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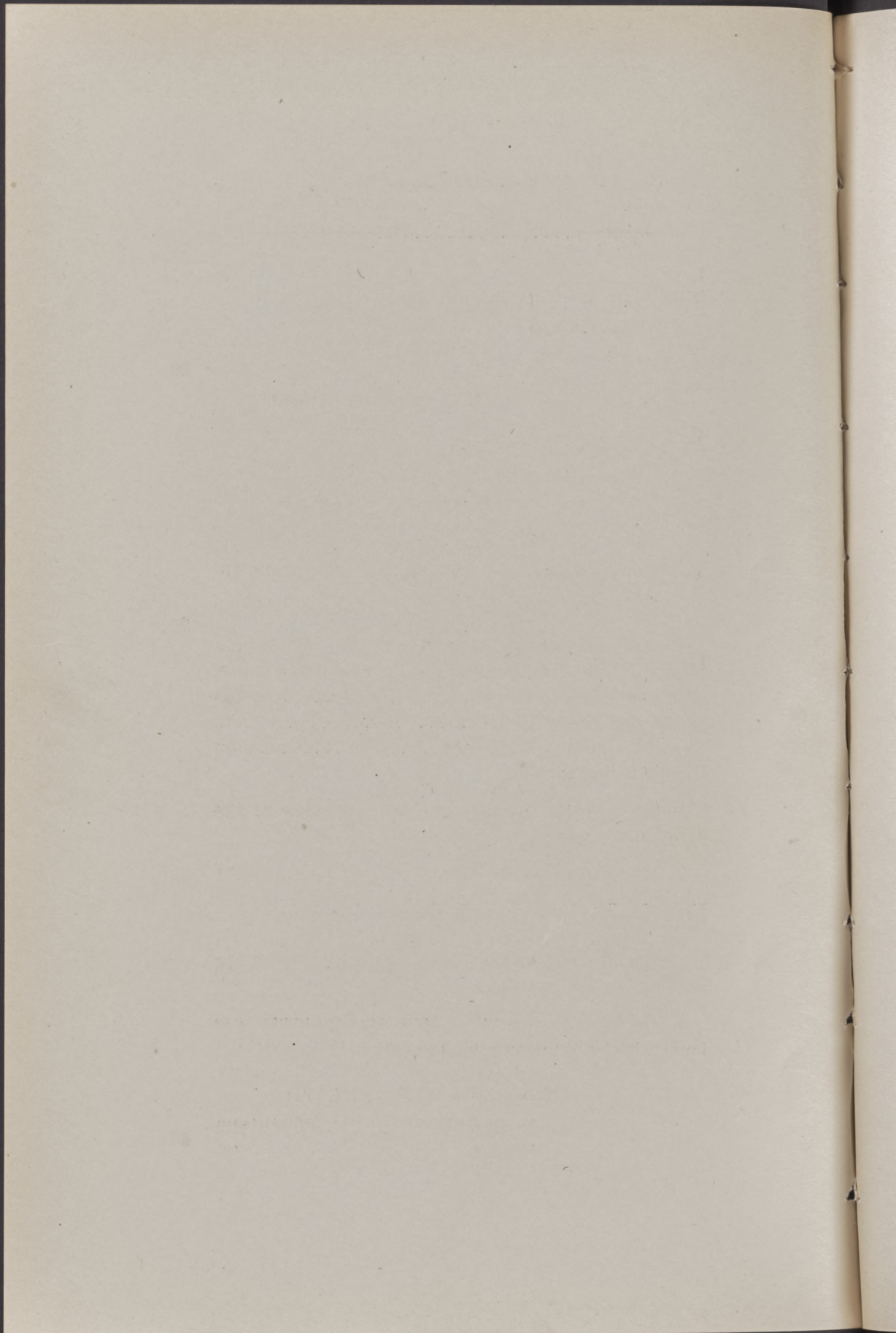
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Notice of Appeal.
Essex County Circuit Court
~~NEW JERSEY SUPREME COURT.~~

MARY LOUISE McDONOUGH and
HARRY FISKE McDONOUGH,
Plaintiffs,

vs.

F. W. WOOLWORTH COMPANY, a
Corporation,
Defendant.

On Appeal

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To Abner Kalisch, Attorney for Plaintiffs-Appellee:

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Please take notice, that the F. W. Woolworth Company, the defendant in the above entitled cause, hereby appeals to the Court of Errors and Appeals in the last resort in all causes in New Jersey from the whole of the judgment entered in this cause on the following grounds:

1. Because the Trial Court refused to grant the defendant's motion to non-suit.

2. Because the Trial Court refused to grant the motion made by the defendant to direct a verdict in its favor.

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3. Because there is no proof of negligence on the part of the defendant.

4. Because it appeared that the plaintiff was guilty of contributory negligence.

RUNYON & AUTENREITH,
Attorneys for Defendants.

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Notice of Appeal

ESSEX COUNTY CIRCUIT COURT.

THE STATE OF NEW JERSEY.

To F. W. Woolworth and Company, a Corporation:
tion:

10

[L.S.]

You are summoned to answer the complaint of Mary Louise MacDonough and Harry Fiske MacDonough in an Action at Law in the Essex County Circuit Court.

20

And take notice that unless you file your Answer to the said Complaint with the Clerk of said Circuit Court at Newark, within twenty days after the service upon you of this Writ and the annexed Complaint, the plaintiff may proceed in the suit and judgment may be entered against you.

WITNESS, William S. Gummere, Judge of our Circuit Court at Newark, the Sixteenth day of June, Nineteen Hundred and Seventeen.

JOSEPH M'DONOUGH,

Clerk.

ABNER KALISCH,
Attorney.

30

40

Complaint.

ESSEX COUNTY CIRCUIT COURT.

MARY LOUISE MACDONOUGH and HARRY FISKE MACDONOUGH, Plaintiffs,
--

vs.

F. W. WOOLWORTH & Co., a Corporation, Defendant.
--

10

} Action at Law.

1. The plaintiffs, Mary Louise MacDonough and Harry Fiske MacDonough, reside in the City of East Orange, in the County of Essex and State of New Jersey.

20

2. The defendant, F. W. Woolworth and Company, is a Corporation of the State of New York.

3. The plaintiff, Mary Louise MacDonough, says that on or about the 30th day of October, A. D. 1916, the defendant was and for a long time prior thereto had been in possession of a certain store situate in the City of Salamanca, in the State of New York, running and operating what is known as a 5 & 10 Cent store.

30

4. That the said store so possessed by the said defendant, the defendant was then and there using and occupying the same and conducting therein the business of selling merchandise, and invited all persons to enter said store desirous of purchasing any goods and merchandise so exposed to them in said store.

5. That on the floor of said store where such said goods was exposed by the defendant for sale,

40

Complaint

there was an opening which opened into a stairway leading to a basement in said building, under the store.

6. That said opening to said basement was not guarded or protected in any way.

10 7. That said opening was in said floor at a part of said store where it was dark, there being no light maintained by the defendant, so that persons moving in and about said store at that part were able to see the opening in said floor.

8. That there were tables arranged on said floor of said store, upon which goods were exposed for sale, which also obstructed the view of persons moving in and about said store at that part.

20 9. That near said opening there were exposed a number of book-cases containing books which were displayed for sale.

30 10. And the plaintiff further says that while she, the plaintiff, Mary Louise MacDonough, was in said store for the purpose of making purchases, and having no knowledge of the improper, careless and dangerous condition of the floor upon which she was on, and there not being sufficient light whereby the opening in the floor could be discerned, she, without any fault upon her part, while examining the books, in stepping sideways stepped into the opening, falling down the stairway, and sustaining a fracture of the left leg below the knee; and thereby by reason of such fall, sustained a severe, painful and permanent injury to her body and limb, and was also greatly bruised, wounded and injured, and was sick, sore and disordered and so remained for a long space of time, to wit, from the 30th day of
40 October, 1916, to the day of the bringing of this

Answer

suit, during all of which time she has suffered and undergone great pain, and in the future will suffer and undergo great pain, to her great damage, Five Thousand Dollars.

And the said Harry Fiske MacDonough, complains that by reason of the injuries sustained by his said wife, he, the said plaintiff, lost the society of his said wife, and was obliged to expend large and divers sums of money in and about curing his said wife of the injuries sustained by her, and in the future will be obliged to expend large and divers sums of money, to his great damage, Two Thousand Dollars. 10

The plaintiffs claim damages of the sum of Seven Thousand Dollars.

ABNER KALISCH, 20
Attorney for Plaintiffs.

Answer.

ESSEX COUNTY CIRCUIT COURT.

MARY LOUISE MACDONOUGH and
HARRY FISKE MACDONOUGH,
Plaintiffs,

vs.

Action at Law. 30

F. W. WOOLWORTH & Co., a
Corporation,
Defendant.

Defendant says:

1. That it has no knowledge of the allegations and facts set forth and contained in paragraph one of the complaint filed herein. 40

Answer

2. It admits the allegations and facts set forth and contained in paragraphs two, three and four of said complaint.

10 3. It denies the allegations and facts set forth and contained in paragraphs five, six, seven, eight, nine, ten, and eleven of the said complaint.

DEFENSES.

1. That the happening of the said alleged accident set forth in the complaint filed herein, was due solely to the negligence of the plaintiff, Mary Louise MacDonough.

20 2. At the time of the happening of the said alleged accident the said plaintiff, Mary Louise MacDonough, was guilty of contributory negligence in that she did not use proper means of observation as to her surroundings and walked into parts and places of the defendant's store to which the public were not invited expressly or impliedly by the defendant, and took the risk of walking into dangerous and hazardous places in and about the said store of the defendant to which the public, as purchasers of goods and merchandise in said store, were not invited.

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Attorneys for Defendant.

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Reply.

ESSEX COUNTY CIRCUIT COURT.

MARY LOUISE MACDONOUGH and HARRY FISKE MACDONOUGH, Plaintiffs,	}	10
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vs.

Action at Law.

F. W. WOOLWORTH & Co., a Corporation, Defendant.	}	
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1. The plaintiffs deny the allegation contained in the First Paragraph of the Answer of Defendant and denies the negligence alleged against her.

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2. The plaintiffs deny the allegations and facts set forth and contained in Paragraph Two of Defendant's Answer, and denies that she was guilty of contributory negligence or that she did not use proper means of observation as to her surroundings, or that she walked into parts and places of the defendant's store to which the public were not invited.

ABNER KALISCH,
 Attorney for Plaintiff.

30

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After Verdict, Judgment entered October 17th, A. D., 1917.

ESSEX COUNTY CIRCUIT COURT.

10	MARY LOUISE MACDONOUGH and HARRY FISKE MACDONOUGH, Plaintiffs,	}	
	vs.	}	Action at Law.
	F. W. WOOLWORTH & Co., a Corporation, Defendant.	}	

Abner Kalisch, Attorney for Plaintiff.

20

Judgment After Verdict in the above entitled Action at Law was rendered on the Seventeenth day of October, A. D. Nineteen hundred and seventeen, in favor of the said Plaintiff Mary Louise MacDonough and against the said Defendant F. W. Woolworth and Company for the sum of Thirty-five hundred dollars and also find in favor of the said Plaintiff Harry Fiske MacDonough and against the Defendant F. W. Woolworth and Company for the sum of Seven hundred dollars and the sum of Sixty Two dollars and ten cents costs of suit.

30

Judgment entered and signed Oct. 17th, 1917.

WM. S. GUMMERE,
Judge.

Book 94—page 345.

40

*After Verdict, Judgment Entered October 17th,
A.D., 1917*

ESSEX COUNTY CLERK'S OFFICE.

STATE OF NEW JERSEY, }
COUNTY OF ESSEX. } SS. :

I, Joseph McDonough, Clerk of the Circuit Court, 10
in and for the County of Essex in the State of New
Jersey, do hereby certify, that the foregoing is a
true and correct copy of a certain Notice of Ap-
peal, Transcript of entire proceedings and judg-
ment record in the case of Mary Louise MacDon-
ough and Harry Fiske MacDonough vs. F. W. Wool-
worth Company, a Corporation, and the same is
taken from and compared with original papers and
record as the same now remains on the files of said
office. 20

IN TESTIMONY WHEREOF, I have here-
unto set my hand and affixed the
official seal of said Court and
County at Newark, N. J., this
7th day of November A. D. 1917.

(Seal)

JOSEPH M'DONOUGH,
Clerk.

30

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Testimony.

ESSEX COUNTY CIRCUIT COURT.

Tuesday, October 16, 1917.

10	MARY LOUISE MACDONOUGH and HARRY FISKE MACDONOUGH, Plaintiffs,	}	
	vs.	}	Action at Law.
	F. W. WOOLWORTH & Co., a Corporation, Defendant.	}	

20 Before Hon. FREDERIC ADAMS, J., and a Jury.
 For plaintiffs appear Isidor Kalisch, Esq.
 For defendant appear Messrs. Runyon & Autenreith, by Joseph F. Autenreith, Esq.

30 Mr. Kalisch: If your Honor please, I am going to ask for an amendment to the tenth paragraph of the complaint, which I do not think embarrasses the defendant in any way. It is the eighth line down in paragraph ten, and it says, "in stepping backward," and I find out upon examination the fact that it should be "sideways."

Mr. Autenreith: There is no objection to that.

The Court: Actually make the amendment.

A jury is called and sworn.

Mr. Kalisch opens for plaintiffs.

40 Mr. Autenreith opens for defendant.

Mary Louise MacDonough—Direct

MARY LOUISE MACDONOUGH sworn in behalf of plaintiffs.

Direct Examination by Mr. Kalisch:

Q. Mrs. MacDonough, you are the plaintiff in this case, are you? A. Yes, sir. 10

Q. This accident of which you complain happened on what day? A. The 30th of October.

Q. Of what year? A. 1916.

Q. And at the store situated in what city or town? A. Salamanca, New York.

Q. How long had you been in the store before the accident occurred? A. Oh, probably ten minutes, or longer than that.

Q. What did you go in to purchase? A. Well, we went in to see if we could find—we went just to look around the store, and if there was anything that we could find to buy that would please us, and it happened to be books. 20

Q. You wanted to go in to get some books? A. Yes.

Q. Where did you see the books placed? A. On the right hand side of the store. This was the front; we went in this way [indicating]. At the end of the counter, which was open, we turned to look at these books— 30

Mr. Kalisch: Do not go too fast.

The Court: It is not at all clear. You say "this way." That does not mean anything. You will have to indicate in some descriptive way what the situation was.

Q. As you come in the door, Mrs. MacDonough, can you tell us whether there are any counters against the wall or not? A. Not directly against the wall. 40

Mary Louise MacDonough—Direct

Q. Well, how near the wall are they? A. Well, just the same as any store; about as far as you are from that rail, I should think [indicating].

10 Q. Assuming that where you sit in the witness box is the entrance to the store, will you kindly tell the Court and jury what appeared on your right hand side and left hand side entering the door? A. There was a counter on the right hand side and one in the center. I walked down to the end of the counter—

Q. No, I do not want you to tell us that; I want you to describe the situation first, so that we will all know what you are talking about. You say there is a counter on the right hand side? A. Yes, sir.

20 Q. And what is in the middle, if anything? A. A counter.

Q. Another counter? A. Yes, sir.

Q. Do they follow the same direction that you would be going in entering the store? A. Yes, sir.

Q. And what is on the left hand side? A. A counter.

The Court: Let me understand a little more clearly how the counters ran.

30 Q. They ran from the front of the store to the back of the store? A. Yes.

By the Court:

Q. Well, the one on the right runs from the front to the back of the store? A. Yes, sir.

Q. And the one on the left hand? A. Yes, I suppose so.

40 Q. And the one in the middle? A. Well, I only went half way down through the store; I stopped half way through the store.

Mary Louise MacDonough—Direct

Q. But its length is from the front toward the rear? A. Yes, sir.

Q. And that is the case with all of them? A. Yes, sir.

By Mr. Kalisch:

10

Q. Now, taking the righthand counter, for example. Can you tell us what there is between the counter and the righthand wall, if there is anything? A. You mean goods?

Q. Well, what is there there? A. Goods to purchase.

Q. Now, where do the sales girls stand? A. Behind the counters.

The Court: At which counter?

20

Mr. Kalisch: On this righthand counter, I am still referring to.

Q. Can you tell us whether above where the girls stand on the wall there is anything showing? A. Yes, goods of all kinds, such as they sell there.

Q. Now, the back counter is on which side of the store, using the same general direction that we have started with? A. The righthand side.

30

By the Court:

Q. How far from the righthand counter? A. How far from it?

Q. You say the back counter is on the righthand side. You have already described a counter on the righthand side, or you have said something about a counter. A. Yes, sir.

Q. It had goods behind it and sales-girls by the

40

Mary Louise MacDonough—Direct

counter where the books were—— A. It is at the end of the counter on the righthand side. The counter ended there, and then came the rack of books, not behind the counter.

10 *By Mr. Kalisch:*

Q. Do you know about how long this righthand counter runs? A. I couldn't say.

Q. You do not know? A. Half-way through the store, I should judge.

Q. Now, at the end of the counter—what is there at the end of this righthand counter? A. You mean on the counter?

20 Q. Is there any space there in the store? A. No, the counter ended, and then came the rack of books on the wall.

Q. Where were those books? A. Against the wall.

Q. In shelves? A. Yes, sir.

Q. Were the shelves on the wall, connected with the wall? A. Yes, close against the wall.

30 Q. What about the titles? For example, if the front of the jury-box were about where the shelves are, on the top of this front, can you tell us about how the titles would show, how the books would be placed? Would it be [indicating]——
A. No, higher up, like this [indicating].

Q. Show the Court and jury. A. Like this, so I had to look up.

Q. Are you measuring from where you sit or from the floor? A. About here [indicating].

Q. To the floor? A. No, like this [indicating], from my head, from where I am standing; from the floor I am standing on the books were here.

Mary Louise MacDonough—Direct

Mr. Kalisch: Indicating a few inches above the witness's head—the titles of the books.

Q. [By the Court.] What does that indicate, what is that the height of? A. The bookcases where the books were kept.

Q. [By Mr. Kalisch.] Where the books were? A. Yes. 10

Q. Will you just please hold the book as you remember the books appearing on these shelves as you came in [handing book to witness]? A. They were small paper books [illustrating].

Mr. Kalisch: The witness indicating the title towards this passageway.

Q. Is that correct? A. Yes. 20

Q. Now, how long a shelf of books was there, about how long did it continue? A. I should judge between 4 and 5 feet.

Q. You say about 4 or 5 feet? A. Yes.

Q. [By the Court.] How many shelves? A. Probably five.

Q. [By Mr. Kalisch.] And how were they placed? A. I didn't have a chance to see exactly, I went down so quick.

Q. Now, we have gone to the book shelves. Now, tell us what happened, what you did, just previous to your accident; just tell the Court and jury. 30

By the Court:

Q. [Interposing.] Let me see whether these book-shelves that you speak of were against the wall. A. Yes, sir.

Q. Against the wall which is behind the counter to your right? A. No, no counter, no counter in front of the book-shelves. 40

Mary Louise MacDonough—Direct

Q. Against the same wall which is behind the counter to your right? A. No, not behind the counter; the counter ended, and then came the book-racks against the wall.

10 Q. I have not made my question clear. Is the case against the same wall which is behind the counter which you have described as being on the righthand side when you came in? A. Yes, sir.

By Mr. Kalisch:

Q. Mrs. MacDonough, assuming that the front partition in front of the jury-box were the counter, about how far back from the end of the counter to the wall against which the books are on the shelves? A. About probably 4 feet.

20 Q. You have got to walk about 4 feet to get to it? A. Yes, about 4 feet, I should think.

By the Court:

Q. When you say "4 feet," what are you measuring from, from the inner side of the counter or from the outer side of the counter? A. From the edge of the counter on the righthand side, the edge of the counter.

Q. Which edge? A. The outside edge.

30 Q. [By Mr. Kalisch.] The outside? A. Yes, sir.

Q. [By the Court.] Suppose this book to be the righthand counter [indicating]. Is this space of 4 or 5 feet which you speak of as being the distance that the case is back—from what point do you measure your 4 or 5 feet? A. The outside.

Q. From what point of the counter do you measure your 4 or 5 feet? A. The outside.

Q. This [indicating]? A. Yes.

40 Q. That is measured from what we might call the front of the counter? A. Yes, sir.

Mary Louise MacDonough—Direct

Q. That portion of the counter which is most distant from the wall? A. Yes.

Q. What is the width of the counter? A. I couldn't say; it is the usual width that they have in those stores; about probably 3 feet; I couldn't state positively.

Q. Well, that 3 feet, if I am right, would come off of your 4 or 5 feet. You probably do not mean that exactly. You say you measure from the wall out to the front edge of the counter, and you say that is 4 or 5 feet? A. As near as I can judge.

Q. In that measurement is counted the width of the counter itself, which you say is about 3 feet. That would leave 2 feet, or, at most, 3 feet. A. Then, I guess it must have been to the inner edge of the counter. When I got inside to this bookshelf there was a the width of the door, the cellar entrance there, which I didn't notice then, until after I had my fall.

Q. You are not clear whether your measurement of 4 or 5 feet goes to the inner edge or the outer edge of the counter? A. No. I am not very good on distance.

The Court: I merely want to know how it lies in your mind, because we have not been there and you have.

By Mr. Kalisch:

Q. Now, Mrs. MacDonough, before you reach the point at which these books appear on the wall, is there any other portion of the counters or wall upon which there were any books, or the library? A. No.

Q. Just tell us how you went toward the books, or whatever you did do, and how the accident hap-

Mary Louise MacDonough—Direct

pened. A. I walked in from the front of the store, and when I saw the books, which were at the end of the counter, the rack against the wall—

Q. Which end? A. The righthand side.

10 Q. The near end or the further end? A. As I was going toward the back of the store—and I stepped into the rack of books and went to look up, and stepped sideways, and down I went. The gate had been tied back; there was nothing there.

Q. There was a gate there? A. Yes, sir.

Q. It was open? A. Yes, it was tied back.

Q. Was there any table or anything of that sort in front of the place? A. Oh, no.

Q. Was there any obstruction in front of the entrance through this gate? A. No.

20 Q. Can you tell us whether they had prices on these books? A. I believe ten cents.

Q. They were ten cent books? A. Yes, sir.

Mr. Autenreith: I object to that, and I ask that it be stricken out. It is hearsay.

[Answer read.]

A. I would say ten cents.

30 The Court: Give us your best recollection about it.

Witness: Ten cents.

Q. Do you know how you fell down? Do you know what sort of a thing you fell down? A. I went through this opening and struck my full length; I touched the left side of my head—that was my full length—and then I rolled the rest of the way down.

40 Q. Do you know what the opening contained? Do you know whether it was merely a drop down

Mary Louise MacDonough—Direct

into the cellar or a stairway, or what it was? A. Not until after I reached the bottom.

Q. Do you know now? A. Oh, yes.

Q. Well, what was it? A. The stairway to the cellar, about fifteen to twenty steps.

Q. And you went down these twenty steps? A. 10
Oh, yes.

Q. Were you hurt? A. Severely.

Q. Where were you hurt? A. A fractured leg, the left leg, and internally, bruised all over, and my left side of my neck, and I am still under treatment.

Q. What doctor did you have? A. Dr. A. G. Hulett, 20 Hawthorne avenue, East Orange.

Q. How long was it that you were in bed as a result of this accident? A. I was in bed eight weeks, a week in the hospital and seven weeks at the doctor's house, and then at my own home, off and on. 20

Q. Were you laid up about the house at all after you were able to get out of bed? A. Oh, yes.

By the Court:

Q. Dr. Hulett, you said, was in Hawthorne avenue. Is that East Orange? A. Yes, sir; 20 Hawthorne avenue, East Orange. 30

Q. What hospital were you in? A. In the Salamanca Hospital, Salamanca, New York.

Q. And you were seven weeks in the doctor's house? A. Yes, sir.

Q. At Dr. Hulett's house? A. Yes, sir.

Q. In East Orange? A. Yes, sir.

By Mr. Kalisch:

Q. Was that in addition to the hospital, or were you a week in the hospital? A. I was a week in the hospital in Salamanca. 40

Mary Louise MacDonough—Direct

Q. How did you get to the hospital? A. In an ambulance.

10 Q. During the time that you were in the hospital can you tell us whether your leg was put in any sort of a cast, or anything of that sort? A. It was put in a frame, and then when the doctor came after me to take me home he put it in a cast, with the assistance of a surgeon there.

Q. What kind of a cast, do you know? A. A plaster cast.

Q. How long did you keep this cast on your leg? A. Until I arrived at the doctor's house, and then it was taken off and reset again and X-rays taken.

Q. Did that give you any pain? A. Oh, very much.

20 Q. Did you suffer pain while you were at the doctor's house? A. Yes, a great deal.

Q. Did you suffer any pain after that? A. Yes.

Q. Do you suffer any pain now? A. Yes.

Q. Where? A. In the leg, in the knee and——

Q. All the time or periodically, which? A. 'Most all the time.

Q. Do you have any difficulty in walking? A. Yes, great difficulty; I can't go out unattended.

Q. Why? A. On account of the pain and the leg being unsafe.

30 Q. Who goes out with you? A. My husband or my daughter-in-law or my son, my sister.

Q. Did you see anybody at the store directly after the accident? A. Yes, the manager; he was there immediately and assisted me in every way; he was very kind; and the girls in the store; they were very kind to me.

Q. Did you have any conversation with the manager? A. Yes, he asked me my name and age——

Mary Louise MacDonough—Direct

Mr. Autenreith: I object to that. The person is not shown to be the manager, or whoever he may be.

Q. After the accident what did this man do, if anything—this person who you say was the manager? 10

Mr. Autenreith: I do not think that is material until his identity may be established, if the Court please.

The Court: It may have a bearing on the nature of the injury.

Mr. Kalisch: May it please the Court, that is not the purpose of the question. The purpose of the question is to show that the person whom we claim was the manager acted as the superintendent of every person there, and every person obeyed his instructions as to what acts to do, and I maintain that a person who has supervision such as that might have some authority to bind his principal. 20

[Question and answer read.]

The Court: There does not seem to be any question just now.

Mr. Autenreith: She started to answer before I had a chance to object. 30

The Court: I overrule the answer so far as it relates to anybody who might have asked her name and age.

Q. What was the rest of the conversation?

Mr. Autenreith: I object on the ground that there is no proof as to who this person is, as to whether he was the manager, and, furthermore, as to whether the conversation 40

Mary Louise MacDonough—Direct

with him was such as could bind his employers.

10 Mr. Kalisch: My point is this, may it please the Court. Mr. Autenreith permitted the first question to be asked, with regard to a part of a conversation with the manager, without objection, and speculated upon the answer. I maintain now that we are entitled to give the entire conversation.

The Court: I do not think there is anything in that. Anybody might have asked the lady's name and address; a porter might have asked it and a salesgirl might have asked it.

20 Q. What did you see him do, if anything, after you were hurt?

Mr. Autenreith: I make the same objection, your Honor, on the ground that I do not know who this person is that she calls the manager. I do not think it is material or competent until the identity of the person is established by proper proof of the fact that he is the manager.

30 The Court: This question does not relate to any statement made by this person, but as to what he seemed to be doing, as to her observation of him. I think it is competent.

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

Exception noted as ground of appeal.

40 Q. What did you see him do, if anything? A. He got down blankets and put them under me on the ground, and ordered the girls to get me a glass of water—

Mary Louise MacDonough—Direct

Mr. Autenreith: That is objectionable, if the Court please—the fact that he asked the girls to do something. That is a conversation between the manager and somebody else.

The Court: Leave out what he said and describe what he did. 10

Witness: Got out blankets, small blankets, and laid them on the ground. It was a stone floor, a cement floor.

Q. Where did he take them from? A. They seemed to be stocked down there, as far as I could see. It was pretty dark.

Q. And what else did he do, if anything? A. He ordered the girls to wait on me—— 20

Objected to.

Q. Tell us what he did. He gave some orders, you say? A. Yes, sir.

Mr. Autenreith: I ask that that be stricken out. That is the witness's conclusion.

By the Court:

Q. You say this was a cement floor? A. Yes, sir; the cellar floor. 30

Q. Oh, on the floor of the cellar? A. Yes.

By Mr. Kalisch:

Q. Just answer this yes or no. Can you tell us whether any instructions were given by this man to the help in the store which, to your knowledge, were obeyed by such help? 40

Mary Louise MacDonough—Cross

10

Mr. Autenreith: I think that is objectionable, if your Honor please, because it embodies the witness's conclusions as to just what this man was doing, whether he was, in her opinion, giving orders, and whether somebody was, in her opinion, obeying those orders. I think the question itself is bad, even though it only calls for a yes or no answer.

The Court: I think the question may be answered either yes or no.

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

Exception noted as ground of appeal.

20

Q. What is your answer? A. Yes, sir.

Cross examination by Mr. Autenreith:

Q. Mrs. MacDonough, how long had you been in Salamanca? A. Why, I arrived about half an hour, I think, before I entered the store.

Q. Had you been there the day before? A. No.

Q. Where had you come from? A. Erie, Pennsylvania.

30

Q. You were with a company, a theatrical company, of some kind? A. Yes, sir.

Q. And you had just come into Salamanca? A. Yes.

Q. You say half an hour before. Were you just simply looking the town over as you got to Woolworth's? A. Yes, sir; I was looking for books, something to read.

Q. You wanted something to read to amuse yourself, and you strolled into Woolworth's? A. Yes, sir.

40

Mary Louise MacDonough—Cross

Q. You had never been in the store before, had you? A. No.

Q. You testified that the counters were on your righthand side as you came in. How many counters were there on the righthand side? A. One long counter.

10

Q. Only one? A. That is as far as I went in the store, halfway in the store, and then that counter broke off, and at the end of that counter there was an open space.

Q. And was there another counter? A. Yes, a little beyond it, down the rest of the store.

Q. Another counter ran from that point down to the end of the store? A. Yes, sir; and there was this open way—

Q. Then there were two counters on the righthand side that ran deep with the store? A. Yes, sir.

20

Q. And it was between these two counters that you say this shelf was where these books were? A. Yes.

Q. That is the space that was open between these two counters? A. Yes, sir.

Q. And this store is about how deep—that is, if you remember it? A. Well, twice the length of this courtroom, I should think.

30

Q. And the second counter ran down to the end of the store, you say, on the righthand side? A. Yes.

Q. And when you went to get one of these books you went in that open space between the first counter on the righthand side and the second one and stepped up towards the books, did you not? A. Yes.

Q. When you stepped in between there you were how close to the books, a foot away? A. Hardly.

40

Mary Louise MacDonough—Cross

Q. Well, you were right up close to the wall, so that you could see the books? A. Yes.

Q. And on your righthand side, behind you, was one of the righthand counters? A. Yes.

10 Q. And on your lefthand side, to the left, was the other? A. Here is one.

Q. Behind you? A. To this side.

Q. But there was another counter running straight down to the end of the store, was there not? A. Not in continuation of this.

Q. There was an opening between the two of them? A. Yes, and the other counter was a little bit ahead of the other one; it didn't run straight along.

20 Q. You told me, if I do not mistake, that there was first this righthand counter? A. Yes, sir.

Q. That ran half-way? A. Yes.

Q. And then a space? A. Yes, sir.

Q. And then another righthand counter ran to the end of the store? A. Yes, but not directly alongside of this other counter; it was a little bit ahead of it; there was room there for the cellar door.

By the Court:

30 Q. What do you mean by "ahead of it"? A. There was a wall ran down this way, and then for the door there was an opening, and then it continued down.

Q. This is what I want to know: Were the two counters in the same line? A. They were supposed to be, but, you see, this counter—

Q. Not what they were supposed to be, but were they, as a matter of fact, in the same line, or was one of them further out in the store than the other?

40 A. Yes, to make way for the cellar floor.

Mary Louise MacDonough—Cross

Q. Without reference to the object of it, was one of the counters further out into the store than the other counter? A. Yes.

Q. Which was further out? A. The one going towards the back of the store.

Q. How much further out? A. Well, probably 10
5—4 feet.

Q. 4 feet further out in the store than the other?
A. Yes, sir.

By Mr. Autenreith:

Q. On the first counter as you come in on the righthand side there were goods displayed, were there not? A. Yes, sir.

Q. And on the second counter, the one that ran towards the rear of the store, there were goods displayed? A. Yes. 20

Q. And you say as you came in you observed salesgirls behind the counters? A. Yes.

Q. That is correct, is it not? A. Yes—not many.

Q. Well, I do not care how many. You observed how many, one or two? A. Yes.

Q. It was around noontime, was it not, that you went in, Mrs. MacDonough? A. Yes.

Q. And was there any salesgirl at the counter near where these books were that you stepped in to see, at the time you stepped in there? A. The 30
girl that I spoke to.

The Court: Which counter do you refer to? She stepped in between the two counters. Do you mean the one nearer to the front of the store?

Mr. Autenreith: The one nearer the front of the store.

Mary Louise MacDonough—Cross

Q. Was there a girl behind that counter? A. As I went in there was a girl there.

Q. When you got to the place where the books were was there a girl in behind the counter there near the wall? A. No.

10 Q. Was there a girl behind the counter that ran to the end of the store at that time? A. I didn't see any; there might have been, but I didn't see any.

Q. You did not look for them, did you? A. Well, I don't know; I don't remember seeing any.

Q. You could not read the titles on these books from the place where these counters were, outside of the counters, could you? A. It was very dark.

20 Q. Could you read it or could you not? A. Well, I didn't read it; I didn't have a chance. I couldn't say positively, because I looked at them and down I went.

Q. You walked in to read the titles, did you not? A. Yes.

Q. To see what the books were? A. Yes.

Q. Did you ask any clerk in the store to come down to that point to wait on you or to tell you what the titles of those books were? A. No, but I asked them where the books were.

30 Q. Never mind that. I asked you if you asked them to wait on you. Now, you are positive, are you, Mrs. MacDonough, as to the fact that the entire counter, the one that is back, is a little further out than the one that is forward? A. Yes.

Q. You are sure about it? A. Yes.

Q. You had never been in this store before? A. No.

Q. And when you stepped in there, you say, as you told Mr. Kalisch, you fell down that cellarway almost before you could see? A. Yes.

40 Q. And yet you are sure that the rear counter is

Mary Louise MacDonough—Cross

not in direct alinement with the forward one? A. Yes.

Q. You are positive? A. Yes.

Q. You never went back to that store since, did you? A. No.

Q. You were in there before the accident about ten minutes? A. Yes, about ten minutes. 10

Q. And during that time you strolled from the front door of the store back to where these books were? A. Yes.

Q. Now, you say also that in the center there were some display cases? A. Yes.

Q. That is, in the center of the store, between the lefthand counters and the righthand counters? A. Yes.

Q. What were they, tables? A. Counters. 20

Q. Counters or tables? A. I couldn't say positively. Something with goods on them.

Q. And they ran back towards the rear of the store? A. As far as I went; I don't know beyond.

Q. On those counters there were goods displayed for sale? A. Yes.

Q. And the prices on them? A. I can't say.

Q. Are you sure that there were prices on the books, then? A. Yes, sir; I saw the price, because I was going to buy the books. 30

Q. Where were the books? A. On the racks.

Q. They were not in glass cases? A. No, sir.

Q. They were on open shelves? A. Yes.

Q. And where was the price of the books? A. On the top of the shelf.

Q. You saw that? A. Yes, sir.

Q. You could not see very well, and you stepped in to see what the books were? A. Yes, sir.

Q. And then you stepped in there, and you stepped sideways? A. Yes, sir. 40

Mary Louise MacDonough—Redirect

Q. And you saw the prices of the books? A. Yes, sir.

Q. And you observed the layout of the counters?

A. Yes, sir. I couldn't say what was on the counters.

10 Q. You went home from Salamanca to East Orange about a week after the injury? A. The doctor came after me and took me home; I went home with the doctor.

Re-direct examination by Mr. Kalisch:

Q. Mrs. MacDonough, you started to answer one of Mr. Autenreith's questions, and you said, "I asked the clerk about the books"—you asked somebody about the books. Where did you ask where the books were; what part of the store were you?

20 A. As I entered the store.

Q. To whom did you speak, a girl or— A. A girl, a salesgirl behind the counter.

Q. Did she indicate where the books were?

Mr. Autenreith: I object. I do not think the witness should be led.

[Question withdrawn.]

30 Q. When you asked her where the books were, where did she tell you they were? A. At the end of the counter.

Mr. Autenreith: I object to the conversation between this person, whom she designates as a girl, and this witness, on the ground that it is not competent or binding on the defendant. It must be hearsay as to the defendant. And, furthermore, it is not re-direct examination, because the cross ex-

Mary Louise MacDonough—Redirect

amination was directed to the point whether at the time she got to the place of looking at the books she asked any one to wait on her, and she volunteered, and she said something as to what happened when she came in, and I told her I did not want that.

10

Mr. Kalisch: If your Honor please, I failed to ask this on my direct examination, when I should have asked it. I ask leave now to ask it, because of my overlooking that point.

The Court: If it is put on the ground of an omitted question, I should allow it. The next question is whether the objection to its competency is well taken. I think there may be something to be said in favor of the objection. I shall sustain it.

20

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

Exception noted as ground of appeal.

Q. You asked someone who was working behind the counter, you say? A. Yes.

Objected to as leading.

The Court: This is merely repetitious. The witness has already said that she spoke to a girl behind the counter.

30

Q. After talking with her what did you do with regard to either going where the books were or not?
A. I went right where she directed me.

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

The Court: Strike out the answer, because it contains a statement as to what the girl said.

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Mary Louise MacDonough—Redirect

Q. You went to the books, you say? A. Yes, where the girl directed me.

10

Mr. Kalisch: No, do not say that. The Court has said that you cannot say what the girl has told you.

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

Mr. Kalisch: I shall consent that it be stricken out.

The Court: Strike it out.

Q. [By the Court.] You went to the books, did you? A. Yes, sir.

20

The Court: That is enough.

Q. [By Mr. Kalisch.] Can you tell us whether the degree of light as between the point near the floor and the point up towards where the books were changed any, whether the one part was lighter or darker than the other? A. The corner where the books were was very dark.

Q. Can you tell us which part was darker, the lower part or up toward the top of the bookcase, wherever it was? A. Yes.

30

Q. The lower part was darker? A. Yes.

Mr. Kalisch: Merely for the purpose of the record, I should like to ask one question.

Q. When you came in the store and asked this girl where the books were what did she say?

Mr. Autenreith: I object to the question on the same ground, that it is not competent.

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Albert Groves Hulett—Direct

The Court: It seems to be the same question. I shall sustain the objection.

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

Exception noted as ground of appeal.

10

ALBERT GROVES HULETT sworn in behalf of plaintiffs.

Direct examination by Mr. Kalisch:

Mr. Kalisch: May it please the Court, Mr. Autenreith admits the qualifications of the witness.

20

Q. Dr. Hulett, were you attending Mrs. MacDonough for her injuries received on or about October 30, 1916? Did you attend her? A. Before that time?

Q. No, after that time? A. Yes, sir.

Q. How soon after that time did you attend her? A. On November 1st I received a telegram from the Salamanca Hospital, and a few hours later I received one from Mr. MacDonough, telling me of the occurrences in brief. The one from the hospital gave me Mrs. MacDonough's condition, and I immediately wired back for particulars, and I got them, and got a request from Mr. MacDonough to do what I thought was best. What I thought was best was to go right on and see her. So I took a train that evening, or, rather, the following evening, because it took twenty-four hours to get the telegrams between us, and it was November 2d that I got the full particulars. I took the night train on the 2d, and went to Salamanca, and I arrived the

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Albert Groves Hulett—Direct

next morning. I went to the hospital and found Mrs. MacDonough. She was in bed, she was in what we call a fracture box, which is a contrivance made with three boards, and the leg is laid in it and bolstered in by means of either sand or cotton, or any other suitable substance. There was some
 10 extension on it—

Q. What is that? A. That is to say, a weight, so as to pull the foot down, the tendency being to stretch the leg out longer than it would normally be, by reason of the fact that after a fracture it tends to jam the ends of the bone past each other. Then over the leg there was a cage, which is made out of thin wood, to keep the weight of the clothes off the leg. The leg was heavily bandaged, and it
 20 had an anterior and posterior splint on it, one along the front and one along the back. There were contusions on the same side—that is, on this side of the head, down the arm—

Q. You mean the left side? A. The left side, the same side as the fractured leg. And on the side—that is, the pelvic girdle, otherwise known as the iliac region—there were contusions of minor degree, discoloration, some abrasion of the skin, a great deal of tenderness on touch. There was stiffness of the neck and shoulder, due to the contusions.
 30 Any attempt to touch the foot at all elicited a great deal of pain. The chart showed that the pain she had been having necessitated opiates, and she was getting them at that time; she was getting small doses of opiates then. The doctors at the hospital, Dr. Spalding and Dr. Lawlor, who had done the emergency work—I called for them, so that I could get their report, and they met me there. I said, "Now"—

40 Q. You cannot tell us that. Tell us what you

Albert Groves Hulett—Direct

found. A. The next procedure was to prepare her for the trip home. So, with their assistance, I took off the extension and splints and put on a plaster cast for the journey.

Q. Is that painful? A. Extremely painful. It requires lifting that leg, attempting to set it in more proper position, because this was the fourth day after the fracture, and a great deal of swelling had gone down, so that the primary dressing was loose; that came off very easily; and the effort to set that leg—guided by an X-ray picture taken immediately after she got to the hospital, we tried to remedy the deformity as well as we could and put it in plaster. That plaster is put on in a powder, with a long strip of plaster, which is set in powder, and when you wet it it sets. There were some contusions. She was ready then for the journey home. She was absolutely unable to move, and she had to be carried out on a stretcher, carried to the ambulance and carried from the ambulance to the station and lifted on the train into a compartment, and, with the assistance of four or five people, made the night trip home, and arrived at seven o'clock on the morning of the 4th.

Q. See if I cannot shorten this a little bit. You took her home that night and arrived the next day? A. Yes, the next morning.

Q. How did you get her home from the station? A. From Jersey City all the way out to East Orange with a large touring car, put the stretcher in the car transversely, right across it.

Q. And when you got home what did you do? A. Put her right to bed, and when she had rested we took another X-ray picture, Dr. Bunn and myself.

Q. Have you got those X-ray pictures here? A. I believe they are here.

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10 Q. You took some X-rays? A. Yes, for the purpose of having the exact positions of the bones and correcting any failure to put them in as good a position as possible, and, guided by that, we reset the leg again and took off this traveling cast, that was made heavy for the journey, and put on a lighter cast. That was allowed to remain on four weeks, and we took that off and put on a third cast, and at the end of eight weeks we took it off. When the last cast was taken off the appearance of the leg was something like this [indicating]; it had somewhat of a funnel shape beginning above the knee; there was a cigar-shaped enlargement of the leg, and the leg ran down funnel-shaped, like, being somewhat edematous from the thigh down around the heel. After the cast was removed the leg was edematous; you could put it with your finger. There were still some greenish or bluish stains where the bruises had been.

20 Q. [By the Court.] What does "edematous" mean? A. Dropsical. The reason for that is this. The healing of the bone results in the enlargement of the circumference of the bone at the point of fracture; that presses on the blood vessels that run through the parts.

30 Q. [By Mr. Kalisch.] That healing part is known— A. As the callus. The pressure would account for the swelling of the ankle. The leg was stiff; the joint was absolutely stiff. Massage, active effort at bending that joint by pressure, to break up the adhesions that had formed in the joint, was necessary before you could get any movement.

40 Q. What do you mean by "adhesions"? A. Adhesions, or new formations of the tissue, which stick together portions of the body, whether it be two bones or two portions that nature does not intend to have connected.

Albert Groves Hulett—Direct

Q. The effort was to break up these adhesions?

A. The effort was to break up these adhesions. It succeeded partially, accompanied by fainting and a great deal of pain. Then she had massage following that every day for several weeks, and then every other day, until we could get approximate motion, so that she could get up from a sitting posture. The swelling went down somewhat, and then reached a level, and has never gone down any further. 10

Q. Since that time have you seen her, Doctor?

A. Yes, sir; right along.

Q. How often? A. I may say on an average of once or twice a week.

Q. What have you to say as to whether there is any permanent effect as a result of this fracture?

A. There is. 20

Q. What is it? A. The appearance. This fractured leg is larger than the unfractured one; the knee is larger than the unfractured one; the lower part of the leg, or calf of the leg, has a decided inward tendency that the right one has not; there is a slight rotation of the foot.

Q. What do you mean by "rotation," turning?

A. Rotation; it is on a vertical axis. The bone at the point of fracture can be definitely felt with the hand as being extremely large and uneven, irregular. There is a loss of movement in the knee-joint. 30

Q. Is that permanent or temporary? A. That is permanent. No more breaking up could be done; we went as far as we could go.

Q. Did you measure the length of the leg? A. It is shorter than the other one.

Q. About how much shorter? A. About half an inch.

Q. Is that unusual where there has been a fracture at the knee? A. That is the usual result. This was a peculiar fracture. A fracture of the lower 40

Albert Groves Hulett—Direct

10 half of the leg would not have produced any difficulty in that knee, but this particular fracture was what we call a comminuted fracture—that is, there were several fragments—and the crack in the bone would lead up through the top of it; consequently, the hemorrhage that accompanies the fracture flowed right into the knee-joint.

Q. You say you took some pictures? A. Yes, sir.

Q. Can you identify those pictures [pictures shown to witness]? A. Yes, sir.

Q. See if you can identify the plates in chronological order, so that we can number them. A. One, two, three, four, five.

Q. Which is that [indicating]? A. That is one.

20 Mr. Kalisch: Do you want me to go further into the proof?

Mr. Autenreith: If the Doctor says that they correctly represent the situation, I shall admit them.

Q. Do those X-ray pictures that I have shown you correctly show the condition of the plaintiff's limb at the time the pictures were taken? A. Of the bone, yes.

30 Q. That is what I mean—of the injured part. A. Yes.

Mr. Autenreith: That is all right. I have no objection.

[The pictures referred to are marked respectively Ex. P1, Ex. P2, Ex. P3, Ex. P4 and Ex. P5.]

By the Court:

40 Q. Where and when were these taken, Doctor?
A. They were taken at my house.

Albert Groves Hulett—Direct

Q. In East Orange? A. Yes, sir.

Q. And when? A. The day following her arrival.

Q. That would be November 4th? A. That was the 5th that these plates were taken.

By Mr. Kalisch:

10

Q. Were they all taken the same day? A. They were all taken the same day, one right after the other.

Q. Do they show different parts? A. Three plates are anteroposterior; that is to say, the lady lying on her back, the plate is put under the leg and the X-ray tube on top, so as to get a view from top to bottom—those first three.

Q. That is, the plates numbered 1, 2 and 3; is that correct? A. Yes. 20

Q. They show a condition of her leg taking the picture from above, with the plate below? A. Yes.

Q. Below the limb; is that correct? A. Yes.

Q. And plate 4? A. And plates 4 and 5 are from side to side.

Q. That is, with the plates on one side— A. And the machine on the other.

Q. —and the machine on the other side? A. Yes, sir. 30

Q. [By the Court.] Are they different views of the same side or one from one side and one from the other side? A. It makes no difference with an X-ray which side you have the machine and which side you have the plate; the rays go right through, and there is simply a shadow.

Q. [By Mr. Kalisch.] Can you tell us whether the pictures taken showed the same condition that your examination disclosed or not? A. They showed more. 40

Albert Groves Hulett—Direct

10 Q. Just tell the Court and jury what plates 1, 2 and 3 show. A. They are alike, except that, due to a little longer exposure in one than in the other, details are a little different. The main bone of the lower part of the leg, or, as a doctor calls it, the tibia, is perfectly normal up to a point about that far from the top [indicating]—

20 Q. About how many inches? A. That is about 3 inches or $3\frac{1}{4}$ inches. —and from that point, beginning on the inside of the leg and curling up spirally into the head, you go into the knee joint surface of the bone, about half an inch to the outside of the center line is a definite line of fracture. That is carried in an irregular way across the top of the bone, and across the articular surface there is another line of fracture that starts on the front of the bone and runs off from the inside on a tangent to the first line; so that this is a Y-shaped fracture with a snake-like tail running into the shaft and leaving a little island of bone held in place, or approximately in place, merely by the ligament. The joint itself shows cloudy, which shows that there is an abnormal fluid in there; namely, pus. There should be a definite, clear shadow right through that joint. Water gives no shadow, and the ordinary serum of the knee-joint is like water. In this picture, which was taken on the fifth day after the accident, you see no callus.

30 Q. Do the pictures that you have in your hand there, No. 4 and No. 5, also show a fracture such as you have described in your testimony, in the early part of your examination? A. Yes, sir.

Q. Have you ever been in that store in Salamanca? A. Yes, I went in the store the day I was in the town; I spent the whole day there.

40 Q. Did you see where the books were in that store? A. Yes, sir.

Albert Groves Hulett—Direct

Q. Where were they?

Mr. Autenreith: I object, unless the doctor can identify the place as the same place where Mrs. MacDonough was.

Q. Were you in the F. W. Woolworth store? A. 10
Yes, sir; in fact, I had to have one of the doctors in the hospital direct me to the store in order to find it. I knew nothing about the town.

Q. Do you remember as you came in the door whether or not there was a counter on the right-hand side of the store? A. Yes, there was.

Q. Will you describe the store as you walked down from the front of the store past this counter, and so on? A. You go in the door of the store, and on the righthand starts the sales counter; that extends quite a distance down the store. I was looking particularly for the point where the accident occurred, naturally; I was naturally interested to see, if I could, the mechanism of her injury. That was my reason for going there; I wanted to see how she must have fallen in order to cause the damage that she had. It would give me some key as to replacement, for one thing. And you walk down this counter, and it ends, and then there was a rack, or a set of shelves, whichever you want to call it, with several tiers of books, dime novels, with a sign "Ten Cents," I think. That rack was the width of that, from that to the back [indicating]; I would say about 5 or 6 feet. 20 30

[The distance indicated by witness is measured and announced to be 5 feet.]

Witness: 5 or 6 feet.

Q. [By the Court.] That is the width of the rack? A. Yes, sir. The day I was in the store, 40

Albert Groves Hulett—Direct

which was on the 3d day of November, in front of this rack there was a——

Q. [By Mr. Kalisch.] At the end of that counter that you pass on the right, is there anything else that you meet before you get to the books? A. That is just what I was going to tell you.

10 Q. Well, answer the question. Was there? A. Yes, sir; there was the day I went in the store.

Q. What was there? A. They had one of these movable tables, and that took up the largest part of this space.

Q. What space? A. In front of these shelves there was a narrow space on one side of the table, a wide enough space for a person to go in sideways at the back end of the table; and then another counter started and ran down the rest of the store.

20 Q. The space which this moveable table filled up, or most of the space was filled up, was there anything there? A. There was some goods on display on the table.

Q. Do you know whether there was any gate there? A. The gate was in front of the stairway.

Q. How near the stairway? A. Well——

30 Q. Well, as you walk through this space which was covered up by this moveable desk, or whatever you call it, how far away from the space is the point at which the stairway starts? A. [Indicating.] Well, we will assume that this is the second counter—the end of the jury-box—the inside corner of the second counter; here is the store space; here is the counter, here; here is the inside counter, which would be back of the second counter, where you gentlemen are sitting. It starts right there; in other words, right at the end of the book rack.

40 The Court: This method of describing the situation, or this last feature of the situa-

Harry Fiske MacDonough—Direct

tion, however graphic it may be to us, will not be intelligible when you come to print the book and take the case up, if you ever do. Therefore it would be desirable for the witness to endeavor to put the description into descriptive words, so that it will be intelligible. 10

Witness: Very well.

ADJOURNED until to-morrow, Wednesday, October 17, 1917, at ten o'clock, A. M.

SECOND DAY.

Wednesday, October 17, 1917. 20

Met pursuant to adjournment.

Present, counsel as before stated.

[By consent of counsel, the examination of the witness Albert Groves Hulett is suspended for the present.]

HARRY FISKE MACDONOUGH sworn in behalf of plaintiffs. 30

Direct examination by Mr. Kalisch:

Q. Mr. MacDonough, you are the husband of Mrs. MacDonough, a plaintiff in this action? A. I am.

Q. And you are also a plaintiff? A. I am.

Q. And were you with your wife on the 30th of October, 1916? A. I was.

Harry Fiske MacDonough—Direct

Q. In the store of F. W. Woolworth Company?

A. Yes.

Q. In Salamanca, New York? A. Yes.

Q. Mr. MacDonough, do you know how many stores F. W. Woolworth Company has in Salamanca? A. One.

10

Q. In that store do you know how many places there are where books are exposed for sale? A. One.

Q. Now, will you please tell the Court and jury where the books that are exposed for sale are placed with reference to a person entering the store in which your wife was hurt? A. Going in from the front door, they are on the righthand side, about 40 or 50 feet from the front door, at the end of the first counter, against the wall, at an open space.

20

Q. Now, as you come in, this first counter that you speak of is on which side? A. The right.

Q. The right of the person entering? A. To the right.

Q. Of the person coming in the door? A. The person entering.

Q. And having this counter to your right, what then does one come to? A. The end of the counter and some book-shelves against the wall.

30

Q. The book-shelves against the wall are where with reference to the very end of this counter on the righthand side? A. They are just at the inside of the counter.

Q. Can you tell the Court and jury whether they begin even with the end of the counter, in the same line? A. The book-shelves were nailed fast to the plaster wall.

Q. Do you know whether there is any entrance way there at all?

40

Objected to as leading.

[Question withdrawn.]

Harry Fiske MacDonough—Direct

Q. Can you describe the physical condition at the end of this counter? A. They had wares for sale against the wall, and there was an open way there so that you could go in and see them.

Q. What kind of an opening was it? A. It was an opening that consisted of a space between two counters. 10

Q. Describe it. A. And it was probably about somewhere between—well, it was irregular, 3 or 5 feet, opening enough for a person to go in comfortably; and then another counter extended down the length of the store, but about 2 or 3 feet further removed from the wall than the first counter.

Q. Running parallel or at right angles with this first counter? A. In a direct line with the first one, only removed further from the wall. 20

Q. Do you mean that the second counter, assuming that this fence in front of the jury-box is the first counter—that the counter came out further than that one [indicating]? A. Correct.

Q. This space between the two counters was about how much? A. About 2 or 3 feet.

Q. Is that what you said you were not sure of, that it was about 3 to 5 feet; is that what you were referring to? A. No, that was the opening between the counters which is vague. 30

The Court: You are now asked as to the space between the counters.

Witness: Yes, sir.

Q. It was what? A. Well, I will say, as near as I can remember, to compromise, about 4 feet.

Q. You are not sure, are you? A. I couldn't swear to it.

Q. Well, do you know whether there was any- 40

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thing closing up the space between the two counters? A. No, nothing between the two counters.

Q. Do you know of any gate or anything of that kind near there? A. There was a gate near, yes.

Q. Where was it? A. That gate ran from the plaster wall to the second counter.

10 Q. When you say "the plaster wall," what have you reference to? A. The right wall.

Q. And that ran from the right wall to which counter? A. Do you want me to tell you the position I saw it in?

Q. That is what I want to know. A. That ran along the plaster wall, that gate; when I saw it it was running along the plaster wall under the bookshelves there.

20 Q. Locked there? A. It was tied back with some kind of cord or string.

Q. Now, can you tell us whether there was any place for the end of the—what do you call it? A. It was a little, ordinary, square gate, with two cross-pieces.

Q. Can you tell us whether there was any place into which the gate when not tied back fitted in?

30 Mr. Autenreith: I object to characterization of the examination, because it is very leading. I think the witness ought to describe it without suggestion.

The Court: I think this question is not objectionable.

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

Exception noted as ground of appeal.

[Question read.]

40 A. Yes, sir; the original purpose of the gate—

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The Court: No.

Witness: Well, it was to cross the opening where the stairs were, to protect it.

Q. You say it was to cross the opening where the stairs were. I asked you whether you know whether there was any place at the opening to the stairs where this gate when not tied back would fit in? A. Yes. 10

Q. Is that so? A. That is right.

Q. And in front of what was the line between the place where the gate fitted in and the hinges of the gate? Do you understand that question? A. Yes. There were steps.

Q. That was in front of the steps? A. Yes.

Q. Now, have they salesgirls in this store? A. Yes. 20

Q. Did you see these racks of books yourself? A. We went in for the purpose of finding them and asked for them.

Q. Well, did you see them? A. After we were told where they were.

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

The Court: Strike it out. 30

Q. Did you see them? I do not care whether you asked where they were or not. Did you see them? A. Oh, yes, we saw them; I saw them, yes.

Q. Can you tell us whether there was any change in the degree of light between the bottom, or the floor, and the top of the book-racks? A. I can tell you.

Q. Well, now, describe to the Court and jury what the change was, if any? A. Being the middle 40

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of the store, the light was less there than in the front, and as you got toward the floor, the counters shaded the floor, so that you couldn't see very distinctly, or, in fact, scarcely at all, but up where the books were you, by going close to them, could read the titles.

10 Q. So it was darker toward the floor? A. Yes, sir.

Q. Can you tell us whether or not there was any sign or anything of that sort near the books? A. There was a little paper at the top shelf, I think, saying "Ten Cents."

Q. Were there any salesgirls near this book-rack? A. Oh, yes.

Q. How near? A. Within speaking distance.

20 Q. Well, that is comparative. A. Well, maybe 3 or 4 feet.

Q. Had you seen any one of those girls whom you saw 3 or 4 feet from the book-racks anywhere else in the store previous to your getting near the book-racks? A. They may have been the same ones; I couldn't recognize their faces; but there were people, employees, about there all around.

30 Q. Can you tell us whether this passageway where the gate was tied back, to your knowledge, had been used by any one previous to your wife going through? A. Yes.

Q. Whom? A. Salesladies.

Q. Did you see your wife fall? A. I was looking at the books when I heard her scream, and I immediately looked, and she was then on her way down, about half. I immediately went below——

40 Q. Well, we shall get to that after awhile. How far in back of her were you as she walked through this opening between the two counters? A. I was looking at the book titles, and she came directly to

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my side, on my left, and the rest of it was quick work.

Q. Well, you mean—— A. Well, she went right down.

Q. Now, Mr. MacDonough, where was your home at the time this accident occurred? A. East Orange, New Jersey. 10

Q. Did you keep any servants, or did your wife take care of the house? A. Well, that was as it happened; sometimes and sometimes not.

Q. Depending upon the possibility of getting them? A. Well, if we were travelling, of course, we wouldn't keep any help.

Q. Before this accident can you tell us whether your wife helped or did not help in the keeping up of the household when you were not travelling? A. Considerably. 20

Q. In what way? A. Attending to the regular housekeeping duties, whatever that may include.

Q. Was she disabled from doing this after the accident? A. She was.

Q. For what period of time? A. From October 30th, when the accident occurred, until about March or April.

Q. To March or April? A. Yes.

Q. Well, that means from October 30th, 1916—— A. Yes. 30

Q.— to March or April, 1917? A. Yes.

Q. As a result of your wife's accident and injuries were you called upon to make any payments for medical expenses or anything pertaining to the treatment of your wife? A. I paid for all.

Q. And how much?

Mr. Autenreith: I object, if the Court please, unless he characterizes the amounts 40

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and the amounts of the respective bills are shown to be reasonably necessary, and their fair value.

The Court: The first thing is to specify the amounts as particularly as you can.

10 Q. Well, first, you had a doctor, did you? A. We had several doctors, on account of—

Q. What doctors? A. At Salamanca we had Dr. Lawlor and Dr. Spalding.

Q. Any other doctor there? A. Not there.

Q. Beginning with them. What, if anything, did you pay Dr. Lawlor or Dr. Spalding for their treatment of your wife?

20 Mr. Autenreith: I object to that question, if your Honor please, because it could only be properly established by the doctor, who can testify that his services were reasonably necessary for the injury and that the amount of his charge was a reasonable charge. This man may have paid any sum; he may have paid for things that may or may not have been reasonably necessary, and he cannot testify to that, because he is not qualified.

30 The Court: The witness may describe what these physicians did, so far as he is able to, and then may state what their charge was.

Mr. Kalisch: I shall withdraw the question for the present.

Q. What did Dr. Lawlor and this other doctor do in the treatment of your wife?

Mr. Autenreith: That is, that he observed?

Mr. Kalisch: Yes.

40 A. What I saw myself?

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Q. Yes. A. When I took hold of my wife's leg and found the bones broken, I told them at once to send for the best surgeon in town, and Dr. Lawlor came very quickly, and he put a temporary bandage of some kind to hold it while they took her on the stretcher to the ambulance and to the hospital. Then he took an X-ray, and her clothing was cut off and she was put to bed, and they called in Dr. ——— 10

Q. [By the Court.] Was it Dr. Lawlor that took the X-ray? A. Yes, sir.

Q. [By Mr. Kalisch.] Did Dr. Lawlor do anything more than that? A. Then he called in Dr. Spalding.

By the Court:

Q. Tell me about what time of day this accident happened. A. This accident happened about 10:45 or eleven o'clock. 20

Q. In the morning? A. About that.

Q. A. M.? A. A. M.; yes, sir.

Q. Go on. A. And Dr. Spalding, I believe, is the hospital physician, and it was necessary——

Q. Do you know the name of the hospital? A. It is the Salamanca Hospital.

By Mr. Kalisch:

Q. What I want to know is, Mr. MacDonough, was that the last thing that Dr. Lawlor did for your wife? A. No. 30

Q. Finish up what he did. A. He treated her for the time that she was there, which was from Monday until Friday.

Q. Do you know how often that treatment was given? A. Every day, both of them. You want what one first? 40

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Q. Dr. Lawlor. Every day, you say? A. Yes. Such as putting on a plaster cast and arranging the sling, and all that, and medicines. She needed some sort of an opiate; she was very much worked up, and so forth, and so on.

10 Q. Mr. MacDonough, I understood that Dr. Hulet put on this plaster cast. A. After. You know, it took several days before he got there. In the meantime, something had to be done, and they had——

Q. Was there another cast put on before Dr. Hulet put one on? A. Well, probably I used the wrong term. I mean this cradle, or whatever it is, and packed—the cradle and packed.

Q. Then Dr. Hulet came? A. Yes.

20 Q. Now, what did Dr. Lawlor render you a bill for for that treatment, beginning as you have described it and ending as you have described it?

Mr. Autenreith: I will make the same objection your Honor, as I made before: that it is not competent testimony as to the amount of the Doctor's charges or of the reasonable value thereof.

30 Q. [By the Court.] Did you pay the bill? A. Yes, sir.

The Court: I think the evidence is unobjectionable.

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

Exception noted as ground of appeal.

Q. [By the Court.] How much did you pay Dr. Lawlor. A. [Referring to memorandum.] \$28.

40 Q. [By Mr. Kalisch.] Now, during that time I

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understood you to say that you had some other doctor? A. The house physician.

Q. What did he do?

The Court: This is Dr. Spalding?

Witness: This is Dr. Spalding; yes, sir.

10

A. Well, he assisted—

Q. Did you pay a bill to this Dr. Spalding? A. I did.

Q. Well, now, describe what he did while you were there with regard to your wife's condition?

A. Well, he attended to the physician's part of the work, while Dr. Lawlor attended to the surgical part.

Q. Well, what did he do? A. Well, the patient was in a very upset condition and she needed much attention, naturally.

20

Mr. Autenreith: I cannot anticipate this kind of an answer to the question, your Honor. It is not responsive. That is not my objection, but the witness is characterizing the condition of the patient, and he is not competent to do that.

Q. Describe what Dr. Spalding did. A. He attended her for her trouble. 30

Q. Did he give her any treatment, that you know of? A. Oh, yes.

Q. Well, then, what did he do, what treatment did he give her? A. Well, he gave her medicine.

Q. How often did he come? A. Every day during the time she was there.

Q. And how many days was that? A. Until Friday, from Monday until Friday.

Q. That is, five days? A. Five days.

40

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Q. Do you know whether he had examined her at all at the time of the accident? A. Not immediately.

Q. Well, after the accident? A. After she got to the hospital he did.

10 Q. Do you know whether he prescribed for her or not after having examined her? A. Yes, he did.

Q. Did you pay his bill? A. I paid his bill.

Mr. Autenreith: I raise the same objection as to the previous question. It is incompetent.

The Court: I make the same ruling.

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

Exception noted as ground of appeal.

20 Q. How much was it? A. \$16.

Q. Was there any other doctor? A. When the patient was brought home there were two more doctors.

Q. What doctors? A. Dr. Bunn, of Orange, and Dr. Hulett, of East Orange.

Q. Dr. Bunn was the X-ray— A. X-ray and surgeon.

Q. I understand that Dr. Hulett did most of the treatment? A. Yes, except the setting of the bones.

30 Q. What did Dr. Bunn do? A. Took X-ray pictures and set the leg, and, assisted by Dr. Hulett, put on the plaster cast.

Q. Did you pay his bill? A. I have paid part of it, and, as he has made calls since I paid that, I expect the rest of it.

Q. You did pay part of it? A. Yes, about half.

Q. How much have you paid?

Mr. Autenreith: I make the same objection to that question, that the testimony as

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to the amount of the doctor's bill is incompetent, if your Honor please.

The Court: I make the same ruling.

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

Exception noted as ground for appeal.

10

A. Up to date I have paid \$40.

Q. How much was the balance of the bill rendered you, of which you paid \$40? How much is the balance of the bill?

Mr. Autenreith: I object to that, because the bill is the best evidence of what it is. Certainly the witness cannot testify to the contents of the bill without producing it.

[Question withdrawn.]

20

Q. Have you ever spoken to Dr. Bunn about the balance due him, about when you expect to pay him? A. Not directly.

Q. How much is the balance that you owe Dr. Bunn on this bill?

Mr. Autenreith: I object on the ground that the witness has already testified that the bill as rendered to him so far he has paid, which was \$40. Now, for him to say what the balance is could only be based on hearsay from what the doctor told him, or the bill rendered, which would require the production of the paper itself.

30

Q. [By the Court.] Have you any bill from Dr. Bunn showing services not covered by the \$40 payment? A. No, sir.

40

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The Court: Then we will have to go to Dr. Bunn for that information.

Q. [By Mr. Kalisch.] What services did Dr. Hulett render?

10

Mr. Autenreith: He has testified.

Mr. Kalisch: Yes, he has testified. All right.

Q. Mr. MacDonough, what have you paid Dr. Hulett?

Mr. Autenreith: The objection there is simply the same objection; but I presume you will connect it up when Dr. Hulett gets back—that is, as to the value of his services.

20

Mr. Kalisch: I do not think that is necessary.

Mr. Autenreith: Then I make the same objection, until it is established that the amount is reasonable and necessary. I make the same objection to the testimony of this witness—that it is incompetent.

The Court: You may answer the question.

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

30

Exception noted as ground for appeal.

Q. How much have you paid Dr. Hulett? A. Nothing yet.

Q. Now, Mr. MacDonough, have you been deprived of your wife's services since this accident?

A. Very much.

Q. Entirely at any time? A. Yes.

Q. And during what period entirely? A. Eight or ten weeks.

40

Q. Eight or ten weeks? A. Yes.

Harry Fiske MacDonough—Cross

Q. And for what period partially? A. About three months.

Q. Is that eight or ten weeks reckoned in the three months, or is the three months subsequent to the eight weeks? A. It is all included.

Q. [By the Court.] The eight weeks is included in the three months? A. Yes. 10

Q. [By Mr. Kalisch.] Does your wife work about the house now? A. Yes.

Q. When you say "services," do you mean also the society of your wife during this period of time that you have described? A. That is included, as other things.

Q. What business are you in, Mr. MacDonough? A. Theatrical business.

Q. Can you tell us whether you have lost any opportunities in a business way by reason of this accident? 20

Mr. Autenreith: I object to the question on the ground that there is no special damage for that laid in the complaint, and, secondly, upon the ground that it is otherwise incompetent and immaterial.

[Question withdrawn.]

Cross-examination by Mr. Autenreith:

30

Q. Mr. MacDonough, had you ever been to Salamanca before? A. Never.

Q. This was your first trip? A. Yes.

Q. And the first trip into this Woolworth store, was it not? A. Yes.

Q. And, as your wife says, you were there about ten minutes before the accident? A. Right.

Q. And that was the time during which you had to make your observation as to the location of coun- 40

Harry Fiske MacDonough—Cross

ters and salesgirls, as you told the jury? A. Yes, that is right.

Q. How deep do you think this store is? A. Well, I think that twice the length of this courtroom would about strike it.

10 Q. Over a hundred feet? A. I didn't go the whole length of the store.

Q. I know, but you could look down the other end of the store, could you not? A. I could, but I don't think I did.

Q. Now, I ask you how deep you think the store was?

Mr. Kalisch: I think the witness has answered that he did not look; he has answered the question.

20 The Court: The witness gave an answer—"about twice the length of this courtroom."

Mr. Kalisch: All right.

Q. Would you think it was a hundred feet; is that your estimate of it? A. Well, I wouldn't like to commit myself, because I am not sure.

Q. And you want the jury to understand, as you recall it, that it was about twice the length of this courtroom? A. Yes. You see, I didn't look. The books were here, and I didn't have any further
30 cause to look below.

Q. You say the books were about 50 feet back from the entrance? A. About that, yes.

Q. How many counters were there running along parallel with the wall on the righthand side as you came in? A. One

Q. Only one counter? A. Yes.

Q. Back to where the books were? A. Yes.

Q. You do not mean to tell this jury that that was a 50 foot counter, do you? A. I knew what
40

Harry Fiske MacDonough—Cross

you were going to say. Well, that is my estimate, my impression, that is all.

Q. You are not sure of that? A. No.

Q. You are subject to the correction that there might be two? A. No, there was one counter.

Q. As you recall it? A. Yes, I don't think there were two. 10

Q. You were not observing counters particularly, were you? A. Yes.

Q. You saw on the counters wares for sale of various kinds, with the price tags on? A. I suppose so; I didn't notice that.

Q. But you noticed the price tags on the books? A. Because we were going to buy one.

Q. Did you notice on the back of the counters the price tags on the various articles as you walked down towards the books? A. No, I didn't place it in my mind. 20

Q. You were looking for books? A. Yes, absolutely.

Q. You think, then, that there was one counter from the entrance to the store back to where these books were? A. I think so, yes.

Q. Just one counter on the righthand side? A. Yes.

Q. And then as you get to that counter there is an opening, or a space, as you call it? A. Right. 30

Q. And then beyond that space there is another counter? A. Yes.

Q. And that runs down to the end, or toward the rear of the store? A. Yes, towards the rear.

Q. Now, this staircase is behind that counter, is it not? A. It is.

Q. [By the Court.] Behind which counter? A. The second one.

Q. [By Mr. Autenreith.] Behind that second 40

Harry Fiske MacDonough—Cross

counter? A. That is why the second counter was further removed from the wall.

Q. I did not ask you that. A. All right, sir.

Q. You walked in ahead of your wife? A. Yes.

Q. Back towards the bookcases? A. Yes.

10 Q. Through this space? A. Yes.

Q. And your wife came in after you? A. Yes.

Q. You say that you had seen salesgirls go through that space before you went through it? A. Yes.

Q. And they had gone in behind the counter, had they not? A. Yes.

Q. To carry on whatever their business might be? A. Yes.

The Court: I think the witness said "a sales girl."

20

Q. Was it more than one or just one? A. Well, I don't know.

Q. Remember that you were only in there ten minutes. A. Right.

Q. It was only one, was it not? A. Well, I saw a human—I don't know whether it was one or double; I saw somebody.

Q. A person? A. Yes, a female person.

30 Q. Now, after your wife fell, of course, you were, naturally, interested in her condition and her welfare, were you not? A. Most undoubtedly.

Q. And you immediately went down the stairway into the basement to take care of her? A. In two jumps; I was down in two jumps.

Q. You were off this floor where the counters and shelves were in about two jumps? A. Yes.

Q. And then you arranged, or saw that it was arranged, that your wife should be removed to the hospital? A. Yes, sir.

40

Q. When did you leave Salamanca? A. I left

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Salamanca the next night, or afternoon, about five o'clock, to meet my company and play in the next town; I took a trolley-car.

Q. What was it? A. Olean, I think, was the town.

Q. You play in your company, do you; you take part? A. I did. 10

Q. You played a one night stand in Salamanca and a one night stand in Olean? A. We had several of them.

Q. And did you play another night stand after you left Olean? A. All the time for eleven weeks.

Q. And in the meanwhile your wife was in the hospital in Salamanca. During that time did you travel back and forth to Salamanca, or did you stay with your company? A. I was able to get there only once. 20

Q. When you say that Dr. Lawlor saw her every day and treated her every day, you are only telling us what you heard about it, because you were only there once after the accident, were you? A. Quite right.

Q. That same thing applies to Dr. Spalding? A. Yes.

Q. About his prescribing and treating her every day you do not know, because you personally were not there except only one day afterwards? A. Yes. 30

Q. Now, as you come in the store, in the Woolworth store, in Salamanca, there are counters on the lefthand side as well as on the right, are there not? A. Yes.

Q. Did you take any particular notice of the counters on the lefthand side as you came in? A. Only that there were three rows of counters, that is all.

Q. Three rows of counters? A. Yes.

Q. Only two on the right, that you saw, and there 40

Harry Fiske MacDonough—Redirect

were three on the left? A. No, I noticed all the counters that ran parallel down the length of the store, three rows of counters, one on each side and one in the center.

10 Q. How many counters were there on the left-hand side? A. On the left of me?

Q. As you come in, yes? A. There were two counters on the left of me.

Q. Running about the same as they were on the righthand side? A. They were all placed equal distance, about.

Q. That is, the counters on the left had the same general layout as those on the right? A. As far as I could tell.

20 Q. And did you notice whether a counter ran across the rear of the store? A. No.

Q. You did not notice that? A. I couldn't tell you that.

Q. Have you a son who is a doctor? A. No, sir.

Q. Or a physician or a surgeon? A. No, sir.

Q. You have a son, have you? A. I have a son.

Q. And he lives in East Orange? A. He lives in East Orange.

Q. He is quite friendly with Dr. Hulett, is he not? A. Yes.

30 Q. What is his vocation? A. He at present is in the wholesale and retail paper business, in Maiden Lane, New York.

Q. Do you live near Dr. Hulett? A. About half a mile or three-quarters.

Q. How old a man is Dr. Hulett, do you know?

Objected to as immaterial.

[Question withdrawn.]

Re-direct examination by Mr. Kalisch:

40 Q. Can you tell us whether the stairway down

Harry Fiske MacDonough—Redirect

which your wife fell was flush with the floor or not—the beginning of it? A. Yes.

Q. [By the Court.] Just what do you mean by that? A. I mean that the first step went from the even floor down; that is, you had to put your foot down about eight inches to take the first step off of the level floor.

10

Q. [By Mr. Kalisch.] Was there any guard about it? A. No.

Mr. Autenreith: He has already testified that there was a gate there, which was open at the time.

By the Court:

Q. Mr. MacDonough, in describing the premises, you say the book-shelves were nailed fast to the plaster wall and that there were wares for sale against the wall. Where were the wares? A. Did I say that at the same time, you mean?

20

Q. Yes, you said that in immediate connection with the statement that the book-shelves were fast to the wall. A. Well, the wares were the books.

Q. The wares were the books? A. Yes.

Q. You say that there was a gate which ran from the plaster wall, the right wall, to the further counter, when you saw it; it was running along the plaster wall under the book-cases. A. Yes, sir.

30

Q. Then the book-cases did not come down to the floor? A. No, sir.

Q. About how high do you think the gate was? A. The gate from the floor was about, maybe, two or three inches over 2 feet.

Q. 2 or 3 inches over 2 feet? A. High.

Q. And then came the book-cases? A. Yes, sir.

Q. The gate when you saw it was held against the wall under the book-cases? A. Yes, sir.

40

Harry Fiske MacDonough—Redirect

Q. Did you notice whether anything held the gate in position? A. It was tied back by a piece of something, some kind of twine or string or cord.

Q. Fastened to what, do you know? A. Tied to the wall. I suppose there was a hook there. I couldn't see what it was tied to, but there was something there that it was tied to.

Q. Did you notice where the gate was hinged? A. Yes, sir.

Q. Where was it? A. It was hinged at top and bottom on the plaster wall side.

Q. Did you ever see the gate closed? A. No, sir.

Q. Do you know the width of the gate; that is, measuring from the hinge to the other end? A. About 2 feet and a half or 3 feet.

Q. And, as you never saw it in position, you had no opportunity of seeing just where the end of the gate further from the hinge would come with reference to the further counter if the gate were closed? A. Well, I had no demonstration of it, no.

Q. Did you have an opportunity to measure or to estimate the width of the stairway? A. I should think they were about the same width as the width of the gate.

Q. The counter that you have described, the one nearer to the street, or to the entrance, had that a space behind it for the salesladies? A. Yes, sir.

Q. And what was behind that, goods displayed? A. There were goods displayed up on the wall a way.

Q. How much further out into the room, into the store, do you think the further counter came than the counter nearer to the front? A. Well, it was in the neighborhood of something around 2 feet, I imagine.

Q. 2 feet further? A. Yes.

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Q. Were there goods displayed behind the further counter? A. There were goods—yes, the same as the front counter; uniformly all over the store, the same.

Q. Did you notice any trapdoor which could be let down to cover the stairway? A. No, sir; it isn't possible to have one. 10

Q. Why not? A. Well, I say it is impossible. I haven't any at home; I don't see why they should have it any other place.

Mr. Kalisch: Just answer the question; do not give your own ideas.

Witness: I couldn't say about that.

Q. You say there were goods behind that further counter? A. Yes, sir. 20

Q. Suppose a saleslady wanted to get at some goods on the shelf behind that counter, where would she stand? A. She would go between the counter and the stairway opening.

Q. How much room was there there? A. Oh, sort of crowd herself in, you know.

Q. And in order to get to the goods she would have to reach across the open stairway? A. That would only last until she got beyond the stairway; then it was all open space again. 30

Q. I am speaking of about back of the stairway. A. Oh, I guess there were no goods directly there, only on the counter.

Q. You do not think there were any goods on the wall? A. Not just over the stairway.

Q. Back of the stairway? A. No, I don't think so.

Q. Now, can you tell us how deep the opening was from the front to the rear? A. Well, it was about twenty steps down. 40

Mary Louise MacDonough—Recalled—Direct

Q. About twenty steps down to the cellar floor?

A. Yes, sir; about; it might have been one or two less or one or two more; I couldn't say.

Q. And your idea is that the opening extended over the steps, did it? A. I beg your pardon.

10 Q. Your idea is that the opening extended over the steps? A. Oh, yes, all the way.

By Mr. Kalisch:

Q. In going to look at the books closely did one have to pass by the opening in the floor or not? A. They had to go right flush to it.

20 MARY LOUISE MACDONOUGH recalled in behalf of plaintiffs.

Direct examination by Mr. Kalisch:

Q. Mrs. MacDonough, can you tell us whether the services of Dr. Lawlor and Dr. Spalding were daily or not? A. Yes, daily.

Q. From what time to what time? A. From Monday until Friday night.

30 Mr. Kalisch: It is stipulated between counsel that, upon examination at this time of Mrs. MacDonough, Mrs. MacDonough will testify to the same medical services that her husband testified to on his direct examination.

Dr. Hulett is not here, and, subject to taking his testimony, I will rest.

Mr. Autenreith: You can put Dr. Hulett on at any time he may come.

40 Reserving the right to complete the testi-

Frank Miguet—Direct

mony of the former witness Dr. Albert Grove Hulett, Plaintiffs rest.

Mr. Autenreith: I move for a nonsuit upon the ground that it is apparent from the evidence in the case that the plaintiff Mrs. MacDonough sustained her injuries, or met with her accident, in a part of the defendant's store where she was not expressly or impliedly invited as one of the general public desiring to purchase. 10

The Court: [After argument.] The question of an inference, a legitimate inference, from the situation that existed, and more particularly the question is whether the plaintiff Mrs. MacDonough, who came into the store by invitation as a customer, could legitimately and naturally infer that this place into which she went was a place to which she, as a customer, was invited to go. I think that is a question for the jury. For that reason I deny the motion. 20

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

Exception noted as ground of appeal.

30

FRANK MIGUET sworn in behalf of defendant.

Direct examination by Mr. Autenreith:

Q. Mr. Miguet, you live in Salamanca, do you?

A. Yes, sir.

Q. And you are employed at the Woolworth store? A. Yes, sir.

Q. Were you employed there at the time that Mrs. MacDonough met with her injury? A. I was. 40

Frank Miguet—Direct

- Q. In what capacity? A. Manager.
- Q. How long have you been in the Salamanca store? A. Since May 10, 1916.
- Q. You were there every day, I suppose? A. Yes.
- 10 Q. Are you familiar with the general layout of counters in this store? A. Yes, sir.
- Q. As you come in the store how many counters are there on your righthand side which run parallel with the wall the depth of the building? A. Four.
- Q. Four counters? A. Yes, sir.
- Q. And about how long is the first counter? A. 18 feet.
- Q. And then what comes? A. An 18-inch space.
- Q. An 18-inch space? A. Yes, sir.
- 20 Q. And then what? A. Another counter.
- Q. The second counter is how long? A. 22 feet.
- Q. And at the end of that counter what comes? A. Another space.
- Q. How wide is that space? A. It is about 22 inches.
- Q. And then another counter? A. Yes, sir.
- Q. And how long is the next counter? A. About 18 or 20 feet.
- Q. Is that this third counter that you have just referred to that has the stairway behind it? A. Yes, sir.
- 30 Q. And then there is another counter, is there? A. Yes, sir.
- Q. Which runs where? A. To the rear.
- Q. And across the rear of the store? A. Yes, sir.
- Q. Sort of an L counter? A. Yes sir.
- Q. [By the Court.] At an angle with the other? A. Yes, sir.
- Q. [By Mr. Autenreith.] It commences in the same direction as the other, and then it goes at an angle? A. Yes, sir.
- 40

Frank Mignet—Direct

Q. These counters, are they moveable or stationary? A. Stationary.

Q. And how are they fastened to the floor? A. Nailed and blocked.

Q. Is there any such thing as a moveable table anywhere along the line of these counters? A. No, sir. 10

Q. Has there ever been as long as you have been there? A. No, sir.

Q. They are all fastened in? A. Yes, sir.

Q. How do they run? Is one counter out further than the other or not? A. No, sir; in a straight line.

Q. Each counter is in a straight line? A. Yes, sir.

Q. With these different spaces between them? A. Yes, sir. 20

Q. What are these spaces? A. Clerks' entrance only.

Q. And in the operation of your store there is the public invited or allowed to come behind a counter?

Objected to.

The Court: That is, to some extent, a question which the witness ought not to answer. The question of the extent of the invitation is a question that the witness cannot settle. 30

Q. Now, these books that are in the store, they are located where—the ones that Mrs. MacDonough spoke of? A. They are back of the second counter and back of the second entrance.

Q. That is, they lie about back of the place where this space is between the two counters? A. Yes, sir.

The Court: Not altogether; some of them are back of the second counter. 40

Frank Miquet—Direct

Mr. Autenreith: And some back of the entrance.

The Court: And some of them are back of the entrance between the second and the third counters. Is that what you mean?

10 Witness: No, sir; the entrance and the first counter takes the book-rack.

Q. Do you mean the first counter or the second counter? A. I mean the second counter.

Q. You do not mean the first 18-foot counter? A. No, sir.

Q. You mean the end of the second counter? A. Yes, sir.

Q. And the opening at that point, between the second and the third? A. Yes, sir.

20 Q. [By the Court.] Then I was right in saying that the books were back of the second counter and back of what you call the entranceway between the second and third counters? A. Yes, sir.

Q. [By Mr. Autenreith.] You say the stairway is behind the third counter? A. Yes, sir.

Q. As you face the books which way is it, the left or right? A. The stairway?

Q. Yes? A. It is to the left.

30 Q. How much of a book-rack is this, how wide is it? A. About 4 feet.

Q. 4 feet wide? A. Yes, sir.

Q. And how high? A. There are four shelves of books.

Q. And about how high? A. About eight-inch shelves.

Q. You heard Mr. MacDonough describe this gate, did you? A. Yes, sir.

Q. That is a gate that does what when it is shut?

40 A. It closes the entrance to the stairway.

Frank Miguet—Direct

Q. Were these books on sale, or on display, at the place in this rack at the end of the second counter?

Mr. Kalisch: I object on the ground that this witness has not qualified to testify at this time to the purpose of the placing of the books at this place on this particular day.

10

The Court: I understood the question to be merely whether the books were on sale.

Mr. Kalisch: I object to it on the further ground that it calls for a conclusion of the witness.

The Court: I think the witness may answer the question as to whether the books were on sale. The question is perhaps objectionable if it is intended to go beyond that.

20

Q. Were they on sale? A. Yes, sir.

The Court: If you meant to ask a broader question than that, I shall sustain the objection.

[Objection withdrawn.]

Q. In the running of this business, you say, you are the general manager? A. Yes, sir.

30

Q. And you have charge of the salesgirls? A. Yes, sir.

Q. The hiring and placing of them at stations about the store? A. Yes, sir.

Q. And do you have salesgirls at this point of the store where the book-shelves are? A. The girl acting behind the second counter is to wait on all shelving.

Q. The girl behind the second counter? A. Yes, sir.

40

Frank Miguet—Direct

Q. And there is a girl that waits behind the second counter regularly? A. Yes, sir.

Q. On the lefthand side of the store as you come in how many counters are there running towards the back?

10 Mr. Kalisch: I object to that as being absolutely immaterial to the issue.

The Court: I do not know what counsel has in his mind.

Mr. Autenreith: Mr. MacDonough testified that these counters ran 50 feet on both sides, and I want to show how badly Mr. MacDonough was wrong in that statement.

The Court: [After argument.] I think it is irrelevant.

20 Q. What kind of lighting did the store have at the time of this accident? A. We used 150 watt lamps.

Q. 150 watt lamps? A. Yes, eight of them.

Q. How many? A. There are ten.

Q. What is the depth of the store? A. About 120 feet.

Q. And how far apart are these lamps set, or were they set at the time of the accident? A. 12 to 15 feet.

30 Q. And do you remember the time that this accident happened? A. Yes, sir.

Q. You were not in the store at that particular time, were you? A. No, sir.

Q. Did you come in afterwards? A. I came in right away, as soon as I was notified.

Q. Well, Mrs. MacDonough hadn't left before you got there? A. No, sir.

Q. What was the condition of the light about the place where this book-shelf was?

40

Frank Miguet—Direct

Mr. Kalisch: I object on the ground that the witness testified that he was not there at the time of the accident and only came there after the accident. Therefore it would be impossible for him to testify as to the light at the time of the accident, and the other time would be immaterial. 10

The Court: Unless the lights are shown to have been in the same condition.

[Question withdrawn.]

Q. What kind of lights are these, electric lights?

A. Yes, sir.

Q. And how near to the bookstand is there a light—that is, a lamp? How near does a lamp hang to the bookstand? A. It is suspended, I should judge, from 3 to 4 feet from the ceiling, and it is nearly opposite the bookcase. 20

By the Court:

Q. What do you mean by “opposite the bookcase”? A. Oh, the light is out over the aisle and the bookcase would be——

Q. How far is this light that you speak of from the righthand wall? A. 6 feet.

Q. And how high is your room, your ceiling? A. I should judge it would be a 12-foot ceiling. 30

Q. 12 feet? A. 10 to 12 feet.

Q. How high do you think this ceiling is? A. 12 or 14 feet.

Q. Up to what point? To the top of the white marblework over the door, how high do you think that is? A. 12 feet.

Q. Is that about the height of your store ceiling? A. Yes, sir; I should think it would be.

Q. What? A. I should think so. 40

Frank Mignet—Direct

The Court: Now, it remains to be shown whether this lamp was in the same condition as to burning, and so forth, at the time of the accident as it was at the time when the witness observed the premises.

10 *By Mr. Autenreith:*

Q. What time did you go out to your lunch on this day? A. Eleven o'clock.

Q. About eleven? A. Yes.

Q. Do you know what time the accident happened?

Objected to as calling for hearsay.

[Question withdrawn.]

20 Q. What time did you get back? A. I got back to the store before 11:30.

Q. And what was the general condition of the lights before you went out? A. They were all working.

Q. Was it light about the store? A. Yes, sir.

Q. And what was the condition when you returned?

Mr. Kalisch: I object.

30 The Court: Not the general condition, but the condition as to this particular spot.

Mr. Kalisch: I object further on the ground that it is immaterial when this witness returned, because there is no proof of the continuance of the same condition as when the witness left; there is no proof of the condition of the lighting apparatus. Therefore I object to the question.

40 The Court: Not yet, but an inference may be built up, if there are sufficient data given. Those things that you mention are elements

Frank Miguet—Direct

in the situation, of course. I think the question of the condition of the light when the witness returned is rather premature.

Mr. Autenreith: Well, of course, I cannot establish what took place when this witness was out by this witness. All I could show is that the lights were in good order when he went out—and Mr. MacDonough has already testified to the time when the accident happened—and when he returned the lights seemed to be in the same condition. That is all I can establish. I am at the point now where I am asking him what the condition of the lighting was when he came in. He said when he came in Mrs. MacDonough was still in the store; she had not left.

10

20

By the Court:

Q. Were these ten lights operated during the daytime? A. Yes, sir.

Q. What made that necessary? A. Because the store is narrow and deep, and the center lights burn all day.

Q. Have you any windows? A. Front windows; the tops are open; the windows are boarded up—

Q. Any side windows? A. No, sir.

30

Q. Any windows or glass in the roof, like this room? A. No.

Q. Then you depend for light on the front windows? A. There are rear windows.

Q. And rear windows? A. Yes, sir.

Q. And on artificial light? A. Yes, sir.

Q. All day long? A. Yes, sir.

The Court: I think there ought to be some evidence as to the way in which these lights

40

Frank Miguet—Direct

are operated and who manages them, and all that.

By Mr. Autenreith:

10 Q. Is this store in what you call a business block in Salamanca? A. Yes, sir.

Q. What is on either side of it? A. There is a drygoods store on one side of it and at the present time there is a meat market on the opposite side.

Q. Does the store itself generate its own power of electricity, or is it from the electric company or the city? A. It is furnished by the city.

20 Mr. Autenreith: I cannot go any further than that. I think the jury can draw an inference. The lights were in good order when he went out and when he came back. The jury can draw an inference that they were all right then.

By the Court:

Q. Whose duty is it to attend to the lights? A. It is my duty to attend to the lights.

Q. You turn them on? A. Yes, sir.

Q. And turn them off? A. Yes, sir.

30 Q. And do you recall anything about that particular day with respect to the management of the lights? A. No, sir.

Q. When you went out what was their condition? A. They were all burning.

Q. Where is the place where you turn off and turn on the lights? A. There is a switchboard in the rear of the store.

40 The Court: Now, I think, Mr. Autenreith, that you may fairly ask your question. I

Frank Miguet—Direct

think the question may fairly be asked as to what the condition of the light was when he returned.

Mr. Kalisch: I object on the ground that there has been no proof of the condition of the lighting apparatus during the time that this witness was absent. Someone may have turned it on directly at the time of the accident, and it was not in the entire control of this particular witness, and therefore the conditions half an hour subsequent to the accident have no bearing on the condition of the lights at the time of the accident. 10

The Court: The objection is overruled.

Plaintiff's counsel prays an exception to this ruling of the Court. 20

Exception noted as ground of appeal.

By Mr. Autenreith:

Q. At the time you returned, when you heard that there had been an accident, when you returned to the store, what was the condition of the lights in the store?

Mr. Kalisch: Will my objection and the exception which I have made previously apply to the question now asked? 30

The Court: Certainly.

A. They were in good condition.

Q. And with respect to the lamp that you have described which was in the neighborhood of the bookshelf, what was the condition of that lamp?

A. That was on a series of four. If that went out, they would be all out in that series and there would be darkness in the center of the store. 40

Frank Mignet—Cross

Mr. Kalisch: I move that the answer be stricken out.

[Question and answer read.]

10 The Court: I shall strike out the previous answer. It is somewhat argumentative. I think if the witness can answer the question more directly, What would the condition of that lamp near the bookcase? that would be competent.

Witness: It was burning.

Q. Any different than it was at the time you went out? A. No, sir.

Cross examination by Mr. Kalisch:

20 Q. Now, this switch—the lights go off and on as you push the switch up and down? A. Yes. You don't push it up and down.

Q. Well, back and forth. A. Back and forth, yes.

Q. Who opens the store in the morning? A. I do.

Q. Who closes it at night? A. I do.

Q. Every night? A. Yes, sir.

30 Q. And every morning do you open it? A. Yes, sir.

Q. How long have you been there? A. Since May 10, 1916.

Q. Don't you have any holidays at all? A. Certainly.

Q. What? A. Yes, sir.

Q. Have you had any holidays on any weekdays? A. I have a holiday every once in awhile.

Q. On those days who operates the lights? A. The cashier.

Frank Miguet—Cross

Q. Had you had your lunch on the day before you came back of the accident? A. I was eating it; I didn't go back.

Q. What? A. I was just eating it when they called me.

Q. How far away from the store is the place where you eat? A. Two blocks. 10

Q. Is it a busy lunch-room? A. No, sir.

Q. You were waited on as soon as you got there? A. Yes, sir.

Q. And you walked down there and had part of your lunch and walked back? A. Yes, sir.

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

Q. And you were only gone half an hour? A. I don't think I was gone that long.

Q. Didn't you have some conversation with Mrs. MacDonough while she was lying at the foot of these steps? A. No, sir. 20

Q. Did you not say to her, in the presence of Mr. MacDonough, while she was at the foot of the steps, "Oh, that was careless of me. We shouldn't have permitted that door to be tied back"? A. No, sir.

Mr. Autenreith: I object to the question because it is not cross examination. There was nothing brought out on his direct examination except the location of properties in and around the store and the condition of the lights. He is laying the foundation on something that is not connected with the direct examination, for the purpose of contradicting him afterwards. That should not be the object of this cross examination. 30

The Court: I think it is a proper attempt to lay a foundation, because it bears on the situation. 40

Frank Miguet—Cross

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

Exception noted as ground of appeal.

Q. You did not? A. No, sir.

10 Q. You did not say that? A. No, sir.

Q. You said nothing at all to her at that time——

The Court: You are laying a foundation. You must ask definite questions as to definite statements. You are not entitled to the general conversation.

Mr. Kalisch: No. I was going to ask:

Q. You said nothing to her at that time in the presence of her husband? A. No, sir.

20

Mr. Autenreith: That is not a proper question to lay any foundation.

The Court: I think it is probably objectionable. The rule is pretty strict about laying foundations.

Q. Did you not say, in the presence of Mr. MacDonough, to Mrs. MacDonough, while she was down at the bottom of these steps, "It was careless of me to leave that gate tied back"? A. No, sir.

30

Q. You do not always leave it that way, do you? A. No, sir. But it wasn't tied back.

Q. How do you know what it was half an hour before you came back? A. Well, I don't think anybody tied it while I was gone. It was never tied, to my knowledge.

Q. So that you do not know, of your own knowledge, whether it was tied or not, do you? A. No, sir.

40

*Frank Miguet—Redirect—Recross**Re-direct examination by Mr. Autenreith:*

Q. One question that I wanted to ask you and I neglected to on my direct examination, and that is: Did you afterwards learn who the salesgirls were that were in the store at the time of the accident? 10

A. There were two salesgirls at the store at that time.

Q. Are they working at the store any longer? A. No, sir.

Q. Do you know where they are? A. No, sir.

Q. Have you been able to find them? A. No, sir. One of the ladies was married and left the store and the other one I was unable to locate.

Re-cross examination by Mr. Kalisch:

20

Q. Do you know the girls' names? A. I know the one that is not married.

Q. What is her name? A. Chamberlain.

Q. What is her first name? A. Daisy.

Q. Do you know where she lived at the time of the accident? A. In West Salamanca.

Q. Did you send someone to hunt for them? A. You mean recently?

Q. Yes, recently? A. I called up——

Q. Do not tell us conversations. 30

The Court: Did you send someone?

Witness: Yes, sir.

Q. So you personally did not make any investigation? A. I did.

Q. What is that? A. I did.

Q. I understood you to say that you sent someone around for these girls? A. I called and tried to find them by 'phone myself. 40

Frank Miguet—Recross

Q. You just telephoned? A. Yes, sir.

Q. That is your investigation? A. Yes, sir.

10 Q. Although you knew where this one girl lived at the time of the accident, you tried to make your investigation by telephone, plus what somebody else would find out for you; is that correct? A. I was informed that she was out of the city.

Mr. Kalisch. I move that that be stricken out.

The Court. Strike it out.

Q. So that your investigation consisted merely of a telephone attempt, plus what somebody reported to you? A. Yes, sir.

20 Q. So that, as a matter of fact, of your own knowledge, you cannot say that either of these girls is not in Salamanca at the present time, can you? A. I took other people's word for it when I asked.

Mr. Kalish. I move that that be stricken out, if your Honor please.

The Court. Strike out the answer. Answer the question directly.

Q. Is that correct? A. Yes, sir.

30 Q. Only two girls were there at the time of the accident, that you knew of? A. Two salesgirls; yes, sir.

Q. Did you not have more than that? A. Only two salesgirls at that hour.

Q. Only two salesgirls? A. Yes, sir.

By the Court:

Q. You say that the space between the second and third counters is about 22 inches? A. Yes, sir.

40 Q. Is that an estimate, or did you measure that?

Frank Miquet—Recross.

A. Well, I didn't measure it. We allow 20 inches for the clerks' entrance, and this was made 2 inches larger, because stock was brought up.

By Mr. Autenreith:

Q. You mean at this point stock is brought up? 10

A. Up the stairway.

Q. And brought out? A. Yes, sir.

By the Court:

Q. Assuming that to be a fair estimate, 22 inches, you say that the racks were 4 feet wide? A. Practically 4 feet.

Q. That, I suppose, is, to some extent, an estimate? A. Yes.

Q. You did not measure it? A. No, sir. 20

Q. That is what you think? A. Yes, sir.

Q. Can you tell us this? This is the question that I am trying to come to. Can you tell us whether the rack comes up to the line of the third counter? A. It does.

Q. Does it overlap the third counter? A. No, sir.

Q. Just comes up to it? A. Just comes up to it.

Q. Then, if the rack was 4 feet wide, and you subtract 22 inches, it would overlap the second counter the difference between the two? A. Yes, 30
sir.

Q. Then to that extent it would be actually behind the second counter? A. Yes, sir.

By Mr. Kalisch:

Q. But the entrance through this gate and towards the books will permit anyone to bring out the goods from the cellar; is that correct?

Frank Miguet—Recross

Mr. Autenreith. I object to that question, if your Honor please, because there was no gate at this entrance. The entrance was open.

[Question read.]

[Objection withdrawn.]

10

The Court. You may answer the question.

A. Yes, sir.

Q. Now, you have supervision of the girls there, do you not? A. Yes, sir.

Q. If someone enters your store and asks a girl about sheet music, for example, have you instructed her as to what to do—the girls?

20

Mr. Autenreith. I object on the ground that this is not cross examination, and anything that he instructed the girls would be immaterial and incompetent.

The Court. That is what was in my mind: that the plaintiff ought not to be affected by instructions not disclosed to her as to the management of the store.

Mr. Kalisch. My point is that our interests could not be injured by proper instructions, but our interests may be benefited by instructions that would increase our rights.

30

The Court. I do not think you can speculate in that way. It might be very dangerous to go into the subject of instruction. I overrule the question.

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

Exception noted as ground of appeal.

By the Court:

Q. Can you tell us the width of that gate? A.
40 Approximately 30 inches.

Mary Louise MacDonough—Recalled in Rebuttal
—Direct

Q. And that would be approximately the width of the stairway? A. Yes, sir.

DEFENDANT RESTS.

10

MARY LOUISE MACDONOUGH, recalled in behalf of plaintiffs in rebuttal.

Direct Examination by Mr. Kalisch:

Q. What electric light or light of any kind was there at or near this book-rack?

Mr. Autenreith. I object on the ground that it is part of the main case and we have been over it several times. That is not rebuttal. They described the condition of the light. 20

The Court. Yes, we have had a description of the general illumination, but nothing more specific than that, nothing as to any specific lamp or light. I think it is proper.

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

Exception noted as ground of appeal. 30

[Question read.]

A. A small bulb at the back part—a little above the top shelf.

By the Court:

Q. What is that? A. A very small electric bulb.

Q. Just state where it was. A. Hanging over the top shelf, rather close to the shelf, a very small, faint light. 40

Mary Louise MacDonough—Recalled in Rebuttal
—Cross

Q. How close? A. Oh, probably 6 inches or more.

Q. 6 inches away from the wall or 6 inches above— A. Above the shelves, above the top shelf.

10 Q. And how far away from the wall? A. Probably a foot.

Cross Examination by Mr. Autenreith:

Q. You noticed this light, did you? A. I noticed it, because it was so faint that I couldn't see the titles of the books.

Q. There were lights over the aisle as you come down, were there not? A. I didn't notice particularly.

Q. Did you notice any other lights in the store outside of this little, faint one? A. No.

Q. You did not see any? A. I did not notice any.

Q. You know that there are windows in that store, do you not? A. I couldn't say positively.

Mr. Kalisch. I object to this as not being proper cross examination.

30 The Court. This is a question as to the general light. I should think it is rather doubtful.

[Question withdrawn.]

Q. You did not observe any other lights in any part of that store during the ten minutes that you were there before you fell— A. No.

Q. —except this one light over the book-case?

40 Mr. Kalisch. I object to that as not being proper cross examination.

*Mary Louise MacDonough—Recalled in Rebuttal
—Redirect*

The Court. I think the objection is good.
Defendant's counsel prays an exception to
this ruling of the Court.

Exception noted as ground of appeal.

Q. Where were you when you first noticed this light? A. In by the book-rack. 10

Q. Right in it by it? A. Yes, sir.

Q. You had not noticed it before you got in there, had you?

Mr. Kalisch. I object to this as not cross examination.

The Court. I think this is proper. You may answer the question.

[Question read.] 20

A. No, not particularly.

Redirect Examination by Mr. Kalisch:

Q. Why, was it light or not, was it— A. It was a very dim light, and the store was dimly lighted except by the front door.

Q. Now, Mrs. MacDonough, when you were lying down at the bottom of the steps did you have any conversation with Mr. Miguet, this gentleman who is standing up, the manger? 30

[The former witness Frank Miguet arises.]

A. Yes.

Q. This man, is it? A. I believe it is; I couldn't say positively, but I believe it is.

Q. A man who said he was the manager? A. Yes.

Mr. Autenreith: I ask that that be stricken out, because that is no proof that he was the manager, and it is hearsay, anyhow. 40

*Mary Louise MacDonough—Recalled in Rebuttal
—Recross*

The Court: This is merely to identify the person.

Mr. Autenreith: If that is its only purpose, all right. He could not prove it by his own declaration.

10

The Court: No. It is merely to identify him.

Q. Did Mr. Miguet say in his conversation with you while you were lying at the bottom of the stairs, in the presence of your husband, "It was careless of me to leave that gate tied back"?

Objected to.

20 A. Yes, sir.

Mr. Autenreith: I object to the question on the ground that it is irrelevant, incompetent and immaterial.

The Court: I overrule the objection.

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

Exception noted as ground of appeal.

30 Q. What is your answer? A. He certainly said it.

Q. Did he say it? A. He certainly did

Recross examination by Mr. Autenreith:

Q. Did you state at that time, "It was careless of me to walk behind the counter and not look where I was going"? A. No, I did not.

Q. The conversation was only on the question of what Mr. Miguet said? A. Shall I say what I said?

40

*Harry Fiske MacDonough—Recalled in Rebuttal—
Direct*

Q. Was there any more said except that Mr. Miguet said what you have testified to before? A. That is all he said. He was most attentive and kind to me.

Q. [By Mr. Kalisch.] He tried to help you up, you mean? A. Certainly he did; he was very kind. 10

HARRY FISKE MACDONOUGH recalled in behalf of plaintiffs in rebuttal.

Direct examination by Mr. Kalisch:

Q. What kind of artificial lights, if any, were there at or near the place where your wife fell? A. Well, I could describe it. I don't know what the real name of it is, but it was what I would call an eight candle-power. 20

Q. Was it a good illumination or a poor one?

Mr. Autenreith: I object to that. The witness cannot compare it.

[Question withdrawn.]

Q. Was it a strong light? A. Weak. 30

Mr. Autenreith: That is the same thing.

Q. Did you hear any conversation while your wife was lying at the bottom of the steps between your wife and Mr. Miguet?

The Court: Yes or no.

Mr. Kalisch: Just answer yes or no.

A. No. 40

*Harry Fiske MacDonough—Recalled in Rebuttal—
Cross—Redirect—Recross*

Q. Did you hear Mr. Miguet say anything to your wife? A. Yes.

Mr. Autenreith: I object to the question. He said that he did not.

10 The Court: He said that he did not hear any conversation.

Witness: That is true.

Mr. Autenreith: He only heard what Mr. Miguet said.

The Court: Yes.

Q. Did you hear Mr. Miguet say, "It was careless of me to leave that gate tied back?" A. Twice.

20 Mr. Autenreith: I make the same objection as to the previous question.

The Court: Yes. I shall overrule the objection and give you an exception.

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

Exception noted as ground of appeal.

Cross examination by Mr. Autenreith:

Q. You heard him say it twice? A. Twice, two different places.

30 *Redirect examination by Mr. Kalisch:*

[By request of plaintiff's counsel, the former witness Frank Miguet arises].

Q. Is the person I am pointing to (indicating Mr. Miguet), the gentleman who said it or not? A. That is the man.

Q. You identify him? A. Yes.

Recross examination by Mr. Autenreith:

40 Q. You say you did not hear the conversation?
A. There wasn't any; a statement.

Albert Groves Hulett—Direct

Q. He just came there and made that statement twice; is that it? A. Once there and once at another place.

Q. And that is all you heard him, making the statement? A. In regard to that thing.

Q. You did not hear any conversation? A. My wife was groaning— 10

Q. Did you hear the conversation? A. There wasn't any conversation.

Q. You only heard the one statement? A. He regretted it.

Q. Made in two places? A. A regret of his.

Further Direct Examination by Mr. Kalisch:

Q. You said he made it at another place. Where was the other place that he said that "It was careless of me to leave that gate open"? A. He worded it different. 20

The Court: Have you laid the foundation for any other place?

Mr. Kalisch: It was brought out on cross examination.

The Court: The question is as to whether you laid a foundation as to any other place.

Mr. Kalisch: No, sir. I have got the benefit of the answer. I shall withdraw the question. 30

ALBERT GROVES HULETT resumes the stand in behalf of plaintiffs.

Direct examination (continued) by Mr. Kalisch:

Q. Now, doctor, you came into the store, you said, and you were describing a certain place. When you came in there it was what date? A. Approximately about the 3d of November. 40

Albert Groves Hulett—Direct

Q. Did you or did you not see a gate at the end of this counter on the right? A. Yes.

Q. Was that closed or open?

10 Mr. Autenreith: I object. What difference does it make whether it was closed or open on the 3d? It is immaterial.

The Court: It might have enabled the doctor to make some estimate, if it were open, as to the extent that it lay against the wall, or something of that kind.

Mr. Autenreith: The purpose of it does not appear.

The Court: I think it is not objectionable.

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

Exception noted as ground of appeal.

Q. Was that open or closed? A. Shut, when I was in the store.

Q. It was shut? A. Yes, sir.

Q. Now, can you tell us whether the passage directly in front of this gate at that time was clear or not? Just answer yes or no.

The Court: Tell us when this was.

30 Mr. Kalisch: The 3d of November.

The Court: What time?

Q. What time of day? A. That was during the lunch hour; it was after half-past twelve and before two o'clock. I can't give you the exact hour now.

Q. Was the passage in front of this gate clear or not?

The Court: What is the bearing of that?

40 Mr. Kalisch: The point is that it may be that the defendant, having seen the results

Albert Groves Hulett—Direct

of carelessly leaving a gate open, may take precautions directly after an accident has occurred that something of that kind might not occur again.

The Court: That is a most excellent reason for excluding the evidence. It is always ruled in railroad cases, where there is an accident at a crossing, that the precautions which the railroad company made afterwards are not evidential. Of course, the effort is to get them in in order to throw a reflected light on the original transaction; but that evidence is always shut out. 10

Mr. Kalisch: I want to show the changed physical condition at the place of the accident, and there has been a case decided in the Court of Errors within the last twelve months which holds that you may show a changed physical condition. 20

The Court: I sustain the objection.

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

Exception noted as ground of appeal.

Q. Did you walk towards the gate? A. As far as the counter and the moveable table would allow me. When I went in there on the 3d of November this obstruction was in front of the book-shelf. 30

Mr. Autenreith: I object to describing the condition on the 3d of November.

The Court: I think it is decidedly objectionable. I sustain the objection.

Plaintiffs counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal. 40

Albert Groves Hulett—Direct

Q. Doctor, have you rendered a bill to Mr. MacDonough for your services? A. I have quoted him my fee, yes.

Q. You have? A. Yes, sir.

Q. And that is how much? A. \$225; that includes everything.

10 Q. That includes treatment from when to when? A. That includes treatment from the 2d of November up till the 1st of October of this year to the wife.

Q. Can you tell us whether Mrs. MacDonough will need treatment or not, as the result of this injury, any time in the future? A. I think that the stiffness of that joint and the pain that it involves will undoubtedly need some attention now and then.

20 Q. Of what kind? A. Either massage or electric application or prescriptions for the pain.

Q. Your work consisted of what? A. First the trip up there—

Q. No, medical or surgical, or both? A. Both.

Q. X-ray? A. That is right.

Q. And your treatment was often or not? A. During the first eight weeks, every day.

Q. And is the amount of the bill, \$225, in your opinion, a reasonable bill for the services rendered? A. Yes, sir.

30

By the Court:

Q. I do not know whether you took some X-rays or whether somebody else took them? A. Two together, Dr. Bunn and I together.

Q. Does this bill include the services of Dr. Bunn as well as your own? A. No, it does not include Dr. Bunn's services.

40

*Albert Groves Hulett—Cross**Cross Examination by Mr. Autenreith.*

Q. Doctor, you went up to Salamanca? A. Yes, sir.

Q. At whose request? A. Mr. MacDonough's.

Q. Do you know Mr. MacDonough's son?
A. Yes. 10

Q. Quite chummy with him, are you not? A. I wouldn't say quite chummy with him.

Q. He lives near you, in the neighborhood?
A. Yes.

Q. And when you went up to Salamanca you went to see Mrs. MacDonough in the hospital?

A. That is right.

Q. What prompted you to go to the store, to look at the store? A. Medical curiosity.

Q. Medical curiosity? A. To see how the accident occurred. 20

Q. And did you actually go down the stairway?
A. I didn't go down the stairway.

Q. Well, that is the only point where the medical curiosity could be satisfied, is it not? A. No, sir.

Q. You did not go behind the counter, did you?
A. I looked over the counter.

Q. Did you go to that store because you were Mrs. MacDonough's physician or her son's friend, which? A. I don't know as I know about it one way or the other. 30

Q. Well, you were interested in them, were you not? A. Naturally. I was the physician in the case.

Q. And you want this jury to understand that you went to this store to see where the counters were and where the gate was and whether it was open or shut purely out of medical curiosity?

Mr. Kalisch. I object to the form of the question. 40

Albert Groves Hulett—Cross

The Court. We shall assume that the witness intended that the jury should understand just what he said.

10 Q. Well, is it the fact that you went there to look at the lay-out of counters and find out whether the gate was open or shut, and the general situation, because you were Mrs. MacDonough's physician or because you were her son's friend? A. I went there the same as I look over the circumstances attached with any sickness or with any injury. I had had no conversation with the members of the family, or no conversation except "Good morning," and a short look at the leg, with Mrs. MacDonough at the time I went in the store.

20 Q. How long have you been practicing medicine, Doctor? A. Since 1912.

Q. How old are you? A. Twenty-seven.

Q. And have you been licensed to practice since 1912 in this state? A. In this state.

Q. Have you at any time during your practice ever gone to see the place of an accident before you went there to look over the Woolworth store in Salamanca? A. You mean had I ever been in the Woolworth store?

30

[Question read.]

Q. Did you ever do it before? A. Certainly.

Q. How often? A. Well, that is something I can't state, how often.

Q. When you find a man that has met with an accident you go to the scene of the accident after you have treated him and see how it happened, from a medical standpoint? A. No, you go before you treat him.

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Albert Groves Hulett—Cross

Q. That is, when you pick the man up at the scene of the accident? A. That is right.

Q. I mean after the accident have you ever gone back to the scene of the accident to see how it happened? A. Yes, sir.

Q. You have done that? A. Yes, sir.

10

Q. And you want us to understand that it is a matter of medical curiosity? A. Certainly, to get the surrounding circumstances, to see how to treat him.

Q. And you have done that many times? A. I have done it more than once.

Q. How many times? A. I can't say; it is hard to remember things for several years of that kind.

Q. Well, five years is not very long in the practice of medicine. A. No, it is not.

20

Q. Did you notice any lights when you went in the store?

Objected to as immaterial and as too remote.

Objection sustained.

Q. This staircase, or stairway, that you mentioned was behind which counter, the second or third? A. The counter that jutted out beyond the—

Q. It was behind that counter? A. Yes, sir.

30

Q. How many counters did you find were on the righthand side of the store? A. I would say two main counters.

Q. And how many others? A. Well, there was this obstruction to the passageway.

Q. I did not ask that; I am asking you about a counter. If you do not call it a counter, do not call it an obstruction. How many counters all together did you see? A. Two.

Q. Two? A. Two.

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PLAINTIFFS REST.

Court's Charge

10 Mr. Autenreith. Now, if your Honor please, I would renew my motion for a non-suit on the same ground that I have stated before, and also move for the direction of a verdict on the ground that it is apparent now that the plaintiff, Mrs. MacDonough, exceeded the bounds of her invitation to enter the store, as one of the general public, to purchase, and that the plaintiffs have not established that the defendant was guilty of wilful negligence, and therefore there should be a direction of a verdict in favor of the defendant.

20 The Court. I still think it is a question for the jury. The testimony is a little more specific now, but my opinion, on the whole, is not changed. I overrule your motion.

Mr. Autenreith. I might also add to my motion the ground that the weight of the evidence illustrates that the place where this woman fell was behind the counter, and that the general public had no right to be there.

The Court. I deny the motion.

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

30 Exception noted as ground of appeal.

Mr. Autenreith sums up for defendant.

Mr. Kalisch sums up for plaintiffs.

At one o'clock, P. M., the court takes a recess of one hour.

AFTER RECESS

The Court charges the jury as follows:

ADAMS, *J.*

40 Gentlemen of the Jury. The leading question in this case is whether there was what the law calls

Court's Charge

invitation—invitation to Mrs. MacDonough to go where she was hurt, or to go to the place from which she fell and so was hurt. That word, *invitation*, is, of course, used in a purely legal sense. There is another way of stating it; that is, Is it a reasonable and legitimate inference from the facts in proof that the F. W. Woolworth Company expected and invited customers to go between the second and third counters to examine books in a rack against the wall? The plaintiff says yes, that she was invited to go there; that is to say, it is to be inferred from the situation that existed that the owners of that property expected just that; that they laid out this portion of their premises with a view to the use of customers who might enter. The question is for you whether that was a reasonable inference. If it was a reasonable inference that such an invitation was extended to the plaintiff Mrs. MacDonough, why, then, she was where she had a right to be.

Just what was the situation? There does not seem to be any doubt about it. On the righthand side of this large shop room there were several counters running from front to rear of the building and on the same line. I think it was Mrs. MacDonough's impression that the second counter did not aline with the one further to the front. She speaks of it as the second counter. The evidence of a witness more familiar with the premises is that it was the third counter. Those are discrepancies which you will have to settle. But that does not affect the particular question as to the situation just at the point between two of those counters. The evidence is that they were 22 inches apart. The testimony on behalf of the plaintiffs, which is an estimate, is that there was a greater distance, and the 22 inches is an estimate also, but

Court's Charge

it is made by a man familiar with the premises, and, of course, the plaintiffs' familiarity with the premises was very slight. There is certainly a good deal to favor the idea that the passageway was 22 inches wide. There is an 18 inch rule [indicating]. 22 inches would be 4 inches more. But whether it

10 be 22 inches or somewhat more, there was a passageway between the ends of two counters, and in front of a person who should enter that passageway was a bookrack, which is estimated to be 4 feet wide, against the wall, so to speak, at the end of the passage. If the defendant is right in saying that the passage was 22 inches wide, the book-case must have been to some extent behind the counter which was nearer to the door, so that some

20 of the books on the shelves would have been actually behind that counter—the testimony being that the book-shelves did not extend beyond the line of the counter next further along. The plaintiff wanted to look at the books, and she went in there, not apparently with a view of finding any particular book, but with a view of looking over the book-case. Now, was it, taking the whole situation into account, a place presumably intended as a place for customers to go into? On the lefthand

30 of a person who went in was a stairway leading to the cellar, and that stairway was behind the next counter. It was either the third or the second counter. It was behind the counter. There was a gate evidently intended to shut off access to the stairway from persons who were on the side or at the head of the stairway. At this particular time that gate, or framework with cross pieces, did not close the access to the stairway, but was swung back and tied under the book-case, which

40 began above the stairway. It was about 3 feet high. That being the situation—and the variance of

Court's Charge

the testimony is within quite narrow limits—what happened was this, as described by Mrs. MacDonough and her husband. There is apparently no one else who saw it. Their testimony is uncontradicted. While Mrs. MacDonough was looking at the books she in some way went sideways, stepped sideways, and fell down the cellar stairs, about twelve steps, I think, onto the cellar floor, and was badly hurt. There is no question about her injuries being serious.

10

It has been said by counsel that the question is whether Mrs. MacDonough was invited to go behind the counter. This seems to me not quite accurate. She did not intend to go behind the third counter, and, in fact, did not go behind any counter, except that she unintentionally fell from this passageway between the two counters down a stairway which was behind a counter, the one of the two counters which was further from the front of the building. If she had intentionally gone behind a counter, the situation would present itself differently to the mind, because there is a strong inference that the space behind a counter is for the employees of the store and not for the customers. She, however, never intended to go behind the counter, so far as the evidence shows. She claimed the right to go to the book-case, and did not exercise or assert any right or claim to do anything more than that, and it was from that point that she fell.

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If there was no invitation, the plaintiffs cannot recover, and the verdict must be for the defendant, because the law is that a person who goes on the property of another without invitation goes at his own risk, and can assert a right to recover damages only in case of wilful injury, which, of course, is not pretended in this case. You will, therefore,

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Court's Charge

observe that the question of negligence on either side is out of the case, if you find there was no invitation, because that ends the case at once. The burden of proof is upon the plaintiff to convince you that it is reasonable to infer that there was an invitation. If there was an invitation, then two
10 questions arise. The first question is, Was the defendant company negligent in leaving the entrance to the cellar stairway unguarded on the side of a place into which the defendant had invited persons to enter? As to that, I should suppose, you would have very little difficulty. But another question would have to be considered in that connection, and that is, Was Mrs. MacDonough herself negligent in not observing the stairway and keeping away from it? Assuming that she had a right to go there,
20 ought she to have known, ought she to have observed, if she was in the exercise of due care for her own safety, that there was a stairway yawning right close to her? Because she must have taken but a step to get herself into it. If she was herself negligent and her negligence was a contributing cause of the injury, she cannot recover however much you may think that the defendant was careless.

30 So, to sum up. If there was no invitation, the plaintiffs cannot recover. If there was an invitation, then the plaintiffs, in order to maintain their action, must satisfy your minds that the defendant was negligent in leaving the entrance to the cellar unguarded. And if it appears from all the evidence in the case, wherever it comes from, that Mrs. MacDonough herself was careless and her carelessness contributed to her injury, that of itself would defeat her right to recover, because contributory negligence always has that effect. So
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Court's Charge

that the particular claim which the plaintiff asserts here in coming into court is one which calls upon her to prove that was a proper place for her to go to, which is only another way of saying that she was invited to go there, and that her injury was due to negligence on the part of the defendant, it not appearing that she herself was in any way responsible. 10

I have spoken of Mrs. MacDonough, because she was the one who was injured. There are two plaintiffs in this case. There will be only one verdict, if the plaintiffs recover, but it will have two branches. Mrs. MacDonough sues for her physical injury. Her husband sues for the loss of his wife's society in the domestic and marital relation, and he also sues for reimbursement for his outlay. His case, therefore, depends upon hers. If her case is not established, his case falls to the ground, because it is secondary. Hers is primary. If she recovers, she is entitled to recover reasonable compensation for her physical injury, for her suffering, her pain and her disability, past, present and future, if it is shown to be likely to be continued. Mr. MacDonough is entitled to recover reimbursement for what his wife's injuries reasonably cost him for medical and other attendance, because he must pay the bills, and what may appear to you to be a just and fair estimate of the pecuniary injury that he has received through the deprivation of his wife's society and comfort in the household in which he and she were members. Therefore, if you take a view of the case which does not sustain the claim of the wife, you will find for the defendant against both plaintiffs. If, on the other hand, you consider her case established against the defendant, you will award so much to Mrs. MacDonough for the things 20
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Court's Charge

for which she can recover and so much to Mr. Mac-Donough for the things for which he can recover, making a double verdict, if you find for the plaintiffs.

I am requested to charge certain propositions on behalf of the plaintiffs.

10 First, "The plaintiff had a right to be where she was at the time of the accident." I cannot charge that without invading the province of the jury. That is a question for you.

20 Secondly, "The jury may consider the fact that no salesgirls at the book-case have been produced as witnesses." You may consider that; but we are to exercise our common sense, and in considering it you may also consider whether, the facts being so much without dispute, it is likely that, if the salesgirls had been produced, they would have presented to your minds anything of any great importance beyond what we already know. The facts of the accident are related by the plaintiffs, and by nobody else. Nobody else knows. The salesgirls could not throw any light on that to the advantage of the plaintiffs. So that we must adopt the account of how the accident happened. What else is there of which they could render any useful knowledge?

30 I am further requested to charge that "There is no proof of any electric light at the time of the accident." I should hesitate to say that. That is for the jury. What is the reasonable inference as to the presence of an electric light near the place of the accident at the time of the accident? I do not say that the local illumination is of no importance. It is. Some testimony has been given as to that by the defendant and it has been the subject of evidence on the other side; but I should not say that there was no proof as to the electric
40 light at that point just at that time. The evidence

Court's Charge

is that there were ten electric lights, and that the manager turned them on in the morning and turned them off at night; that they were burning when he went to get his lunch, and they were burning when he came back, and that he turned them on and off at the switchboard. Of course, somebody else may have meddled with them, of which there is no evidence. But there is ground for a reasonable conclusion on this subject. We cannot say that there is no proof. There is no direct proof. We can say that, and it is for you to say in considering particularly the question of negligence on both sides, especially the negligence of Mrs. Mac-Donough, just what the light was and what facilities and opportunities she had of seeing what her surroundings were.

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[The jury retires.]

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PLAINTIFFS' REQUESTS AND EXCEPTIONS

Plaintiffs' counsel requests the Court to charge the jury as follows:

(1) The plaintiff had a right to be where she was at the time of the accident.

(Denied.)

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Plaintiffs' counsel prays an exception to the refusal of the Court to charge as requested.

Exception noted as ground of appeal.

(2) The jury may consider the fact that no salesgirls at the book-case have been produced as witnesses.

(Charged.)

(3) There is no proof of any electric light at the time of the accident.

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(Denied.)

Plaintiffs' counsel prays an exception to the refusal of the Court to charge as requested.

Exception noted as ground of appeal.

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New Jersey
Court of Errors and Appeals

MARY LOUISE MACDONOUGH AND
HARRY FISK MACDONOUGH,
Plaintiffs-Appellees,

vs.

F. W. WOOLWORTH COMPANY,
A CORPORATION,
Defendant Appellant.

On Appeal.

Brief on Behalf of Appellant.

This case was tried in the Essex County Circuit Court on October 17th, 1917, and a verdict was rendered in favor of the plaintiff, Mary Louise MacDonough, in the sum of \$3,500, and in favor of the plaintiff, Harry Fisk McDonough, for loss of services of Mary Louise MacDonough, his wife, together with his expenses incurred, in the sum of \$750.

This appeal brings up the question of error in the refusal of the Trial Court to grant defendant's motions to non-suit and to direct a verdict. Both of these motions are based upon the failure of the plaintiffs to prove negligence on the defendant's part sufficient to go to the jury.

FACTS.

The plaintiffs, on October 30, 1916, entered the store of the defendant at Salamanca, New York, not to make any specific purchase, but, if they saw anything to please them, intended to make a purchase, and, after entering the store, they decided to buy books (p. 11). As they entered the store they found counters on the right hand side of the store,

in the center of the store and on the left (p. 12). These counters extended from front to rear of the store (p. 13), and parallel with the walls. There was a space between the counters and the walls, behind which salesgirls stood (p. 13). On the right-hand side, as the plaintiffs entered the store, there were two counters running from front to rear of the store—first one counter, then an opening, and then another counter (p. 25). The space between the front and rear counters is where the plaintiff, Mary Louise MacDonough, walked through toward the book-rack, which was against the wall (p. 25). The rear counter of the two extended further out into the store than the first one (p. 27). On these counters goods were displayed for sale; goods were displayed behind all counters throughout the store (pp. 64 and 65). The plaintiffs went into the open space between the front and rear counters toward the book-rack, which was against the wall (p. 25), and after they had stepped in there the plaintiff, Mary Louise MacDonough, fell down the stairway and was injured (p. 19). The injuries which she sustained consisted of a fractured left leg and bruises, which confined the plaintiff, Mary Louise MacDonough, to her bed for seven weeks (p. 19). The stair-case down which the plaintiff, Mary Louise MacDonough, fell was directly behind the second counter (p. 59). Part of the book rack extended behind the first counter and the other part was on a line with the open space between the counters (p.).

The legal question therefore arises: Were the plaintiffs, expressly or impliedly, invited by the defendant to enter this portion of the store where the plaintiff, Mary Louise MacDonough, was injured?

The liability of defendant is only co-extensive with the invitation, express or implied. The plaintiffs exceeding this invitation could not recover, except for wanton or wilful acts of negligence.

The Trial Court in sending the case to the jury ruled that the jury might infer from the facts and circumstances that there was an implied invitation to plaintiffs to go into this open space towards the book-rack at the point where the plaintiff, Mary Louise MacDonough, was injured.

Under the facts in this case the defendant contends there could be no inference drawn. There must be a point in the line of cases where the province of the jury ends and the law defines the rights of the parties; for, if the jury is permitted, on the slightest pretense, to draw inferences of implied invitation, then the rule of law—which limits a store proprietor's liability to that portion of his premises which he holds open to the public and expressly and impliedly invites it to enter—will be extended to the remote corners of his place of business and compel him to transact his business at his peril.

There can be no doubt from the plaintiff's (Mary Louise MacDonough) own testimony that, when she attempted to look at the books which were on the shelves against the wall, she went behind the counters in the defendant's store:

“Q. And when you went to get one of these books you went in that open space between the first counter on the right hand side and the second one and stepped up towards the books?

A. Yes” (p. 25).

And that while she stood facing the book-rack and in front of it both counters were behind her.

"Q. Well, you were right up close to the wall so you could see the books? A. Yes.

"Q. And on your right-hand side behind you was one of the right-hand counters? A. Yes.

"Q. And on your left-hand side to the left was the other? A. Here is one.

"Q. Behind you? A. To this side" (p. 26).

Her purpose in going behind the counters was to read the titles on the books.

"Q. You walked in to read the titles? A. Yes" (p. 28).

The plaintiff, Mary Louise MacDonough, further testified that there were salesgirls behind the first counter (p. 28), and before she went behind the counter to read the titles on the books she did not ask any of the clerks in the store to wait on her or to tell her what the titles of the books were (p. 28).

There can be no doubt of the universal proposition that a storekeeper who lays out counters in his store transacts the storekeeper's business from behind the counters, and the public transacts its business from the other side. The very word "counter" signifies that it is an object which acts as a counter against the public and separates the public from the wares and private business of the storekeeper; and it is a matter of universal and common knowledge on the part of everyone who enters a store as one of the public to make purchases, that they have no right to go behind the counters in that store.

In the case at bar the plaintiffs both testify that they saw salesgirls behind the counters.

"Q. And you say as you came in you observed salesgirls behind the counter? A. Yes" (p. 27).

And that furthermore the plaintiffs had seen salesgirls go through this same open space to get behind the counters to carry on their business.

“Q. You say that you had seen salesgirls go through that space before you went through it? A. Yes.

“Q. And they had gone in behind the counter, had they not? A. Yes.

“Q. To carry on their business, whatever that might be? A. Yes” (p. 60).

These facts indicate that only one conclusion can be arrived at, namely, that the plaintiffs had no right to proceed through this open space behind the counters, unless they were expressly or impliedly invited to go there, and this by some act on the part of the defendant, of which they had knowledge, and which would consist of an implied invitation.

The rule of law is well settled that the moment a person exceeds an invitation, either express or implied, under these circumstances they become a bare licensee, and the defendant would then owe them a duty only to refrain from acts of wilful or wanton negligence. *Phillips vs. Library*, 55 N. J. L., 307; *Ryerson vs. Bathgate*, 67 N. J. L., 337; *Nolan vs. Bridgeton*, 65 Atl., 992 (Ct. of E. & A.); *McCormick vs. Anistaki*, 66 N. J. L., 211.

The question therefore resolves itself ultimately into whether, as a matter of law, the facts and circumstances were such that there was any invitation, express or implied. There was no express invitation, for the plaintiff, Mary Louise MacDonough, testified that the reason she went through this open space to get behind the counters was to read the titles of the books which were on the rack against the wall (p. 28), and that she did not ask any clerk

in the store to wait on her; there were salesgirls present behind the counter further towards the front of the store (p. 60).

There is no evidence in the case that any servant or agent of the defendant, by act or statement, indicated to the plaintiffs that they might pass through this open space to the book-rack behind the counter. Therefore, there is no express invitation.

As to the next query—was there an implied invitation—the situation and location of the counters and the shelves and condition of the store must be taken into consideration to determine whether, from those things alone, an implied invitation can be inferred.

There is no question but that the plaintiffs were invited to enter the store for the purpose of making purchases, and for that purpose were invited to use such portions of the store as were held out to the general public as that portion of the store to which they were entitled to go for the purpose of examining and purchasing articles. But when the plaintiffs passed into this open space behind the line of the counters to the book-rack, they then went beyond the invitation and went into a place or part of the store to which they were not impliedly invited as one of the public, and thereby exceeded the invitation.

In *Phillips vs. The Library Company*, 55 N.J.L., at page 315, it is held:

“The owner’s liability for the condition of the premises is only co-extensive with his invitation. A person on private grounds by invitation of the owner going of his own volition into other parts of the premises exceeds the bounds of his

invitation, and if he does not thereby become a trespasser, goes out of the way to create a risk for himself."

Applying this rule to the case at bar, it will be noted that the plaintiffs went behind the counters of their own volition and undoubtedly thereby created a risk for themselves.

To extend the invitation, however, by implication to justify their presence in this part of the store, a further rule is laid down in the case above cited, as follows:

"In this branch of the case evidence of the usual custom with respect to the parts of the premises into which persons were admitted, who enter the premises for the purpose for which the invitation was extended, is competent to show the extent of the implied invitation."

Phillips vs. Library, supra.

In the case at bar there is no evidence of any kind which indicates a custom of persons going through this open space behind the counters to the book-rack, but, on the contrary, one of the plaintiffs testified that he had seen salesgirls go through this space behind the counter.

"Q. You say that you had seen salesgirls go through that space before you went through it? A. Yes" (p. 60).

This fact establishes, if anything, a notice to the public that it is a place for salesgirls, who are the agents of the owner, to go through and not the public. There is no evidence which tends to prove that any other person, other than the salesgirls, had

used this space, and the manager of the store testifies as follows:

“Q. What are these spaces? A. Clerks’ entrance only” (p. 69).

This passage way, therefore, is established to be a place used only by the defendant’s servants and agents, and the plaintiffs had knowledge thereof for they had seen salesgirls go through it and had not seen any of the general public use it. There being no proof of a general custom existing under which the general public went through this opening, and there being no proof that by any act or statement of the defendant or its servants or agents, the plaintiffs were invited to go through this open space behind the counters, we are then confronted with the query of just what circumstances could be construed by the jury to have been an implied invitation. It appears that there was a price tag on the book-rack, and from that fact the plaintiffs may contend that there was an invitation; but this cannot be a sound rule, because it appears in the testimony that there were price tags on other articles on the counters and along the shelves (pp. 27, 59). The placing of a price tag on an article does not mean that the purchaser is thereby invited to approach that article, wherever it may be, to examine it, for it is a matter of common knowledge that in a store of this character there are articles in the windows with price tags on, and if the price tag is an invitation, then the public may walk into the show windows to examine the articles. There are price tags on articles hung from the walls and ceilings, and from other places inaccessible to the public, unless they go behind the counters to examine the articles or, if the articles are hung high out of reach, they would be entitled to climb on

the counter or use any other means to examine the articles. Therefore, it cannot be a sound principle to say that the presence of a price tag gives the public the right to approach near enough to the article to examine it, wherever the article may be. This proposition, therefore, can well be cast aside as not being anything more than a notice to the public that the article will sell for a certain price.

It might be well at this point to distinguish a recent case in this Court which was brought against the same defendant, that is the case of *Derenot vs. F. W. Woolworth Co.*, 99 Atl., 126. In that case the plaintiff, having made some purchases, desired to purchase a five-pound sugar box and she was requested by the saleswoman who waited upon her to point out the box, and the saleswoman, walking slightly in advance of the plaintiff and followed by her, walked through an open space between the railings, the plaintiff still following, and at the same time pointing to a sugar box on a shelf against the wall of the store, and while doing this she fell down a flight of stairs. The Court held from that evidence it was permissible for the jury to draw the inference that the saleswoman, by her statements and her conduct, had invited the plaintiff to the place in the store where she met with the accident. But in the case at bar there was no attempt made to consult the salesgirls with reference to these books or with reference to her right to go in and examine the books which were behind the counters, and, as the plaintiff, Mary Louise MacDonough, states she went there because she could not read the titles of the books from a point outside of the counters and went into this part of the store purely of her own volition (p. 25).

How can it be said from these circumstances that any inference can be drawn indicating an implied

invitation? There is no custom established, no act or statement, that the defendant or its servants, expressly or impliedly, invited the plaintiff, Mary Louise MacDonough, to enter there; salesgirls were in the immediate vicinity for the purpose of waiting on her; she had seen the salesgirls go through the opening which was notice that it was an entrance for clerks only. What principle, therefore, of reasoning can be invoked to say there was an implied invitation? The very fact of the presence of the stairway behind the second counter indicates it was not a place for the public for, as the defendant's witness testified, it was up this stairway that goods were brought from the cellar to the store (p. 83). The plaintiff, Mary Louise MacDonough, testified that the stair-case is directly behind the second counter.

“Q. Now, this stair-case is behind that counter, is it not? A. It is.

“Q. BY THE COURT—Behind which counter? A. The second (p. 59).

This means that the plaintiff, Mary Louise MacDonough, had to step behind the second counter in order to have fallen down this stairway, for it would be physically impossible to have fallen down that stairway unless she got to the point where the stairway was located.

The law is well settled that the liability of the defendant is only co-extensive with the invitation to enter. *Ryerson vs. Bathgate, supra; Phillips vs. Library, supra; Bonfield vs. Blackmore (Ct. E. & A.), 100 Atl., 161*, and that invitation, be it either express or implied, certainly could not, under the circumstances of this case, have been assumed by the plaintiffs to include the entry through this space

between the counters and going behind the same.

In the case of *Cowan vs. Kirby*, 180 *Mass.*, 504, it appeared that a man had put his team of horses in a livery stable and, after receiving a check therefor, returned, and in attempting to put packages into the wagon was injured, and it was held that in the absence of custom or special invitation to do as he did, he was a bare licensee in and about the premises of the livery stable-keeper, and there was no invitation to enter for the purpose aforesaid. Certainly that case presents a much stronger situation than the case at bar, for one might fairly assume that he would have the right to go into a livery stable, where he had checked his property, in order to do anything with reference to his property that he might see fit; but it was determined, *as a matter of law*, that the invitation did not extend that far and the jury could not infer an invitation to enter the stable and go to his wagon purely from the fact that the wagon had been stored there. This case laid down the further proposition:

“It is only those parts of the premises where customers are expected to be that the owner or occupants must keep in a suitable condition for them, and in such parts only has a customer a right to assume that care has been used to protect him from injury. He enters knowing that the place is not arranged merely for his own convenience. He may expect that he will be safe in conducting himself as a customer is expected to act, but he has no right to expect that he will be safe if he oversteps that limit.
* * * If, without some special invitation, express or implied, a customer sees fit to pass from that part of the

establishment—where it is designed and expected that he shall be—into other parts not designed or adapted for his use but for the work of the place, he becomes at best a mere licensee as to whom the owner or occupant has no duty to keep his premises safe.”

Cowan vs. Kirby, supra. Cases cited.

Under that ruling every customer knows, as a matter of universal knowledge, which every Court must take judicial notice of, that the proprietor transacts his business behind the counters, and that the public transacts its business on the other side of the counters and is served over the counters, and when the plaintiff went in this passageway and got into a position where she fell down a stairway directly behind a counter, as a matter of law she must have known that she was in a place where, as a customer, she had no right to be and where the defendant would not expect her to be, and thereby she exceeded the limits of the implied invitation, namely, to enter the store as a customer to make purchases. In fact by analogy the case of *Derenot vs. Woolworth, supra*, where the customer was led by act and statement of the saleswoman to the point where she was injured, if those were the circumstances from which the jury could infer invitation, then the converse of the proposition must be true—that without those circumstances the jury could not infer an invitation—and hence, in the case at bar where there is no act or statement of any of the defendant’s employees, but the plaintiffs went into this part of the store of their own volition, then there were no facts or circumstances from which the jury could infer an implied invitation to go into that place.

Concrete illustrations may be found in the following cases:

In *Lehman vs. Amsterdam Coffee Co.*, 146 Wis., 213, (131 N. Y., 362), the Court recognized that the maintenance of an unprotected stairway in the part of the store not intended for customers would not be negligence rendering the storekeeper liable for the fall of a customer not invited to that part of the store, and in that case there was proven an *express invitation* to the plaintiff to go into that part of the store.

In *Rooney v. Woolworth*, Sup. Ct., Conn. 52 Atl.,) 411, it was held that the conclusion of the Trial Court "that the user of a portion of the premises was under an implied invitation—was a conclusion of law, and in that case the plaintiff was using a different entrance or exit from that which was commonly used by the public.

In *Hart vs. Grennall*, 122 N. Y., 271, it was held that where a customer unnecessarily followed a clerk to the rear part of the store, there being no appearance which invited him into that part of the building, and in scales so was injured, he was not entitled to recover. The Court said, in part:

"The rule must be applied with reference to the situation of the property and its apparent arrangement for the comfort of the business. A merchant must have a place to store his goods and counters and figures upon which they may be displayed, scales upon which to weigh them and trucks with which to move them."

In all cases cited on the concrete illustration of customers falling through trap-doors or down stair-

ways in a store, there is always reference to the express invitation or by the act of a clerk or servant of the proprietor impliedly inviting a customer to a portion of the store where such conditions exist, in determining the liability of the storekeeper for negligence, and many such illustrations may be found in the notes in 21 *L. R. A.*, p. 456. But in no case is there any submission of the question to the jury, unless there has been an act on the part of a clerk or a custom established in a particular store from which an inference of implied invitation can be found. The following principle seems to be well settled:

“Obviously the rule that the keeper of a public place of business is bound to keep his premises and the passageways in a safe condition and use ordinary care to avoid accident for injury to those properly entering upon the premises on business, does not apply to such parts of the building as are used for the private purposes of the owner, unless the party was induced by the invitation or allusion of the owner, express or implied, to enter thereon.”

1 *Thompson Neg. (2d Ed.)*, p. 907; *Schmid vs. Bauer*, 80 *Cal.*, 565 (5 *L. R. A.*, 580).

The finding of what is an invitation, express or implied, was a matter of law for the Court and not a question for the jury.

There is no dispute of fact concerning the question of the layout of the store, the situation of the counters and the location of the book-case, and there is no dispute as to the fact that the plaintiff, Mary Louise MacDonough, voluntarily and of her

own volition walked through the open space behind the counters to investigate this book shelf against the wall. In fact, the only testimony on that point is the testimony of both plaintiffs, and therefore there was no question of fact to be first determined by the jury from which they might make a finding of whether or not there was an implied invitation. The facts, as testified to by the plaintiffs, are fully set forth herein, and the Court, as a matter of law, should have determined whether such facts gave rise to an invitation, express or implied, to enter that portion of the premises. For surely the question of what constitutes a licensee or a guest is primarily a question of law as applied to undisputed facts. If there were disputed facts the Court would then instruct the jury as to what facts would constitute invitation, if so found by them, and what would not constitute an invitation, if they found otherwise.

In the case of *Rooney vs. Woolworth*, 52 Atl., 411, it was held that the conclusion of the Court as to what was an implied invitation was a matter of law and was a finding of law and is reviewable on appeal. There must be some line of distinction as to when the power of the Court ends and when the power of the jury begins, to determine this question; and when there is no dispute of facts to submit to the determination of the jury, then the Court must say, as a matter of law, under the undisputed facts whether such facts constitute in law an implied invitation or not.

In *Phillips vs Library*, *supra*, the Court said that the question in that case was one for the jury, but this was due to the fact that the jury had to determine first, whether the pathway which the plaintiff in that case used was so universally used as to have been acquiesced in by the defendant, and

secondly, whether the pathway under the disputed evidence had not been established by custom. But in all cases where facts are not disputed it is for the Court to determine, as a matter of law, whether the plaintiff was a trespasser, a bare licensee or a guest; and this the Court refused to do in the case at bar, but submitted it to the jury for them to draw inferences which the facts and circumstances, as a matter of law, do not permit.

The opinion in the case of *Phillips vs. Library, supra*, is summed up in the following quotation, after reciting the facts:

In such a case it is a question of fact whether the path taken by the plaintiff has, by its accustomed use, with the knowledge of the defendant, become a way which by its use and appearance indicated a way that persons so using the premises were invited to use."

In the case at bar there is no accustomed use established; there is no act or statement of a servant or agent of the defendant which would tend to invite plaintiff, Mary Louise MacDonough, to the part of the store where she was injured. There is nothing established except the location of the counters, the location of the book-shelf against the wall behind the counters, the location of the stairway behind the counters, and the act of the plaintiff, Mary Louise MacDonough, going behind the counters to examine the books. This in law either constitutes an invitation or not.

In the case of *Furey vs. N. Y. Central, &c., Co.*, 67 *N. J. L.*, 271, the Court of Errors and Appeals decided that under the facts there was no implied invitation.

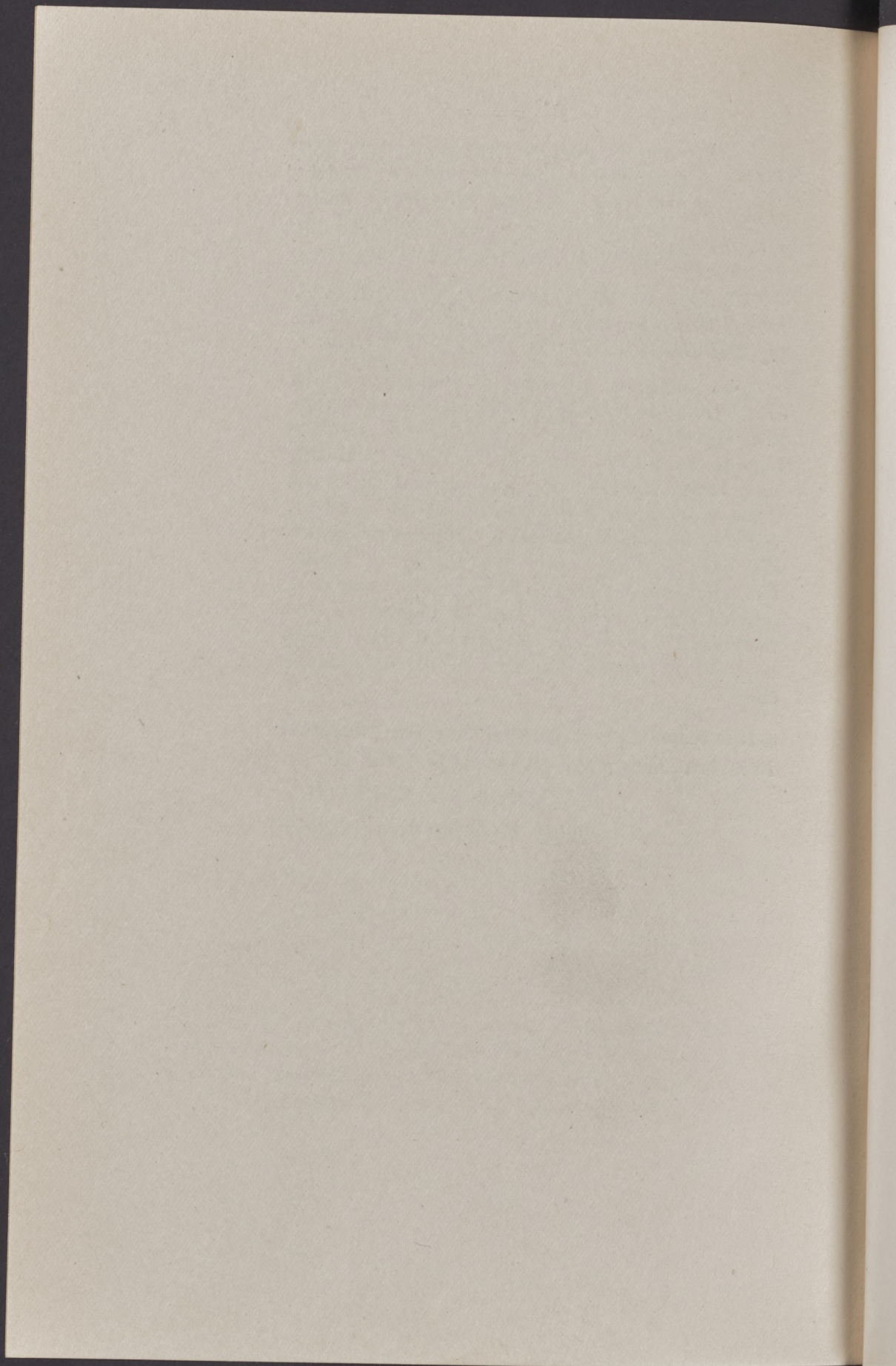
“If when the plaintiff rests their be no evidence from which the jury may reasonably infer that the defendant’s negligence caused the injury complained of, the plaintiff should be non-suited.”

Kelly, &c., Co. vs. Central R. R. Co., 70 N.J.L., 190; Michaels vs. Adams Express Co., 71 N. J. L., 41; McGuire vs. Central R. R., 68 N. J. L., 608.

There being no inference of negligence to be drawn from the facts because there was no invitation, express or implied, extended to the plaintiffs to go to that part of the store at which plaintiff, Mary Louise MacDonough, was injured, the Trial Court should have granted the motion to non-suit, and also the motion to direct a verdict as the plaintiffs’ case is based upon the theory of invitation, and their proof does not go to the extent of proving wanton or wilful acts of negligence, and therefore it was error on the part of the Trial Court not to have directed a verdict in the defendant’s favor.

It is respectfully submitted that the judgment in favor of both plaintiffs should be set aside.

RUNYON & AUTENRIETH,
Of Counsel for Defendant-Appellant.



New Jersey Court of Errors and Appeals

MARY LOUISE MACDONOUGH, and
HARRY FISK MACDONOUGH,
Plaintiffs and Appellees,

vs.

F. W. WOOLWORTH COMPANY,
a corporation,
Defendant and Appellant.

On Appeal.

Brief of Appellee.

Facts.

On October 30th, 1916, the plaintiff entered the Five and Ten cent store of the defendant, at Salamanca, N. Y., for the purpose of purchasing some books (p. 11, ll. 19-25), and while there met with the accident—for which this suit was instituted.

There was a counter on the righthand side, one in the middle, and one on the lefthand side of the store, and these counters extended from the front to the rear end of the store, and they followed in the same direction that one would be going in upon entering the store (p. 12, ll. 10-30).
Q They continued from the front, to the rear of the store? A "Yes."
Q Now taking the righthand counter for example, can you tell what there is between the counter and the righthand wall if there is anything? A "You mean goods?"
Q Well what is there there? A "Goods to purchase."
Q Now where do the sales girls stand? A "Behind the counters" (p. 13, ll. 10-20). There are two counters on the righthand side of the store and at the end

of the first counter there is a space, in which space there was a rack against the wall containing books which were displayed for sale and there followed another counter, running in the same direction (p. 14, ll. 18-25; p. 25, ll. 15-22). The second counter extended a little farther out in the store than the first counter did (p. 27, l. 10). On these counters, as well as behind them, goods were displayed for sale. While we realize that this Court is not concerned with the extent of the injuries of the plaintiff or the damages awarded by the jury, yet we desire to correct a misstatement of the appellant's brief as to the extent of the plaintiff's injuries. The counsel in his brief merely referred to the injuries as a fractured leg, and bruises, confining the plaintiff to her house for seven weeks, but the testimony uncontradicted, plainly shows that she was not only confined to the house for eight weeks, but that she continued to suffer pain long afterward (p. 20), and is unable to go out unattended (p. 20, ll. 26-30). She had sustained injuries on her head and arm (p. 30), and so intense was the pain that opiates had to be administered (p. 34), and that her leg after it had been taken out of the plaster cast was deformed and stiffened (p. 36), and she was and is still being treated for her injuries, and that the injured leg was shortened by one-half an inch (p. 37), this may make but little difference in a man, but it certainly does make a great difference in a woman, being obliged to walk with a limp. *Turning to the facts in the case as they were presented to the jury, it may be safely observed that this action presented purely questions of fact, solely within the province of a jury to determine, and which were properly submitted by the Court for the consideration of the jury.* It was proven

that a book rack was at the end of the passageway leading between the two counters on the righthand side of the store, this book rack was composed of shelves fastened against the wall (p. 14, ll. 21-23). The shelves upon which the books were displayed were about four or five feet long and about five in number (p. 15, ll. 21-26). The appellant's brief erroneously and incorrectly states the facts in this case regarding the situation of the book rack, in repeatedly asserting that the book rack was behind the counter; this is not the fact and the incorrectness of this statement becomes clear by the charge of the learned trial judge commenting upon this part of the case, referring to it in his charge to the jury he says: "It has been stated by counsel that the question was whether Mrs. MacDonough was invited to go behind the counter?" This seems to me not quite accurate (p. 101, ll. 15-17). The learned judge's comment was based upon the plaintiff's testimony, which was as follows: Q And when you went to get one of these books you went in that open space between the first counter on the righthand side and the second one and stepped up towards the books, did you not? A "Yes." Of course when the plaintiff was standing near the book rack all the counters and other goods would be in the rear of her. Q Well, you were right up close to the wall, so that you could see the books? A "Yes." Q And on your righthand side, behind you, was one of the righthand counters? A "Yes." Q And on your lefthand side, to the left, was the other? A "Here is one." Q But there was another counter running straight down to the end of the store, was there not? A "Not in continuation of this." Q There was an opening between the two of them? A "Yes,

and the other counter was a little bit ahead of the other one; it didn't run straight along." Q And then another righthand counter ran to the end of the store? A "Yes, but not directly alongside of this other counter; it was a little bit ahead of it; there was room there for the cellar door." The Court thereupon questioned the plaintiff as follows: Q What do you mean by "ahead of it?" A "There was a wall ran down this way, and then for the door there was an opening, and then it continued down." Q This is what I want to know: Were the two counters in the same line? A "They were supposed to be, but, you see, this counter—" Q Not what they were supposed to be, but were they, as a matter of fact, in the same line, or was one of them further out in the store than the other? A "Yes." Q How much further out? A "Well, probably four or five feet" (p. 26, ll. 20-40; p. 27, ll. 1-10). This place where these book racks were fastened, and the books were exposed for sale was the only place in the store where the books were displayed for sale (p. 17, ll. 34-38). On the lefthand side of this passageway to the books there was an opening which led down to the cellar, with about twenty steps and it was necessary to pass this opening in order to approach the book case (p. 14, ll. 7-9). In order to enable the plaintiff, who was desirous of purchasing some books, to read the titles of the books, that were exposed and displayed for sale, she was obliged to approach close up to the case and look slightly upward, in order to read the titles (p. 14, ll. 20-40). It is true that at this point there was a small electric bulb suspended over the top of the shelf, but from evidence given by the plaintiff in answer to the question put by the Court the light was insufficient. Q What electric light or light

of any kind was there at or near this book rack? A "A small bulb at the back part—a little above the top shelf." By the Court. Q What is that? A "A very small electric bulb." Q Just state where it was. A "Hanging over the top shelf, rather close to the shelf, a very small faint light" (p. 85, ll. 20-40), and the witness continued in answering the questions of the Court: Q How close? A "Oh, probably six inches or more." Q Six inches away from the wall or six inches above— A "Above the shelves, above the top shelf." Q And how far away from the wall? A "Probably a foot," and upon cross examination of the counsel of the appellant: Q You noticed this light, did you? A "I noticed it, because it was so faint that I couldn't see the titles of the books" (p. 86, ll. 1-20). Thus by this evidence, it clearly appears that the light was not sufficient to enable a person to read the title of the books without going close to them, and it is certainly apparent that the light was put there to enable persons desiring to purchase books to read the titles of those books displayed upon the rack, and under the conditions that there then existed, the plaintiff could not have examined or been able to read the title of the books which were on sale upon the shelves of the rack without going to the very end of the passageway between the two counters, for in so doing she was but one foot distance from the books (p. 25, ll. 29-40). There was also displayed on the top of the racks a sign signifying the price of the books; this sign contained the words "Ten cents" (pp. 18-20; p. 48, ll. 15-16). The course which the plaintiff took in order to reach this rack, was taken from the information given to her by the sales girls employed in the store, who told her

in what direction she was to go (p. 30, ll. 16-24), and the sales girls directed her to the books which were at the end, near the stairway (p. 27, ll. 29; p. 28, l. 9). What further invitation was necessary to this plaintiff than the books as they were exposed for sale in an ordinary place and manner? Manager said books were on sale. P. 71. l. 1-2

In front of the opening in the floor on the left of the passageway toward the books, there was a gate, which at the time of the said accident was fastened to the book case (case, p. 63). Q You say that there was a gate which ran from the plaster wall, the right wall, to the further counter, when you saw it; it was running along the plaster wall under the book cases. A "Yes, sir." Q That the book cases did not come down to the floor? A "No, sir." Q About how high do you think the gate was? A "The gate from the floor, was about, maybe, two or three inches over two feet." Q And then came the book cases? A "Yes, sir." Q *The gate when you saw it was held against the wall under the book cases?* A "Yes sir" (p. 63, ll. 20-40). Q Did you notice whether anything held the gate in position? A "It was tied back by a piece of something, some kind of twine or string or cord." Q Fastened to what, do you know? A "Tied to the wall. I suppose there was a hook there. I couldn't see what it was tied to" (ll. 10-30, p. 64). So that it appears that a person coming to inspect the books would naturally look upward and have no occasion to look on the floor. The plaintiff walked into the passageway toward the rack of books, went to look up, and in taking one step sideways went down in the opening in the floor, where the gate had been tied back (p. 18, ll. 8-15). This testimony is corroborated by her husband and

stands uncontradicted. There were two sales girls in the store at the time of the accident, and yet were not produced as witnesses at the trial. A very weak effort had been made to locate them by the manager of the store who, was the defendant's only witness. His effort certainly does not induce one to believe that he was particularly anxious to have them as witnesses, they not, now, being in the employ of the defendant's company. The defendant Miguet, the manager, stated that the girl behind the two counters was to wait on shelving (p. 71, ll. 35-40), but she was not near the book case when the plaintiff went to look and examine the title of the books. The plaintiff also testified that the manager, after the accident, said that it was careless to leave the gate tied back (p. 88, ll. 17-23; p. 90, ll. 16-29). The gate which was placed in front of the passageway was certainly not put there to protect those familiar with the premises, particularly those employed there, but surely to protect those who had occasion to come there to purchase and were unfamiliar with the condition of the store. It is quite likely that the manager considered he had been neglectful of his duties toward his customers when he remarked that "to have left the gate tied against the wall was negligent," it is hard to conceive of grosser carelessness than was displayed in this case. The book case was fastened against the wall with a projecting top shelf, with an *open passageway* leading toward it, and a sign with the price of the books displayed. Everything was done to attract the eye of a person entering the store for the purpose of purchasing the books, and yet leaving the place in darkness and the surroundings dangerous. Could there be greater carelessness and want of due care in protecting customers having occasion to visit the

store? Is it reasonable to believe that the defendant company expected the sales girls in attendance to take the books in their arms and hold them while the person selected such as he or she might desire to purchase, or is it not more natural that the persons wishing to purchase books would select them from the shelves in the book case? The appellant argues that the fact that there existed a stairway would indicate that customers had no right to passage at that point, but this contention is not tenable. If this passageway was not to be protected so that the public might use it without danger, and if it was intended that no person should visit that point, why was a gate considered necessary at all? The sales girls and others employed in the store must have known of the stairway, and could easily avoid the place, and they would need no protection gate, but the unsuspecting customers who were not apprised of this fact, and the plaintiff, this being the first visit to the store, certainly could not be charged with negligence in walking down the passageway in the ordinary manner and inadvertently stepping into the unguarded opening. This accounts for the manager's statement, when the matter was fresh in his mind, immediately after the accident happened, "It was careless of him to leave the gate tied back," for he certainly knew that the presence of the gate there was to protect customers who walked down the passageway toward the book rack, and the gate should not have been tied back, and if it had not been tied back the accident would never have happened.

Upon examination of the several cases cited by the appellant, the only one that is applicable to the case at bar is *Deronet v. F. W. Woolworth Co.*, 99 Atl. 126. This case, however, does not

disclose as strong a case of negligence on the part of the storekeeper as the one under discussion, for in that case the plaintiff *did* actually go behind the counter in the store, while in this case she went along a regular passageway which was open to all customers of the store. There is no evidence in the entire case that the plaintiff walked behind a counter or was in any place that she was not entitled to be. What she did do is very succinctly stated by the learned judge in his charge to the jury, "She did not intend to go behind the third counter, and in fact, did not go behind any counter, except that she unintentionally fell from this passageway between the two counters down a stairway, which was behind a counter," the one of the two counters which was farther from the front of the building, etc.

If she had intended to go behind a counter, of course, the situation would be different, because the space behind the counter is reserved for employees only and not for customers, unless a clear invitation to the customer is given to go behind such counter, but as to this phase of the case the trial court charged the jury:

"If she had intentionally gone behind the counter, the situation would present itself differently to the mind, because there is a strong inference that the space behind a counter is for employees of the store and not for the customers. *She, however, never intended to go behind the counter, so far as the evidence shows.* She claimed the right to go to the book case and did not exercise or assert any right or claim to do anything more than that, and it is from that point that she fell."

There is not a scintilla of evidence from which it possibly can be inferred that the plaintiff did not use due care in walking along this passageway. There can be no doubt that she used such care as was required of persons entering the store for the purpose of making purchases. There was nothing to indicate to her that this pit-fall was placed on the lefthand side of the passageway in an unguarded manner. The trial court, after the close of the plaintiff's case, and after the close of the entire case, properly refused the motions of non-suit and direction of a verdict. This passageway was the same kind as this one along which she walked from the front to the rear of the store, only shorter. It was for the jury to determine whether the plaintiff in this case used such care in walking along the passageway to the books, as was incumbent upon her at that time. It was a question of fact for the jury whether there had been an invitation to the plaintiff and it was a question of fact for the jury whether the defendant had been guilty of negligence. The jury found from the evidence that the plaintiff was where she was induced to go by the implied invitation of the defendant, the books being there exhibited by the defendants for the purpose of sale to customers, and that the defendant was guilty of negligence in having the gate tied back which had been placed for the protection of persons having occasion to visit that part of the store. In other words, the jury resolved all questions of fact favorably to the plaintiff.

We maintain that the entire case presented merely questions of fact for the jury to pass upon, and they have answered these questions of fact by their verdict.

We respectfully submit that the judgment should be affirmed, with costs.

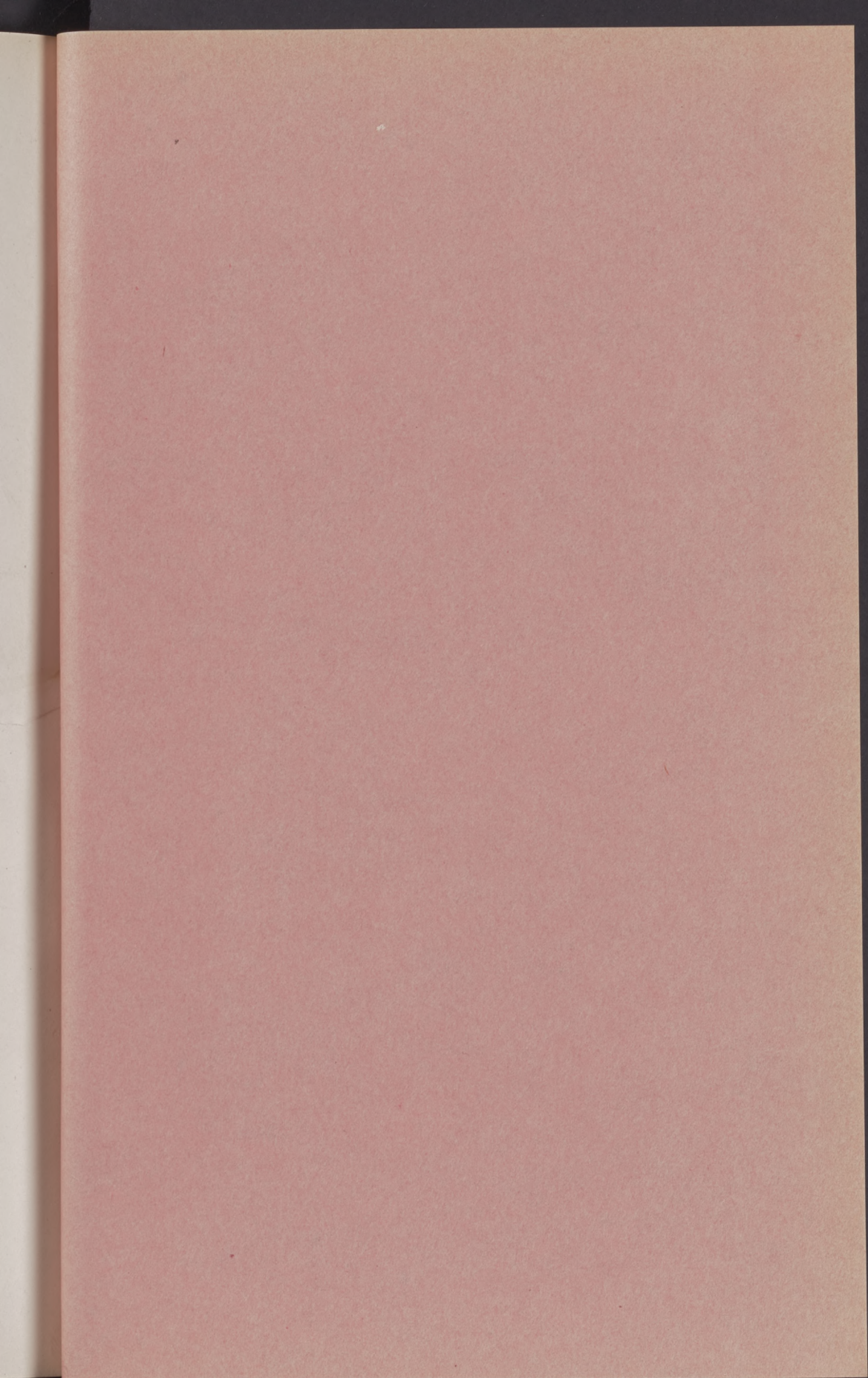
For appellee;

ABNER KALISCH,
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