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Notice of Appeal.

(Filed July 21, 1920.)

HUDSON COUNTY CIRCUIT COURT.

MICHAEL GRIFFIN,
Plaintiff.

vs.

JOHN BARTON PAYNE, Director
General of Railroads, Agent.
Defendant.

Action at Law. 10

To ALEXANDER SIMPSON, Attorney for Plaintiff.

Take notice that the defendant appeals to the
Court of Errors & Appeals of the State of New
Jersey, from the whole of the judgment entered
in this case, upon the following grounds: 20

1. Because the trial court refused to grant a
judgment of non-suit in favor of the defendant
and against the plaintiff.

2. Because the trial court refused to direct a
verdict in favor of the defendant and against the
plaintiff.

Very respectfully, 30

WALL, HAIGHT, CAREY & HARTPENCE,
Attorneys for Defendant-Appellant.

Dated July 16th, 1920.

(Indorsed)

Service admitted.
ALEX SIMPSON.

40

Complaint.

(Filed October 1, 1919.)

HUDSON COUNTY CIRCUIT COURT.

MICHAEL GRIFFIN,

Plaintiff,

vs.

10

WALKER D. HINES, Director General of Railroads, operating Pennsylvania Railroad Company and Cleveland, Cincinnati, Chicago & St. Paul Railway,

Defendant.

} Action at Law.

20 The plaintiff who resides at No. 488 Grove Street, in the City of Jersey City, in the County of Hudson, says that:

1. The defendant is now and was at all times hereinafter mentioned, in control and management of the Pennsylvania Railroad Company and the Cleveland, Cincinnati, Chicago & St. Paul Railway.

30 2. The plaintiff on the 21st day of August, 1919, at Jersey City, in the County of Hudson, was injured through the negligence of the defendant.

3. The negligence of the defendant consisted in this:

40 That while the plaintiff was engaged in unloading hams from a car of the Cleveland, Cincinnati, Chicago & St. Paul Railway, upon the tracks of the Pennsylvania Railroad Company, at Jersey City, as he was in the act of opening the car door,

Complaint.

because of the negligence of the defendant to use reasonable care to see that said car was in proper state of repair, by reason of the wood where the hinges of said door were fastened to the car giving way, the said door fell and injured the plaintiff.

4. Plaintiff was at all times in the exercise of due care for his safety. 10

5. By reason of said accident, plaintiff was injured permanently in and about his scalp and brain.

6. Plaintiff by reason of said injuries was forced to expend money for medical expenses and has lost earnings he otherwise would have made.

Plaintiff demands \$10,000 damages. 20

ALEX. SIMPSON,
Attorney for Plaintiff.

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Answer.

(Filed October 16, 1919.)

HUDSON COUNTY CIRCUIT COURT.

MICHAEL GRIFFIN,
Plaintiff.

10

vs.

JOHN BARTON PAYNE, Director
General of Railroads, Agent.
Defendant.

} Action at Law.

20 The defendant, WALKER D. HINES, as Director General of Railroads, but only in his capacity of such Director General, in possession of and operating the Pennsylvania Railroad, answering the complaint herein, says that:

30 (1) The summons and complaint herein were served upon C. I. Leiper, the Superintendent of the New York Division of the Pennsylvania Railroad, and defendant appears herein and answers only in his capacity of Director General of Railroads in possession of and operating the Pennsylvania Railroad and not in his capacity as Director General of Railroads in possession or operation of any other railroad whatsoever.

40 (2) He admits that at all times mentioned in the complaint he was in control and management of the Pennsylvania Railroad, in his capacity of Director General of Railroads, pursuant to the provisions of the Acts of Congress approved August 29, 1916, and March 21, 1918, and of the proclamations and orders of the President of the United States made in pursuance thereof, and not

Answer.

otherwise. He denies all other allegations of the first paragraph.

(3) He denies the second paragraph and says that the plaintiff was not on the 21st day of August, 1919, or at any other time injured through any negligence of the defendant in connection with his operation of the Pennsylvania Railroad. 10

(4) He denies the third paragraph, and says that he was not as Director General of Railroads guilty of any negligence in connection with the operation of the Pennsylvania Railroad.

(5) He denies the fourth paragraph.

(6) He denies the fifth paragraph.

(7) He denies the sixth paragraph.
Second Defence: 20

(1) Plaintiff assumed the risk out of which his alleged injuries, if any, arose.

(2) The injuries of the plaintiff, if any, were occasioned by his own negligence.

Third Defence:

The negligence, if any, out of which defendant's alleged injuries arose, was not negligence in connection with or arising out of the operation of the Pennsylvania Railroad, and this defendant is not liable in this action for negligence arising out of the operation of any other railroad than the Pennsylvania Railroad. 30

VREDENBURGH, WALL & CAREY,
Attorneys of Defendant in his capacity of Director General of Railroads, in possession and engaged in operating the Pennsylvania Railroad only. 40

Judgment.

(Entered July 2, 1920.)

This action was tried before Judge Luther A. Campbell with a jury at the Hudson Circuit June 30th, 1920.

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

10 They say they find for the plaintiff and against the defendant and they assess the damages of the plaintiff on occasion of the premises at the sum of One Thousand Seven Hundred and Fifty (\$1,750,00) Dollars.

20 Whereupon it is adjudged that the plaintiff recover of the defendant the sum of One Thousand Seven Hundred and Fifty Dollars damages and his costs which are taxed at Fifty Three Dollars and Eighty-one cents (\$53.81), making in the whole the sum of One Thousand Eight Hundred and Three Dollars and Eighty-one cents (\$1,803.81).

Judgment entered this 2nd day of July, 1920.

LUTHER A. CAMPBELL,
Judge.

30

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Testimony.

HUDSON COUNTY CIRCUIT COURT.

MICHAEL GRIFFIN,

Plaintiff.

—vs.—

JOHN BARTON PAYNE,
*Director General of Railroads,
as Agent, Etc.*

At Law.

10

APPEARANCES:

Alexander Simpson for the Plaintiff.

Vredenburgh, Wall & Carey (Eugene H.
Vredenburgh) for the Defendant.

20

The above entitled case was tried June 30th, 1920, before Honorable Luther A. Campbell, Judge, and a jury.

Mr. Simpson opened the plaintiff's case to the jury. Mr. Vredenburgh opened the defendant's case to the jury.

MICHAEL GRIFFIN, SWORN

Direct Examination by Mr. Simpson:

30

Q. Where do you live? A. 488 Broad Street, Jersey City.

Q. How old are you? A. How old am I? 41 years old.

Q. And on the 21st of August 1919, were you working for the Merchants Refrigerating Company? A. Yes sir.

Q. Where? A. At Second and Warren Street, Jersey City.

Q. Jersey City? A. Yes sir.

40

Michael Griffin, for Plaintiff—Direct

Q. And how long had you been working for them? A. Five years last April.

Q. Is there a railroad siding alongside of the warehouse? A. Yes sir.

Q. Whose siding is it? A. It is on the Second Street side.

Q. But whose siding is it? A. It is the Pennsylvania siding. It is the only one.

Q. On the 21st of August was there a train of cars brought there? A. Yes sir.

Q. Who brought them there? A. Pennsylvania Railroad.

Q. What did you do with these cars, if any thing? A. We unloaded the freight.

Q. What did you do? A. I went to open the car door.

Q. Where was the car that you went to open the door? A. Right on the siding.

Q. What did you attempt to open the door for? A. So as to unload the car.

Q. What kind of a door was it, a sliding door? A. No sir.

Q. What kind of door? A. Regular refrigerating door.

Q. How does it open, outward? A. It swings out on hinges in two halves.

Q. Two halves? A. Yes sir.

Q. When you attempted to open this door did anything happen? A. Yes sir.

Q. What happened? A. One side of the door fell on me; one side fell down and caught me on the head.

Q. Where were you standing? Where were you standing under the car, that is, in the sense of being below the level of the door— A. Yes sir.

Q. Or were you up on a platform on the level of the floor? A. I was standing on the street side below the level of the door.

Michael Griffin, for Plaintiff—Direct

Q. So when this door fell on you it fell on you as you were standing on the street? A. Yes sir.

Q. What part of your head did it hit? A. Right here, the right side of my head.

Q. What happened to you? A. I was crushed; I had to have it stitched.

Q. How many stitches? A. There were seven or eight; I won't be positive, but the Doctor is here that stitched it. 10

Q. Were you taken to St. Francis Hospital? A. Yes sir.

Q. In an ambulance? A. Yes sir.

Q. How long did you remain there? A. Until about six o'clock that evening; sometime around six.

Q. How long were you confined to your house? A. I was confined to my house about five weeks all together. 20

Q. Who was your Doctor at your house? A. Doctor Crowley.

Q. How much did you weigh when you were hurt? A. I weighed about 162 pounds.

Q. What do you weight now? A. About 142.

Q. Have you noticed any effect in your head since this accident? A. Yes sir; all the time.

Q. What effect? A. Dizziness and headache.

Q. And you are under treatment for them? A. Yes sir. 30

Q. By Doctor Crowley? A. Doctor Crowley.

Q. Now, did you see after the door fell on you—did you see why it fell on you? A. No sir; I was knocked out.

Q. You were knocked out? A. Yes sir.

Q. Who was there with you? A. Michael O'Connor and Patrick Jennings.

Q. And what wages did you lose? A. Well, I was getting \$29 a week and I lost seven weeks wages. 40

Michael Griffin, for Plaintiff—Cross

Q. Do you remember what your Doctor's bill was? A. Yes sir; \$40.

Q. Did you have any bills for medicines? A. Yes sir, I did; \$6.25 from Mr. Mooney and \$3.50 from St. Francis Hospital, ambulance.

Q. Anything else? A. That is all that I can remember.

10 Q. And that is the only cut you got, the one that took seven stitches? A. Yes sir.

Q. And where did you get that cut? A. Right in this side, the right hand side.

Mr. Simpson: Cross examine.

Cross Examination by Mr. Vredenburgh:

Q. What time of day were you to unload this car? A. Between three and four o'clock; it may be around half past three; it was between three and four.

20 Q. What time did the car get there, do you know? A. It must be in there long ahead of that, because we are generally called to unload them when they come in.

Q. What were you working on at that time? A. At that time I was upstairs putting away a samples of eggs; and I came down, the cars were in.

Q. What kind of work did you do? A. What 30 kind of work do I do?

Q. Yes. A. Regular—loading and unloading cars—porter work.

Q. Now, that Second Street siding, there is a platform on one side, is there not? A. Yes sir.

Q. That is, there is a platform along the edge of the warehouse? A. Yes sir.

Q. And what is on this side? A. The street.

Q. Is there a roadway along the track? A. This is Second Street; right outside of the tracks 40 is the roadway.

Michael Griffin, for Plaintiff--Cross

Q. And which side of the car was this door on that you opened? A. On the north side, the side of the roadway.

Q. The side of the roadway? A. Yes sir.

Q. And which side of the car did you unload? A. The platform side.

Q. The south side? A. Yes sir.

Q. Why did you go around the car and open the door on the other side? A. Because I was told; that is the custom. There is a big shed covers those cars to the middle of the car, thrown off the building. When you open the inside door on the platform you cannot see what you are doing. It is the custom to open the outside door so as to see what you are doing. 10

Q. Do you remember having a conversation with Mr. Graham about this accident shortly after you were injured? A. I don't know the gentleman. 20

Q. Do you remember having a conversation with somebody? A. Somebody concerning whom?

Q. Somebody from the Pennsylvania Railroad Company? A. Yes sir; there was a gentleman down there on the day.

Q. You say you had been working five years? A. Five years last April, the date that happened.

Q. How many cars did you open every day? A. Oh, well, I could not exactly tell you. I opened a good many? 30

Q. One or two? A. What is that.

Q. One or two? A. Yes, and eight and twenty, probably, according to what comes in.

Q. Ten and twenty maybe? A. Yes sir.

Q. Cars every day? A. Yes sir—I would not say every day; but some days.

Q. Some days there are ten and twenty? A. Some days one, some days none, some days there probably may be twenty, fifteen. 40

Michael Griffin, for Plaintiff—Cross

Q. You opened doors like this all the time? A. Pretty near all the time, yes.

Q. For five years? A. Yes.

Q. How do you open these doors, Mr.? A. You open these doors—there is an iron bar goes into a socket on top, and another one on the bottom.

10 Q. Yes. A. Then there is an iron handle in the middle connects with both parts; so you take your lever out after you break the seal; you swing the lever up a bit and you disconnect the top bolt and the bottom bolt; and then you push the lever against a little handle that is there so as the door will open out.

Q. Now, suppose that is the top of the car and that is the bottom of the car and these are the two sides of the door here. This is the center of the door— A. Yes.

20 Q. Now, right here there is an iron bar or rod that goes up? A. Yes; it is closer to the center of the door.

Q. Well, it is closer over here to the center. A. Yes.

Q. Over here there is another rod that goes down, isn't there? A. Yes.

Q. And here is a little lever that you work these rods with? A. Yes sir.

30 Q. You push that lever up? A. You swing that up.

Q. Swing that up. Now, when that lever is down this rod goes through the top of the door and into the— A. Socket.

Q. — a socket in the car, does it not? A. Yes sir.

Q. And this one, rod, on the bottom part of the door goes into another part of the socket? A. Yes sir.

40 Q. And the effect of raising this handle or moving or twisting this handle is to pull that socket

Michael Griffin, for Plaintiff—Cross

up there and pull that one down there to free the door, isn't it? A. Yes.

Q. What did you see when you went around to the north side of this car to open up the door?

A. I see a piece of a board nailed across the door, close to the bottom.

Q. Close to the bottom? A. Yes.

Q. Across here? A. Yes.

Q. Like that? A. Yes; not quite so high.

Q. Little bit nearer the bottom than that? A. Yes sir.

Q. This is the edge of the door here? A. That is what?

Q. That is the way it was, is it? A. Yes.

Q. Was it on the outside or was it—

Mr. Vredenburg: Strike that out.

Q. Was that piece over the handle that I speak about or underneath? A. It was over the bar that runs down; it was not as high up as to reach the lever that turns the handle.

Q. You could not move that lever until you got the cleat off, could you? A. You could.

Q. You could? A. Yes, but you could not move the lever until you got the seal off.

Q. You could not move the lever until you got the seal off? A. No. The lever is made fast to the lower part of the bolt.

Q. You broke the seal, did you? A. Yes sir.

Q. You always break the seals on these cars? A. Yes, whoever is sent to break them get orders to unload the cars and break the seal.

Q. There is no railroad employee there to break the seal? A. No, not that I know of. I never seen him.

Q. Never saw him? A. No.

Q. As a matter of fact, when the cars are put on the Second Street siding up against the warehouse, after that they are in the hands of ware-

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Michael Griffin, for Plaintiff—Cross

house company employees? A. That is what I understand.

Q. The warehouse has nothing to do with it? A. No.

Q. What was the first thing you did when you got around the north side of the car? A. I broke the seal, took the seal off, put it in my pocket
10 so as to hold it for the checker and get the number of it.

Q. What did you do then? A. I loosened the board off.

Q. Took down the cleat? A. Yes.

Q. What did you do then? A. I turned the lever, as I said, for to open the door, and just as I freed the bolt, the top and bottom, the door bounced out on me.

Q. You got this cleat off, did you? A. Yes sir.

Q. How did you get it off? A. With my hatchet.

Q. With your hatchet? A. Yes sir.

Q. And axe? A. Yes, an axe, a small axe. I carry it in my pocket. It broke off in pieces. I beat it down and it broke off in pieces.

Q. Where did you hit it? A. On the edge of the board.

Q. Here, the edge? A. On the center.

Q. Here? A. Across to the handle.

Q. Here? A. Yes, because on account of the bar being inside it came out from the door and all; so I could hit it better there.

Q. And the whole cleat fell down? A. Yes; I pulled it off; yes.

Q. How were those doors locked? A. What is that?

Q. How do they lock those door? A. Just the same as you see there.

Q. With a seal on? A. Yes.

Q. It never occurred to you that there was
40

Michael Griffin, for Plaintiff—Cross

anything the matter with those doors? A. No sir; it looked as clear to me as that board there does.

Q. Do they have cleats on every door? A. Not every door. Very often they are cleated, and in other cases if doors are not cleated they are spiked with nails like that so as to make hard the opening or something; I don't know the reason why. 10

Q. Well, they don't put a cleat on the door unless there is something the matter, do they? A. I don't know anything about that.

Q. Now, those rods that go up into the top of the car will hold the door in end to end position very well or firmly, won't they? A. Hold the door in position?

Q. Those two rods that go up while the handle is down? A. Yes. 20

Q. And when you turn the handle the door is released? A. Yes.

Q. But when the handle is down the door is securely locked in? A. Yes.

Q. Can't move. Where do you say you work now, Mr. Griffin? A. Pardon me.

Q. Where do you say you work now? A. The Merchant's Refrigerating Company.

Q. Same place? A. Yes sir.

Q. What do you do now? A. I do light jobs around, such as pack eggs, cooper up cases, and one thing and another. 30

Q. And how much are you getting a week? A. I am getting a weekly salary, \$32—

Q. Same as you were in 1919? A. Yes sir.

Q. Do you wheel around articles of freight on a hand truck? A. No sir; the boss won't let me. He says I ain't fit to do it.

Q. You have never done that since? A. No sir, not since I was hurt. 40

Michael Griffin, for Plaintiff—Redirect
William F. Hill, for Plaintiff—Direct

Q. Quite sure of that? A. Certainly.
 Mr. Vredenburgh: That is all.

Redirect Examination by Mr. Simpson:

Q. Those doors come cleated frequently that way? A. Quite often.

10 Q. You have to knock the cleats off? A. Quite often.

Q. And it did not indicate to you there was anything the matter with the door? A. No sir; there was no sign whatsoever.

Mr. Simpson: That is all.

(Witness excused)

20 WILLIAM FRANCIS HILL, SWORN.

Direct Examination by Mr. Simpson:

Q. Doctor Hill, did you attend this man Griffin at St. Francis Hospital? A. Yes sir.

Q. Will you please tell these gentlemen what his condition was? A. Well, Mr. Griffin had a concussion on the brain and he had a laceration of the scalp.

Q. Can that concussion of the brain be caused by violence by being struck by a door in the head.
 30 A. Yes.

Q. And what does that mean, a concussion of the brain? It that a jarring of the brain? A. Well, concussion of the brain means his whole brain refuses to act and he is unconscious.

Q. And did you put any stitches in his head?
 A. I think I put about seven or eight; I am not positive.

Q. Then he went or was taken home? A. He
 40 was taken home that night from the hospital.

William F. Hill, for Plaintiff—Cross

Q. You did not see him after that? A. No; I did not see him after that, except a few days ago.

Mr. Simpson: That is all. Cross examine.

Cross Examination by Mr. Vredenburg:

Q. The first time you saw Mr. Griffin was in the hospital, Doctor? A. I think I treated him in the ambulance; I went down and got him in the ambulance. 10

Q. You went for him in the ambulance? A. Yes, I went there for him, and I treated him in the hospital, in the emergency room and stitched up his head and dressed him up.

Q. How long did you examine him? A. Well, I could not say exactly; I guess about a half an hour it took me to go over him and stitch his head up.

Q. Shave his head and take stitches in it? A. 20 Well, that is customary. I don't know whether we did it in that particular case, but we usually do.

Q. And what led you to believe that he had concussion of the brain? A. For the simple reason that he was unconscious. When I first got him he was unconscious for at least a half an hour, and according to our medical training that means concussion of the brain.

Q. Then you say that every one that is knocked 30 unconscious and remains so for a period of thirty minutes has concussion of the brain? A. Well, not every one who is knocked unconscious, but every one who is hit on the head and has an evident laceration of the head and is unconscious for at least one or two minutes has concussion of the brain.

Q. For at least one or two minutes? A. Yes.

Q. Did you at that time form any opinion as to the permanency of the injury? 40

Leo. F. Crowley, for Plaintiff—Direct

Mr. Simpson: I have not asked him that.
I am not proving permanency by him.

Mr. Vredenbrrgh: That is all, Doctor.

Mr. Simpson: That is all.

(Witness excused)

10 LEO F. CROWLEY, sworn.

Direct Examination by Mr. Simpson:

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

Q. How long have you practiced? A. About ten years.

Q. Where is your office? A. Jersey Avenue near 8th Street.

20 Mr. Vredenburgh: Qualifications are admitted.

Q. Now, did you attend Michael Griffin from the night of his injury; that is, the night he came from the hospital until the present time? A. I don't know whether night, counsellor.

Q. Well, the next day did you see him? A. The next day or two.

30 Q. What was his condition when you first saw him? A. Well, he had a scalp wound of—in which several stitches had been taken; I don't know how many; and he was suffering from a concussion of the brain and a straining of the muscles in his neck and the back.

Q. And how long did you treat him at his house, about? A. I imagine around six weeks; I think two or three days a week; something like that.

Q. Since that time has he been to see you? Have you prescribed for him? A. Yes, up to 40 within a month I have seen him.

Leo. F. Crowley, for Plaintiff—Cross

Q. What in your opinion is his condition now? Has he complained to you of headaches? A. Yes.

Q. Dizziness. Well, if that is true in your opinion is he still suffering from the effects of this blow? A. Yes sir.

Q. He says at the time of the accident he weighed 162 pounds; he now weighs 142 pounds. Would that indicate anything to you as to his condition as the result of this accident? A. Well, I would not say that entirely; I would not say it would not, either. I know he had a much healthier look the last four or five years since he has been a patient of mine than since this accident. 10

Q. What is your opinion as to the duration of it? A. I cannot say that, although this chronic headache has been lasting quite a long while.

Q. Lasting longer than it should? A. Longer than it should, longer than it usually does. 20

Q. Your bill was forty some odd dollars? A. About in that neighborhood, yes.

Mr. Simpson: That is all.

Cross Examination by Mr. Vredenburgh:

Q. You say Mr. Griffin had been in better physical condition before the accident than he was after the accident? A. I don't remember treating Mr. Griffin before this accident, although I treated other members of his family, and he was a good, healthy looking man as far as I could see. 30

Q. It is your opinion that this blow pushed upon the head or upon the brain of Mr. Griffin to cause a permanent— A. Well, you get a shaking up of all the brain tissue and the cells. Now, what the pathology of his brain is just now I could not tell you. The chances are the brain tissue and cells have not readjusted themselves. 40

Leo. F. Crowley, for Plaintiff—Cross

Q. What treatment do you recommend for it?

A. A little potassium iodide; that is all.

Q. Pardon. A. A little potassium iodide, rest, not too violent labor.

Q. What is that? A. If there are any clots of blood or any traces of blood that will promote the exhaustion with the potassium iodide.

10 Q. If there were a clot of blood in his brain—

A. That will do the same thing; give him the same medicine for that.

Q. But his condition would be much more serious than it is now? A. Oh, yes.

Q. He has not got a clot? A. I don't think so.

Q. What do you think he has got? A. Just shaking up of the brain cells; that is all. They have not readjusted themselves.

20 Q. Won't they come back? A. There is undoubtedly some little hemorrhage in there from the concussion that has not been all absorbed. I would not say it was a clot.

Q. If it were all absorbed what would be his condition? A. Then he ought to be in normal shape again.

30 Q. What is the rate at which these clots are absorbed in the natural process? A. Why, most men that I have with concussion of the brain, it lasted maybe a month, a matter of weeks, nothing to what this man has had. It is almost a year now, I think, since this man was hurt.

Mr. Simpson: About ten months.

40 Q. Well, what length of time do you say it will take for the clot or hemorrhage to be absorbed and for Mr. Griffin to be again a normal man, as you said he would in time be? A. I would not say that he would be in good shape again, because he is so long getting better now.

Leo. F. Crowley, for Plaintiff—Cross

He certainly had a reasonable time to get better.

Q. Then this blood will not absorb in Mr. Griffin's head? A. I don't think I said he had a clot of blood there. If he had a clot of blood he would have paralysis.

Q. I asked you what in your opinion he did have if he did not have a clot? A. I said a shaking up, and possibly the remains of a little blood. 10

Q. And you said the remnant of the little blood would be absorbed in the course of time? A. It usually takes two or three weeks as a rule.

Q. Well, then, he must have something else. A. Well, he could not have anything else. He has got no clot of blood. He would have paralysis in some part of his anatomy. It might have been an abscess of the brain, but he has not got that. 20

Q. You specify several things, including clots and abscesses, that he has not got. Now, what in your opinion has he got? A. I just told you about three times a shaking up of his brain cells, which is all there is happens with concussion, and possibly a little hemorrhage or extravasation of blood that does not produce a clot, and when that is absorbed he might have some little pigment left in, and that is about all.

Q. How do you explain— 30

Mr. Vredenburg: Strike that out.

Q. How do you attribute loss of weight to concussion of the brain? A. I do not.

Q. To what do you attribute it? A. I don't know in Mr. Griffin's case.

Q. Then his loss of weight has nothing whatsoever to do? A. It may be—

Q. Excuse me. His loss of weight has nothing whatever to do with the blow he received on 40

Leo. F. Crowley, for Plaintiff—Cross

the head? A. Not directly. It could be—it could happen to his nervous system. He certainly is in a nervous condition since the accident. The nervousness and the effect it has had on his stomach would cause him to loose weight. I have been treating him for his stomach since.

10 Q. Have you treated Mr. Griffin for any other ailment since the date of the accident? A. Only, as I said, his stomach; that is all.

Q. What? A. His stomach.

Q. His stomach? A. That is what I remember treating him for.

Q. What is the matter with his stomach? A. He has been complaining of his stomach bothering him, pain in his stomach, bothered with gas and fermentation of his food.

20 Q. What is the cause of that in your opinion? A. I think it is due to his nervousness, nervous gastritis.

Q. What treatment did you give him for his nervous indigestion? A. I gave him the regular routine treatment that I have for that. I couldn't tell you what the prescription was I gave him just now; it would change. Sometimes you give him one thing and sometimes you give him another.

30 Q. Is that a curable— A. And I had him on a diet—sure, it had helped him a little bit; it has not cured him.

Q. When do you think he will recover from his nervous indigestion? A. I could not tell you that, whether he is ever well or not.

Q. Don't you think that his loss of weight is due to nervous indigestion and not to concussion of the brain?

The Court: That is what he has practically said.

40 The Witness: I have told you that a couple of times.

Leo. F. Crowley, for Plaintiff—Redirect
Michael O'Connor, for Plaintiff—Direct

Redirect Examination by Mr. Simpson:

Q. Shock and concussion of the brain frequently produce nervousness? A. Yes sir.

Q. And without another cause that in your opinion would be a diagnostical reason for attributing his nervousness to shock from the accident, wouldn't it? A. Yes sir.

10

Mr. Simpson: That is all.

Mr. Vredenburgh: That is all.

(Witness excused)

MICHAEL O'CONNOR, SWORN.

Direct Examination by Mr. Simpson:

Q. Mr. O'Connor, on the 21st day of August, 1919 were you at the Merchants Refrigerating Company? A. Yes sir.

Q. Working there? A. Yes sir.

Q. Did you see this accident on that day to Mr Michael Griffin? A. Yes sir.

Q. What did you see? A. He went out to open the back door of the car. He was too long out, we went out to know what was delaying him opening the door, and he was breaking off the slats that was across the door, and as soon as he lifted up the lever out come the door. The door broke away, jamb and all—hinges and all, from the part of the car that was rotten, and the spikes that was driven in through the jamb, that was holding the door and the jamb, and to the car, came away when the weight came on the door, and it caught Griffin on the head before Griffin could get away from it.

30

Q. Did you look at that door after the accident? A. Yes; I did.

40

Michael O'Connor, for Plaintiff—Cross

Q. Now, where did you find it rotten, as you say? A. It was on top where the spikes were driven into the car.

Q. What were the spikes driven in? A. The top and bottom of the jamb.

Q. This little work of art of Mr. Vredenburgh's—can you come down and point out on this where
10 it was the spikes went in? A. Right here.

Q. Where the spikes went in on top? A. The top of the jamb.

Q. And you say the wood was rotten then? A. Yes sir, it was; it was like saw dust.

Q. Did you call the attention of Mr. Julian, the Pennsylvania Railroad car inspector, to the condition of the door? A. Not me. I suppose somebody else did.

20 Mr. Simpson: Cross examine.

Cross Examination by Mr. Vredenburgh:

Q. When did you get the door on the south side of the car open? A. The door that faced—

Q. The platform. A. When did we get it open?

Q. Yes. A. About half past three, I guess. Something about that time.

Q. About half past ten? A. Half past three.

Q. Did you open that door? A. No sir; I didn't.

30 Q. Who did open it? A. Some one of the boys, I guess.

Q. Did you unload this car? A. Sir?

Q. Did you help to unload the car? A. Yes, I did; yes sir.

Q. And it was necessary to open the door on the north side, on the street side, to unload this car, was it? A. Yes sir.

40 Q. Why? A. Because we wouldn't have light enough to unload the freight out of it. Always we do open the outside doors.

Michael O'Connor, for Plaintiff—Cross

Q. Didn't have light enough? A. Yes sir.

Q. How high was the loading platform on the south side where you unloaded the car? A. About three or four feet, I think.

Q. Did it come up to a level with the bottom of the door? A. Not quite. We have a partition, raised piece, put up on the platform into the car, because the car is about that far from the platform, the door. We have to use a raised piece between the car door and the platform coming out with trucks. 10

Q. Where were you standing when Mr. Griffin started to open the door? A. We were standing by the side of the door. I was lucky it didn't come on myself.

Q. You were around on the street side? A. Yes sir; I was.

Q. What did you go over there for? A. To know what was delaying him opening the door. 20

Q. To help him open the door? A. No, what was delaying him from opening the door.

Q. You wanted to find out why he didn't get the door opened. Now, what was the first thing you saw? A. I saw him when he broke off this piece of wood that was across the door. When he lifted the lever the door gave away like that, and it caught Griffin on the head before he could get away from it. 30

Q. What did you say? A. I told him to look out, the door was coming.

Q. Did you yell "Look out!"? A. He was going away from the door.

Q. Did you yell "Look out!"? A. I told him to get away, the door was coming, and it caught him before he could have gone away from it.

Mr. Vredenburgh: That is all.

Mr. Simpson: That is all.

(Witness excused)

Patrick Jennings, for Plaintiff—Direct

PATRICK JENNINGS, SWORN.

Direct Examination by Mr. Simpson:

Q. Where do you live, Mr. Jennings? A. 193 Bay Street, Jersey City.

Q. And on the 21st of August, 1919 were you working for the Merchants Refrigerating Company? A. Yes sir.

10 Q. Did you see this accident to Mr. Griffin? A. Yes sir.

Q. What did you see? A. I seen him breaking the board off lifting up the lever and seen the door come out and hit him on the head.

Q. What happened to him when it hit him in the head? A. Why, he was going to fall and I hollered to Connors to run and catch him. He carried him over to the platform.

20 Q. Now, did you look at this door to see what its condition was? A. I did, sir.

Q. Where did you look, what part of the door? A. The side of the door where it was nailed on. That was all rotten, them boards, and where the jamb was the door and jamb all came out, the hinges and all that was on to it, and the jamb was rotten and where it was nailed on was rotten.

30 Q. The jamb came off? A. Came off with the door.

Q. That is the jamb that the hinges were fastened on came off? A. Came off with the door.

Q. So that when the door fell it had the jamb and hinges on it? A. Hinges on it. The hinges didn't come out; it was the jamb came out.

Q. The hinges didn't come out; it was the jamb came out? A. No, it was the jamb came out.

Q. And you say where the jamb came out it was rotten? A. It was rotten.

40 Q. How did you determine that? A. Because

Patrick Jennings, for Plaintiff—Cross

I could pull it out with my hand. I was feeling it.

Q. You could pull it off with your hand? A. Yes, pull off pieces of board with my hand.

Cross Examination by Mr. Vredenburg:

Q. Did you go around to the north side of the car the same time Mr. Griffin went around? A. No; that is my position there all the time. I am 10 watchman there on that side.

Q. You are on the north side? A. North side of the car, yes.

Q. Did you see Mr. Griffin come around to open the door? A. I did.

Q. And did you see Mr. O'Connor—Mr. O'Connor come around? A. I saw him come out through the cars. He come around the street.

Q. Now, Mr. O'Connor got around a minute 20 or two before the door fell, did he not? A. Yes; he got around before the door fell.

Q. And you heard him yell out— A. Yes, and I yelled to Mr. Griffin to "run, Mike."

Q. You yelled to him to run? A. Or he would get killed, and I suppose if he didn't run he would get killed; because if that door ever hit him an inch further in he was killed dead.

Q. He did not run? A. He did run as quick 30 as he could. He got out of the way. If he didn't he was killed.

Q. You don't unload cars yourself, do you? A. I do not. I am watchman.

Redirect Examination by Mr. Simpson:

Q. When you hollered to him he tried to get out of the way but he couldn't get out of the way completely? A. The door jumped out the same as it was alive.

Q. Now, one other thing I want to ask you; 40

Patrick Jennings, for Plaintiff—Recross

are you the gentleman that called Mr. Julian, the Pennsylvania— A. I didn't call him. One of the head galvanizers came out and examined the door.

Q. Were you there when Mr. Julian was there?
A. I wasn't there when Mr. Julian was there, but I was there when the galvanizer was there and
10 examined the door.

Q. Who is the head galvanizer? A. The head galvanizer and car inspector.

Q. Car inspector? A. Yes.

Q. You were there when he examined the door?
A. I was there when he examined the door.

Mr. Simpson: That is all.

Recross Examination by Mr. Vredenburgh:

Q. You say the door jumped right out as if it
20 was alive? A. Same as it was alive, yes; because they were in so close it jumped out.

Q. It didn't walk away after it did that, did it? A. No, it didn't, it fell on the floor, on the street.

Q. It couldn't jump out before he lifted up that lever, could it? A. Of course, he had to lift up that lever to loosen it. That is to keep it fast.

Mr. Vredenburgh: That is all.

Mr. Simpson: That is all.

30

(Plaintiff Rests)

Defendant's Motion For A Non-Suit.

Mr. Vredenburgh: I ask for a non-suit in the case on the following grounds:

On the ground that it is not proved that this car was a car belonging to the Pennsylvania Railroad Company or in the possession of the Director General operating the Pennsylvania Rail-
40 road Company at the time it was opened, or that

Defendant's Motion for a Non-Suit

it was loaded on the line of the Pennsylvania Railroad Company, or by whom it was loaded.

It has not been shown that the door of the car was not in a reasonably safe condition. The shipment moved in August 1919 when the congestion on all railroads was notoriously great.

The Court: Do you think that would make any difference, Mr. Vredenburg, whether congestion 10 was great and the demand was extraordinary, as to whether a car was in reasonably safe condition for use or not?

Mr. Vredenburg: It might have a bearing upon another point. It might not have on the present motion. I will withdraw that.

And it has not been shown that it was negligent under the circumstances for the railroad company, the Pennsylvania Railroad Company, assuming, as you must, that the door was in the 20 same condition when it was loaded as when it was found on the 21st, when it was on the run on the 21st,—he has not shown any reason why it should have been, being a refrigerator car containing perishables,—should have been taken and shopped and opened and the refrigeration ruined for the time being in order to make a temporary repair such as the present car required.

It is held in *Cyc* that if the car is suitable and safe when it leaves the possession and the control 30 of a railroad company it has exercised due care in the premises.

The Court: I will decline to non-suit.

Mr. Vredenburg: May I have an exception?

The Court: You may have it.

Mr. Simpson: I am perfectly willing to agree, if he wants to prove that it came into the Pennsylvania's hands from another carrier already loaded at a certain time,—I am willing to admit that to prevent swearing a lot of witnesses. 40

Michael Hanley for Defendant—Direct

Mr. Vredenburgh: I want to ask for a non-suit on another ground, and that is the contributory negligence of the plaintiff in deliberately walking around to the north side.

The Court: You need not argue that, because those things are almost always questions of facts, and assuredly in this case it is a question of fact
10 as to whether or not that which he did under all the circumstances was negligent on his part.

Now, Mr. Simpson has made an offer. I do not know whether it meets with your approval or not. I do not know what the purpose will be.

Mr. Simpson: I am willing to admit if you have a lot of witnesses that you want to prove that you got the car at a certain point, already loaded,
—I am willing to admit all that without you putting on, if you will state what you are going to
20 prove.

The Court: He may be able that if you put the witness upon the stand they would testify to what you say as to that.

Defendant's Case.

MICHAEL HANLEY, SWORN.

30 *Direct examination by Mr. Vredenburgh:*

Q. Where are you employed, Mr. Hanley? A. The Pennsylvania, P F K.

Q. Where were you employed in August 1919? A. Same place.

Q. Have you a record showing an inspection of the contents of car C. C. C. and St. Louis, 84617 on that date, or on August 16th? A. Yes sir.

40 Q. Have you brought that record? A. I haven't that record. The gentleman here, Mr. Kelly, has it.

Robert Cavanagh, for Defendant—Direct

Q. Do you recall this car being inspected by an inspector of Harris Brothers? A. Yes.

Q. What did you do? A. I opened the car door for them and they went in the car and inspected the car and as soon as they were through I closed the door again sealed the car up.

Q. Which car door did you open? A. The car on the—the door on the south side. 10

Q. The south side of the car? A. Yes sir.

Q. That would be the same door that was against the plaintiff on the Second Street siding by the warehouse, would it not? A. Yes sir.

Q. And did that door open easily? A. Yessir; no trouble.

Mr. Vredenburg: Cross examine.

Mr. Simpson: No questions.

(Witness excused)

20

Robert Cavanagh, sworn.

Direct examination by Mr. Vredenburg:

Q. You are employed by the Pennsylvania Railroad Company? A. Pennsylvania Railroad Company.

Q. Were you so employed in August 1919? A. I was.

Q. Do you remember opening a car—the car I referred to? A. I believe that was the car; I could tell by looking at the papers. 30

Mr. Simpson: I will admit it is this car.

Let us save time.

Q. Which door of the car did you open? A. The south side door as it stood in the yard.

Q. Did you reseal it? A. I did.

Q. Did the door open easily or not? A. Opened easily.

Mr. Vredenburg: That is all.

40

*Robert Cavanagh, for Defendant—Cross
Frederick G. Johnson, for Defendant—Direct*

Cross examination by Mr. Simpson:

Q. The door you opened had no cleat over it, had it? A. No.

Mr. Simpson: That is all.

10

FREDERICK GEORGE JOHNSON, SWORN.

Direct examination by Mr. Vredenburgh:

Q. Where are you employed? A. Car inspecting department, Pennsylvania Railroad, Harsimus Cove.

Q. How long have you been employed here? A. 21 years in September.

20 Q. Are you familiar with cars such as has been described in this case? A. Yes sir.

Q. Does that diagram fairly represent the doors and the way they are fastened by the rods? A. That is a good illustration, but there is one thing missing on the door, on the left side for a handle there.

30 Q. Oh, there is another handle on the left side? A. Yes, a short handle that you take hold of to pull the door out, and that lever—when you swing that lever you swing your lever to the left and then you push out and that opens that door. A man don't have to stand directly in front of the door to open it.

Q. He does not? A. No sir; he stands to one side.

Q. Which side would he stand in naturally swinging the lever? A. He would stand left to the lever.

Q. Stand to the left of the lever? A. Yes sir.

40 Q. And then that lever swings over toward the other door, does it? A. Yes sir.

Frederick G. Johnson, for Defendant—Direct

Q. So that in opening this door he would naturally stand here and pull it over? A. That is it. You pull your lever that way and you push like that.

Q. Push it in? A. Push, in and that lets the door come out.

Q. You could not very well stand on this side of the door and do that operation? A. Not very well. 10

Q. Did you examine this door after it had been — A. After the accident, yes.

Q. After the accident? A. After the accident.

Q. Had the cleat been entirely torn from the door? A. It was a board seven eighths by eight inches by seven foot was across the two doors and nailed to the side of the car.

Q. A board eight inches wide and seven inches long? A. Seven feet long and seven eighths inch thick. 20

Q. How much does one of those doors weigh? A. Oh, I should judge about seven or eight hundred pounds.

Q. Can you explain how this door could have swung out or leaped out as has been testified to by Mr. O'Connor? A. No sir, not to have it swung out. When I arrived there I was notified at four o'clock by our clerk, Mr. Watson, that Mr. Julian's office called up and there was a man hurt on the Merchants Refrigerating siding on Second Street, the door had fell off and hit him on the head. So I went immediately up there. I arrived there about five minutes after four and the door was laying face down on Second Street on the ground, and Mr. Jennings over there and Mr. O'Connor were standing there. I told them I was an employee of the Pennsylvania Railroad and I asked them if they witnessed the accident and they said yes— 30- 40

Frederick G. Johnson, for Defendant—Direct

Mr. Simpson: I object to all this conversation. What did you see there? You can save time. What did you see?

The Witness: The door was laying on the ground and had the door hinge post attached to it.

10 Q. Does the office in which you work keep a record of all repairs that are made in the yard?

A. Yes sir, all repairs and all cars shopped.

Q. Does your record show that this car had been shopped or repaired in any way by the Pennsylvania Railroad? A. Our M. P. 111 shows a car was shopped at four o'clock on Second Street.

Q. That was after the accident? A. Yes sir.

20 Q. It is customary to shop and repair refrigerator cars which are under ice and which contain perishable shipments? A. Why, in a case like that they would put an M. P. 197 ticket on for shop when empty.

Q. Shop when empty? A. Yes.

The Court: Just where would that put that ticket?

The Witness: Under the initial number on the side of the door.

The Court: And what would that ticket—I suppose it is a tag of some sort?

30 The Witness: It is a card I should judge about six by four inches and they have red stripes through the center, and some have blue stripes. It designates the initial and number of the car, the defect, the time and the inspector's name.

The Court: That was placed there after the accident?

The Witness: Yes.

40 Mr. Vredenburgh: That is all.

Frederick G. Johnson, for Defendant—Cross

Cross examination by Mr. Simpson:

Q. When you got there this door was lying with what you call the hinge jamb, as I understand it—is that what you call it? A. Post.

Q. On the ground? A. Yes.

Q. This hinge post had come away from the car? A. Half of it.

Q. Did you examine it to see what would make it come away? A. Why, there is a casing on top and there is a casing on the bottom. 10

Q. Did you examine to see why this door had fallen off? A. I could see where it was decayed.

Q. It was decayed, rotten? A. Yes sir.

Q. If it had been properly constructed it would be so constructed that it would not come off with normal use, would it? A. No sir.

Mr. Simpson: That is all, sir.

Mr. Vredenburgh: That is all. 20

(Witness excused)

ROBERT GRAHAM, SWORN.

Direct examination by Mr. Vredenburgh:

Q. You are employed by the Pennsylvania, Mr. Graham? A. Yes sir.

Q. How many years have you been working for them? A. Pretty near thirty years. 30

Q. Can you tell what the custom is in making temporary repairs on refrigerator cars containing perishable shipments?

Mr. Simpson: I will admit that if you want me to, instead of wasting time proving it.

The Court: Is he going to state the same thing as the preceding witness?

Mr. Vredenburgh: Yes.

Mr. Simpson: I will admit that, that that is a fact; that their custom is not to repair —whatever your last witness said it was. 40

Robert Graham, for Defendant—Direct

Mr. Vredenburgh: That is all.

(Witness excused)

Mr. Vredenburgh: It is also admitted that this car is a Big Four railroad car.

Mr. Simpson: Yes, whatever you say it was.

Mr. Vredenburgh: And that it was loaded beyond the line of the Pennsylvania Railroad Company?

Mr. Simpson: Yes, if you will tell me where you got it. Where do you say you got it?

The Court: Where did it come into your possession?

Mr. Vredenburgh: It came into the possession of the Pennsylvania Railroad at Edgemore, Delaware.

Mr. Simpson: Have you got the date?

Mr. Vredenburgh: August 7th.

Mr. Simpson: August 7th. All right.

Mr. Vredenburgh: That is all.

It is hereby stipulated and agreed by and between the attorneys hereto, that the following deposition of Sanford A. Toadvine be taken on the 20th day of May, 1920, at the office of Vredenburgh, Wall & Carey, One Exchange Place, Jersey City, in the presence of Charles J. Gormley, Notary Public. The signature of the witness at the end of his testimony is hereby waived.

ALEXANDER SIMPSON,
Attorney for Plaintiff.

VREDENBURGH, WALL & CAREY,
Attorneys for Defendant.

Depositions.

HUDSON COUNTY CIRCUIT COURT.

MICHAEL GRIFFIN,
Plaintiff.

vs.

WALKER D. HINES, Director Gen-
eral of Railroads, Agent,
Defendant.

Action at Law,

10

Appearance:

Alexander Simpson by I. Ross McCombe for plaintiff.

Vredenburgh, Wall & Carey, by Eugene H. Vredenburgh for defendant. 20

SANFORD A. TOADVINE, being duly sworn, testified as follows:—

Direct Examination by Mr. Vredenburgh:

Q. State your name, age, residence and present occupation. A. My name is Sanford A. Toadvine, age forty-seven, my address is 1710 N. Broom Street, Blomington, Delaware, occupation, Car Inspector. 30

Q. By whom are you now employed? A. Pennsylvania Railroad Company.

Q. Were you employed by the Pennsylvania Railroad Company as a Car Inspector at Edgemore, Delaware Yards on August 7, 1919? A. Yes.

Q. What were your duties as Car Inspector at that time? A. My duties were to inspect the trains to see if they were in good condition so as to proceed.

40

Depositions

Q. Did you keep records to show the trains inspected by you on that date? A. Yes.

Q. Have you examined those records to refresh your recollection of the trains inspected by you at Edgemore, Delaware, on Aug. 7, 1919? A. Yes.

10 Q. Did your records show that you examined a freight train which passed through Edgemore, Delaware, on Aug. 7, 1919, and which train contained Car C. C. C. & St. L. No. 84617? A. Yes.

Q. Did you report all defects found in your inspection of the trains? A. Yes.

Q. Did you make any report on Aug. 7, 1919, showing a defect in Car C. C. C. & St. L. No. 84617? A. No, I have no record showing any defect of that car on that date.

20 Q. If you found on your inspection that a freight car door was reinforced by a cleat, or piece of wood being nailed across said door, would you report that as a defect in said car? A. When we go over a door and find it nailed and secure, we do not make a record of it.

Cross examination by Mr. McCombe.

30 Q. Does your duty as Car Inspector require you to examine the cars with respect to defects on each and every car that leaves the Yard where you are employed? A. Well, we have to inspect every car that is on our shift.

Q. Do you keep a complete record of each and every car you make inspection of? A. Yes, we make a record of the cars that are in bad order.

Q. Do you make inspection of a great many cars of which you do not keep a record? A. Yes.

40 Q. It is not an unusual thing to see a board nailed across the door of a car, is it? A. Sometimes we see boards nailed across the door of a car.

Q. Would a board over a car door indicate to

Depositions

you that that door or any part of it was defective? A. Yes, it would indicate that there was something wrong with the door.

Q. If you have a board nailed securely to the door, would that be sufficient for you to pass that car? A. Yes.

Q. In other words, your chief concern was to see that the door was securely fastened. A. Yes. 10

Q. When you see a door fastened in the manner you describe by a board or cleat, it would not be necessary for you to make a report of such car; but in this particular car No. 84617, having seen a board over the door, your inspection was limited to whether or not that board over the door was fastened securely? A. Yes.

Q. It was not necessary to make any further inspection? A. No. 20

Redirect examination by Mr. Vredenburgh.

Q. In case the locks on a freight car door are broken or defective, is it not customary to secure such a door by nailing a piece of wood across it? A. Yes.

STATE OF NEW JERSEY }
COUNTY OF HUDSON } ss:

I, CHARLES J. GORMLEY, a Notary Public of New Jersey, hereby certify that on the twentieth day 30 of May, A. D., Nineteen hundred and twenty, at 4.30 o'clock, P. M., the above depositions were taken before me as herein stated.

IN WITNESS WHEREOF, I have hereunto set my hand and seal, this 26th day of May, A. D. Nineteen hundred and twenty.

CHAS. J. GORMLEY,
Notary Public of New Jersey.

Both Sidest Rest.

40

Defendant's Motion for a Direction of Verdict

Mr. Vredenburg: I wish to request a direction of a verdict for the defendant on the same grounds named in the request for a non-suit; that the duty of the company to repair this car under the circumstances has not been shown; that the car was in process of transporting under ice perishable shipment from the south to Jersey City; that the
10 car was in a safe condition for transportation—safe and suitable condition for transportation when received by the defendant and was in such condition also when delivered to the consignees; and that the attention of the consignee, whose duty it was to unload the car and in whose exclusive control it was when it was unloaded, was sufficiently called to any defects in the door by the fact that there was a cleat, a big board nailed
20 across; and, further, that it was not necessary for the unloading of the shipment to open this particular door. This was a door on the north side of the car, on the street side, and the car was unloaded on the south side of the car, on the platform side; and that the condition of the door was so evident, from its condition and from the fact that the cleat was nailed across and could so easily have been opened with ordinary common sense and ordinary reasonable care for the plaintiffs own safety, that he contributed to his accident
30 and should not recover.

The Court: My idea is that the railroad company was under the obligation to exercise reasonable care. If the fact is, and it seems to be uncontroverted the custom of the railroad company with respect to refrigerating cars, if they find a defect, not to make an immediate repair because that would probably destroy the perishable goods they contain; but it seems to me there must be
40 still a duty in the railroad company to give some warning or notice to the consignee, whether ver-

Defendant's Motion for a Direction of Verdict

bal or in writing, or by some physical indication that there is a condition of disrepair of which the consignee should take notice.

Now, the whole thing here involves, it seems to me, a question of fact as to whether or not this cleat across the door was a sufficient notice, proper notice on the part of the railroad company to the consignee. Now, it has not been said in this case, although it has been said in number of instances cleats are found across doors,—it has not been said, as I remember it, that they always indicate defect in the door. 10

Mr. Simpson: Never indicates it. That is the proof.

The Court: I do not recall that; but it did not always, as I remember it; and that, therefore, seems to me to be a question of fact as to whether it was sufficient notice to the consignee and a sufficient living up to the rule of reasonable care upon the part of the railroad company with respect to that particular car. I think it is entirely a question of fact. If there was contributory negligence on the part of the plaintiff, of course, that ends the case; but I have not felt under the facts in the case that I was in a position where I could either direct a non-suit or direct a verdict because of contributory negligence. I think it is a matter of fact which the jury ought to pass upon. 20 30

For those reasons I will decline to direct a verdict.

Mr. Hartpence: I ask an exception.

Mr. Vredenburg summed up to the jury for the defendant.

Mr. Simpson summed up to the jury for the plaintiff.

Mr. Hartpence: I wish to object to the remark of counsel as to not putting our physician on the stand. 40

Judge's Charge

There is no reason in the world why we should put the Doctor on the stand. There is no evidence that our Doctor examined him or knew anything about it.

Mr. Simpson: You do not deny it, do you?

10

Court's Charge To The Jury.

Gentlemen of the Jury:

This is an action by Michael Griffin against John Barton Payne, Director General of Railroads, as agent, operating the Pennsylvania Railroad; and the plaintiff is asking a recovery for damages for injuries which he alleges he received and suffered, and, as he alleges, is still suffering, growing out of an accident to him on the 21st of August, 1919, which happening you will remember from the testimony without my attempting to repeat it.

His prime allegation and the one upon which to a very great extent you are first to direct your attention is that the Pennsylvania Railroad Company which had had control of this particular car prior to the time of its delivery to the consignee did not use that care that the law imposed upon it. That care which the law imposed upon the railroad company was reasonable care to see that the cars and appliances in and about the cars should be in reasonably safe condition for those having a right to use them, and using them with reasonable care; that they should be able to do so with safety. It might be said reasonable safety, because that is what it is.

Now, of course, gentlemen, there are two kinds of defects and disrepairs. There are those which are latent and cannot be discovered except by

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Judge's Charge

extraordinary means and extraordinary care. That is not the class of care, you see, which the Pennsylvania Railroad Company was put under. There is another class of disrepair or character of disrepair which by the exercise of ordinary care could reasonably be discovered. It is such defects and such shortcomings that the Pennsylvania Railroad Company was called upon to exercise reasonable care in discovering, or reasonable care to so protect those who would use the cars and their appliances in a proper and a reasonable manner from harm. 10

Now, it is said it is a custom, and I think it stands undisputed, in railroading that refrigerator cars loaded with perishable goods found in any particular to be defective are not repaired by the Railroad company, because the repairing—the very repairing would destroy the cargo; but still the allegation is and still the contention is even if that be so the Pennsylvania Railroad Company did not use and exercise reasonable care in turning over this car to the consignee for use by it and its employees, the persons who had a lawful right to make use of it. 20

The railroad company says in turn, “Why, we did, because there was across these doors a cleat, and any person exercising reasonable care in using that door would or should have taken notice from that fact. That was physical notice, in other words, that there was a defect in and about that door and a person exercising reasonable care in the use of it should have taken notice thereof and acted accordingly.” 30

The first thing before you, gentlemen, is to determine whether or not the plaintiff has made out by the greater weight of the evidence that under the rule which I have given you the Pennsylvania Railroad Company was negligent. Did it 40

Judge's Charge

transgress or disobey under the facts and circumstances in this case as they are before you that rule of reasonable care under which it was placed and which it was its duty to exercise? If the plaintiff has not made that out then he is not entitled to have a verdict. If he has made it out then the next thing for your determination is
 10 whether or not such negligence was the proximate cause of this happening to him. Was it the thing that brought about and produced this happening to him? That likewise must be made out by the greater weight of the evidence and the burden there is also upon the plaintiff. If it has not been made out then again the plaintiff is not entitled to a verdict but your verdict must be for the defendant. If he has made that out also then you are to next inquire as to the conduct of the plain-
 20 tiff himself, because he in law was charged with exercising reasonable care upon his part in the manner in which he made use of this car and its appliances.

The plaintiff was required to use the care that a reasonable and a prudent person under all of the circumstances would or should have used. The condition of this car, the fact of the cleat being there, and all those things—all the facts and circumstances as they are in the evidence are to
 30 be taken into consideration by you, and the query is: did he act under the circumstances in a reasonable manner? Did he exercise reasonable care for his own safety? The burden of satisfying you as to that rests upon the defendant and must be made out by the greater weight of the evidence or fair preponderance of the evidence; and when I have said that the burden rests either upon the plaintiff or defendant I do not mean by that that that greater weight of the evidence must come
 40 entirely and solely by the witnesses produced by

Judge's Charge

those particular parties, namely, by plaintiff or defendant, upon whichever the burden rests; but you are to get the greater weight of the evidence, if it is in the case, from all the evidence in the case.

If it has been satisfied to you by the greater weight of the evidence that the plaintiff himself was negligent, then even if he has established these two other things I have spoken of, he is not entitled to a verdict. If he was negligent and that negligence contributed to what happened to him, then the law does not give him any relief or redress. If that is the situation you arrive at, and when arriving at that point you so decide, then again your verdict must be for the defendant.

If, however, that has not been made out and these other things have been made out; namely, negligence on the part of the defendant and that such negligence was the proximate cause, then the plaintiff is entitled to have a verdict, and if he is then you will need to know for what a verdict may be had in a case of this character.

If he is entitled to a verdict he is entitled to be compensated for the pain and suffering and disability which he has had or endured, which he may be at this time enduring, and which in reasonable probability he will endure in the future, the burden being upon him to satisfy you by the greater weight of the evidence what pain and suffering he has had, what its intensity was, whether or not it is continuing and if continuing, what it is at the present time, what its degree and what its intensity are. If it is continuing it is also a burden upon him to satisfy you by the greater weight of the evidence that it is reasonably probable that it will continue into the future and as to how far into the future it will continue

Judge's Charge

and to what degree and in what intensity. As he may have satisfied you in that manner, if he has, he is entitled to be compensated.

He is also entitled to be compensated for loss of earnings. He says that he lost seven weeks at \$29 per week. The burden is upon him there, too, to satisfy you that he has met with a loss,
 10 over what time it will run, and that that loss is the proximate result of injuries and disabilities coming to him by and through the happening in question.

He is also entitled to be compensated for the cost of effecting a cure. Such costs are physicians bills, medicines and things of that character. He says the physicians bill was \$40, medicine \$6.25, and I think an ambulance service of \$3.50. The burden there, too, as to all these mat-
 20 ters relating to what a verdict may be for rests upon the plaintiff. He must satisfy you of the items with reasonable definiteness and by the greater weight of the evidence. If he has, and as he has, gentlemen, then he is, if entitled to a verdict, entitled to a verdict for such sum as the evidence will warrant and require.

If the plaintiff is entitled to a verdict you will announce that by saying that you find for the plaintiff and against the defendant and assess the
 30 plaintiff's damages at so much money, making it one lump sum, and not separating it in the items I have given to you.

If the plaintiff is not entitled to a verdict and the defendant is, then you will announce that by saying that you find for the defendant and against the plaintiff.

With that you may take the case.

Verdict

Mr. Hartpence: I note an objection to those portions of the charge where you stated that if the jury found the negligence complained of was established then the plaintiff is entitled to a verdict. Of course, our theory is that there is no evidence of negligence in the case that would entitle the plaintiff to a verdict, and that a verdict should have been directed for the defendant. 10

I note an exception to that part of the charge where your Honor charged the jury that it was the duty of the Pennsylvania Railroad Company to see that the cars were in reasonably safe condition for those who used them.

Further, to the court's charge to the jury that it was their duty to see that reasonable care was exercised to discover the defects in these cars so as to make them reasonably safe for and to protect those who would use them from harm. 20

The Court: You may have your exceptions.

Mr. Hartpence: We also desire to note an objection to the remark by counsel in summing up that they had sued for \$5,000 damages, which we think is an improper remark to make to the jury.

Mr. Simpson: That is not a subject for exception under the case of Price against New York Central. The proper way is to ask the court to direct the jury to disregard it. He did not do that. He waited until I was through without making any objection when I was in my summing up, and then objected, but he did not ask for anything else, and I submit that is not a subject of objection. Not only that, but there is no proof that my summing up was taken down. There is nothing upon which he can assign error. 30

Mr. Hartpence: Well, will counsel for plaintiff say that he did not say to the jury that "we have sued for \$5,000"?

Mr. Simpson: Oh, no. I will admit that. I have sued for \$10,000, but I told them that I sued for \$5,000. 40

New Jersey Court of Errors and Appeals

MICHAEL GRIFFIN, Plaintiff-Respondent, vs. JOHN BARTON PAYNE, Director General of Railroads, Agent, Defendant-Appellant.	} Action at Law Appeal from Hudson Circuit Court.
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BRIEF FOR PLAINTIFF-RESPOND- ENT

This is an appeal from the Hudson Circuit Court in an action commenced by the plaintiff against the Pennsylvania Railroad. The circumstances were these:

The plaintiff was employed in a manufacturing establishment to which the defendant had delivered certain cars on a siding. It was necessary for the plaintiff and his fellow workers to open the doors of these cars and unload the cars. While the plaintiff was engaged in opening the door of a car, because of the rotten condition of the side of the car, which was so rotten that it had decayed, after the plaintiff had taken off the cleat or board (pp. 1-14), which was fastened across the door and was endeavoring to open the door, standing on the ground, the rotten part of the wood being at the top of the door some 5 or 10 feet above his

head, the door fell from its hinges, because of the rotten condition of the wood (p. 23, l. 20, *et seq.*; p. 26, l. 20, *et seq.*; p. 27, l. 4). Evidence of defendant (p. 35, l. 10, *et seq.*), and struck him on the head and back and injured him.

The car was not a car of the defendant company but had been in its possession for a long time, two weeks and had been thoroughly inspected by its inspector on August 7th, 1919, date of accident was August 21, 1919 (p. 37). The inspector did not see this condition of the door or report the condition of the door, although it was the custom of the railroad if there were defective doors to have them reported. Upon this state of facts the Judge allowed the case to go to the jury for them to find whether it was negligence on the part of the defendant to either fail to discover the defect or to have repaired it if it was discovered. It is admitted that the car was not reported by the inspector as a defective car, although that was the custom.

POINT I

Negligence.

If the above facts were true, there was evidence to go to the jury as to the negligence of the defendant. This is not like the earlier case of *Anderson v. Erie*, 39 Vr., 647, where a car had come into the possession of the defendant company from another railroad without opportunity for the defendant to examine it and the employee of the defendant had been injured, but it is rather in line with the later case of *Schwall vs. D. L. &*

W. R. R., 92 Law, 187; 105 Atl., p. 193, where it seems to be held by inference that if the car had been in the possession of the defendant a sufficient length of time for it to have discovered the defect, it would have been negligence or could have been so esteemed by a jury.

In the instant case, the car had been in the possession of the defendant for two weeks without the defect having been discovered. It had been inspected by an inspector of the defendant (p. 37), and he did not report the car if he did discover the defect. Under these circumstances it was for the jury to say whether negligence existed on the part of the defendant.

If it is contended that it was no duty of the defendant to repair the car because it was a refrigerator car with perishable goods, then it was their duty to put a notice or warning of some kind on it before it was unloaded (see p. 34, ll. 10 to 20).

The defendant is certainly bound to use reasonable care to make such a cursory examination as would disclose the defect under the case of *Anderson v. Erie*, before cited.

The jury had a right to say whether such cursory examination if made, would not have disclosed the rotten condition of the door which was so apparent to every one who testified, thus showing the insufficiency of the inspection.

POINT II**Contributory negligence of the plaintiff.**

The plaintiff was not guilty of lack of reasonable care. It was proved that cars frequently came in where the fastenings were bad so that the door would not close, nailed up with boards. The mere fact that a board was across the door did not charge the plaintiff with notice that the wood was so rotten that the door would fall on him. It merely charged him with knowledge that the fastening was out of order and that the door would not stay locked unless nailed up, because it was testified that it was the common custom to so nail the doors. It was therefore for the jury to say, not for the Court, whether or not the mere seeing of the cleat across the door put the plaintiff in a position where it was negligence in him to remove the cleat; although the proof was that it was the general custom to remove such cleats on the theory that the door was in good condition (pp. 1 to 14; p. 15, p. 16).

Plaintiff therefore insists that the trial below was without error and that the verdict should be affirmed.

Respectfully submitted,

ALEX. SIMPSON,
Attorney for Plaintiff-Respondent.

New Jersey Court of Errors and Appeals

MICHAEL GRIFFIN,
Plaintiff-Respondent,

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VS.

JOHN BARTON PAYNE, *Director*
General of Railroads, Agent,
Defendant-Appellant.

BRIEF FOR DEFENDANT-APPELLANT. 20

Statement of Facts.

Michael Griffin, the plaintiff in this case, at the time of the accident hereinafter referred to, was an employee of the Merchants Refrigerating Company whose warehouse and delivery track adjoin the right-of-way of The Pennsylvania Railroad Company at Second and Warren Streets, Jersey City, New Jersey. 30

Plaintiff was employed as a laborer and his duties included the unloading of cars consigned to his employer and delivered to it on the delivery track above mentioned.

During the month of October, 1919, there was shipped from Richmond, Virginia, a carload of perishable freight consigned to the Merchants Refrigerating Company. The lading was loaded into a refrigerator car of the C. C. C. & St. L. R. R. Co. numbered 84617 and was duly transported by 40

defendant to Jersey City and delivered to the consignee.

This car came into the possession of the Director General of Railroads operating the Pennsylvania Railroad, Eastern Lines, (the only defendant in the case) at Edgemore, Delaware.

The delivery track above referred to is on the North side of the warehouse of plaintiff's employer. After the car had been delivered on this track, the plaintiff and a fellow employee proceeded to open the doors of the car in order to unload it. The door on the North side of the car, i. e., the side opposite the delivery platform of the Refrigerating Company, was opened by plaintiff who walked from the platform around the end of the car for that purpose. When he reached the door, he found it secured by a wooden cleat, an inch thick by seven inches wide and seven feet long, as well as by the customarp locks and seals. The cleat was nailed across the door and to the hinge posts on each side. Plaintiff knocked this cleat off with an axe and then proceeded to open the door which is accomplished by raising an iron lever to a horizontal position and then releasing the locks by turning the lever to the left as the operator faces the door. The door in question is a double door, the two halves opening out from the centre. The right hand half of the door opens first when the lever is turned as described. Plaintiff went through this operation and when the lever had been pushed to the left and the lock released, a fellow employee shouted to him that the door was falling. Plaintiff attempted to jump clear, but being immediately in front of the right half of the door, he could not get entirely out of the way, and the door, weighing some seven hundred pounds, fell partly upon him, causing the injuries for which this suit is brought.

The defect, if any, which caused the door to fall, if it did, has not been disclosed by the testimony,

nor does it appear whether the door fell when the unlocking operation was just completed or after plaintiff had attempted to pull the door open. There is some evidence, in the cross-examination of a witness for defendant, to the effect that the door hinge post was rotted, but no evidence that the rotted part was apparent on inspection before the door was opened, nor that the hinge post had rotted sufficiently to allow the door to fall of its own weight. 10

The car had been inspected by defendant at Edgemore, Delaware, and at Jersey City. No defects were discovered.

The jury returned a verdict in favor of plaintiff for \$1750.

The refusal of the trial judge to grant defendant's motion for a non suit and to direct a verdict in favor of defendant are alleged as error.

ARGUMENT

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Plaintiff did not show what the defect was that caused the door to fall.

In the case of *Joseph Stryczek v. The Pennsylvania Railroad Company*, an unreported case in the Federal District Court for the District of New Jersey, a copy of the opinion therein appearing at the end of this brief, plaintiff was injured by the falling of the boom of a derrick due to the fact that one or more of the bolts, which attach the lower eye-beam to the mast, came out. This in turn permitted the eye-beam to break and the pin, which held the boom, to become dislodged, and, consequently, to allow the boom to fall. There was nothing in the evidence to show why the bolt came out or whether it was broken or merely became unfastened. The only evidence as to the cause of the accident was that afterward one of 30 40

the bolts was out and two of the bolts were bent. The court held that if the bolt broke, it was very doubtful indeed whether it would have been possible to discover the defect, if any, which caused it to break by the exercise of any reasonable inspection, and that *before the plaintiff was entitled to have his case submitted to the jury*, there should have been some evidence to show whether or not the bolt, which attached the eye-beam to the mast, simply came out owing to the nut coming off or whether it broke, etc.; and further, some evidence as to whether or not that defect could have been discovered by reasonable inspection. The court further held that as the burden was on the plaintiff to show negligence on the part of the defendant and as one of the elements of negligence was the fact that *the defect could have been discovered by reasonable care and inspection, it follows that the plaintiff was under a duty to show the latter before he could recover*; and consequently, as there was no evidence from which it could be ascertained whether or not an inspection would have revealed the defect, the case should not have been submitted to the jury. The court cited the following cases as authority for the principle that in the absence of evidence that reasonable care and inspection would have disclosed the defect, the mere failure to inspect would not warrant holding the master liable: *Stassett v. Taylor Iron & Steel Co.*, 30 82 N. J. L., 631, 632; *Atz v. Manufacturing Co.*, 59 N. J. L. 41, 42; *Electric Co. v. Kelly*, 57 N. J. L. 100, 103; *Southern Ry. Co. v. Derr*, 240 Fed. 72, 75; 26 Cyc 1139; *Copper Co. v. Riordan*, 220 Fed. 584, 590.

In the case at bar there is no evidence in plaintiff's case that a defect existed or that reasonable inspection on the part of defendant would have revealed the defect, if there were any.

It is submitted that under the rule laid down in 40 the Stryczek case and the authorities cited therein

the trial judge should have granted defendant's motion for a non suit on the ground that plaintiff's prima facie case had not been made out. In order to establish his prima facie case, it was necessary for plaintiff to show that the defect existed and that it could have been disclosed by a reasonable inspection. Plaintiff failed doubly for neither of these essential elements of the negligence alleged were shown.

It is further submitted that the trial judge 10 should have granted defendant's motion to direct a verdict in favor of defendant at the close of the case, inasmuch as it appeared that, notwithstanding plaintiff's failure as indicated, defendant had made a reasonable inspection of the car and such inspection did not disclose a defect.

Furthermore it is submitted that the contributory negligence of the plaintiff is so marked that the trial judge committed error in not granting a non suit or directing a verdict in favor of defendant. Plaintiff was accustomed to open doors 20 similar to the one in question. The lever by which the door is unlocked, is in the centre between the two doors and is operated by turning it to the left, i. e., away from the door which fell on plaintiff. The natural position in operating this lever, as the evidence shows, is to stand in front of the left door and pull the lever around with the right hand. This seems to be a necessary precaution for the following obvious reasons: 30 the right door, which opens first, might have pressure against it and swing out forcibly; part of the lading of the car might have shifted in transit so that it would fall out of the car upon the door being opened. Plaintiff's experience should have caused him to appreciate this. However, plaintiff, in opening the door, stood directly in front of it; so close, indeed, that he was unable to jump clear when his fellow worker shouted to him that the door was falling. 40

It is submitted that this manner of opening a door of a loaded refrigerator car is careless, and that plaintiff, in so doing, did not have proper regard for his own safety, and thereby negligently contributed to his injuries.

For these reasons it is respectfully urged that the verdict in favor of plaintiff in this case be set aside and a new trial granted.

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WALL, HAIGHT, CAREY & HARTPENCE,
*Attorneys for and of Counsel with
Defendant-Appellant.*

EUGENE H. VREDENBURGH,
Of Counsel.

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Opinion.

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY.

<p style="text-align: center;">JOSEPH STRYCZEK, <i>Plaintiff.</i></p> <p style="text-align: center;">vs.</p> <p style="text-align: center;">PENNSYLVANIA RAILROAD COMPANY <i>Defendant.</i></p>	}	<p>Action at Law 10</p> <p>MEMORANDUM</p>
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On rule to show cause why the verdict rendered in favor of the plaintiff should not be set aside, and new trial granted.

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DANIEL D. LOEB and FRANK HARDENBROOK, for Plaintiff,

VREDENBURGH, WALL & CAREY, for Defendant.

HAIGHT, *District Judge.*

A more careful examination of the law than was possible during the course of the trial of this case, and a critical scrutiny of the testimony, convinces me that the defendant's motion for a non-suit, or at any rate, its motion for the direction of a verdict in its favor, should have been granted. It seems to be entirely well settled that, as between master and servant, when it is sought to visit liability on the former for injuries received by the latter, based upon the master's failure to discharge his duty in respect to inspection and repair of the machinery, tools or appliances with which, or the place in which the servant was working, it

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must appear that reasonable care in inspection would have disclosed the defect, and that, in the absence of such evidence, the mere failure to inspect will not warrant holding the master liable. *Stasset* vs. *Taylor Iron & Steel Co.*, 82 N. J. Law, 631, 632 (Ct. E. & A.); *Atz vs. Manufacturing Co.*, 59 N. J. Law, 41, 43 (Supreme Court); *Electric Co. vs. Kelly*, 57 N. J. Law, 100, 103, (Supreme Court); *Southern Railway Co. vs. Derr*, 240 Fed. 73, 75, (C. C. A. 6th Cir.); (a case cited by plaintiff); 26 Cyc. 1139, and cases cited. Such, also, is the necessary conclusion to be drawn from the remarks of Judge Gilbert in *Cooper Co. vs. Reardon*, 220 Fed. 584, 590 (C. C. A. 9th Cir.), which is also a case cited by counsel for the plaintiff. Of course, this rule is the necessary outgrowth of the fundamental rule that the master is required to exercise only reasonable care to have the appliances with which, or the places in which the servant is required to work, reasonably safe. If a defect in either appliances or place could not be discovered by the exercise of reasonable care, then a failure to have discovered a defect and to have repaired the same could not be said to be due to a failure to exercise reasonable care to have the appliance and place reasonably safe. The plaintiff in this case was, however, not an employee of the defendant, but an employee of a concern which had a contract with the defendant to do for it certain work, in which the plaintiff was actually engaged at the time he received his injuries. The plaintiff was, therefore, an invitee or licensee (more than a bare licensee) of the defendant, and the latter was under an obligation to exercise towards him, as respects the place in which he was required to work, the same degree of care as he would have been required to exercise if the plaintiff had been one of its servants. See *Richmond, etc. R. R. vs. Elliott*, 149 U. S. 266. Hence, before the plaintiff was entitled to recover for his injuries, there should

have been some evidence to demonstrate that the defect in the derrick, which admittedly was the cause of the accident, could have been discovered by the exercise of reasonable care on the part of the defendant. The accident was due to the fact that one or more of the bolts which attached the lower eye-beam to the mast, came out. This, in turn, permitted the eye-bolt to drop out and the pin, which held the boom, to become dislodged, and consequently to allow the block and falls and the boom to fall. *I cannot find anything in the evidence to show why the bolt came out, or, for that matter, whether it was broken or merely became unfastened.* The only person who testified on this point was the captain of the boat. His testimony was to the effect that he went aloft after the accident, and saw one of the bolts which attached the lower eye-beam to the mast "cut and two of the bolts bent." These bolts were about one and a quarter inches thick and about twelve inches long, and went through the mast, apparently being fastened on the other side of the mast by a nut, although the evidence is not clear as to that. The captain testified that he had "looked over" this part of the boat and derrick about eight days before the accident, but he made no further examination or tests, with a wrench or otherwise. *If the bolt broke, it is very doubtful indeed whether it would have been possible to have discovered the defect therein which caused it to break, by the exercise of any reasonable inspection.* The derrick had been tested to lift some ten tons, and had been used on the very day of the accident to lift a load of approximately that weight. If, on the other hand, the bolt came out because a nut became unscrewed, it might very readily be that a reasonable inspection would have discovered that condition, and that the inspection which the captain made before the accident was consequently inadequate, when it is considered

how obvious was the danger to which those working under the beam, were exposed if there was any defect such as that. On the other hand, it may be that the nut would have become loosened from the bolt, such a short time before the accident, that reasonably frequent inspections would not have discovered it. *It seems entirely clear, therefor that before the plaintiff was entitled to have his case submitted to the jury, that there should have been*

10 *some evidence to show whether or not the bolt which attached the eye-beam to the mast simply came out, owing to the nut coming off, or whether it broke, etc.; and further, some evidence as to whether or not that defect could have been discovered by reasonable inspection. If it could have, the jury would be at liberty to determine whether or not the inspection which was made was adequate to discharge the duty which the defendant owed to the plaintiff. Of course, as the burden was*

20 *on the plaintiff to show negligence on the part of the defendant, and as one of the elements of negligence was the fact that the defect could have been discovered by reasonable care and inspection, it follows that the plaintiff was under a duty to show the latter before he could recover. Consequently, as there is no evidence from which it could be ascertained whether or not an inspection would have revealed the defect, the case should not have been submitted to the jury. It follows, therefore, that*

30 *the verdict should be set aside and a new trial granted. It is proper to observe in addition that upon a new trial the plaintiff should adduce more satisfactory evidence than he did at the last trial as to the relationship which he bore towards the defendant at the time he received his injuries.*

THOMAS G. HAIGHT,
Judge.

UNITED STATES OF AMERICA, }
 DISTRICT OF NEW JERSEY. } ss.

I, GEORGE T. CRANMER, Clerk of the District Court of the United States of America, for the District of New Jersey, in the Third Circuit, do hereby certify the foregoing to be a true copy of the original memorandum on file, and now remaining among the records of the said Court, in my office.

[SEAL] IN TESTIMONY WHEREOF, I have hereunto subscribed my name and affixed the Seal of the said Court, at Trenton, in said District, this Ninth day of August, nineteen hundred and eighteen.

GEORGE T. CRANMER,
Clerk District Court, U. S.
 by R. S. CHEVRIER,
Deputy.

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