicating).

Q. That was before the accident? On the morning of the accident? A. No; it was after the accident.

Q. I have asked you to place the radiator where it stood on the morning of October 21st, before the accident? A. When I seen it, it stood up here like that (indicating). 20

Q. Now, will you tell the jury where it stood and where it lay after the accident, on the afternoon of October 21st? A. About like that (illustrating).

Q. On the opposite side? A. Yes.

Q. In the morning you saw it on the lefthand side? A. Yes, sir.

Q. And in the afternoon on the righthand side? A. After it fell over.

Q. Now, Mr. Regan, you have employees of the Central Railroad who you call truckers, do you not? 30
A. Yes, sir.

Mr. Miller: I object to that as not redirect.

Mr. Walker: This is part of my case.

Mr. Miller: I do not think it is proper, after the witness has been directly examined.

The Court: It was brought out in the original case.

Mr. Walker: In the original examination of this witness I went into the position of this radiator. Now, on redirect, I want to go into 40

Nicholas Regan—Redirect.

it a little more inasmuch as there has been a question raised by this attorney as to where it was. This man was the clerk.

The Court: I will allow that question and allow the defendant an exception.

10 Defendant's counsel prays an exception and the same is allowed.

Q. (Question read.) A. Yes.

Q. Do you recall how frequently the truckers came into your section on October 21st? A. No, sir.

Q. Can you tell approximately the number of truckers that came into your section on the afternoon of October 21st? A. No, sir.

Q. Would you say that there were more than half a dozen?

20 Mr. Miller: I object.

The Court: He said he didn't know.

By Mr. Miller:

Q. Do you know whether any truckers came in there on the afternoon of October 21st? A. I couldn't tell you; but there naturally was.

Q. Would the truckers have any reason to move this radiator? A. No, sir.

30 Q. After it had been placed once by the truckers what is their duty with regard to that? A. They had nothing to do with that at all.

By Mr. Walker:

Q. The truckers are men who pile up stuff in the section? A. Yes, sir.

Mr. Miller: I object.

40 The Court: It is your original case, but if you say you have omitted something I will allow you to put it in, but not as ordinary redirect.

James O'Donnell—Direct.

Charles Cadmus—Direct.

JAMES O'DONNELL sworn in behalf of the plaintiff.

DIRECT-EXAMINATION BY MR. WALKER:

Q. Mr. O'Donnell, where are you employed? A. M. Straus & Sons.

Q. Do you know about M. Straus & Company receiving a load of chicken manure on or about October 21, 1915? A. Yes, sir; I do. 10

Q. Will you state, if you know how it happened, that Mr. Collins went for this load of chicken manure?

Mr. Miller: I have stated that he came down there because this came over the Central Railroad on the siding.

Mr. Walker: Do you concede that the Central Railroad telephoned to this company? 20

Mr. Miller: I think it is very highly probable. I have conceded that Mr. Collins had a right there. He was an invitee on our premises on that day and how he got there I do not think makes a particle of difference.

Mr. Walker: All I was going to ask Mr. O'Donnell was whether or not he received word from the Central Railroad on October 24st. If you concede it I will withdraw him.

Mr. Miller: Withdraw him. I concede it. 30

CHARLES CADMUS sworn in behalf of plaintiff.

DIRECT-EXAMINATION BY MR. WALKER:

Q. Mr. Cadmus, where are you employed? A. Murphy's Furniture Company.

Q. How long have you been working for them? A. Started this morning.

Q. Where did you work before that? A. Simons Pipe Bending Company. 40

Charles Cadmus—Direct.

Q. What position do you hold at the Simons Company? A. Teamster.

Q. While you worked for the Simonds Pipe Bending Company as teamster did you have occasion to go to the Newark Warehouse during Monday on October, 1915? A. Yes, sir.

Q. Do you recall seeing a radiator in section S of 10 the Newark Warehouse? A. Yes, sir.

Q. Do you recall seeing that radiator on or about October 21st? A. Yes, sir.

Q. Were you in section S on October 21st? A. I was.

Q. Did you see the radiator on October 21st in section S? A. Yes, sir.

Q. Can you tell the jury about how high and how wide that radiator was that you saw on October 21st? A. I think about 38 inches high.

20

By the Court:

Q. How wide? A. I guess about 2 1/2 feet wide.

By Mr. Walker:

Q. That is really the length? A. Yes, sir.

Q. The width would be? A. About that size (indicating).

Q. That would be about ten or twelve inches? A. 30 Ten or twelve inches, yes.

Q. On October 21st, the morning of October 21st, where did you see this radiator? A. Why, it was sitting right near the wall of a house.

Q. On the morning of October 21st how near the wall did you see it? A. I judge about 2 feet from the wall.

Q. Did you see that radiator attached to the floor? A. No, sir.

Q. Did you see it attached to the wall of the 40 building in any way? No, sir.

Charles Cadmus—Direct.

Mr. Miller: It seems to me these questions are so nearly leading that they can be objected to.

Mr. Walker: I withdraw that question.

Q. Was this radiator attached in any way to anything? A. No, sir.

Q. How near is the nearest light to where this radiator stood on October 21st in the Newark Warehouse of section S? A. I guess about 8 feet. 10

Q. The glass light is about 8 feet away? A. Yes, sir.

Q. How high is the ceiling of section S where this radiator stood? A. About 20 feet, I guess, but then the lamp hangs down.

Q. The ceiling is about 20 feet and the lamp hangs down, how far in feet? A. I guess it must be 10 feet, 8 or ten feet.

Q. On October 21st in the morning did you see a lot of chicken manure alongside of this radiator? A. That I didn't notice. I didn't know what was in the bag. I was looking for freight so I can't say what was in the bag. 20

Q. Did you see any bags there October 21st? A. There was bags laying there, yes, but I never paid no attention to what they were.

Q. Did you ever notice bags of anything lying alongside the radiator on this morning of October 21st? A. Not that I noticed, no. It might have been a matter of two or three days before I was over there before. 30

Q. How frequently did you go to section S for the Simmons Pipe Bending Company? A. Three times a week on the average.

Q. Have you gone there more than three times a week? A. Sometimes, yes, sir.

Q. Have you gone there as much as once a day.

Mr. Miller: Let him tell. I object to it as leading. 40

Charles Cadmus—Cross.

The Court: Yes, that is leading.

Objection sustained.

Q. Have you gone there more than three times a week? A. Yes, sir.

Q. How many more times? A. That I can't say.

Q. During the month of October, just prior to the week of October 21st, how many times did you go to section S of the Newark Warehouse? A. I can't recall how many times I went there.

10 Q. Can you give us any approximate idea? A. No, sir.

Q. What was the last time you went there before October 21st? A. About four days. I wasn't the only one to go there. Sometimes automobiles go there, other drivers.

CROSS-EXAMINATION BY MR. MILLER:

Q. You say you worked for the Simmons Pipe Bending Company? A. I did at that time.

Q. Do you know a man named John Mulligan working there? A. Yes, sir.

Q. Do you know whose handwriting— A. I can't swear to it.

Q. Do you recognize this? A. This is it here.

Q. Yes? A. Yes, sir.

Marked D-2 for identification.

Q. Mulligan was another truck driver? A. Yes, 30 sir; driver.

Q. How did you notice this particular radiator? A. I happened to see the radiator standing there.

Q. Coming to your company? A. No, sir; I didn't look at it, didn't see the mark on it, just noticed it passing it.

Q. You worked for the Simmons Company? A. Yes, sir.

Q. How long before the accident had you seen the radiator there? A. I can't say. That is the first 40 I noticed it.

Charles Cadmus—Cross.

Q. Was your attention particularly attracted to this radiator? A. No, sir.

Q. When did you hear about the accident? A. Why, a month ago.

Q. A month from this time?—some time in September of this year? A. Yes, sir. I didn't know John was hurt.

Q. And then someone came to you and asked you 10 if you had seen this radiator? A. Yes, sir.

Q. When was it they came to you? A. I couldn't say. I wasn't home at the time. They left that information.

Q. Did you talk to somebody about it? A. No, only when I got a subpoena. That is all I know.

Q. Since then have you been talking to somebody about it? A. No, only the question was asked if I had seen it.

Q. Did anybody ask you before you were put on 20 the witness-stand where this radiator stood? A. No, sir.

Q. Nobody asked you? A. No, sir,

Q. So that there was nothing to call your attention to this radiator since that day. Have you thought about it since? A. Since I have thought about it to tell whether I had seen it or not.

Q. But between October 21, 1915, and September, 1916, you had nothing in your mind about this radiator? A. No, sir.

Q. Had no reason to fix it in your mind. A. No, 30 sir.

Q. No one had spoken to you about it? A. No, sir.

Q. Didn't know it had fallen over and hurt Collins? A. No, sir.

Q. Well, you are positive on that particular morning, on the 21st day of October, 1915, this radiator was standing there 2 feet from the wall? A. Yes, 40 sir.

Richard M. Johnson—Direct.

Q. What kind of a day was the 21st day of October? A. That I can't tell.

Q. What day of the week was it? A. That has got me.

Q. What did you do that day? A. I delivered stuff all day long.

Q. What places did you deliver stuff on the 21st of October? A. Over in Harrison.

10 Q. Who did you deliver to in Harrison on the 21st of October? A. Hyatt Roller Bearing Company.

Q. How do you know you delivered on the 21st of October to the Hyatt Roller Bearing Company? A. That is as near as I can remember.

Q. I want you to be sure about it. A. I am positive.

Q. As I understand you, you had never seen this radiator before or since October 21st, 1915? A. No, sir.

20 Q. The only time you have ever seen it? A. Yes, sir.

RICHARD M. JOHNSON sworn in behalf of plaintiff.

DIRECT-EXAMINATION BY MR. WALKER:

Q. Where are you employed? A. Simmons Pipe Bending Works.

30 Q. Mr. Johnson, how long have you worked for the Simmons Pipe Bending Company? A. Now it is going on five years.

Q. What position do you hold with them? A. Teamster.

Q. As driver or teamster of the Simmons Company do you have occasion to go to the Newark Warehouse? A. Yes, sir.

Q. Do you have occasion to go to any particular section of the warehouse? A. Well, it is generally in section S.

40 Q. Why do you go to section S? A. Simply be-

Richard M. Johnson—Direct.

cause they are laid out in that style, from A to B, from B to C, until you come to S.

Q. The Simmons Company's stuff goes to section S? A. Generally, as a rule.

Q. Well, now, Mr. Johnson, do you recall going to section S of the Newark Warehouse during October, 1915? A. I couldn't swear that I did.

Q. Do you remember going before October 21, 1915?

A. No; I couldn't say so. 10

Q. Well, Mr. Johnson, didn't you make a statement—

Mr. Miller: I object to anything further on that, on the ground that it is incompetent, irrelevant and immaterial.

Mr. Walker: Well, wait until I finish my question.

M. Miller: No, I think that is so clearly improper that your Honor should snip that in the bud. 20

The Court: I cannot rule on a question until I hear it. I may do an injustice to counsel. You may ask the question and the witness will not answer it until I rule.

Q. Mr. Johnson, on your trips to the Newark Warehouse—

Mr. Miller: Are you going to amend this question? 30

Mr. Walker: I am now going to amend it to see if I cannot meet your objection.

Q. On your trip to section S, in the Newark Warehouse, during 1915, have you on any occasion seen a radiator?

Mr. Miller: I object.

A. Yes, sir.

Richard M. Johnson—Cross.

Andrew J. Collins—Direct.

Mr. Miller: I move to strike out the answer.

The Court: Isn't it too remote?

Mr. Miller: Yes.

Mr. Walker: Then I will change the question.

The Court: Strike out the answer. The objection to the question is sustained.

Q. Mr. Johnson, on your trips to section S of the Newark Warehouse Company have you ever seen
10 a radiator in section S during the month of October, 1915? A. That is something I couldn't recollect. I see so many radiators up there sometimes I don't know what they are, or who they belong to, where they go to, or anything else.

Q. Mr. Johnson, do you know whether or not the Simmons Pipe Bending Company, the company that you work for, received a radiator from the Central Railroad delivered to Section S of the Newark Warehouse, during the month of October, 1915? A. I
20 could not say.

CROSS-EXAMINATION BY MR. MILLER:

Q. You know John Mulligan, don't you, Mr. Johnson? A. Yes, sir.

Q. You know John's handwriting? A. Yes, sir; chauffeur.

Q. I show you this paper (handing witness D2 for identification). Who signed it? A. Mr. Mulligan, if that is his name. I don't know his hand-
30 writing.

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

Q. You work for the Simmons Pipe Bending Company? A. Yes, sir.

ANDREW J. COLLINS, plaintiff, sworn in his own behalf:

DIRECT-EXAMINATION BY MR. WALKER:

Q. Mr. Collins, where are you employed now? A.
40 M. Strauss & Sons.

Andrew J. Collins—Direct.

Q. Where have you been employed? A. By M. Strauss & Sons.

Q. Were you employed by them on October 21, 1915? A. Yes, sir.

Q. Will you kindly state briefly where you went on the afternoon of October 21, 1915? A. I went up to the Newark warehouse; at least, my boss told me to go up to the Central and get this chicken manure, that was up at the Central.

Q. What did you do after you reached the Newark Warehouse? A. I drove in the driveway, backed up to section S, went to Mr. Regan and asked him if there was bags of chicken manure there for M. Strauss & Sons. He said, "Yes, Mr. Collins, your bag's lying over there. You go up to the office and get a proclaim and come back and get your goods."

Q. Now, Mr. Collins, what did you do after you got the proclaim? A. I went up to the office and they told me—

Q. No. After you got the proclaim from the office what did you do? A. What did I do?

Q. Yes. A. After I got the proclaim from the office I come back and got up on my wagon, walked out on the platform, took one bag and put it in my wagon. I went back to get another and on my way back this radiator fell on my toes and mashed them.

Q. Do you know Nicholas Regan? A. I do.

Q. Clerk of Section S, is he? A. Yes.

Q. Who did you see at the office, Mr. Collins? 30

Mr. Miller: Is that important?

Mr. Walker: Do you admit that he went to the office and got this proclaim?

Mr. Miller: I have admitted time and time again that he had a right to be there.

The Court: As I understand, gentlemen, the whole question in this case rests upon what happened at the time of the accident. It is admitted that he was there by invitation of the company. 40

Andrew J. Collins—Direct.

Q. After you came back to your wagon, in section S, what did you do? A. I have already stated that I took one bag and put it on my wagon. I went back for to get another, and on my way back the radiator fell on my foot.

Q. Which foot? A. My right foot.

Q. So, on your way back, Mr. Collins, for your second bag, did you touch anything besides the
10 second bag? A. No, I didn't touch the second bag at the time I got hurt. I was on my way for it.

Q. You were on your way to get the second bag?
A. To get the second bag.

Q. When the radiator fell over on you? A. When the radiator fell over on me.

Q. Will you tell the jury whether or not you touched this radiator on the way back for the second bag? A. I will. Gentlemen of the jury, I have not touched the radiator on my way back for
20 the second bag.

Q. Now, Mr. Collins, at the time this radiator fell over on your foot, will you state about how near the nearest window was to the place where you stood when the radiator fell on your foot? A. It must be at least 25 feet from this part of section S where the nearest window was. There was no window on this side (indicating) of the building when the radiator fell on my foot; no window whatever.

Q. No, Mr. Collins, will you kindly state where
30 the nearest light was? A. Yes. I mean on the bottom floor, no window on the bottom floor.

Q. We are interested about the bottom floor, where this accident happened. A. No window on the bottom floor on the south side.

Q. When the accident happened how far from where this radiator fell on your foot, where you stood, was the nearest light? A. I should judge there may be a light about 10 feet away.

Q. How high are the ceilings in section S? A. The
40 ceilings there are high—I guess, maybe, about 22

Andrew J. Collins—Direct.

or 24 feet, as near as I could judge, high; the ceilings may be higher than 24; that is from the driveway.

Q. Mr. Collins, after the radiator fell on your foot, what did you do? A. After the radiator fell on my foot it knocked me down.

Q. What happened after you were knocked down? A. After I was knocked down I hollered for help to the clerk of section S, Mr. Regan. 10

Q. What happened after you hollered for Mr. Regan? A. Mr. Regan came up and asked me what was the matter. I told him, I said, "This radiator fell on my foot."

Mr. Miller: I object. Not what he said.

Witness: "This radiator has fell on my foot."

Mr. Miller: I move that that be stricken out.

The Court: It is not competent what he said.

Q. Never mind that. Mr. Collins, have you any 20 idea what caused this radiator to fall on your foot?

A. I have.

Mr. Miller: I object.

The Court: That is hardly competent.

Q. Well, now, Mr. Collins, why did this radiator fall?

Mr. Miller: I object. We ought to have proof for some knowledge of that, first.

Mr. Walker: He has testified that he knew 30 the radiator fell on his foot.

The Court: You have not shown that he saw the radiator fall or how he knew it. I think they are entitled to know some of the facts. A mere guess would not do.

Q. Had you seen the radiator before this accident? A. Not on that day.

Q. Had you seen it on some other day? A. I had seen that radiator, presumably the same radiator as 40

Andrew J. Collins—Direct.

that, laying over on the same section, two weeks previous to that.

Q. On the afternoon that you went for your second bag of chicken manure, assuming that the radiator was standing in its place, did anything happen to cause this radiator to fall, so far as you know?

10 Mr. Miller: I object.

A. So far as I know—

Mr. Miller: Wait a minute. I object to that for two reasons. First, the assumption is too positive. He is asking this witness to draw an obvious conclusion. Of course, a man can tell the facts, what did happen, but he cannot tell what caused this thing to come down, to draw that conclusion.

20 Mr. Walker: If we can furnish any explanation for the falling of that radiator we ought to do it. I feel that it is incumbent on the plaintiff to furnish an explanation if he can.

The Court: You are now asking a question, supposing certain things.

Mr. Walker: I will amend it and withdraw that question.

30 Q. Mr. Collins, when this radiator fell on your foot, on the afternoon of October 21, 1915, will you kindly state what happened, and what the circumstances were within your knowledge, and what caused it to fall?

Mr. Miller: I object.

The Court: What the situation was at the time is proper, if it happened at that time. The last part of the question is not proper, what caused it to fall.

40 Mr. Walker: I will leave out what caused it to fall.

Andrew J. Collins—Direct.

Q. (Question read as follows: "Q. Mr. Collins, when this radiator fell on your foot, on the afternoon of October 21, 1915, will you kindly state what happened?")

(Witness pauses.)

Q. (By the Court.) Can you answer that, Mr. Collins? A. Yes, your Honor. At the time the radiator fell on my foot I noticed a train running on 10 the Central Railroad outside the building.

Q. (By Mr. Walker.) Mr. Collins, did you notice or hear? A. I heard the train going by at that moment.

Q. You were inside the building at the time? A. I was inside the building and I heard the train on the outside.

Q. When the train passed what did you notice? A. After the train passed the radiator was on my foot and I was in misery, hollering for help. 20

Q. Now, Mr. Collins, after you had hollered for help where were you taken? A. Where was I taken? They have kept me there for one hour before taking me home, and they put my foot into a pail of cold water.

Q. At the end of an hour you were taken home by whom? A. At the end of half an hour.

Q. Who took you home at the end of an hour? A. Mr. Strauss's chauffeur from the factory. They telephoned for the ambulance and the ambulance didn't 30 respond, or it was busy.

Q. (By Mr. Miller.) Who telephoned for the ambulance? A. Mr. Regan. I told them to telephone, but the city ambulance wasn't in, or something like that.

Q. (By Mr. Walker.) Mr. Regan telephoned for the city ambulance? A. No; sent someone, I believe.

Q. Well, it don't make any difference. He telephoned for the city ambulance? A. Yes. 40

Andrew J. Collins—Direct.

Q. After you got home what did you do about your foot? A. After I got home my wife sent the chauffeur out immediately for a doctor and Dr. Busch came immediately.

Q. Is that the doctor that the chauffeur got to attend your foot on October 21st? A. Yes, sir.

Q. Dr. Bush? A. Yes, sir.

Q. Now, Mr. Collins, how long did Dr. Bush treat
10 your foot? A. Dr. Bush had visited me from the 21st of October up until the 1st of April, and frequent visits since.

Q. That is, he visited you at your home, do I understand? A. Yes.

Q. Were you at your home all the time from October 21st to April 1st? A. I was at home, totally disabled.

Q. (By Mr. Miller.) Home until April 1st? A. April 4th.

20 Q. (By Mr. Walker.) Well, now, Mr. Collins, what has happened to your foot as the result of this accident? A. Blood poisoning.

Q. Well, state briefly what happened after the blood poisoning set in? A. After blood poisoning set in one of my toes turned black over night, gangrene, gangrene on the toes, and Dr. Bush and Dr. McCormack amputated it.

Q. Where did they amputate this toe? A. At my home.

30 Q. Go on. What else happened? A. Afterwards, they came around the next day, and there was another—or a day or two following—another of the toes turned black, and they called in Dr. Epstein, a specialist, and he advised me to go up to the Newark Private Hospital and have all my toes amputated.

Q. Can you tell when you went to the Newark Private Hospital? A. The 29th of October.

40 Q. How long did you stay at the Newark Private Hospital? A. Three weeks.

Andrew J. Collins—Direct.

Q. Where did you go from there? A. From there I had been taken home.

Q. Mr. Collins, how much did the Newark Private Hospital charge a week for your room? A. \$20 a week and \$5 for the operating table.

Q. How much did Dr. Epstein charge for operating? A. I believe \$125, something like that.

Q. Did Dr. Epstein charge anything for visiting you at your home? A. Well, for the few visits I 10 paid him.

Q. How much did you pay him for the two visits at your home? A. \$2 a visit.

Q. How many did he make? A. I think he made six or eight.

Q. Are you positive that he made— A. He made as many as six.

Q. Now, Mr. Collins, besides Dr. Epstein and Dr. Bush, were you attended by any other doctor? A. Dr. McCormack has made some calls. 20

Q. How much did Dr. McCormack charge, do you recall? A. Well, I suppose it would be about \$25; I ain't positive.

Q. How many times did Dr. McCormack call? A. He called at the operation and two or three times afterwards.

Mr. Miller: May I interpose to ask this question?

Q. (By Mr. Miller.) Have any of these bills been 30 paid?

Mr. Walker: That is cross-examination.

Mr. Miller: If he has paid them, that is the proof, isn't it? If they are not paid, that is not the way to prove how much the Doctor has been paid.

The Court: The evidence with reference to Dr. McCormack's bill is incompetent because the witness says he does not know. If the Doctor had rendered a bill it would be another matter. 40

Andrew J. Collins—Direct.

Q. Have you been treated by any other doctor besides these three? A. Dr. McCormack, Dr. Bush and Dr. Epstein, that is all.

Q. Have you seen any other doctor about your foot? A. No.

Q. Now, Mr. Collins, I ask you if you recognize these bills of the Pacific pharmacy?

10 Mr. Walker: Have you any objection to these bills going in?

Mr. Miller: If he has paid these bills and they are for this injury I have no objection whatever.

Q. Do you recall these bills? A. I do.

Q. Will you state whether or not the items covered by these bills were incurred as the result of the injury to your foot? A. They were.

20 Q. All the items represent medicines that you bought, or your wife bought, at the drug store? A. Yes, cotton bandages, gauze, medicines, alcohol for baths. That is only a small part of them, though.

Mr. Walker: It amounts to \$23.95.

Mr. Miller: Put them all in.

30 Q. Now, Mr. Collins, did you have any other expenses with the drug store? A. I had. We have been buying, off and on, a lot of things there, day after day, that we have't got no bills at all for.

Q. (By Mr. Miller.) Have you any clear recollection of it? A. I have no clear recollection of it.

Mr. Miller: Then I don't think we ought to take his guess.

Witness: I have a good recollection, though, of the expenses, what I have sustained, on doctors, druggists, and so forth.

40 Q. How much have you spent? A. At least \$1600.

Andrew J. Collins—Direct.

Q. (By Mr. Walker.) Now, Mr. Collins, I show you a bill of Dr. Bush's. The first entry is October 21, 1915, and the last entry is November 18, 1915. Will you kindly state if this bill that you paid Dr. Herman Bush is his bill from October 21st to November 18th? A. It is.

Q. Is this item of \$160 the amount that you paid Dr. Bush? A. Yes.

Q. I understood you to say that you were treated by Dr. Bush from October 21st to April 4, 1916. Can you tell the jury, if you know, the balance of Dr. Bush's bill, for treating you, from November 18th to April 4th? A. I cannot tell the balance exactly. I haven't got a written account of it.

Q. Have you paid him at different times? A. Yes. We paid him, sometimes, day after day. Dr. Bush knows that.

Q. That is when he would call at your home? A. Yes.

Q. How much have you paid him when he called at your home? A. \$2 a visit.

Q. How often did Dr. Bush visit your home from November 18th to April 4th? A. Sometimes once a day, sometimes twice. I have not kept an account.

Q. Do you think it is a fair average of once a day? A. More than that.

30

By Mr. Miller:

Q. Averages more than once a day? A. Yes.

Q. All that time? A. Yes.

Q. Right up to April 4th it averages more than once a day? A. Yes.

Mr. Walker: That is from November 18th.

Q. This is from November 18th to April 4th? A. Dr. Bush has come, on occasions, more than once.

40

Andrew J. Collins—Cross.

By Mr. Walker:

Q. Well, I am asking you for an average, from November 18th to April 4th. What was the average of Dr. Bush's visits to your home, where you paid him a visit? A. Dr. Bush's calls?

Q. Yes. A. There was some days that blood poisoning showed out on my foot that he would call in the evening. If my wife called to Dr. Bush he would be there in the morning. That would be two visits in one day. As a general rule he came once in a day.

Q. That is as I understood you to say it? A. Yes.

CROSS-EXAMINATION by MR. MILLER:

Q. Mr. Collins, do you mean to say that from November 18th to April 4th Dr. Bush came to see you every day? A. Yes.

Q. Didn't miss a single day? A. At some time, yes.

Q. Every day? A. Yes.

Q. You say that he has been treating you right up to the present time? A. Once in awhile he has treated me, yes.

Q. You said frequent visits since April 4th, didn't you? A. Well, that is once in awhile.

Q. Well, now, which is it, frequent or once in awhile? A. Well, frequent; I don't mean every day.

Q. Well, since April 4th how many times has the doctor called to attend you for this foot? A. He might have called on me for about twenty-five times.

Q. Since April 4th? A. Yes.

Q. Sure of that? A. I think, as near as I can judge.

Q. But it is quite a large number of times since April 4th? A. Yes.

Q. Sure of that? A. Yes.

Andrew J. Collins—Cross.

Q. You worked on April 4th, didn't you? A. I only worked April 4th, but after awhile I was not well then.

Mr. Miller: I ask that that be stricken out.

The Court: Strike it out.

Q. You went to work on April 4th? A. Yes.

Q. Went to work for Strauss? A. Yes.

Q. You got a job as gate keeper down at Strauss's? 10
A. Yes.

Q. Tending the gate? A. Yes.

Q. Have you missed a single working day since April 4th until you came to court here? A. Well, I have missed single days.

Q. They were holidays? A. But I have not worked down there as a general rule. I could go home when I felt like it; I was instructed to do that.

Mr. Miller: I move that that be stricken out. 20

The Court: Strike it out.

Q. I want to know whether you have missed a single working day? A. No. That I don't show up?

Q. You haven't missed a single working day? You have got your week's wages every week since April 4th? A. Yes.

Q. Has Mr. Strauss paid you your week's wages every day while you were laid up? A. Yes.

Q. So that you haven't lost a day in wages? Mr. 30
Strauss paid you up to the time you went back to work, and you have earned your wages since, isn't that so? A. Yes.

Q. Now, Mr. Collins, you said there was a light about 10 feet from this radiator? A. Yes; some kind of a light from the ceiling.

Q. An electric light? A. Yes.

Q. Was it lit? A. I don't recall whether it was it at the time of the accident. I know it was afterwards.

Andrew J. Collins—Cross.

Q. But you don't recall whether it was at the time of the accident? A. No.

Q. You have taken one bag and put it on your truck? A. Put it on my truck.

Q. You had not seen the radiator that day until it fell, is that a fact? A. I have not.

Q. Do you recall what kind of a globe covered this light that was 10 feet from the radiator? A. I don't. I didn't notice it specially.

Q. Was it a white globe?

Mr. Walker: I object. The witness says he does not remember.

Q. Is there anything else you remember about the globe? A. Well, I remember that—about the globe? No.

By Mr. Walker:

20 Q. How much did you pay when you went to the office of Dr. Bush? I didn't ask you that on direct-examination. A. How much I paid?

Q. To the office. A. My wife, Mrs. Collins, has paid Dr. Bush all bills.

Q. I asked you, when you went to Dr. Bush's office, April 4th, did you then pay Dr. Bush anything for treating you? A. My wife paid him all bills that he has got.

30 By Mr. Miller:

Q. Mr. Collins, do you recognize this signature (shows paper to witness)? A. Yes, sir.

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

Mr. Miller: I ask that it be marked for identification.

Marked D3 for identification.

Q. Do you remember when you wrote your name 40 on that? A. I don't think I know what it is.

Andrew J. Collins—Cross.

Q. Well, do you remember some interrogatories that I sent Mr. Walker and you answered, and you swore to? A. Yes.

Q. See if these are not the questions that you swore to at that time. A. That has been in wrong about Dr. Trainor.

Q. Now, answer the question. You recognize these as interrogatories? A. I do.

Q. Dr. Trainor is wrong, too? Look what you 10 said about Dr. Bush stopping attending you, and see if that is not wrong. A. Oh, well he stopped attending me for the sickness, you know. That is, the 4th of April he made regular calls.

Q. Well, did he stop or didn't he stop? A. He didn't stop. He came to see me later.

By Mr. Walker:

Q. Well, now, look at the answer there and see 20 what you said about Dr. Bush stopping and see what is wrong about the answer that you swore to. A. I cannot see it very well.

By Mr. Miller:

Q. Well, let Mr. Walker see it.

(Witness hands paper to Mr. Walker for examination.)

Q. Now, was that right or wrong? Did the doc- 30 tor stop on August 10/16, or not? A. Did he stop on that date?

Q. Well, he isn't treating you up to the present time? You are sure he stopped?

Mr. Walker: I object to that question as the witness has testified that Dr. Bush visited him up until recently.

Q. Is it a fact that the doctor stopped attending you some time last August? A. Well, he has 40

Andrew J. Collins—Cross.

called to see me on several occasions since that last August.

Q. Is it a fact that he stopped attending you for the injury to your foot on last August? Do you know whether he did or not? Can't you tell us? A. He has come to see me several times.

Q. Did he treat you for your foot since then? A. He has asked me—

10 Q. Did he come to treat you for your foot? A. I believe he has come since.

Q. Has he come for the purpose of treating your foot? A. Well, no, because if it was required—

Q. Did he treat your foot? A. Well, no, he hasn't treated it.

Q. When was the last time he did treat it? A. I don't remember.

Q. Is he in the habit of coming and making social calls? A. No; he has never been in the habit of
20 making social calls before I got the injuries.

Q. I am talking about since your injuries? A. No.

Q. But you were mistaken when you said he stopped treating you in August, here, in this affidavit? That is wrong, isn't it? A. What is that?

Q. This affidavit that you took on the 13th of September, saying that Dr. Bush stopped August 10th, that is wrong, is it? A. He has been there on August 10th.

30 Q. No, just look at that. Is that right or wrong? A. August 10th? Yes.

Q. Was this true or wasn't it? (Reads) "*Question: How long did each of said doctors attend you?*" And among other things in the answer you said, "Dr. Bush, from October 21, 1915, to August 10, 1916". A. Yes, he has called on me up to that time.

Q. And you swore to this on the 13th of September, 1916? That is a month after August 10th? A.
40 Yes.

C. Herbert Walker—Direct.

Q. Now the question is whether it is true that Dr. Bush stopped calling on you on August 10th. Did he call on you after that? A. He has given me things since August 10th.

Q. So that when you made this statement on August 10th you were mistaken? A. Well, he has been there on that day.

Q. That is what you meant, did you? This is so, when you swore, on September 13th, that Dr. Trainor— A. Dr. Trainor? I didn't say that that was done—

Q. Will you just bear with me a moment— A. Dr. Epstein?

Q. The fact is that the statement you swore to in September, that Dr. Trainor had been visiting you, is not so? A. Dr. Trainor has been to visit me, but not as a patient.

Q. But at this time, on September 13th, you swore on your oath "Dr. Trainor visited and examined the plaintiff on one occasion." A. He was there on one occasion, yes.

Q. But when you came down to put on your final touches? A. Not my regular doctor.

Q. When you came to put on the final touches in answer to the defendants' interrogatories, asking what doctors attended you, that answer wasn't so? A. Dr. Trainor has come over and looked at my feet.

Mr. Walker: I object to the question. 30

C. HERBERT WALKER testifies as follows:

Mr. Miller: Make your statements. I do not ask to have you sworn.

EXAMINATION:

Witness: Your Honor, I wish to state that I personally called up Dr. Trainor and asked him to represent me in an examination by Dr. Satch- 40

C. Herbert Walker—Direct.

well, of this plaintiff. He said that he would charge his customary charge for the visit. This was the charge of one dollar there.

By Mr. Miller:

Q. Why did you want Dr. Trainor to come and visit Dr. Satchwell? A. Dr. Satchwell called up my
10 office and asked that Mr. Collins submit to a medical examination.

Q. For the benefit of who? A. I understood that he represented the casualty company.

Q. Don't you know that Dr. Satchwell represented the insurance company that was paying compensation in this case? A. I didn't get the name of the insurance company because the memorandum was left in my office.

Q. Don't you know that Dr. Satchwell represents
20 the casualty company, or the insurance company, that is paying insurance on Mr. Collins, to cover his compensation that Strauss owes him? A. No, I do not.

Q. You don't know that? A. No.

Q. You mean you don't know that of your own personal knowledge so that you can swear to it? A. I do not know what company Dr. Satchwell is working for to-day, or was working for when he made that examination.

30 Q. Has Strauss paid any compensation to Collins? A. I don't know anything about that?

Q. Now, let me ask this. Do you contemplate bringing suit for Mr. Collins to recover compensation against Strauss? A. I have not been retained, up to date, to bring suit. I don't say what I will do later on.

William P. O'Rourke—Direct.

WILLIAM P. O'ROURKE sworn in behalf of plaintiff.

DIRECT-EXAMINATION BY MR. WALKER:

Q. Mr. O'Rourke, where are you employed? A. I am the superintendent of buildings of the City of Newark.

Q. Mr. O'Rourke, can you tell me whether or not there has been filed in the building department a plan of the Newark Warehouse? A. Yes, there has been filed such plans.

Q. I show you a plan and ask you if you will show the jury, and if you will state to the jury, whether this is the plan that has been regularly filed with the building department?

Mr. Miller: What do you want to prove by this witness.

Mr. Walker: I want to show the jury the plan of section S. 20

A. This (indicating) is Ward street and here (indicating) is the first floor.

Q. Where is the place where this accident happened, do you know, Mr. O'Rourke? A. No, I don't know. This (indicating) is Ward street; this (indicating) is Railroad and this is (indicating) is Mechanic.

Mr. Walker: Mr. Miller, as I understand, this is section S (indicating)? 30

Mr. Miller: This is the first floor plan of the warehouse.

Q. Can you tell from your plan how far this line (indicating) is from here? How many feet?

The Court: That shows nothing on the record.

Q. (Indicating.) I will say, from the line of the driveway to the line of the back wall. A. I can scale it. 40

Nicholas Regan—Direct.

Q. That is what I mean. A. It is approximately 8 feet.

By Mr. Miller:

Q. Are you sure of that? A. No, not sure. These plans were in my custody. They were made long before I was superintendent.

10 Q. You don't know whether they were built that way? A. They were built that way, with some slight changes.

Q. Do you know whether this is 8 feet wide or 11 feet wide? It is 11 feet wide. I had it measured last night. Do you want these figures? A. (Measuring with scale.) It is slightly over 10 feet on scale, yes.

By Mr. Walker:

20 Q. It is 10 feet, you say? A. It is a little over.

NICHOLAS REGAN recalled in behalf of plaintiff.

DIRECT-EXAMINATION BY MR. WALKER:

Q. Now, Mr. Regan, I would like you to show the dimensions that show the dividing line of section S at this time, I mean at the point in this particular section? A. This (indicating on map) is section S.

30 Q. This is section S (indicating)? A. This (indicating) platform comes down to about here.

Q. Down to about here? A. Yes.

Q. Is that the correct point? A. This (indicating) is it, yes, sir.

Mr. Miller: Make a line so as to show it, please.

(Witness complies.)

Q. Where, on this end, does the section run? A.
40 I think it runs up this way, about 35 feet.

Nicholas Regan—Cross.
William P. O'Rourke—Direct.

- Q. Here is the elevator. Does it run beyond that?
A. It runs right by this elevator.
Q. Right in—— A. Right by the elevator.
Q. Where is your desk on this section? Point that out? A. It is right about here.
Q. Back of this or alongside that? A. What does that represent? It is right against that column (indicating). 10
Q. Your desk is right against the column, is it?
A. Yes, sir.
Q. Is this right? A. Yes.

CROSS-EXAMINATION BY MR. MILLER:

- Q. As a matter of fact, there is no wall dividing section S from the other sections, is there? A. Oh, no.

20

WILLIAM P. O'ROURKE, recalled.

By Mr. Miller:

- Q. This is a modern concrete and steel building, is it not? A. Yes, sir.
Q. And concrete floors? A. Concrete floors.
Q. Steel and concrete floors? A. Yes.
Q. On a pile foundation? A. I believe it is pile.
Q. Down to a hard bottom? A. Yes. 30

Mr. Walker: Is there any objection to my offering that in evidence?

Mr. Miller: No.

Mr. Walker: I offer it in evidence.

(Marked Exhibit P3.)

40

Herman Bush—Direct.

HERMAN BUSH sworn in behalf of plaintiff.

DIRECT-EXAMINATION BY MR. WALKER.

Q. Doctor, are you acquainted with Mr. Collins?

A. Yes, sir.

Q. The plaintiff in this suit?

10 Mr. Miller: We will concede the doctor's qualifications and that the doctor attended him. Let us get at the crux of the matter.

Q. Doctor, will you kindly state, briefly, what you did on the day you saw Mr. Collins? A. I was called in to see him on October 21st, between four and five, P. M. I found the man suffering intensely, the right foot swollen and discolored. One or two toes were badly crushed. I first tried to relieve his pain suddenly; next I tried to save, if possible, every-
20 thing. I was afraid, mostly, of gangrene and gave him some more antiseptics, a hot compress and some applications. It was between four and five the same evening when Mrs. Collins called me up, and about eleven, P. M., Mrs. Collins told me he was suffering excruciating pain.

Mr. Miller: I move that that be stricken out.
The Court: Strike it out.

Witness: (Continuing.) I came there at eleven
30 and relieved him. The next morning gangrene developed in one of the toes which was badly crushed.

Q. Which toe was that, Doctor? A. I really cannot recall which toe there. I called in Dr. McCormack in consultation and we both decided in order to save, if possible, the other toes, to amputate. We amputated one under a general anæsthetic. He received a general anæsthetic. On the third day the second toe began to develop gangrene and Dr. McCormack and I together, saw him together. We made an-
40 other consultation. We tried to apply surgeon's rem-

Herman Bush—Direct.

edies to see if it will not sluff off by itself, if it will not be really needed to operate. During the fourth day Dr. Epstein called me up and 'phoned me that the Straus people requested him to see the case with me in consultation. I readily consented that Dr. Epstein call. Dr. Epstein went to see him. Septis developed. In other words, he showed some symptoms, suddenly, of septis.

Q. Septicemia? A. Yes. We decided the best 10 place for him would be a hospital for him. An X-ray was also taken of him to see whether there were any fractures, and how many toes were really fractured. We removed him to the hospital, the Newark private. On examination, under a general anæsthetic, Dr. Epstein and I concurred that the very best interest would be to amputate all, because there was a very great deal of discoloration. We didn't deem it advisable to go piecemeal because the man had a chance to lose the entire foot to the ankle 20 joint.

Q. Now, Doctor, did I understand that by operating and amputating the four toes in the Newark Private Hospital you saved the foot of Mr. Collins?

A. I think so.

Q. Well, now, Doctor, how many times, about—how often, have you seen Mr. Collins? A. As a rule I made it my business to see him once for dressing, before April.

Q. How often was his foot dressed from October 30 21st, 1915? A. Once a day.

Q. To April 4th? A. Well, I don't believe I dressed it to April 4th, although I didn't see him every day after he came home from the hospital. I dressed him for a period of three or four weeks every day; then every second day.

Q. So that you were the doctor who did the dressing on different days while he was at his home? A. Yes, or at the hospital.

Q. Or at the hospital? A. Yes, sir.

Herman Bush—Direct.

Mr. Walker: Now, I will ask Mr. Collins to remove his shoe and I will ask him to show the jury his foot.

Mr. Miller: I object to that. I do not consider it at all necessary. It is conceded that his toes are off.

Mr. Walker: The plaintiff's case rests upon the fact that the five toes were amputated.

10 The Court: I understand he admits the fact that the man's toes were cut off.

Mr. Walker: Do you admit that not only the five toes were cut off but part of the joint?

Mr. Miller: Part of the joint, yes. There is no rule of law in this state that permits this gentleman to make such an exhibition, and I object to it. Whatever the facts are he can testify to them. He was there when they were taken off.

20 Mr. Walker: I have a right to prove that a part of the joints were taken off.

The Court: You have the right, if you think it necessary. I will not prevent it.

Mr. Walker: Now, come over here, Mr. Collins.

(Plaintiff comes to the witness-stand and removes his shoe and stocking.)

Q. Show where this first operation took place.

30 A. The very first one? The second or last toe. This (indicating) was gangrene. If I remember rightly, this (indicating) developed gangrene but he decided to wait. There are various types of gangrene. Sometimes we will limit this and it will sluff off. It was well developed. This was my main hope, to save the toe if I can. The next day developed a moist gangrene, which is subject to infection. The man began to show some temperature, and with a man of his age I was afraid that with such
40 symptoms the man might lose his life.

Herman Bush—Cross.

CROSS-EXAMINATION BY MR. MILLER:

Q. In other words, you were afraid the poison might run up into his leg? A. Yes. We decided immediately to amputate that third toe. Gangrene developed in the second toe. There was two objects, to prevent the spread of the gangrene and further, secondly, to mutilate it as little as possible, 10 realizing he was a workman of that age. So, gangrene developed again in the toe adjacent to the toe we amputated. I again called in Dr. McCormack to see what was best for it. We again decided it was best to wait. We put on various antiseptics to limit the gangrene. That has not succeeded. Then, again, Dr. Epstein called me up and asked whether I succeeded in so far removing a portion of the swelling, because when he saw him his whole foot was swollen up badly, the foot was threatened. 20

Q. Did you save it? A. Then Dr. Epstein called me up and we both agreed—

Q. Dr. Epstein was Strauss, his employer's, physician? A. Yes. We both agreed to remove him to the Newark Private Hospital, and then we decided to amputate all the toes.

Q. Was there anything cut back of the joints? A. To disarticulate the joints.

Q. So he has the back part of the joints and the front part is gone? A. Yes. 30

Q. So that no part back of the joint is gone? A. No. Cutting was not advisable in a man of his age; he might have gangrene produced by surgery.

Q. But he didn't have anything like that? A. No. Considering the nature of the injuries the result was very excellent, because our main object was to produce a scar tissue so if he walks, so it minimizes the pain. Scar tissue always causes pain. Considering the injury it is a fine stump, absolutely so. 40

Herman Bush—Cross.

Q. Doctor, how long did you have to keep dressing this stump? A. I really cannot say definitely.

Q. You didn't have to dress it up until April 4th?

A. No.

Q. Can you not approximate the date? A. After he came from the hospital.

Q. I want to get an approximate idea of how long it was you had to keep dressing this stump? A. I
10 dressed him three or four weeks after getting him from the hospital; it was about three months, let us say, from the date of injury.

Q. That you continued to dress him? A. Yes.

Q. The first part of that three months, I understand, you went every day? A. Yes; sometimes twice a day.

Q. In the early part of the injury? A. Yes.

Q. But after that you went only every other day?

A. That is so on some occasions, yes, between—I
20 stopped dressing him on——

Q. Wait a minute. You said at the latter part of the time, when he removed the dressing, you went every other day. Is that so? A. Not so. I want to say it, please. That dressing—the dressing was needed, because at times he complained of a great deal of pain.

Q. The question is, How long you had to go there? A. Until April 4th, if I remember right.

Q. Don't you know he went to work April 4th?

30 A. About, approximately.

Q. Do you know he went to work April 4th? A. I advised him to go to work.

Q. Because you thought his stump was in shape ready to go to work? A. Yes.

Q. That had healed? A. Yes.

Q. That had recovered on April 4th? A. Yes, sir.

Q. You didn't have to treat him the day before April 4th? A. I saw him a few days before.

Q. Did you have to treat him the week before he
40 was so far healed? A. Yes, sir, he had abrasions on

Herman Bush—Cross.

the posterior surface and also the anterior surface, and these had to be taken care of.

Q. The latter part, after the first three months, after the accident, I want to know whether you came there every day? A. I couldn't tell you. Perhaps I missed some days.

Q. Have you been paid? A. Yes.

Q. By whom? A. By Mrs. Collins.

Q. How much have you been paid? A. \$160; this 10 was the bill; then she paid me for some visits.

Q. Up to what point was this \$160 to cover? A. He has the bill.

Q. I want you to tell me. A. I don't remember.

Q. Does he owe you anything now? A. No, sir.

Q. So that for everything you have done you have been paid? A. Yes, sir.

Q. When did you last treat him for this injury? A. I don't believe I saw him half a dozen times since April 4th. Then Mrs. Collins called me in to 20 see him.

Q. Have you any distinct recollection of having been there after April 4th? A. I saw him, probably, a few days.

Q. Have you any distinct recollection of ever having seen this man for the purpose of treating him for this injury after he went to work, after April 4th? A. I wouldn't say he needed treatment after that.

Q. The question is whether you have been there 30 for the purpose of treating him after he started to work? A. Mrs. Collins called me in to see him a few times after.

Q. You don't think that was necessary? A. No.

Q. And so you didn't think it was necessary. Did you charge him? A. The regular fee.

Q. Did you tell him there was nothing that you could do for him? A. I told him so.

Q. And that he had made a good recovery? A. Yes, sir.

Herman Bush—Cross.

Q. And you advised him to go to work on April 4th? A. Yes, sir.

Q. Advised him to? A. Yes.

Q. You say Dr. Epstein performed the operation? A. I assisted him.

Q. He performed the operation? A. Yes, sir.

Q. He was at the operation? A. Yes, sir.

10 Q. He was the physician employed by the man's employer, Straus? A. He told me so.

Mr. Walker: I object to what Dr. Epstein told him.

Mr. Miller: You brought it out.

Mr. Walker: No, I didn't bring it out.

Mr. Miller: I will stand on the record on that point.

Mr. Walker: I ask that that part of Dr. Bush's answer to the effect that Dr. Epstein told him that he had been engaged by Straus & Company be stricken out.

20

The Court: I understand it is uniformly the rule in this state, if you bring out a part of a conversation, the other party can bring the rest of it out. I will allow it.

Q. Did Dr. Epstein tell you that he was there for Strauss the first day he called you up? A. He called me up and asked me if I would have an objection to his being called in. "Strauss requested me to see him with you in consultation." I told him I would very cheerfully do so.

30

Mr. Walker: Is there any objection to my putting in evidence the time tables of the Central Railroad Company?

Mr. Miller: Yes. There is no proof that the train was on time.

The Court: We are bound to try this case according to the evidence. The train might have been a mile off. You haven't shown how near

40

Herman Bush—Redirect.

the train was to the building. You have simply said that just before a train went by.

Mr. Miller: Even so, your Honor knows that a train going by one of these steel buildings does not have any effect.

Q. Mr. Collins, did you pay Dr. Epstein? Did you, yourself, pay him anything? A. Mr. Strauss has done that from the Department of Liability. 10

Q. You mean the insurance? A. The insurance from me paid Dr. Epstein.

Q. Then you didn't pay Dr. Epstein anything? A. No.

Q. Dr. Epstein was paid by the insurance company through Mr. Strauss? Mr. Strauss took the money the insurance company gave him for you and paid Dr. Epstein with it, is that so?

Mr. Walker: I object. It is not within the 20 the plaintiff's knowledge to know what money was paid by the insurance company to Mr. Straus & Company.

Mr. Miller: How do you know that? Let the witness say that.

The Court: I will allow the question, if the witness can answer.

Q. (Question read.) Is that so, Mr. Collins? A. I don't remember.

Q. You just told us so when you were sitting 30 down here a minute ago, but you have forgotten it since walking from there to there (indicating)? A. I don't remember.

REDIRECT-EXAMINATION BY MR. WALKER.

Q. Can you state to the jury how near the trains of the Central Railroad Company are to section S?

A. They run right alongside the building, right near it.

Herman Bush—Redirect.

Q. Do the Central Railroad Company trains run in the same building?

Mr. Miller. I object to that as being immaterial, and the fact is they do.

Mr. Walker. You admit they do?

Mr. Miller. Yes.

10

[PLAINTIFF RESTS.]

Mr. Miller. I move for a nonsuit upon the ground that there is no proof of any fact showing any negligence upon the part of the defendant or on the part of its servants or agents.

The Court. (After argument.) I think there is enough in this case to allow it to go to the jury. It is a very close case, but still I think under the general rule as recently laid down by the Court of Errors if there is anything to go to the jury it should be submitted.

20

[DEFENDANTS REST.]

Mr. Miller. I move for the direction of a verdict on the same grounds as was submitted in my motion for a nonsuit.

30

The Court. Motion denied.

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

Exception noted as ground of appeal.

Mr. Miller sums up for defendants.

Mr. Walker sums up for plaintiff.

40

Judge's Charge.

COLLINS v. CENTRAL R. R. Co.

The Court charges the jury as follows:

CUTLER, J.

Gentlemen of the Jury. The suit in question was brought by the plaintiff against the Central Railroad Company and the Newark Warehouse Company, but by the order of the Court and by consent of the 10 parties to the suit the warehouse company has been eliminated from your consideration, a nonsuit being granted so far as they were concerned; and so the case, as now before you, is between the plaintiff and the Central Railroad Company of New Jersey, the sole defendant now in the case.

The plaintiff brings this suit against the Central Railroad Company to recover damages for injuries which he received on the 21st day of October, 1915, while in the freight station of the railroad in New- 20 ark. It is not disputed that on the day in question the plaintiff entered the premises of the defendant for the purpose of removing certain bags of chicken manure consigned to his employer, and that the injury he received, and for which he now asks damages at your hands, was received by him while he was on the defendant's premises for the purpose of removing this manure.

The fact that the plaintiff was injured while on the premises of the defendant does not of itself en- 30 title the plaintiff to recover damages from the defendant for such injury. In order to recover for the injury which he then received it must appear by the evidence offered in this case that the defendant or its employees were negligent, and that this negligence was the proximate cause of the plaintiff's injury.

You are the sole judges, gentlemen, of the evidence, and you are to determine from the evidence which has been offered before you what the circum- 40

Judge's Charge.

stances actually were. The defendant kept the freight delivery station open for the purpose of the delivery of freight, and it became the duty of the company to exercise reasonable care to keep this delivery station in a safe condition for the use of the persons who lawfully had occasion to use it. That was the duty of the defendant company. The defendant was not an insurer of the safety of the plaintiff against accidents happening to him while on the premises. The defendant's duty to the plaintiff was satisfied when it used reasonable care to maintain the premises in a condition safe for his proper use. If the defendant company had, at any time before the accident, either knowledge or notice of a dangerous condition of its premises it would have been negligence on the part of the company not to have remedied this condition. It was also the duty of the company to make a proper inspection of the premises from time to time.

I have said that the defendant was obliged to use reasonable care to maintain the premises in a condition safe for the plaintiff's use. Reasonable care, in this connection means not extraordinary care but such care as a reasonable man would exercise in view of all the circumstances presented to him; such care as an ordinarily prudent person would exercise under the conditions existing at the time he was called upon to act in this case. The defendant is a corporation, and you will have to apply this rule to the agents and employees of the company who were operating and managing this particular freight station. Did the defendant company, by its servants and employees, use reasonable care to keep this freight station in a safe condition? If it did, then your verdict must be for the defendant. If it did not, then your verdict must be for the plaintiff. As I have said before, you are the sole judges of the evidence.

If you find that the accident was not caused by

Judge's Charge.

any negligence or failure of the employees of the defendant company to use reasonable care in keeping this building in proper condition for the use of those persons who were invited by it to remove freight from the building, including the plaintiff, then, of course, your verdict must be for the defendant; but if, on the contrary, you find that the accident was caused by the negligence of the defendant's employees, than you will go a step farther 10 to determine what damages the plaintiff is entitled to recover for this injury.

In a case of this character, gentlemen, you have no right to render a verdict to punish the defendant, even if you think the defendant should be punished for negligence. All the plaintiff is entitled to recover, if he can recover anything, is for the injury which he received at that time; not for sympathy; not because the defendant is a corporation; but such compensation as has been established by him, for 20 such injury as the evidence has established that he incurred at that time. He is entitled, in the first place, to recover for his pain and suffering, by reason of the accident, if you find that the company is liable for this accident, and in that, gentlemen, you have to use your good sense. There is no rule of law by which you can say that his suffering is worth so many dollars. The plaintiff is entitled to that, as an element of his damages, and you, as twelve sensible men, are to figure that out for yourselves. The 30 Court cannot help you in that.

The plaintiff is entitled, in addition to that, to such money as he has actually paid out or become liable to pay out by reason of the injury which he received, in endeavors to be cured of his injury. He is not entitled to recover moneys that somebody else paid out for him; he is not entitled to recover against this defendant for moneys that he never will be called upon to pay out; and you must take the evidence with reference to the moneys that were 40

Judge's Charge.

paid to Dr. Epstein and determine whether he is liable for that, not whether Dr. Epstein received his money, not whether the bill is reasonable or not. The question in the first place is, to determine whether or not the plaintiff in this case paid the money or became liable to pay it. If he did, then Dr. Epstein is entitled to receive a reasonable sum for the services which he rendered. It is not disputed, however, that he paid Dr. Bush \$160, and some moneys the doctor said his wife paid him for other visits. You are to determine the exact amount he paid. The doctor says he does not owe him anything now. How much money has he received? It is for this plaintiff to establish the fact before you, and you cannot guess. You are to decide this case according to the evidence.

The plaintiff paid three weeks board at the hospital, at \$20 a week, and \$5 for the operating room. It appears he paid \$23.95 for drugs. Now, gentlemen, if there is any other evidence you are to take it into consideration. There was no evidence of the amount that he has to pay Dr. McCormack. He does not produce the doctor, and it does not appear that the doctor has presented any bill, and it is not competent for you at this time to guess what the doctor's bill was to be. This case must be decided according to the evidence as it has been presented here.

There is another element of damage which enters into it, and that would be his permanent injury. You may consider that, in determining your verdict, and if you find that he is entitled to anything on that account allow him such sum as he would be entitled to receive at your hands by reason of the permanent injury, the loss of his toes. You may take into consideration, in that connection, whether or not his earning capacity in the future will be lessened by reason of this injury.

Now, gentlemen, you will take this case, and pay

Judge's Charge.

no more attention to any evidence I have called your attention to than to any of the other evidence. You will carefully consider it, and if you find that this accident was not an accident which was caused by any failure of the company to perform any duty that the law casts upon it, in keeping the place in a reasonably safe condition, your verdict should be for the defendant. If, on the other hand, you find that it was caused by the negligent failure of the company to use reasonable care, then your verdict will be for the plaintiff, and you should determine the damages on the lines that I have mentioned to you. 10

Juror No. 2: May I ask two questions?

The Court: Yes, sir.

Juror No. 2: I think, in the testimony last night, when they were illustrating the position of the radiator, or the book representing the radiator, it was placed on the left of the manure. After the accident he was asked to show the position of the radiator after the accident. It was over on the right side of the manure. Is that correct? 20

The Court: That is what was testified to.

Juror No. 2: I wondered how it got from one side to the other side after it was placed.

The Court: There is no evidence as to how it happened. That is the evidence as you have mentioned it. 30

Juror No. 2: The other question is, If this gangway was so that it was possible for the man to get his bags over to the end without going to the side, if those bags were piled along the wall, and the radiator was opposite the bags, my point is whether it was necessary for him to be opposite the bags? 40

 Exceptions.

The Court: Gentlemen, you must take all this into consideration. The whole question is for you to determine whether or not the company performed its duty. If it did, they are not liable; if it did not, then they are.

Juror No. 2: I wanted to make sure what the evidence was.

10 (The jury retires.)

Mr. Miller: I desire to except to that portion of your Honor's charge in which you charge the jury that if they had notice of the dangerous position of the radiator before the accident happened they were bound to remove it and repair the dangers, or whatever your Honor said about that.

20 Exception noted as ground of appeal.

Mr. Miller: I except to that part of your Honor's charge in which you say the defendant should have made an inspection from time to time, as introducing a new issue in this case in the charge, contrary to our cases.

Exception noted as ground of appeal.

30 Mr. Miller: I except to that part of your Honor's charge in which you say that if they find the defendant failed to exercise reasonable care the verdict should be for the defendant, on the ground that there was no place in the charge in which your Honor charged the rule of law that the plaintiff was bound to prove their failure to exercise care by a thorough preponderance of the evidence, the burden of proof being on the plaintiff all through the case and not changing in any way.

40 Exception noted as ground of appeal.

Exceptions.

Mr. Miller: I except to that part of your Honor's charge wherein you say that the plaintiff was entitled to recover for a lessening of earning power, there being no evidence as to the lessening.

Exception noted as ground of appeal.

Mr. Miller: I except to the latter part wherein your Honor said if the accident was not caused by the failure of the defendant to use reasonable care the verdict should be for the defendant, for the same reason, that it left out the fact that it was the plaintiff's duty to prove the entire case by a fair preponderance of the evidence. 10

Exception noted as ground of appeal.

Mr. Miller: I except to the last thing your Honor said, "That the whole question for you is whether the defendant performed his duty." 20

Exception noted as ground of appeal.

Application being made to me by the Attorney of the Central Railroad Company of New Jersey, in the presence of the Attorney of the plaintiff to correct the stenographer's transcript, and to specify the portions of the Judge's charge to which the exceptions refer. 30

I thereupon examined the transcript and find the sentence on page 79, which reads "Defendant's counsel prays an exception to this ruling of the Court", should read, "Defendant's Counsel objects to these rulings of the Court".

That in the following sentence the word "exception" should read "objection".

That following each exception the sentence "exception noted as ground of appeal" should read "Objection noted as ground of appeal". 40

Exceptions.

The part of the charge to which the Court understood the first objection applied reads as follows:

“If the defendant company had, at any time before the accident, either knowledge or notice of a dangerous condition of its premises it would have been negligence on the part of the company not to have remedied this condition”.

10

The part of the charge to which the Court understood the second objection applied reads as follows:

“It was also the duty of the company to make a proper inspection of the premises from time to time”.

The part of the charge to which the Court understood the third objection applied reads as follows:

20

“I have said that the defendant was obliged to use reasonable care to maintain the premises in a condition safe for the plaintiff's use. Reasonable care, in this connection, means not extraordinary care but such care as a reasonable man would exercise in view of all the circumstances presented to him; such care as an ordinarily prudent person would exercise under the conditions existing at the time he was called upon to act in this case. The defendant is a corporation, and you will have to apply this rule to the agents and employees of the company who were operating and managing this particular freight station. Did the defendant company, but its servants and employees, use reasonable care to keep this freight station in a safe condition? If it did, then your verdict must be for the defendant. If it did not, then your verdict must be for the plaintiff. As I have said before, you are the sole judges of the evidence”.

30

40

Exceptions.

The part of the charge to which the Court understood the fourth objection applied reads as follows:

“ You may take into consideration, in that connection, whether or not his earning capacity in the future will be lessened by reason of this injury ”.

The part of the charge to which the Court understood the fifth objection applied reads as follows: 10

“ You will carefully consider it, and if you find that this accident was not an accident which was caused by any failure of the company to perform any duty that the law casts upon it, in keeping the place in a reasonably safe condition your verdict should be for the defendant. If, on the other hand, you find that it was caused by the negligent failure of the company to use reasonable care, then your verdict will be 20 for the plaintiff, and you should determine the damages on the lines that I have mentioned to you ”.

The part of the charge to which the Court understood the sixth objection applied reads as follows:

“ The whole question is for you to determine whether or not the company performed its duty; if it did they are not liable; if it did not then they are ”. 30

The plaintiff's attorney objects to these corrections of the transcript, and also to the statement of the court as to what parts of the charge it understood the objections applied, and his objection is hereby noted.

WILLARD W. CUTLER,
Judge, &c.

Grounds of Appeal.

Filed Dec. 2, 1916.

NEW JERSEY COURT OF ERRORS AND
APPEALS.

10	ANDREW J. COLLINS, Plaintiff-Respondent, vs. THE CENTRAL RAILROAD COM- PANY OF NEW JERSEY, Defendant-Appellant.	}	On Appeal from the Essex County Cir- cuit Court.
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GROUNDS OF APPEAL:

20 To
 C. HERBERT WALKER, Esq.,
 Attorney of Plaintiff-Respondent.

SIR:

TAKE NOTICE that the following are the grounds upon which the defendant, The Central Railroad Company of New Jersey, appeals from the judgment heretofore entered in this cause against it:—

30 1) The said judgment was given for the plain-
 tiff, Andrew J. Collins, and against the defendant,
 The Central Railroad Company of New Jersey,
 whereas by the law of the land judgment ought to
 have been given for said The Central Railroad Com-
 pany of New Jersey and against the said Andrew J.
 Collins.

40 2) The Judge before whom the trial of the issues
 joined between the parties was had, erroneously re-
 fused to grant defendant's motion for a non-suit at
 the close of plaintiff's case.

Grounds of Appeal.

3) The said Judge erroneously denied defendant's motion for the direction of a verdict in its favor at the close of the whole case.

4) The said Judge erroneously charged the jury as follows:—

“If the defendant company had, at any time before the accident, either knowledge or notice of a dangerous condition of its premises it would have been negligence on the part of the company not to have remedied this condition.”¹⁰

5) The said Judge erroneously charged the jury as follows:—

“It was also the duty of the company to make a proper inspection of the premises from time to time.”

6) The said Judge erroneously charged the jury as follows:—²⁰

“I have said that the defendant was obliged to use reasonable care to maintain the premises in a condition safe for the plaintiff's use. Reasonable care, in this connection, means not ordinary care, but such care as a reasonable man would exercise in view of all the circumstances presented to him; such care as an ordinarily prudent person would exercise under the conditions existing at the time he was called upon to act in this case. The defendant is a corporation, and you will have to apply this rule to the agents and employees of the company who were operating and managing this particular freight station. Did the defendant company, by its servants and employees, use reasonable care to keep this freight-station in a safe condition? If it did, then your verdict must be for the defendant. If it did not, then³⁰
⁴⁰

Grounds of Appeal.

your verdict must be for the plaintiff. As I have said before, you are the sole judges of the evidence."

7) The said Judge erroneously charged the jury as follows:—

10 "You may take into consideration, in that connection, whether or not his earning capacity in the future will be lessened by reason of this injury."

8) The said Judge erroneously charged the jury as follows:—

20 "You will carefully consider it, and if you find that this accident was not an accident which was caused by any failure of the company to perform any duty that the law cast upon it, in keeping the place in a reasonably safe condition, your verdict should be for the defendant. If, on the other hand, you find that it was caused by the negligent failure of the company to use reasonable care, then your verdict will be for the plaintiff, and you should determine the damages on the lines that I have mentioned to you."

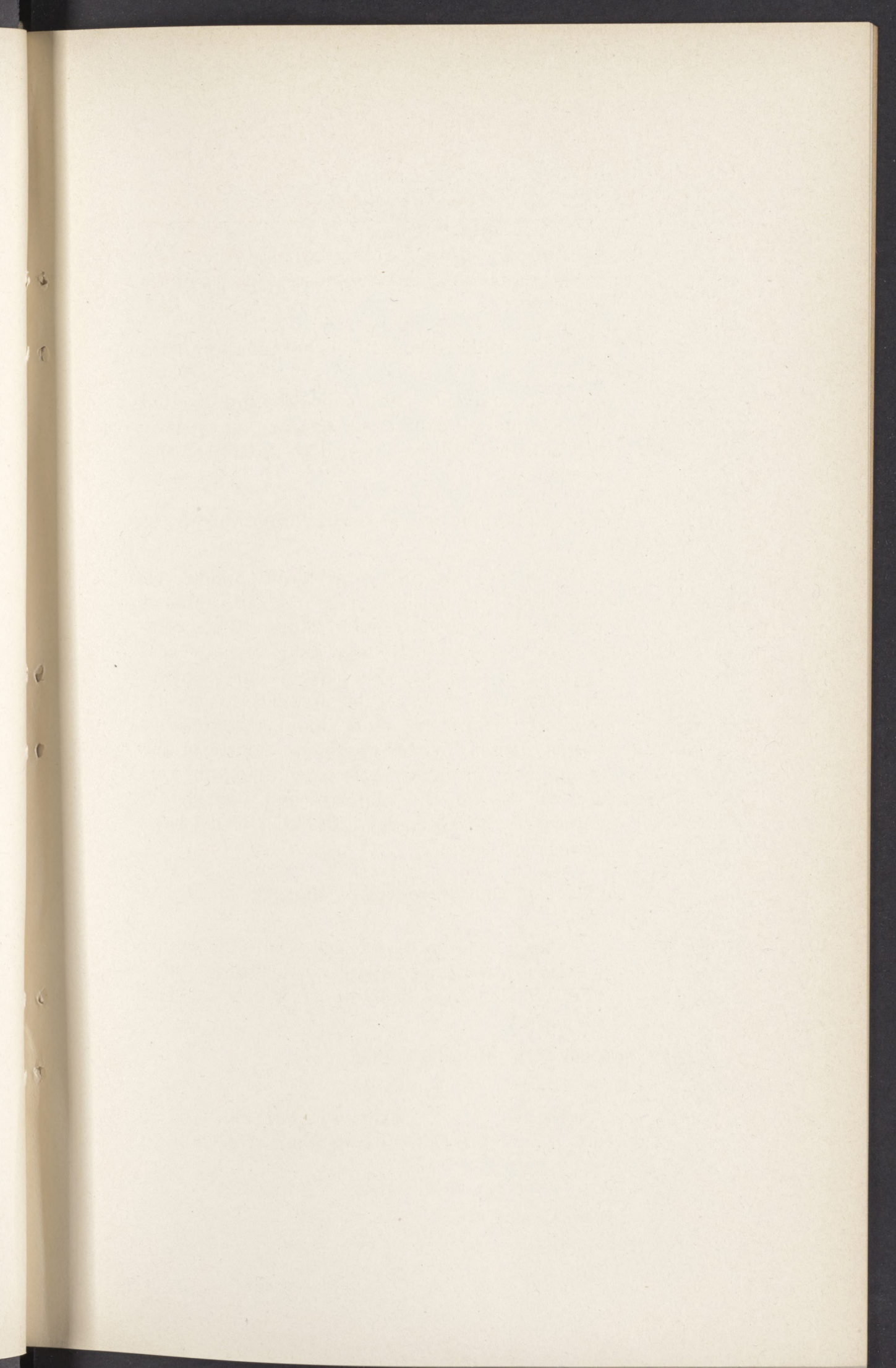
9) The said Judge erroneously charged the jury as follows:—

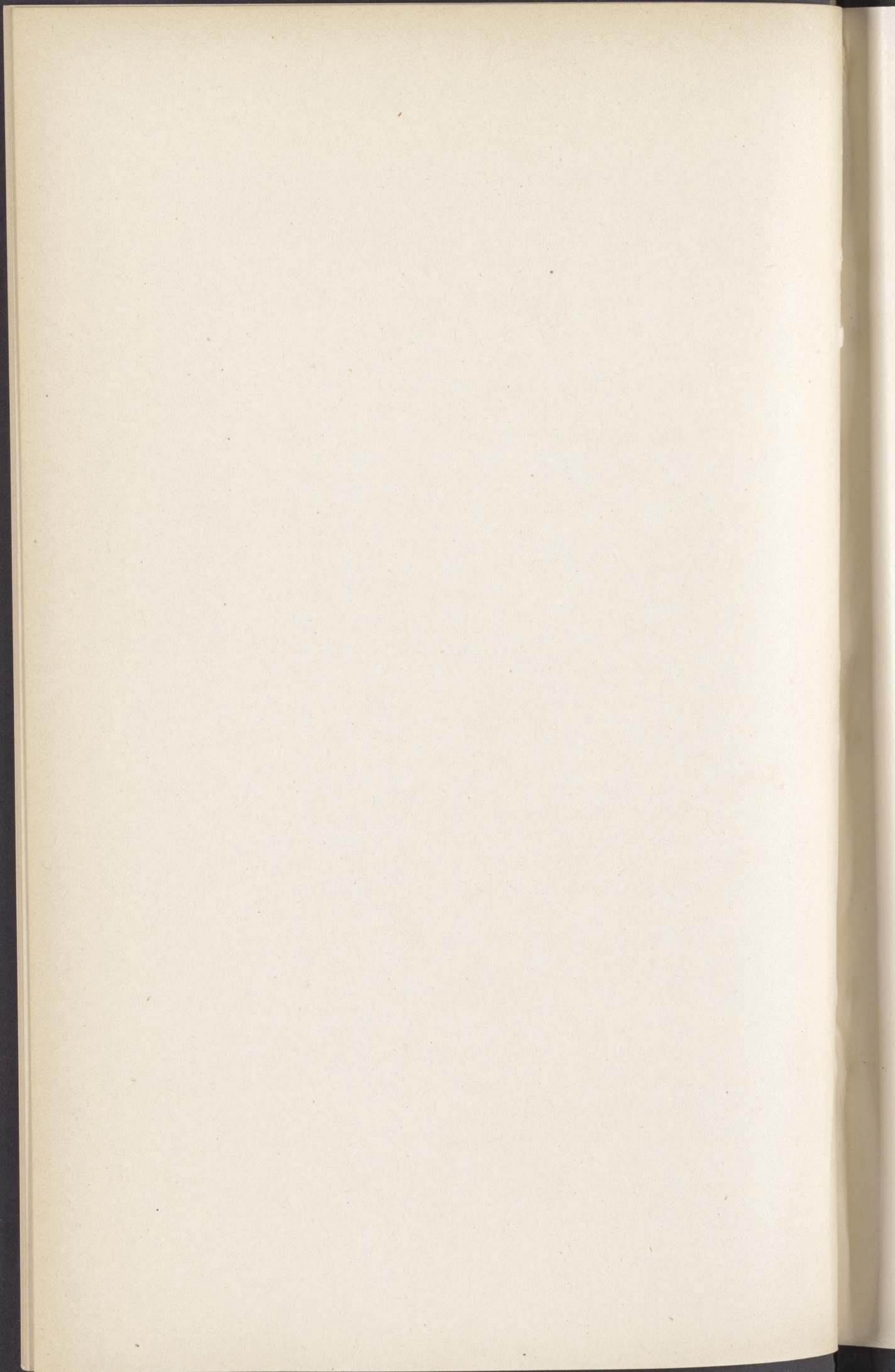
30 "The whole question is for you to determine whether or not the company performed its duty. If it did, they are not liable; if it did not, then they are."

Dated, November 24th, 1916.

Yours &c.,

CHARLES E. MILLER,
Attorney of Defendant-Appellant.





NEW JERSEY COURT OF ERRORS
AND APPEALS.

ANDREW J. COLLINS, <i>Plaintiff-Respondent,</i> <i>vs.</i>	} <i>On Appeal from Essex County Circuit Court.</i>
THE CENTRAL RAILROAD COM- PANY OF NEW JERSEY, <i>Defendant-Appellant.</i>	

BRIEF FOR RESPONDENT.

C. HERBERT WALKER,

Counsel.

Defendant's counsel in their statement of the case omitted the following evidence, which follows in quotation: "That the delivery platform of Section S was ten feet in width and twenty-five feet in length, where the accident occurred. (Rec., p. 12, ll. 6 and 7.) Section S runs right by elevator. (Rec., p. 5, l. 2.) Have three or four truckers around the elevator taking goods away. (Rec., p. 15, l. 32.) Truckers pile up stuff in section. (Rec., p. 28, l. 34.) That bags were five feet from wall and four feet to wagon." (Rec., p. 21, ll. 21 and 22.) Mr. Regan, clerk of Section S, in section "all the day of the accident. (Rec., p. 24, l. 7.) Employee thinks he saw radiator between 8 and 9 o'clock. (Rec., p. 24, l. 33.) Employee admits that time and again a person might go by radiator and not see it. (Rec., p. 24, l. 12.) Employee testified that radiator after the accident was partly in front of bags. (P. 20, l. 9.) Employee marks diagram showing location of walls of section, bags and radiator." (Rec., p. 20, l. 27.) The second day of trial same employee testified "that radiator was not in front of bags after accident." (Rec., p. 26, l. 21.) Same employee testified that "I was excited here yesterday and I was excited down there at the time of the accident. (Rec., p. 23, ll. 27 and 28.) Looked for

name of it, who it was for. (Rec., p. 24, l. 37.) That radiator had been seen laying in section two weeks prior to accident. (Rec., p. 30, l. 36.) Defendant was an invitee on our premises on that day. (Rec., p. 29, l. 23.) That Straus & Co. who employed defendant received notice of arrival of their freight from Central Company. (Rec., p. 29, l. 30.) Truck drivers came to Section S to get deliveries of their stuff. (Rec., p. 14, l. 18.) On morning of October 21st about two feet from wall. (Rec., p. 30, l. 36.) Not attached to floor. (Rec., p. 30, l. 38.) Radiator not attached to anything. (Rec., p. 31, l. 7.) Decided to amputate all the toes. (Rec., p. 59, l. 36.)

I.

THE TRIAL COURT DID NOT ERR IN REFUSING TO GRANT A NON-SUIT AND TO DIRECT A VERDICT IN FAVOR OF THE DEFENDANT.

Counsel's argument disregards an important part of the evidence. The evidence that on the morning of the accident the radiator was standing in an unprotected position and not in any way fastened to anything, two feet from the wall. The radiator had been moved from a secured position up against the wall to an unsecured position on the other side of a pile of chicken manure. There was a passageway of four feet which was used by truckers, employees of defendant, to cart freight from elevator through Section S. These employees piled stuff in the section and in using their hand trucks would be obliged to move the radiator which was in the passageway or in close proximity to passageway. The defendant company put in no evidence to overcome this presumption. No evidence that outside drivers had free access to Section S. No evidence that defendant's servants moved standing radiator from its unsecured position in the morning or afternoon of October 21st. Clerk of Section S might have seen radia-

tor and assumed that because he examined tag and saw whom it was addressed to, it was all right. Defendant's servants failed to make a proper examination or inspection of the radiator or delivery platform on the date of the accident. The evidence of Mr. Regan was so uncertain and contradictory that it was a question of fact for the jury to determine how much of employee's statements were true. Defendant company failed to show that its servants had taken any means to safeguard plaintiff while on its premises. The radiator was in the custody and under the management of defendant's servants and defendant was obliged to use a reasonable amount of care to protect plaintiff.

There was no evidence that the plaintiff in any way caused the radiator to fall and the fact that radiator in falling hit and crushed part of his toes, was sufficient to convince a jury that plaintiff was not close to the radiator. Inspection made by defendant's servant failed to show how and in what manner radiator was standing on floor. There was great possibility of radiator leg resting on a small piece of cement and radiator falling of its own weight or by a slight jarring of floor when train pulled in station of defendant. The rule *res ipsa loquitur* can be applied to this case.

Sheridan v. Foley, 58 N. J. Law 230.

Burne v. Boadle, 2 H. & C. 722.

Battschinger v. Robinson, 83 N. J. L. 739.

Sefler v. Vanderbeek & Sons., Inc., 96 Atl. Rep. 1009.

Deronet v. F. W. Woolworth Co., 99 Atl. Rep. 126.

II.

THERE WAS NO ERROR IN THE CHARGE OF THE TRIAL COURT.

A

The statement of law contained in the charge is correct because it is left to the jury to say whether or not there was sufficient time to rem-

edy the dangerous condition and presupposes that the jury would find that there was sufficient time to remedy the defective condition. The Trial Court made his charge in this manner because of the uncertainty and questionable value of the testimony of employee in charge of Section S. This extract from charge of Trial Court is made more clear by the repeated statements of the Trial Court that the defendant company was not an insurer and was simply obliged to use reasonable care.

Seftler v. Vanderbeek & Sons, supra.

Deronet v. F. W. Woolworth Co., supra.

B.

This is a plain and correct statement of the duty of the defendant company. There was no evidence that the delivery platform and radiator was carefully and properly inspected on the morning of accident.

Battschinger v. Robinson, supra.

Branagan v. Public Service Ry. Co., 85 N. J. L. ~~256~~ 365

C.

The rule quoted by appellant is not applicable to this case as contributory negligence was not pleaded. The question in this case was whether the defendant company through its servants and employees were guilty of negligence, under the facts of this case and that was properly a question for the jury. This Court has repeatedly held that where only a slight degree of negligence is proven by the plaintiff, the question of negligence is a question for the jury.

Deronet v. F. W. Woolworth Co., supra.

Branagan v. Public Service Ry. Co., supra.

Schmatterer v. Bamberger & Co., 81 N. J. L. 558.

Respectfully submitted,

C. HERBERT WALKER,

Of Counsel.

New Jersey Court of Errors and Appeals.

ANDREW J. COLLINS,
Plaintiff-Respondent,

vs.

THE CENTRAL RAILROAD COM-
PANY OF NEW JERSEY,
Defendant-Appellant.

On Appeal from
Essex County
Circuit Court.

BRIEF FOR APPELLANT.

This action was instituted in the Essex County Circuit Court to recover for injuries sustained by plaintiff on October 21st, 1915. Originally there were two defendants, the Railroad Company and the Newark Warehouse Company, but at the trial a voluntary nonsuit was entered as to the Warehouse Company (Rec., p. 8). The negligence alleged was that an unprotected radiator had been placed or allowed to remain in a passageway in defendant's freight station in the warehouse building of the Warehouse Company, which fell over and struck plaintiff as he was loading some bags of chicken manure consigned to his employer, upon his truck (Rec., p. 3). The trial having proceeded against the Railroad Company alone, resulted in a verdict in favor of the plaintiff, upon which the judgment now under review was entered.

Statement of the Case.

The scene of the accident was an L-shaped platform about ten feet wide, raised above and facing a driveway on which wagons came in from the street (Rec., pp. 9, 18, 19, 54). This platform was lighted by electric lights which were burning when the accident occurred, and there was one light within ten feet of where plaintiff was injured (Rec., pp. 12, 31, 38, 47).

On the day of the accident, plaintiff had come to this platform to get a load of chicken manure consigned to his employer (Rec., p. 37). This manure was in bags piled in a portion of the platform known as Section S, and extended from the rear wall for a distance of about four feet (Rec., p. 11). The radiator which injured plaintiff was also in Section S, awaiting delivery, having been brought into the section after the manure (Rec., p. 25). This radiator was about three feet long and from two and a half to three feet wide, and its width was variously estimated at from ten inches to two and a half feet (Rec., pp. 11, 30).

When the radiator was first brought into Section S, it was placed against the rear wall, to the left of the pile of chicken manure (Rec., pp. 13, 18, 24, 27, 30, 33). The accident occurred in the afternoon, and the radiator was last observed by the employees of the defendant prior to the accident, between eight and nine that morning, at which time it was standing up against the rear wall (Rec., pp. 24, 37). After plaintiff arrived at the platform, he went to the office to get his delivery papers, and then started to load the manure upon his truck (Rec., p. 37). He testified that he took one bag from the pile and put it on his truck and then started back to get another. On the way back the radiator fell on his foot and injured him (Rec., pp. 37, 38).

He said that he had not observed the radiator before it fell on him (Rec., p. 39) and that he had not touched it (Rec., p. 38). He also testified that at the time the accident happened, he heard a train running on the Central Railroad outside the building (Rec., p. 41). There was no proof, however, that the passage of this train had any connection with the fall of the radiator, and it appeared that the building in which the accident occurred was a modern concrete and steel structure erected on a pile foundation driven to a hard bottom (Rec., p. 55).

After the accident the radiator was found lying to the right and in front of the pile of chicken manure (Rec., pp. 10, 14, 20, 27). There was no proof that it had been moved to this place by the employees of the defendant, and it appeared that none of the employees of the defendant would have any occasion to move it after it had been placed against the wall in Section S (Rec., pp. 14, 16, 28). It also appeared that persons not employed by the Railroad Company—truck drivers who came to get freight—had access to this section (Rec., p. 14).

There were motions for a nonsuit and for the direction of a verdict in favor of the defendant, both of which were denied.

Errors Relied Upon.

2) The Judge before whom the trial of the issues joined between the parties was had, erroneously refused to grant defendant's motion for a nonsuit at the close of plaintiff's case.

3) The said Judge erroneously denied defendant's motion for the direction of a verdict in its favor at the close of the whole case.

4) The said Judge erroneously charged the jury as follows:

“If the defendant company had, at any time before the accident, either knowledge or notice of a dangerous condition of its premises it would have been negligence on the part of the company not to have remedied this condition.”

5) The said Judge erroneously charged the jury as follows:

“It was also the duty of the company to make a proper inspection of the premises from time to time.”

8) The said Judge erroneously charged the jury as follows:

“You will carefully consider it, and if you find that this accident was not an accident which was caused by any failure of the company to perform any duty that the law cast upon it, in keeping the place in a reasonably safe condition, your verdict should be for the defendant. If, on the other hand, you find that it was caused by the negligent failure of the company to use reasonable care, then your verdict will be for the plaintiff, and you should determine the damages on the lines that I have mentioned to you.”

9) The said Judge erroneously charged the jury as follows:

“The whole question is for you to determine whether or not the company performed its duty. If it did, they are not liable; if it did not, then they are.”

ARGUMENT.**I.**

The trial Court erred in refusing to grant a nonsuit and to direct a verdict in favor of the defendant.

When plaintiff rested his case, there was no evidence tending to show that there was anything about the radiator itself or about its position at the time the accident occurred which would lead a reasonably prudent man to anticipate that it would be likely to injure plaintiff. There was no evidence tending to show that the radiator had been placed in the position where it was at the time of the accident, by the employees of the defendant; and it appeared that it was just as likely that it had been placed there by the outside truck drivers. There was no proof that its position had ever been in fact brought to the previous notice of the defendant or that it had remained in that position for such space of time before the accident as would have afforded the defendant sufficient opportunity to make proper inspection of its delivery-platform to ascertain its condition as to safety and remove the radiator back against the wall again. We think that on this state of the proofs a nonsuit should have been granted and that a verdict should have been directed in favor of the defendant.

Schnatterer v. Bamberger & Co., 81 N. J. Law, 558.

Buda v. Dzuretzko, 87 N. J. Law, 34.

Vecsy v. Central R. Co., 88 N. J. Law, 177.

II.**There was error in the charge of the trial Court.***a.*

The trial Court charged the jury as follows:

“If the defendant company had, at any time before the accident, either knowledge or notice of a dangerous condition of its premises it would have been negligence on the part of the company not to have remedied this condition” (Rec., p. 66).

The rule as laid down by this Court in *Schnatterer v. Bamberger & Co.* (*supra*) is not that knowledge or notice at any time before the accident is sufficient to charge the defendant with negligence, but that the defect must have existed for such space of time before the occurrence of the accident as would have afforded the company sufficient opportunity to make proper inspection of its premises to ascertain their condition as to safety and to repair their defects.

The charge as given was clearly prejudicial to the defendant. Under it the jury were justified in finding the defendant guilty of negligence if its employees had discovered that this radiator was in a dangerous position so short a time before the accident occurred that it would be impossible for the employee making the discovery to get from the place where he was to the radiator to change its position before plaintiff was injured.

b.

The trial Court further charged:

“It was also the duty of the company to make a proper inspection of the premises from time to time” (Rec., p. 66).

The uncontradicted evidence showed that defendant's employees had inspected the delivery-platform between 8 and 9 o'clock on the morning of the day of the accident, and at that time had found the radiator in a safe position against the rear wall. The evidence being undisputed, it was error to submit to the jury the question whether that inspection was sufficient.

Timlan v. Dilworth, 76 N. J. Law, 568.

c.

The Court further charged the jury as follows:

"You will carefully consider it, and if you
 "find that this accident was not an accident
 "which was caused by any failure of the com-
 "pany to perform any duty that the law casts
 "upon it, in keeping the place in a reasonably
 "safe condition, your verdict should be for the
 "defendant. If, on the other hand, you find
 "that it was caused by the negligent failure of
 "the company to use reasonable care, then your
 "verdict will be for the plaintiff, and you
 "should determine the damages on the lines
 "that I have mentioned to you" (Rec., p. 69).

"Gentlemen, you must take all this into con-
 "sideration. The whole question is for you to
 "determine whether or not the company per-
 "formed its duty. If it did, they are not liable;
 "if it did not, then they are" (Rec., p. 70).

As we understand the rule of law, plaintiff was not entitled to recover unless he had proved that the defendant was negligent by a fair preponderance of the evidence. We think that these portions of the charge conflict with that rule because they in effect placed upon the defendant the burden of exculpating itself from the charge of negligence.

Respectfully submitted,

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 Of Counsel.

