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**Summons.**

State of New Jersey to Wright & Cobb Transportation Company and Heller Brothers Company.

You are summoned to answer the annexed complaint of Alita E. Hough, in an action at law in the Essex County Circuit Court. And take notice that unless you file your answer to the said complaint with the clerk of the Essex County Circuit Court, at Newark, within twenty days after 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: Frederick Adams, a judge of the said Court, at Newark, this 22nd day of March, nineteen hundred and seventeen.

W. HOWARD DEMAREST,  
*Attorney.*

JOSEPH McDONOUGH,  
*Clerk.*

*Complaint*

## Essex County Circuit Court

10	ALITA E. HOUGH, <div style="text-align: right;"><i>Plaintiff,</i></div>	}	<i>Action at Law. Complaint.</i>
	<i>vs.</i>		
	WRIGHT & COBB TRANSPORTATION COMPANY AND HELLER BROTHERS COMPANY, <div style="text-align: right;"><i>Defendants.</i></div>		

20 Alita E. Hough, residing in the Town of Belleville, Essex County, New Jersey, says that:

1. On February 21, 1917, plaintiff was lawfully walking on Mt. Prospect avenue, a public highway of the City of Newark, near Verona avenue, at which place an automobile truck owned or controlled by defendant, Wright & Cobb Transportation Company, was loading or unloading material for defendant, Heller Brothers Company, at their building on said avenue.

30 2. Said defendant or some one of them, in violation of the ordinances of the City of Newark, improperly propelled said automobile truck or caused or permitted the same to be propelled over and across the curb and sidewalk of Mt. Prospect avenue, blocking the passage of plaintiff and other pedestrians, without permission from the proper authorities for that purpose, first had and obtained.

40 3. The agents and servants of defendant, Wright & Cobb Transportation Company, and of defendant, Heller Brothers Company or some one of them, were at the time and place aforesaid, engaged in

*Complaint*

the operation of loading or unloading said automobile truck. Said agents and servants being the duly authorized agents and servants of their respective employers, the defendants herein.

4. At the direction of said agents and servants and at their instance, and representation of the safety of such passage, plaintiff attempted to pass said automobile truck, but while so passing, they or some one of them, negligently and in a reckless and careless manner, dropped or caused or permitted to drop, the tail-board of said automobile truck, striking the plaintiff on the mouth and forcing her head violently against the side of the adjoining building, owned and occupied by defendant, Heller Brothers Company. 10

5. As a direct result of the negligence of the defendants or as a direct result of the negligence of some one of them, plaintiff sustained severe injuries to her lips, teeth, gums, jaw bones and head, and was otherwise greatly injured about her body. 20

6. By reason of said injuries, plaintiff was confined to her bed and to her house for a long space of time, to wit, four weeks, and suffered and still does suffer and will in the future continue to suffer great pain and inconvenience.

Plaintiff demands of the defendants the sum of \$5,000 damages. 30

W. HOWARD DEMAREST,  
*Attorney of Plaintiff.*

*Summons and Complaint*

## ESSEX COUNTY CIRCUIT COURT.

28005

10	ALITA E. HOUGH,  <div style="text-align: right;"><i>Plaintiff,</i></div>	}	<i>Action at Law. Summons and Complaint.</i>
	<div style="text-align: center;"><i>vs.</i></div> WRIGHT & COBB TRANSPORTATION COMPANY AND HELLER BROTHERS COMPANY,  <div style="text-align: right;"><i>Defendants.</i></div>		

20

W. HOWARD DEMAREST,  
*Attorney of Plaintiff,*  
Kinney Bldg., Newark, N. J.

I hereby appoint and depute John L. Kane to  
serve the within writ.

Witness my hand and seal this 23rd day of March,  
1917.

RALPH B. SCHMIDT.

30

By HARVEY W. KEOUGH,  
(L. S.) *Under Sheriff.*

Filed March 24, 1917.

JOSEPH McDONOUGH,  
*Clerk.*

Sheriff's fee, \$4.96.

40

Served the within summons and complaint March  
23, 1917, personally upon Allen Cobb, agent in  
charge of the Wright & Cobb Transportation Com-  
pany with within named defendant at their place  
of business foot of Center street, Newark, and per-

*Summons and Complaint*

sonally upon A. G. Heller, Vice-President of the Heller Brothers Company the within named defendant at their place of business 875 Mt. Prospect avenue, Newark, N. J.

RALPH B. SCHMIDT,  
*Sheriff.*

By JOHN L. FARRE, 10  
*Special Deputy.*

20

30

40

*Stipulation*

## ESSEX COUNTY CIRCUIT COURT.

	ALITA E. HOUGH,	} <i>Action at Law. Stipulation.</i>
	<i>Plaintiff,</i>	
	<i>vs.</i>	
10	WRIGHT & COBB TRANSPORTATION COMPANY AND HELLER BROTHERS COMPANY,	}
	<i>Defendants.</i>	

It is hereby stipulated and agreed by and between the several parties to this action, by their attorneys, that the defendant, Wright & Cobb Transportation Company be struck from the Summons and Complaint, and that said Summons and Complaint be and the same is hereby amended so as to read Allen Cobb, trading as Wright & Cobb Transportation Company, and the said Allen Cobb, so trading is hereby substituted as a party defendant in this action without service of process or complaint.

It is further stipulated that each of the defendants have fifteen days within which to file answer to the complaint.

30 Dated July 28, 1917.

W. HOWARD DEMAREST,  
*Attorney for Plaintiff,*

RICHARD F. JONES,  
*Attorney for Defendant, Allen Cobb.*

KELLOGG & CHANCE,  
*Attorney for Defendant, Heller  
Brothers Company.*

Answer

Answer.

(Filed July 31, 1917.)

ESSEX COUNTY CIRCUIT COURT.

ALITA E. HOUGH,  <div style="text-align: center;"><i>vs.</i></div> ALLEN COBB, TRADING AS WRIGHT & COBB TRANSPORTATION COM- PANY AND HELLER BROTHERS COMPANY,  <div style="text-align: right;"><i>Defendants.</i></div>	}	<i>Plaintiff,</i>  <i>Action at</i> <i>Law.</i> <i>Answer to</i> <i>Amended</i> <i>Complaint.</i>	10
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The answer of Heller Brothers Company, one of the defendants in the above named suit, having an office at No. 865 Mt. Prospect avenue, in the City of Newark, County of Essex and State of New Jersey, says that: 20

1. This defendant admits so much of paragraph "1" of the amended complaint as alleges that on February 21, 1917, plaintiff was walking on Mt. Prospect avenue, a public highway of the City of Newark near Verona avenue near which place an automobile truck, owned and controlled by defendant, Allen Cobb, trading as Wright & Cobb Transportation Company, was loading material of defendant, Heller Brothers Company at their building on said avenue. This defendant alleges that it had hired said defendant, Allen Cobb, trading as Wright & Cobb Transportation Company as an independent contractor to transport said material from its said building and that said defendant, Allen Cobb trading as Wright & Cobb Transportation Company was engaged, in so doing, as such independent con- 30 40

*Answer*

tractor at said time and place. This defendant denies each and every allegation of paragraph "1" of said amended complaint not hereinbefore expressly admitted.

10 2. As to paragraph "2" of the amended complaint, said defendant, Heller Brothers Company denies that it, in violation of such ordinance or otherwise, improperly or otherwise propelled said  
20 automobile truck or caused or permitted the same to be propelled over or across the curb or sidewalk of Mt. Prospect avenue; it denies that there is a curb at that place on Mt. Prospect avenue; it further denies that the said automobile truck blocked the passage of the plaintiff or other pedestrians; it admits that it did not get permission to back said truck upon said sidewalk and alleges that no such permission is necessary. As to the allegations of  
said paragraph not hereinbefore expressly denied, it alleges that it has no knowledge or information thereof sufficient to form a belief.

3. It admits that an agent and servant of this defendant, Heller Brothers Company was, on February 21st, 1917, on Mt. Prospect avenue, a public highway of the City of Newark, near Verona avenue, engaged in aiding in the operation of loading an automobile truck owned and controlled by Allen Cobb, trading as Wright & Cobb Transportation  
30 Company, and admits that the said agent and servant was the duly authorized agent and servant of this employer, the defendant, Heller Brothers Company, for the purpose of bringing to the said automobile truck the materials to be loaded, but denies all allegations of the said third paragraph of the said amended complaint not hereby admitted and in particular denies that said agent and servant of this defendant, Heller Brothers Company had any  
40 authority to do any other acts than those hereinbefore expressly stated.

*Answer*

4. It denies the fourth paragraph of the said amended complaint.

5. It admits that the plaintiff sustained injuries but has no knowledge or information thereof sufficient to form a belief as to the extent thereof, and denies that such injuries were the result of the negligence of the defendants.

6. Still denying that the injuries sustained by the plaintiff were sustained by the negligence of the defendants, it avers that it has no knowledge or information thereof sufficient to form a belief as to the matters alleged in the sixth paragraph of the said amended complaint. 10

7. Said defendant, Heller Brothers Company, in respect of paragraph "2" of the amended complaint, raises the objections and point of law that there is not any valid ordinance of the City of Newark regulating the propelling of automobiles over or across the curb or sidewalk of the public highways of the City of Newark. 20

*FIRST DEFENSE.*

The defendant, Heller Brothers Company, was not guilty of negligence.

*SECOND DEFENSE.*

Whatever damages and injuries were sustained by the plaintiff, Alita E. Hough, at the time and place mentioned in the amended complaint were caused and contributed to by her negligence and she negligently exposed herself to the risk of such an accident and neglected to take precautions or to exercise care to guard and protect herself against such an accident and at the time and place mentioned in the amended complaint she was conducting herself in a careless and reckless manner and was not exercising care or taking precautions in 30 40

*Answer*

walking upon the said public highway and sidewalk and in attempting to pass and while passing the automobile truck in the amended complaint mentioned.

*THIRD DEFENSE.*

10 That the alleged accident, at the time and place referred to in the amended complaint, and any injuries and damages alleged to have been sustained by the plaintiff as a result thereof, were due to the negligence or fault of some third person or persons causing and contributing to the same, for whose acts the said defendant, Heller Brothers Company is not liable or responsible, and were not caused by negligence or fault of said defendant, Heller Brothers Company or on the part of anyone for whose acts said defendant is liable or responsible.

20 WHEREFORE the defendant, Heller Brothers Company demands judgment in its favor and against the said plaintiff together with its costs and disbursements most wrongfully sustained.

KELLOGG & CHANCE,  
*Attorneys for Defendant,  
Heller Brothers Company.*

30

40



*Answer*

2. He denies the allegations contained in paragraph "2" of the Complaint.

3. He admits that the duly authorized agents and servants of the defendant, Heller Brothers Company, were at the time and place aforesaid, engaged in the operation of placing upon and loading an automobile truck of the defendant, Allen  
10 Cobb, trading as Wright & Cobb Transportation Company, with the material of said defendant, Heller Brothers Company.

He denies the remaining allegations contained in paragraph "3" of the Complaint.

4. He denies the allegations contained in paragraph "4" of the Complaint.

5. He denies the allegations contained in paragraph "5" of the Complaint.

20 He denies that any injuries sustained by the plaintiff were the direct result of his negligence.

6. He avers that he has no knowledge or information thereof sufficient to form a belief, as to the allegations contained in paragraph "6" of the Complaint.

7. This defendant, Allen Cobb, trading as Wright & Cobb Transportation Company, in respect to paragraph "2" of the Complaint, raises the objections and point of law that there is no valid  
30 ordinance of the City of Newark regulating the propelling of automobiles or automobile trucks over, upon or across the curbs or sidewalks of the public highways or streets of the City of Newark.

*FIRST DEFENSE.*

The defendant, Allen Cobb, trading as Wright & Cobb Transportation Company was not guilty of negligence.

*Answer*

*SECOND DEFENSE.*

The plaintiff was guilty of contributory negligence.

That the alleged accident and whatever damages and injuries were sustained by the plaintiff, Alita E. Hough, at the time and place mentioned in the Complaint, were caused and contributed to by her negligence, and she negligently exposed herself to the risk of such an accident and neglected to take precautions or to exercise care to guard and protect herself against such an accident and at the time and place mentioned in the Complaint, she was conducting herself in a careless and reckless manner, and was not exercising care or taking precautions in walking in, upon or over the said public highway and sidewalk, and in attempting to pass, and while passing, the automobile truck in the Complaint mentioned.

*THIRD DEFENSE.*

That the alleged accident, at the time and place referred to in the Complaint, and any injuries and damages alleged to have been sustained by the plaintiff, as a result thereof, were due to the negligence or fault of some third person or persons, causing and contributing to the same, for whose acts the said defendant, Allen Cobb, trading as Wright & Cobb Transportation Company, is not liable or responsible, and were not caused by the negligence or fault of the said defendant, Allen Cobb, trading as Wright & Cobb Transportation Company, or on the part of any one for whose acts the said defendant, Allen Cobb, trading as Wright & Cobb Transportation Company, is liable or responsible.

WHEREFORE, the defendant, Allen Cobb, trading as Wright & Cobb Transportation Company, de-

*Answer*

mands judgment, in his favor and against the said plaintiff, that the Complaint herein as to him be dismissed, together with the costs and disbursements of this action.

10

RICHARD F. JONES,  
*Attorney for Defendant, Allen  
Cobb, trading as Wright &  
Cobb Transportation Company.*  
Office and Post Office address,  
1 Exchange Place, Jersey City, N. J.

20

*Discontinuance***Discontinuance.**

(Filed April 25, 1918.)

## ESSEX COUNTY CIRCUIT COURT.

ALITA E. HOUGH,

*Plaintiff,**vs.*ALLEN COBB, TRADING AS WRIGHT  
& COBB TRANSPORTATION COM-  
PANY AND HELLER BROTHERS  
COMPANY,*Defendants.*

10

*At Law.**Discontinu-  
ance.*

The attorneys for the respective parties consent-  
ing thereto, it is on this 22nd day of April, 1918,  
ordered the above entitled cause be and the same is  
hereby discontinued without costs as to the defend-  
ant Allen Cobb, trading as Wright & Cobb Trans-  
portation Company.

20

FREDERICK ADAMS,  
*Circuit Court Judge.*

We consent to the entry of the above discontinu-  
ance.

J. HOWARD DEMAREST,  
*Attorney of Plaintiff.*

30

RICHARD F. JONES,  
*Attorney for Defendants, Allen  
Cobb, trading as Wright &  
Cobb Transportation Company.*

April 25, 1918.

40

*Verdict*

ESSEX COUNTY CIRCUIT COURT.

28005

10	ALITA E. HOUGH,  <div style="text-align: center;"><i>vs.</i></div> HELLER BROTHERS COMPANY, <div style="text-align: right;"><i>Defendants.</i></div>	}	Plaintiff,  Verdict by Jury.	Action at Law.
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Judgment for Plaintiff.

Amount .....	\$140.00
Costs .....	77.00
	\$217.00

20 W. HOWARD DEMAREST,  
*Attorney of Plaintiff.*

This action was tried before Judge Frederic Adams with a jury at the Essex County Circuit Court on April 29, 1918.

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

30 They find in favor of the plaintiff Alita E. Hough and assess the damage against the defendant Heller Brothers Company at the sum of one hundred and forty dollars.

Whereupon it is adjudged that the plaintiff recover of the defendant the sum of one hundred forty dollars and costs which are taxed at seventy dollars and making in the whole the sum of two hundred and seventeen dollars.

Judgment entered and signed April 29, 1918.

WM. S. GUMMERE,  
*Judge.*

40 Book 94, page 511.

*Rule to Show Cause***Rule to Show Cause.**

(Filed June 17, 1918.)

## ESSEX COUNTY CIRCUIT COURT.

ALITA E. HOUGH,

*Plaintiff,**vs.*

HELLER BROTHERS COMPANY,

*Defendant.**Action at  
Law.**Rule to  
Show Cause.*

10

Application having been made to me, the under-  
signed (the Judge before whom said cause was  
tried), within six days after the rendering of the  
verdict in the above cause, for a rule to show cause,  
why the verdict should not be set aside, and a new  
trial granted, on the ground that the damages  
awarded are inadequate, and the matter having been  
considered;

20

It is on this 30th day of April, 1918, on motion  
of W. Howard Demarest, attorney for the plaintiff,  
ordered that the said defendant show cause before  
me, in the said Essex Circuit Court, at the Court  
House, in the City of Newark, on the 18th day of  
May, 1918, at ten o'clock in the forenoon of said  
day, or as soon thereafter as the matter can be  
heard, why the verdict in this cause should not be  
set aside and a new trial granted.

30

FREDERIC ADAMS,  
*Circuit Court Judge.*

40

*Order for New Trial***Order for New Trial.**

(Filed June 19, 1918.)

## ESSEX COUNTY CIRCUIT COURT.

10	ALITA E. HOUGH,  <div style="text-align: center;"><i>Plaintiff,</i></div>	}	<i>Action at</i>
	<i>vs.</i>		<i>Law.</i>
	HELLER BROTHERS COMPANY,  <div style="text-align: center;"><i>Defendant.</i></div>		<i>Order for</i>
			<i>New Trial.</i>

20 A verdict in favor of the plaintiff in the sum of \$140.00 having been returned by the jury in the above entitled cause, and the plaintiff having applied for and procured within six days from the date of the entering of said verdict, a rule to show cause why the same should not be set aside because the amount thereof was inadequate, and upon the return of said rule, to wit: on the 18th day of May, 1918, counsel for the plaintiff and for the defendant appeared, and their arguments having been heard and considered, and the court being of the opinion that plaintiff should have a new trial on the ground

30 that the damages are inadequate, or at her option a judgment for \$300.00 be entered in her favor and against the defendant; and the plaintiff having elected to stand trial,

It is on the 19th day of June, 1918, ordered that the verdict for \$140.00 in favor of the plaintiff in the above entitled cause be set aside, and that a new trial be granted pursuant to the practice and rules of this court, in respect of damages only that it stand good in all other respects, and that plaintiff

40 have a new trial on the question of damages, for

*Order for New Trial*

which purpose the rule to show cause entered on April 30th, 1918, is made absolute.

It is further ordered that the defendant pay the costs of this application, inclusive of stenographer's fees of \$13.50 and \$5.00 and that the cause be placed on the list for trial.

FREDERIC ADAMS,  
*Circuit Court Judge.*

10

20

30

40

*Judgment*

**Judgment.**

(Entered October 1, 1918.)

ESSEX COUNTY CIRCUIT COURT.

28005

10

ALITA E. HOUGH,

*Plaintiff,*

*vs.*

HELLER BROTHERS COMPANY,

*Defendant.*

*Action at  
Law.*

*Verdict by  
Jury.*

20

JUDGMENT FOR PLAINTIFF.

AMOUNT .....	\$750.00
COSTS .....	95.00
Total .....	\$845.00

W. HOWARD DEMAREST,  
*Attorney of Plaintiff.*

30

This action was tried before Judge Nelson Y. Dungan with a jury at the Essex County Circuit Court on October 1st, 1918.

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

They find in favor of the plaintiff Alita E. Hough and assess the damages against the defendant Heller Brothers Company at the sum of seven hundred fifty dollars.

Whereupon it is adjudged that the plaintiff re-  
40 cover of the defendant the sum of seven hundred

*Judgment*

fifty dollars, and costs which are taxed at ninety-five dollars making in the whole the sum of eight hundred and forty-five dollars.

Judgment entered and signed October 1st, 1918.  
Circuit Court Judgments No. 95, page 5.

WM. S. GUMMERE,

*Judge.* 10

20

30

40

*Notice of Appeal*

**Notice of Appeal.**

(Filed October 14, 1918.)

**ESSEX COUNTY CIRCUIT COURT.**

10

ALITA E. HOUGH,

*Plaintiff,*

*vs.*

HELLER BROTHERS COMPANY,

*Defendant.*

*Action at  
Law.*

*Notice of  
Appeal.*

20

*To Howard Demarest, Esq.,  
Attorney for Plaintiff.*

Sir:

Take notice that the defendant appeals to the Court of Errors and Appeals of New Jersey from the whole of the judgment entered in the above entitled cause, and that it will hereafter, in compliance with law and the rules of court in such case made and provided, serve and file its grounds of appeal.

30

Dated October 10th, 1918.

Respectfully yours,

**KELLOGG & CHANCE,**

*Attorneys for Defendant.*

40

*Grounds of Appeal***Grounds of Appeal.**

(Filed November , 1918.)

NEW JERSEY COURT OF ERRORS AND  
APPEALS.

ALITA E. HOUGH, <i>Plaintiff-Appellee,</i> <i>vs.</i> HELLER BROTHERS COMPANY, <i>Defendant-Appellant.</i>	}	<i>Action at Law. On Appeal from Essex Circuit Court. Grounds of Appeal.</i>	10
--	---	--	----

The defendant-appellant, Heller Brothers Company states the following grounds of appeal in this cause:

20

1. The trial court erred in denying the defendant's motion for a non-suit.
2. The trial court erred in denying the defendant's motion for a direction of a verdict.

Dated October 29th, 1918.

Respectfully yours,  
**KELLOGG & CHANCE,**  
*Attorneys for Defendant-Appellant.*

To W. Howard Demarest, Esq.,  
 Attorney of Plaintiff-Appellee. 30

40

*Alita E. Hough, direct*

**Testimony.**

**ESSEX CIRCUIT COURT.**

Thursday, April 25, 1918.

10	ALITA E. HOUGH, <i>vs.</i> HELLER BROTHERS COMPANY.	}	<i>Action at Law.</i>
----	---	---	-----------------------

Before Hon. Frederic Adams, J., and a jury.  
 For plaintiff appears W. Howard Demarest, Esq.  
 For defendant appear Messrs. Kellogg & Chance,  
 by R. Robinson Chance, Esq.

A jury is called and sworn.

Mr. Demarest opens for plaintiff.

20 Mr. Chance opens for defendant.

*Mr. Demarest.* If the court please, I want to start off by offering in evidence, as agreed by Mr. Chance and myself, a radiograph, or X-ray, containing four negatives showing the condition of the upper and lower jaws with reference to the teeth injured in this accident. That is consented to, I believe. This appears to have been taken March 24, 1917.

(Marked Ex. P. 1.)

30 *Mr. Demarest.* I want also to offer three photographs of the plaintiff, each showing particularly the condition of her mouth, the date of which, I believe, will be testified to as being March 18 or 19, 1917, or in that neighborhood. Those are consented to also.

(Marked respectively Ex. P. 2, Ex. P. 3 and Ex. P. 4.)

40 *Mr. Chance.* If your Honor please, I am about to offer two pictures, showing the truck which it will be testified to is the—

*Alita E. Hough, direct*

*The Court.* How are you going to offer them now?

*Mr. Chance.* It is by stipulation between the parties that we are going to put them all in now.

*The Court.* Go on and tell us what they are.

*Mr. Chance.* They are pictures of the truck against which the face of the woman came in contact.

10

(Marked Ex. D. 1.)

*Mr. Chance.* And the other is a picture of the sidewalk and the plant of the defendant, Heller Brothers Company, at the place about where this accident took place.

(Marked Ex. D.2.)

ALITA E. HOUGH, plaintiff, sworn in her own behalf.

20

*Direct examination by Mr. Demarest.*

Q Mrs. Hough, you are the plaintiff in this case?

A I am.

Q You are married?

A I am.

Q And your husband's name?

A George W. Hough.

Q Where do you live?

A 33 Wilson place, Belleville.

Q The date that this accident happened was 30  
February 21, 1917?

A Yes.

Q Where did it happen, on what street?

A On Mt. Prospect avenue.

Q In which direction were you going?

A Towards Belleville.

Q North?

A Yes.

Q On what side of the street, the downtown side  
of the street?

40

*Alita E. Hough, direct*

A No, going towards Belleville.

Q But you were on the easterly side of the street?

A Yes.

Q And on the northeast corner of Mt. Prospect avenue and Verona avenue, is that where Heller Brother's plant is located?

10 A Yes.

Q And is there a door, or entrance, on Mt. Prospect avenue?

A Yes.

Q Do you know for what purpose that entrance is used?

A Why, I don't know.

Q Does this picture, D. 2, represent what you recollect to be the location?

A Yes.

20 Q And this is the door, or entrance, that you refer to?

A Yes.

*Mr. Demarest.* Indicating an entrance toward the right of the picture.

Q And it was at that entrance that this accident occurred?

A Yes.

Q Was there a vehicle of some kind backed up against the building?

30 A Yes.

Q Is there a sidewalk at that place?

A There is.

Q And is there a curbstone along the street?

A Well, I don't know; I never noticed it.

Q What kind of a truck was there?

A A truck for shipment.

Q An automobile truck?

A Yes, sir.

Q How close to the building was it?

40 A Well, there was about a foot difference in

*Alita E. Hough, direct*

the tail-board and the building.

Q (*By the Court.*) How did it stand, backed up?

A Yes, sir.

Q (*By Mr. Demarest.*) Was the tail-board raised or lowered?

A Lowered, even with the truck.

Q So that it was out straight?

10

A Yes.

*By the Court.*

Q Even with the floor of the truck, you mean?

A Yes.

Q So that the floor of the truck and the tail-board would be on the same plane?

A Yes.

*By Mr. Demarest.*

Q What was being done at the truck then?

20

A They were bringing out a box on a crane.

Q An overhead track?

A Yes.

Q Who was bringing this out?

A Why, a boy.

Q Did he come out of the factory?

A Yes.

Q That is, Heller Brother's plant?

A Yes.

Q And what did he do with the box?

30

A Why, he put it on the truck.

Q On the tail-board?

A Yes.

Q And what did he do then?

A He said, "One moment, and I will let you go through."

Q (*By the Court.*) The boy said so?

A Yes.

Q (*By Mr. Demarest.*) And did you go through?

40

*Alita E. Hough, direct*

A I started to go through.

Q What else did he do before you went through?

A Well, to my recollection, there was one man standing on the front of the truck and this boy was standing on the rear.

Q He is the one who told you to go through?

A Yes.

10 Q (*By the Court.*) Was the man standing on the side of the truck?

A One on the front and one on the rear.

Q (*By Mr. Demarest.*) And it was the boy who asked you to go through?

A Yes.

Q And what did he do before you went through?

A Why, he said, "One moment, and I will let you go through."

Q (*By the Court.*) Well, did he do anything?

20 A Yes, he raised the tail-board.

Q The boy raised the tail-board?

A Yes.

Q (*By Mr. Demarest.*) And then you went through?

A Yes.

Q Did anything happen then?

A Why, I looked up, and all I remember saying, "You have knocked my tooth out," and that is all I remember until I was in a small office.

30 Q Inside of the building?

A Yes.

Q Well, did the tail-board drop on you?

A Yes.

Q And where did it strike you?

A In the jaw.

Q Upper or lower?

A Upper.

Q What part of your jaw, the front or the side

or—

40 A The front.

*Alita E. Hough, direct*

Q And what tooth was knocked out?

A The front tooth.

Q One of the centers?

A Yes.

Q One of the central teeth?

A Yes.

Q And were any other teeth injured?

A Yes, the one next to it and— 10

Q What was the matter with that?

A Well, that was the one that was badly rotated on the left of that first central.

*By the Court.*

Q What happened to the one that was on the left?

A It was knocked loose and rotated.

Q There was one knocked out, and the one to the left of that was badly rotated; is that right? 20

A Yes.

*The Court.* Well, go on.

*By Mr. Demarest.*

Q What happened to the other teeth?

A The one on the right of the one that was knocked out, that was loosened, so that the nerve abscessed and had to be removed.

*By the Court.*

Q The one to the right of the one that was knocked out, did I understand you to say? 30

A Yes.

Q That had to be removed?

A The nerve; that was also broken on the end.

*By Mr. Demarest.*

Q Any other teeth injured?

A Yes, there was a lower one injured.

Q What happened to that?

A There was a corner broken off of that. 40

*Alita E. Hough, direct*

Q Was there a corner broken off of the other central?

A Yes.

*By the Court.*

Q Was that on the lower jaw?

A On the upper.

10 Q You have gone back to the upper jaw?

A Yes.

*By Mr. Demarest.*

Q Were any other teeth loosened or damaged?

A The bottom teeth were all loosened.

Q For how long did they stay loosened?

A To my recollection, about two months the bottom ones were loose; I was unable to bite on them.

Q (*By the Court.*) On which jaw were the teeth that were loosened?

20 A The lower.

Q (*By Mr. Demarest.*) Were your lips or gums cut?

A Yes.

Q Which ones?

A They were bruised, the upper and lower.

Q Did they bleed?

A No, they did not.

Q Did any part of your face or mouth bleed at the time?

30 A Only where the tooth was knocked out.

Q And that did bleed?

A Yes.

Q Where were you taken after the accident?

A When I came to I was in this little office.

Q Had you been unconscious?

A Well, I don't remember anything after the accident until I came to in this office.

Q What office was that?

A Why, it was in the shipping room.

40 Q Who was there?

*Alita E. Hough, direct*

A A man they called Mr. Wanamaker.

Q Was he employed there?

A Well, I presume he was.

Q (*By the Court.*) Was this in the Heller building?

A Yes, sir.

Q (*By Mr. Demarest.*) Did he have working clothes on? 10

A Yes.

Q And who else was there?

A Why, the man that was standing in the front of the truck as I started to go through.

Q Was anybody else there?

A Not that I remember.

Q Was the boy that was at the rear of the truck there?

A Not that I remember.

Q Was there another boy there besides him? 20

A Not that I remember.

Q The only man you talked to was Wanamaker?

A Yes.

Q How did you talk to him?

A Why, he talked to me; I was crying about my tooth, and he said, "Don't cry. We will fix your teeth." And he turned to this man that was on the truck, and said, "I always knew"—

*The Court.* Never mind about that. There are some doubts about these statements by Mr. Wanamaker. There is no proof that he was an agent to make statements there. 30

*Mr. Demarest.* No, there is not.

*The Court.* Strike out the last statement.

Q Was any physician called to attend you?

A Dr. William H. Warren.

Q At the time of the accident was that?

A Yes.

Q Did he come there to the factory? 40

*Alita E. Hough, direct*

A Yes.

Q Do you know who called him?

A I do not.

Q You did not call him?

A I did not.

Q And no one at your instance called him?

A No.

10 Q And did he attend you after the accident?

A He did.

Q Did he and Mr. Wanamaker or any other employee have a conversation in your presence?

A They did not.

Q How long were you confined to your home after this accident?

A I was in bed two weeks, and the third week I was able to be up and around, and then I lived with my mother for four weeks.

20 Q Did you live with your mother prior to the accident?

A No, I did not.

*By the Court.*

Q Where was that, at what place did your mother live, madam?

A She lives at the same address.

Q What was that?

A She lives at the same address, 33 Wilson place, Belleville.

30

*By Mr. Demarest.*

Q And you went upstairs in her house to live after the accident?

A I did.

Q For how long did you continue that?

A About four weeks.

Q During which time you were not doing your own housework?

A I was not.

40 Q (*By the Court.*) Was this building that you

*Alita E. Hough, direct*

speak of an apartment house?

A Yes.

Q (*By Mr. Demarest.*) How many families?

A Two.

*By the Court.*

Q You lived on what floor?

A The first.

Q And your mother on what floor?

A The second.

10

*By Mr. Demarest.*

Q For how long did you continue to live with your mother?

A Four weeks.

Q And then did you resume your ordinary vocations?

A Not entirely.

Q In what respect did you not resume them? 20

A Why, I wasn't able to do all my own work.

Q Are you now able to do so?

A Yes.

Q Were there any other results of this accident besides the injury to your teeth?

A Yes.

Q What were they?

A Why, I had nervous indigestion.

Q How does that affect you?

A Why, none of my food seemed to digest. 30

Q Have you had medical treatment on that account?

A Yes.

Q Who has treated you for that?

A Dr. Dieffenbach.

Q And he is in Newark?

A Yes.

Q And you have had dental treatment for the injury to your teeth?

A Yes.

40

*Alita E. Hough, direct*

Q Who has done that?

A Dr. Tillou, Dr. Charles Tillou.

Q (*By the Court.*) Of Newark?

A Yes.

Q (*By Mr. Demarest.*) Has any other dentist examined your teeth besides Dr. Tillou?

A Dr. Burlew.

10 Q Any one else?

A Dr. Fish.

Q When did he examine you?

A Monday of this week.

Q At his office?

A Yes, sir.

Q (*By the Court.*) Is he a Newark physician?

A Yes.

*Mr. Demarest.* A dentist, if the court please, not a physician.

20 Q (*By Mr. Demarest.*) How frequently did you try to go to Dr. Tillou?

A A number of times.

Q Well, would you say weekly?

A Yes, twice a week; when I first consulted him—

Q Are you still going?

A Yes, sir.

Q What were you going to say?

30 A When I first consulted him I went twice weekly.

Q And recently how frequently?

A Well, about once a week.

Q Is it going to be necessary for him to perform any kind of an operation?

A Yes.

Q For what purpose?

A There is a piece of that tooth in the jaw.

40 *The Court.* Is not this question a little doubtful—"Is it going to be necessary to perform an operation?"

*Alita E. Hough, cross*

*Mr. Demarest.* Well, perhaps the dentist will be better able to testify to that.

Q Mrs. Hough, can you tell us what was the condition of the street on the day this accident happened—that is, the roadway at this point?

A In front of the truck it was muddy also.

Q How about the sides approaching the front of the truck? 10

A As far as I can remember, that was also muddy.

Q Had it been raining?

A No; it had been a heavy frost the night before.

Q Any snow?

A No.

Q You did not care to go around the front of the truck?

A I did not. 20

Q Why?

A Why, it was muddy.

Q Is that the only reason?

(No response.)

Q If it is, say so, and if it is not, tell us?

A Well, it was muddy and I couldn't get out in front of the truck.

Q What time of day was this, Mrs. Hough?

A Between four and four-thirty.

*Cross examination by Mr. Chance.* 30

Q Mrs. Hough, after the time that you were hurt how did you get home, did you walk, or were you taken in an automobile?

A The doctor took me home in his automobile.

*By the Court.*

Q Dr. Tillou?

A Dr. Warren. Oh, no, it wasn't his car.

Q Well, he took you home?

A He took me home, yes, but it wasn't his car. 40

*Alita E. Hough, cross*

Q In an automobile?

A Yes.

Q How far was that from your home?

A Why, about ten minutes, perhaps less than that.

Q Ten minutes' walk?

A Yes.

10 *By Mr. Chance.*

Q You had bundles in your arms, did you not, when you went by the truck?

A Yes, I had been shopping in Verona avenue.

*By the Court.*

Q One or more bundles?

A More, because I had been to the butcher shop and the delicatessen store.

Q You had bundles?

20 A Yes, sir.

*By Mr. Chance.*

Q Had you been to any other place?

A Yes, into a small drygoods store there on Verona avenue.

Q And that about sums up your list of bundles?

A No, I had the parcel in a bag.

Q How many bundles altogether did you have?

A To my memory I had three.

*By the Court.*

30 Q Three bundles besides the bag?

A Yes.

Q What kind of a bag was that?

A Just a small silk bag.

Q Which hand did you hold that in, or did you hold it on your arm?

A In my right hand.

*By Mr. Chance.*

40 Q Were you knocked down by the impact of the tail-board against your face?

*Alita E. Hough, cross*

A I was knocked up against the building; I was knocked, but not knocked down.

Q You did not fall?

A I don't remember; all I remember is just saying, "My tooth is out," and I remember nothing else until I was in this small office.

Q You have never been engaged in any business except housework, the domestic service that you rendered your husband? 10

A No, I have not.

Q Was this tooth that was knocked out a pivot tooth or a natural tooth?

A Natural.

Q Had you ever received dental treatment previous to the date of the accident?

A In 1915.

Q Who treated you then?

A Dr. Charles Tillou. 20

Q Did you have medical treatment a short time before the happening of the accident?

A No, I did not.

Q When did you have the doctor last before the happening of the accident?

A About two years.

*The Court.* You mean a physician?

*Mr. Chance.* Yes, I meant a physician..

*Witness.* Yes.

Q Did you hear the parties on the truck say anything between themselves? 30

A Why, when I was in this small office—

Q No, you misunderstand my question. At the time just before you started to pass by the truck did you hear any conversation between the people on the truck?

A I did not.

Q Were you all the way past the tail-board as it hit you, or were you just beginning to pass, or about midway, or how far? 40

*Alita E. Hough, cross*

A About midway.

Q Was the door in the front of Heller Brother's building open or closed at the time?

A Open.

Q Open?

A Yes.

10 Q Do you remember whether the sidewalk covers the entire space between the curbing and the building, in front of Heller Brothers' building?

*Mr. Demarest.* I do not think that is material. I shall object to it, if you Honor please. As long as there is a sidewalk there, I think, that is all that is necessary to be put in evidence.

20 *The Court.* I think it is competent to show just what the physical situation was. I see no objection to her answering it. Do you understand the question, madam?

*Witness.* No, I do not.

Q (Question read.)

A I have never noticed.

Q (*By the Court.*) You do not remember?

A No, I do not.

Q (*By Mr. Chance.*) Was there anybody between the truck and the building at the time of the accident besides yourself?

30 A Only this boy that was bringing out this box on this crane.

*By the Court.*

Q What do you mean by "crane?"

A There is a crane above that they bring these cases out on and drop them on the trucks.

Q The crane was up above?

A Yes.

Q How was the boy working it? Where was the boy?

40 A He was inside, bringing out this box.

*Alita E. Hough, cross*

Q Inside of the building?

A Yes.

Q The box was on the crane?

A Yes, sir.

Q How was the boy bringing out the box?

A He was bringing it out to this truck on this crane.

*The Court.* I am afraid I do not understand the crane. Have you got any photograph of it there? 10

*Mr. Demarest.* Yes, sir (handing photograph to the court). It should probably be called an overhead track.

*The Court.* Is there any objection to this being used now?

*Mr. Demarest.* Not on my part; no, sir.

*The Court.* Then I shall ask the jury to look at it first. 20

*Mr. Demarest.* I shall show both of them to the jury (handing Ex. D. 1 and D. 2 to the jury).

Q I see, madam, on photograph marked D. 1 a representation of the sidewalk and of a wagon, or truck, and of a building. That is Hellers' building, I suppose?

A Yes.

Q And that is the same truck or one like it, I suppose? 30

A Yes.

Q Where is the crane, what you call the crane?

A That extension (indicating).

Q This projection from the building in line with the upper part of the truck. Now, will you tell us how the boy was using that crane?

A He was bringing the box out on this and putting it on the truck.

*Alita E. Hough, cross*

Q Can you tell us how he did it? Where was the box when you first saw the box?

A On this—about between the opening and the tail-board, that space between the building and the tail-board (indicating).

Q Well, how does that crane work? Does it work up and down?

10 A No, the box was sliding on this crane.

Q You say the crane slides?

A Why, the box was sliding on the crane, on a wheel.

*Mr. Demarest.* If your Honor please, I have other witnesses here in court who will testify as to the operation of it.

At one o'clock P. M., the court takes a recess of one hour.

20

AFTER RECESS.

ALITA E. HOUGH, plaintiff, resumes the stand in her own behalf.

*Cross examination* (continued) by Mr. Chance.

Q How long after the time of the happening of the accident was it before you saw your dentist?

A Three weeks and one day.

30 Q When did you decide to bring a suit for this injury?

Objected to as immaterial.

*The Court.* (After argument.) I sustain the objection to the question as irrelevant.

Q When did the dentist begin his treatment, as soon as you saw him that three weeks after the accident, or did he do something in the way of waiting before he began actual treatment?

40 A The day that I consulted him; that was three weeks and one day after the accident.

*Alita E. Hough, cross*

Q (*By the Court.*) You mean Dr. Tillou?

A Yes.

Q You have spent no money of your own for dentists, have you?

*Mr. Demarest.* I object to that. The complaint is not based on expenditures, nor does the plaintiff ask for the return of moneys spent.

*Mr. Chance.* Upon that statement, I withdraw the question. 10

Q Suppose you state to the court and jury what sort of procedure Dr. Tillou went through in the course of his treatment?

A Why, he treated my gums with iodine and with a solution. Of course, I don't know just what it was.

Q Is that all that he did?

A With a small appliance that they use for treating the gums. Being that I am not a dentist, I don't know just how to tell you. 20

Q Are you very certain that that tooth on the right side that you say was found chipped by the dentist was not chipped before the happening of the accident?

A Yes.

Q How wide was the tail-board of that truck, according to your recollection?

A Well, I don't just remember the width.

Q Well, was it six feet or one foot, or what? 30

A Well, I don't know.

Q You cannot, I presume, approximate it?

A No, I cannot.

*By the Court.*

Q Do you remember how the height of the tail-board when it was raised was, compared with your height?

A I do not.

*Alita E. Hough, re-direct*

*Re-direct examination by Mr. Demarest.*

Q Mrs. Hough, did you have and have you recently had difficulty in biting with the front teeth?

A I have; I am unable to bite with my front teeth.

1<sup>0</sup> Q For how long a time, measured in minutes, if you can, did you stand at the side of the truck before attempting to pass through?

A To my recollection, about three minutes.

Q Was that period the period elapsing after the boy at the rear of the truck had said for you to wait and he would let you through, or was that before he said that?

A After he said that he would let me through.

Q You waited that long?

A Yes.

2<sup>0</sup> Q During that time you have been asked whether you heard any conversation between this boy and the man who, you testified, was at the front of the truck. Was there any conversation between them?

A Not that I heard.

Q And you stood there for about three minutes?

A Yes, sir.

Q During that time there was no conversation between them?

3<sup>0</sup> A There was not.

Q I omitted to ask you about the treatments of Dr. Warren. Did he treat you at your home?

A Well, he didn't treat me at my home; he prescribed for me and I went to his office.

Q Did he come to your house after the accident at all?

A He did.

Q How many times?

A He was there three weeks every day.

4<sup>0</sup>

*Alita E. Hough, re-direct*

Q Well, you must have misunderstood me. I asked you before whether he treated you at your house. He did, did he?

A Yes, he was there three weeks.

Q Every day?

A Yes, sir.

Q (*By the Court.*) At his office or at your house? 10

A At my home.

Q (*By Mr. Demarest.*) And then after the treatments at your home did you take treatment from him at his office?

A Yes.

Q For how long?

A Well, that I don't just remember.

Q Several treatments?

A Yes.

Q Several prescriptions? 20

A Yes.

Q What was the condition of your digestion before this accident?

A Very well; I never had any trouble.

Q The dental treatment that you testified was administered to you in 1915 by Dr. Tillou, what was the nature and extent of that?

A I had a cavity filled and my teeth cleaned.

Q And were your teeth prior to the accident in good condition? 30

A Yes.

Q Was the boy that you said was at the rear of the truck on the truck or on the ground?

A To my recollection, he was on the truck.

Q (*By the Court.*) When?

A When this accident happened.

Q (*By Mr. Demarest.*) You do not think he was on the ground?

A My recollection is that he was on the truck. 40

*Howard Lewis Doolittle, direct*

*By the Court.*

Q When he said for you to wait where was he?

A My recollection is that he was on the truck.

Q Where was the box that he was handling?

A On the truck.

Q In what way, if you remember, did he raise the tail-board?

10 A From the truck.

Q In what way?

A He pulled it up.

Q How did he get hold of it—how did he get hold of the tail-board in order to raise it?

A Well, I don't just know whether he used chains or by hand.

20 HOWARD LEWIS DOOLITTLE, sworn in behalf of plaintiff.

*Direct examination by Mr. Demarest.*

Q Mr. Doolittle, where do you live?

A 53 Smith street, Belleville.

Q Did you ever work for Heller Brothers?

A Yes, sir.

Q Who was your immediate superior; that is, your boss?

A Mr. Wanamaker.

30 Q And what office did he hold?

A I suppose he had charge of the shipping room.

Q Called the shipping clerk?

A No, sir; I couldn't say.

Q You do not know what he was called?

A No, sir.

Q Did you work in the shipping room?

A Yes, sir.

Q Did you work there at the time of this accident, on February 21, 1917?

40 A Yes, sir.

*Howard Lewis Doolittle, direct*

Q Where were you working at that time?

A In the shipping room.

Q (*By the Court.*) That is, of Heller's factory?

A Yes, sir.

Q (*By Mr. Demarest.*) What were your general duties?

A To nail the covers on the boxes and to load the trucks. 10

Q And is there a young man named O'Neill that works there, too?

A Yes, sir.

Q Or that did work there at that time?

A Yes, sir.

Q And were his and your jobs similar?

A No, sir.

Q What was his duties?

A I believe he packed the boxes.

Q At the time of this accident was he doing his work or your work? 20

A He was doing my work.

Q What were you doing?

A I was catching, using the tackle; I would catch it on the box and pull it almost up to the door, and O'Neill would then take it from there and load it on the truck.

Q Can you describe to us the tackle that you mentioned and the overhead track on which the boxes were conveyed? Where did this overhead track start? 30

A It started toward the rear of the shipping room.

Q That is how many feet away from this door, would you say?

A A couple of hundred feet; I couldn't say exactly how many feet.

Q Well, quite a distance?

A Yes, sir.

*Howard Lewis Doolittle, direct*

Q And these boxes were put onto some kind of tackle. What is that?

A They are put on the tackle and pulled up—

Q I want you to describe the tackle. Was it on a wheel that runs on the track?

A Yes, sir.

10 Q And are there chains that are attached to that wheel?

A Yes, sir.

Q What is the purpose of the chains?

A To pull one chain you would raise the box and pull the other one and it would lower it.

Q (*By the Court.*) What do the boxes rest on?

A On a hook that is attached to the chain.

Q (*By Mr. Demarest.*) Sort of a tongs?

A Yes, sir.

20 Q And one portion of this tongs arrangement would connect with each side of the box?

A Yes, sir.

Q Just like as if a man takes up a piece of ice with tongs?

A Yes, sir.

Q And the chain was attached to either of those tongs?

A Yes, sir.

Objected to as leading.

30 *The Court.* I shall let the answer stand.

Q Does this overhead track which has been called by Mrs. Hough a crane incline; is it on a slant?

A I don't know whether there is any slant or not.

Q And what method is employed to convey these boxes when they are taken up by these tongs?

A Why, just take hold of both chains and pull on them and it will pull the box along.

40 Q Revolving the wheel on the track?

*Howard Lewis Doolittle, direct*

A Yes, sir.

Q And do you push them out over the wagon, or truck, that happens to be standing outside?

A Yes, sir.

Q And then what is done?

A Then pull on one chain, and that lowers the box; as soon as the box rests on the truck the tongs leave go.

10

Q Where were you at the time this accident happened?

A Just inside the doorway, pulling the chain back inside, to go for another box.

Q By "chain" you refer to the tackle that takes hold of the boxes?

A Yes, sir.

Q (*By the Court.*) Where was the box just then?

A The box had been lowered onto the truck and the chain had been passed in to me.

20

Q (*By Mr. Demarest.*) Whose duty was it generally to do the work that you were doing that day?

A It was my work.

Q Well, I understood you to say that O'Neill was doing your work that day?

A Yes, sir.

Q He was helping, then, to do it?

A Yes, sir.

30

Q And where was O'Neill at this time?

A He was standing near the doorway.

Q Was he on the truck or on the ground?

A Why, when I just had taken it out at the time he was on the ground.

Q And then you took the chains back after the box had been delivered onto the truck?

A Yes, sir.

Q Did you see what O'Neill did after that?

40

*Howard Lewis Doolittle, direct*

A O'Neill started to raise the tail-board of the truck, I think.

Q Did you see the tail-board go up?

A I couldn't be sure that I did see it go up; no, sir.

Q What makes you say that he started to raise the tail-board?

10 A Because of what he stated after the accident.

*The Court.* Never mind what he said after the accident; just tell us what you saw.

Q Did you see the tail-board come down?

A No, sir.

Q Did you hear it go up or did it make any noise in being raised?

A I can't remember whether it did or not.

Q Did you hear it come down?

A No, sir.

20 Q What was the next thing you did see or hear?

A The next thing I seen was O'Neill coming back into the door, and shortly after that Mrs. Hough came in, and she started to cry, and her tooth was out on the floor.

Q With whom did she come in?

A Mr. Wanamaker came in and assisted her into the little office there which he has, and he sent down to the office for one of the girls.

Q He sent for what?

30 A He sent into the office for one of the girls.

Q Were you given any particular instructions as to how your work should be done?

*Mr. Chance.* I object on the ground that it is immaterial what instructions were given to this witness.

*The Court.* Why?

40 *Mr. Chance.* Because there is nothing to show that anything that this man did had anything to do with her injury; that is, there has

*Howard Lewis Doolittle, cross*

been no proper foundation laid for any testimony as to what this man's duties were.

*The Court.* Well, the witness having said that O'Neill was doing his work, it may perhaps be useful to know what his work was and what instructions, if any, had been given him about doing it. It may not lead to anything, but I think it possibly may. I shall allow it. 10

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

Exception noted as ground of appeal.

Q Were you given any particular instructions?

A The only instructions that I was given was that I should nail the covers onto the boxes and to load the trucks.

Q Nothing further than that? 20

A No, sir; not that I can remember of.

Q You did not see where O'Neill was at the time this tail-board was supposed to have been raised, did you, Mr. Doolittle?

A No, sir.

Q You just knew that he was outside before that?

A Yes, sir.

*Cross examination by Mr. Chance.*

Q Did Mrs. Hough walk into the little room where you saw her or was she carried in, if you recall? 30

A I think she came in with the assistance of Mr. Wanamaker; I won't say for sure, but I believe she did.

Q Now, just a few moments ago did you not say that Mr. Wanamaker came in afterwards?

(No response.)

Q If so, how do you reconcile that statement with the present one? 40

*Howard Lewis Doolittle, cross*

(No response.)

*By the Court.*

Q Did you say so or not, if you remember?

(No response.)

Q Can you answer the question?

(No response.)

10 Q The question merely is whether you said before that Mrs. Hough came in with Mr. Wanamaker, or whether Mr. Wanamaker came in before, or whether Mr. Wanamaker came in afterwards. Do you remember whether you made any statement on that subject?

A Yes, sir.

Q What did you say?

A I believe that I said Mr. Wanamaker came in afterwards, but just now I recollect that I think  
20 she came in with Mr. Wanamaker.

*By Mr. Chance.*

Q So that your present feeling is that she came in with Mr. Wanamaker?

A Yes, sir.

*By the Court.*

Q How old was O'Neill?

A I don't know his age.

Q As old as you are?

30 A Yes, sir.

Q How old are you?

A Eighteen.

Q And where was he generally employed, what part of the place?

A In the shipping room.

Q Is that where you were employed?

A Yes, sir.

Q Did you work side by side?

A Why, most—part of the time he would fill  
40 the boxes, and then I would nail the covers on.

*Howard Lewis Doolittle, cross*

Q You would nail the covers on the boxes which were filled?

A Yes, sir.

Q Part of the time?

A Yes, sir.

Q And at other times how would it be?

A Well, I would have to stencil the boxes, and then I would pile them up in a pile for the certain expresses. 10

Q At other times you would fill the boxes?

A No, sir; I didn't fill the boxes at all.

Q Well, you say part of the time you would fill the boxes and he would nail them up?

A No, sir; I said he would fill the boxes and part of the time it took me to nail them up and put them on the truck and stencil them; I had to stencil the names on. 20

Q How was he generally employed?

A Filling the boxes, packing them.

Q And how were you generally employed?

A Nailing covers on and keeping them in separate piles, according to what express they were to be shipped out on.

Q Was there ever anyone else who nailed up the boxes except yourself?

A Well, the young man that had the job before me.

Q I am speaking of the time when you were there? 30

A No, sir.

Q How long were you there?

A Just seven days.

Q Seven days?

A Yes, sir; I should say that was about the time.

Q Seven days before this accident to Mrs. Hough?

*Howard Lewis Doolittle, re-direct*

A No, sir; I believe I worked there two or three days before the accident.

Q You were there two or three days before the accident?

A I should say that was about the time.

Q And what had you been doing before that?

A Going to school.

10 Q And when you came there two or three days before the accident was O'Neill there?

A Yes, sir.

Q And what were you set to work to do first?

A Nailing the covers on the boxes.

Q And you kept at that until when?

A Until I left.

Q Were you nailing covers on the boxes at the time of the accident?

A Not at the time of the accident, I wasn't.

20 Q When was it that you changed from nailing covers on the boxes to doing something else?

A Why, my job took in nailing the covers on and loading them on the truck; at the time of the accident I happened to be catching them onto the tongs to load them onto the truck.

Q Then when you went there, two or three days before the accident, was it part of your duty to load the boxes on the truck after you had nailed the boxes up?

30 A Yes, sir.

*Re-direct examination by Mr. Demarest.*

Q Mr. Doolittle, such instructions as were given to you as to the mode and manner of carrying out your duties, did Mr. Wanamaker give you those, or someone else?

40 A If I remember rightly, the young man that had the job before me broke me in on it. There wasn't much breaking in to be done, but he showed me.

*Charles Wanamaker, direct*

Q Did you notice whether Mrs. Hough bled at the time of this accident? Did her mouth or lips bleed?

A Well, I remember her tooth dropping on the floor, and then I believe she put her handkerchief up to her mouth, but I couldn't say whether she bled or not.

Q (*By the Court.*) What was Mr. Wanamaker's position? 10

A He had charge of the shipping room.

CHARLES WANAMAKER, sworn in behalf of plaintiff.

*Direct examination by Mr. Demarest.*

Q Mr. Wanamaker, you work for Heller Brothers? 20

A I do.

Q What is the nature of your position there?

A Shipping clerk.

Q Did this last witness, Howard L. Doolittle, work there in the shipping room?

A For a short duration.

Q Was there another young man named O'Neill that worked there?

A Quite a long time.

Q What is his first name? 30

A Charles O'Neill.

Q Is it part of your duty to direct them what to do?

A It is.

Q Was Doolittle doing work that O'Neill would usually do on this day?

A No.

Q Does O'Neill ever do the work that Doolittle did on this day?

A They all work together. 40

*Charles Wanamaker, direct*

Q It doesn't make much difference?

A That is true.

Q How many young fellows have you in the shipping room that do this kind of work, loading trucks?

A That particular job, there is four.

Q Is Mr. O'Neill in court here to-day?

10 A He is.

Q You did not see this accident, did you, Mr. Wanamaker?

A I did not.

Q Do you know the substantial position of the truck at the time of the accident?

A It was backed in—

Q No, just say whether or not you know, please?

A I know part of it; after the accident, not before.

20 Q Was it backed across the sidewalk?

A If you call it the sidewalk, it was.

Q It was backed up close to the building?

A Not tight.

Q Not tight, but pretty close?

A Enough to pass.

Q It was not out by where the curbstone is, or should be?

A No.

*The Court.* Do not lead.

30 Q Is there any particular facility provided for the backing up of trucks at that place?

A That space is where this one was backed in.

Q Is what?

A Is made exactly for that purpose, to back in there.

Q In what way is it made to fill that purpose?

A Laid by cobblestones.

Q All the way?

A All the way from the building to the curb.

40 Q And are there any guards put up against the

*Charles Wanamaker, cross*

building that would also fit in with that same purpose?

A There is guards put against the building, to save it from injuring the building.

Q Save what?

A Save the trucks.

Q What are those guards?

A Wooden, 2 by 12, fastened up on the building. 10

Q One on each side of the door?

A One on each side of the door.

Q How are they fastened?

A With bolts right through.

Q Do you know how long they have been there?

A Before my time.

Q How long is that?

A Three years.

Q I ask you to look at a picture marked Exhibit D. 1 (photograph shown to witness). With reference to that I ask you if it shows there that there is any portion of the space you mentioned as being provided for trucks laid with flagstones or sidewalk? 20

A Well, I speak of these cobbles here (indicating).

Q I am asking you whether there is any flagstones or sidewalk there?

A Well, I call this the same as would go on a regular crossing, crossing stones. They are not flagstones; they are crossing stones. 30

Q They are not cobblestones, are they?

A Each side of those are cobbles.

*Cross examination by Mr. Chance.*

Q Does this picture, which is marked D. 1, show about the position of the truck at the time you saw it immediately after the accident?

A Yes, sir. 40

*Charles W. Tillou, direct*

Q How far was there between the back part of the truck proper—I am not speaking of the tail-board—and the building?

A There was only three feet.

10 CHARLES W. TILLOU, sworn in behalf of plaintiff.

*Direct examination by Mr. Demarest.*

Q Dr. Tillou, you are a practicing dentist?

A I am.

Q Where do you practice?

A Corner of Washington and Delavan avenues.

Q How long have you practiced dentistry?

A Since 1903.

20 Q Did you treat Mrs. Hough, the plaintiff in this case?

A I did.

Q Had she been a patient of yours prior to the time when this accident happened?

A She had.

Q Regarding this accident, can you tell us about the time when you first treated her; that is, how long after the accident or on what date you first treated her?

30 A Why, the plaintiff said it was three weeks, I believe, after the accident. I should judge it was about that time, from the appearance.

*By the Court.*

Q When you were first called in?

A She visited my office at that time.

Q The first time you saw her in reference to this particular injury?

A Yes, about three weeks and a day, I think it was.

Q After the accident?

40 A After the accident.

*Charles W. Tillou, direct*

*By Mr. Demarest.*

Q And what did you find to be her condition?

A I found the upper central missing and the upper anterior and lower anterior teeth very much loose, quite loose.

Q By "anterior" you mean the front teeth?

A Yes.

Q What else did you find? 10

A I found the vacant socket where the central was missing, and the corner broken off of one of the lower front teeth, the canine.

Q And did you find anything wrong with the gums?

A And pus exuding from the gums around all the loose teeth.

Q Did you find anything wrong with the left lateral upper? 20

A It was very loose.

Q And what happened to the central, the upper central, that was not knocked out?

A The remaining central, the corner was broken off of it, and that was very sore, and at a subsequent visit I had to open the tooth and remove the pulp. It was dying at the time she first visited me.

Q (*By the Court.*) Was that upper or lower?

A Lower. It was not entirely dead at the time I removed it.

Q (*By Mr. Demarest.*) You have had occasion to examine these X-ray pictures, have you not (shown to witness)? 30

A Yes.

Q Can you tell us from a dental standpoint what that discloses?

A I can't tell from memory and I can't see very well here.

Q Can you hold it up to this light?

A (*After examining.*) Well, it shows a foreign body in the socket of the tooth that was removed; 40

*Charles W. Tillou, direct*

it may be a portion of the tooth and it shows an inflammatory condition also around the lower teeth, and also the upper. That is all I can get out of that.

Q Does it show anything in the nature of a fracture of the process?

A I couldn't tell from that, I don't think.

10 Q Does it show that the left upper lateral was rotated?

A You could hardly tell from an X-ray.

Q Did your examination show anything of that nature?

A Well, the tooth was very loose and it was rotated. If I remember rightly, Mrs. Hough's teeth were slightly irregular, but not as I found them at that time.

20 Q About how frequently did Mrs. Hough call upon you for treatment after this accident?

A Well, two to three times a week.

Q For how long a period?

A Well, she has been coming ever since, but at less frequent intervals, probably since last fall.

Q Is she still taking treatment from you?

A Well, yes, I have seen her; I don't remember the date, but a short time ago.

30 Q What will be the probable extent of her treatments, as to the length of time in the future that she will be obliged to continue them?

A Well, that is probably pretty hard to tell. I don't think we can accomplish much more by treatment. I think those teeth will remain loose.

Q Are they loose now?

A Yes, quite loose. Of course, they have improved a great deal, but they are still loose, especially the upper central and the upper lateral.

Q Have you taken any means to replace the tooth that was knocked out?

40 A Simply by a partial plate.

Charles W. Tillou, direct

Q A plate with one tooth on it?

A A plate with one tooth on it.

Q Is that a permanent arrangement?

A That is just temporary; at least, it was made for that. If Mrs. Hough is satisfied to get along with that, she may possibly do it. I hesitate to place a bridge in the mouth on account of the adjacent teeth being loose.

10

Q In your opinion, from your examination, what will be the ultimate disposition of the central that is still there?

A Well, that is pretty hard to say. It will probably get looser.

Q What would you do in case it did?

A Remove it and place a larger bridge, including the central that is removed.

Q Have you taken into consideration at all the presence of what you would call a foreign substance, probably a piece of the tooth that is gone, and what would happen to that ultimately?

29

A That should be removed.

Q How would that be removed?

A By an incision and get after it.

Q Have you noticed any receding of the gums in this case?

A There is a slight recession.

Q When did that first become apparent?

A I couldn't say as to that.

30

Q (*By the Court.*) Of both jaws?

A Yes.

Q (*By Mr. Demarest.*) Would you ordinarily attribute such a recession to a traumatic condition such as is apparent here?

A That would cause it, although there are other causes.

40

*Charles W. Tillou, cross*

*Cross examination by Mr. Chance.*

Q What can cause recession of gums besides a blow?

A Excessive brushing, hard brushing, too stiff a toothbrush; pyorrhea, so called.

Q Will you state to the jury just what treatment you gave Mrs. Hough's teeth?

10 A Why, I have washed the mouth with antiseptics, applied iodine at different times. Antiseptic treatments are about all you could do in a case of that kind.

Q Did you make any treatments of the roots of that one that was broken off?

A No, I haven't as yet. Mrs. Hough hasn't been in a physical condition to allow it; I told her that she couldn't. As long as it was making no trouble it was better to leave it alone.

20 Q You opened it, though, did you not?

A It was already open; the socket remained open for some time.

Q How about this tooth with the little chip out of the side there, did you kill the nerve in that?

A That nerve had begun to die and it was causing a great deal of pain, and I suspected that it was dying before I opened the tooth. There was a small filling in that side, and it was broken from the corner up to the filling, so I removed the filling, enlarged the hole, and then removed the pulp.

30 Q Which tooth do I understand you to refer to, the upper—

A The upper central, the remaining central.

Q How about the lower right cuspid?

A There has nothing been done with that yet; the corner was broken off.

Q Well, don't you think the best way to open up a tooth is at the top of the tooth rather than at the side?

40 A It is; yes, sir.

*Charles W. Tillou, cross*

Q Why was that not done in this case?

A Because there was a piece already out and there was a filling, and it was much better to get into the tooth there than to make a new cavity.

Q Then that tooth was practically a normal tooth?

A I said it had a filling in it and the tooth was broken from the corner of the tooth to the filling. 10

Q Did that filling extend from the top toward the nerve or not?

A No, it was a very small filling; it had probably been in a number of years.

Q Did you put it in?

A No.

Q What is your technique for treating dead teeth?

A I remove the pulp and sterilize the pulp chamber and the root canal, fill it with a gutta percha point, fill it solid to the top of the root. 20

Q Did you do that in this case?

A It hasn't been filled, no.

Q Well, is there any reason why that should get well until it is properly treated?

A It will get well with a sterile dressing in it. We would expect it to get well before we fill it, with a sterile dressing.

Q But would it get well before you put it through the treatment which you just stated was the proper treatment? 30

A It has been treated.

Q Did you see anything which would indicate to your mind that there was the presence of pyorrhea in Mrs. Hough's teeth?

A There were indications, but they were the same as might be expected from an injury.

Q Well, there is no way for you to tell, then, what these things would be caused by, whether they would be caused by pyorrhea or something else? 40

*Charles W. Tillou, cross*

A I think it is very difficult to tell.

Q How about tartar, do you find any of that on these teeth?

A Everybody has a slight amount of tartar. There was a slight amount of tartar on Mrs. Hough's teeth, no more than normal.

Q (*By the Court.*) What is pyorrhea?

10 A It is pretty hard to tell. It is an inflammatory condition around the neck of the teeth. That is about as near as we can get it. There is absorption present usually.

Q (*By Mr. Chance.*) I believe you have said that these teeth are in the habit of being loose. Why do you not put a splint or something on there to hold them in place?

A They were not quite loose enough for that; they set in place pretty well. I have done that  
20 where they have been very loose.

Q They were not loose enough to require that in this case, you thought?

A I thought so.

Q What further treatment, in detail, would you give if this case continues in your hands to effect what you think is a cure?

A I doubt if it can be cured. I would, of course, fill the roots of the central if it was tight enough, I would probably put a crown on it and bridge the  
30 space, and possibly it would be necessary to devitalize the central tooth, and do likewise with that, in order to carry the bridge. Both of those teeth are still loose, and it would probably be a question of time if they would loosen still more.

Q About that small piece. Could not that be taken out very easily with scissors, or something?

A Easily from a dentist's standpoint, not from the patient's.

Q How long would it take?

40 A Probably wouldn't take very long; you can't

*Charles W. Tillou, re-direct*

tell. It might take half an hour.

Q Why would it take so long? Could it possibly take so long?

A You may have to cut up some of the process to get at it. It is a very small piece. You may get it in two or three minutes. I said "possibly."

Q Is there any hole over where this piece shows on the X-ray plate? 10

A There is an opening there now, and it was discharging pus around the first of the year. I made an appointment to remove it at that time, but Mrs. Hough was taken sick, and we haven't been able to get to it since.

Q Do you not think that as soon as that bone is removed it will heal?

A There would be a decided improvement there, I think. That would have been removed long ago, only for Mrs. Hough's physical condition. 20

Q What sort of things do you sterile these dead roots with?

A You mean what medicines—medicaments?

Q Yes, what preparation?

A I used a mixture of formalin and creosote in this tooth.

*Re-direct examination by Mr. Demarest.*

Q Dr. Tillou, what do you refer to when you say Mrs. Hough's physical condition would not permit you to do certain things? 30

A Well, possibly I may want to correct that. I might say that she felt she wasn't physically able to undergo an operation of that kind.

*Gilderoy Burlew, direct*

GILDEROY BURLEW, sworn in behalf of plaintiff.

*Direct examination* by Mr. Demarest.

Q Dr. Burlew, you never treated Mrs. Hough, did you?

A I did not.

10 Q You made an examination?

A Yes.

Q Do you remember on what date you made it?

A It was in August.

Q Is this the memorandum of that examination that you made at that time (shown to witness)?

A Yes, that is my memorandum.

Q Do you remember, without referring to that, what you found to be her condition, so far as her teeth were concerned?

20 A Yes.

Q Well, tell us what conditions you found in August when you examined her?

A Well, I found that the right upper central incisor was entirely missing from the mouth; the left upper incisor had been fractured and the nerve was dead, what we call a dead tooth; and the lateral, what we call the lateral tooth, was turned around, rotated, and a little bit loose. That was the upper jaw. In the lower jaw the right lower canine had been fractured, the corner broken off, and the four lower incisors were irregular and slightly loosened. That was on the lower. That was about the condition, as I remember it, at that date.

30

Q Did you make another examination, at my request, at a later date?

A Yes, later I made another examination.

Q What did you find the condition to be then?

*The Court.* When was that, if you remember?

40

*Gilderoy Burlew, direct*

*Witness.* I don't recall the date of the later examination; possibly two months.

*By the Court.*

Q Two months after the other?

A Yes.

Q Some time in October?

A I think so.

Q The first one was in August, I think?

10

A Yes.

*By Mr. Demarest.*

Q Will you tell us what you found?

A I found the conditions, if anything, a little changed. The teeth seemed to be a little bit looser, if anything, and a very noticeable tenderness around the alveolar process, which seemed to be very marked under pressure.

Q Did you notice any recession of the gums?

20

A I don't recall that specially.

Q Doctor, you never saw this X-ray plate, did you (shown to witness)?

A No.

*Cross examination by Mr. Chance.*

Q You did not treat the teeth at all, did you?

A No.

30

40

*Charles Joseph O'Neill, direct*

CHARLES JOSEPH O'NEILL, sworn in behalf of plaintiff.

*Direct examination* by Mr. Demarest.

Q Mr. O'Neill, you worked for the Heller Brothers' Company, did you not?

A Yes, sir.

Q At the time of this accident?

10 A Yes, sir.

Q How long did you work for them prior to this accident?

A About two years.

Q And had you or had you not seen trucks backed up to this doorway frequently?

A Well, they are not backed right up against the door.

Q But they are in substantially the position as shown by the picture?

20 A Yes, sir.

Q Frequently there?

A No, sir; not very frequently; once a week.

Q Mr. Wanamaker was your superior; he was your boss?

A Yes, sir.

Q Did he give you particular instructions as to how your work was to be done?

30 A When I was hired there, before Wanamaker was there, I was hired to do floor work and packing and everything.

Q So that he did not particularly instruct you?

A No, sir.

Q Was it part of your duty to load these trucks?

A Yes, sir.

Q And did Mr. Doolittle, who testified here to-day, have the same kind of a job as you had?

A No, sir.

Q Was it from time to time part of his duty to load the trucks?

40 A Why, he loaded them sometimes, yes, sir.

*Charles Joseph O'Neill, cross*

*Cross examination by Mr. Chance.*

Q Was that truck that was in front of the building there that day Heller Brothers' truck?

A No, sir.

Q Do you know whose it was?

A Wright & Cobb Transportation Company's.

Q In your direct examination you stated something about your duties being "and everything." 10  
What was included by "and everything?"

A Packing and nailing and putting out the cases and getting out parcels post and wrapping them up, and things like that—taking empty cases.

Q Anything else?

A No, sir.

Q Were you on Wright & Cobb's truck at the time of this accident?

A No, sir.

Objected to as not cross examination. 20

Objection sustained.

Q Do you know where the man who hired you is now?

A He is dead.

Q Explain just how the boxes were loaded onto the truck?

A Why, the day this happened Doolittle was hooking these—

*Mr. Demarest.* I object to this question, too. 30  
I do not think I touched upon the method of working in my direct examination either.

*Mr. Chance.* If your Honor please, he touched upon what the duties were, and among the things testified to were loading the truck.

*The Court.* He said that part of his duty was to load the trucks. I think that opens the inquiry as to the method of loading them. Proceed.

*Mr. Chance.* You may answer the question. 40

*Charles Joseph O'Neill, re-direct*

*Witness.* He was standing inside, hooking these—there is tongs—

Q Do not describe the accident; describe the method in which the trucks were loaded?

A Why, I was just saying there was a chain with a wheel, and he was standing there hooking—there is two teeth on each hook; he would hook  
10 those on, and then I would pull it out on the chain and take it out, and he would stand there until I came back.

Q How would you put it out?

A By pulling one chain it pulls the case up, and by pulling the other chain, that lowers it down.

Q From what position would you pull these chains, inside of the building or outside, or where?

A Inside of the building we would pull the chain.

20 Q Where were you when you would release the boxes?

A Outside, right this side of the tail-board, like.

Q On the truck or on the ground?

A On the ground.

Q How far from the building would the boxes be when they would be in the position that you have testified as represented by the picture?

A About three feet.

*Re-direct examination by Mr. Demarest.*

30 Q You mean by that the main portion of the truck, without reference to the tail-board?

A Yes, sir; without reference to the tail-board.

*By the Court.*

Q That is, supposing the tail-board to be up, then it would be about three feet?

A Yes, sir; with the tail-board up.

40 Q Supposing the tail-board to be up, would it be about three feet from there, from the tail-board to the building?

*Charles Joseph O'Neill, re-direct*

A Yes, sir.

Q And can you tell us how wide the tail-board was?

A Well, I should judge about two feet.

Q Well, supposing the tail-board was down, how far would it be from the edge of the tail-board to the building?

(No response.)

10

Q You say when it is up it would be about three feet from the truck to the building. Suppose the tail-board is not up, suppose it is down flat, how far would it be from the tail-board to the building?

A I mean about three feet when it is down, it is about three feet from the building; it is only three feet, in my judgment.

Q Suppose it is up, how far would it be from the building?

A The width of the tail-board added to that, whatever it is.

20

Q I am trying to get at the width of the tail-board. I want to be sure that you and I use the word "width" in the same sense. Do you think the tail-board is two feet wide?

A Well, it is close on to two feet.

*The Court.* All right, if that is your judgment.

*By Mr. Demarest.*

30

Q Can you tell us by referring to this picture with the truck on it how far this overhead track, as I call it, extends out from the edge of the building, how many feet?

A I don't know how far that is.

Q And these trucks are backed up in more than one position, I suppose; I suppose sometimes they are a little closer and sometimes they are further away?

40

*Motion for Non-Suit*

A Generally they are not over this here crossing stone (indicating).

Q This one is closer than usual, is it then?

A No, sir.

Q That one is across the crossing stone, is it not?

A Yes, sir; it is a little across.

10 Reserving the right to call Dr. William H. Warren and Dr. Richard H. Dieffenbach, plaintiff rests.

20 *Mr. Chance.* If your Honor please, I desire to move at this time for a non suit. The first ground is, in general, the usual ground. Taking the evidence as it is, drawing all the reasonable inferences that can be drawn from it, there is not enough to suffice and warrant a finding for the plaintiff and against the defendant. More particularly, I would say that there is nothing in the evidence which shows that the plaintiff sustained an injury brought about by one who is in the employ of Heller Brothers and who was at the time of the injury doing something that was within the line of his duty as an employee of Heller Brothers.

30 I desire to move for a non-suit on the further ground that the evidence seems to be so clear that no reasonable inference can be drawn to the contrary that this woman had ample space to pass behind the space where the tail-board would hit her, and in passing the place where it did hit her she was guilty of contributory negligence. It appears further that the position where she claims the injury was was about in the front of the mouth, and it seems rather peculiar that a person should be hit on the left side, as she says that she was, and sustain injuries in the front of the mouth. It seems to

40

*William L. Fish, direct*

me that that is also a thing which shows very clearly that she must have turned her face around into the tail-board, rather than the tail-board have dropped against her face. For that reason I say there is clear evidence of contributory negligence.

*The Court.* (After argument.) These are evidently questions of fact for the jury. I deny the motion. 10

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

Exception noted as ground of appeal.

WILLIAM L. FISH, sworn in behalf of defendant.

*Direct examination* by Mr. Chance. 20

Q Doctor, state your qualifications as an expert dentist?

*Mr. Demarest.* They will be admitted.

*Mr. Chance.* I prefer to have him state it.

*The Court.* State what your qualifications are, Doctor?

A That is rather embarrassing. I have practiced dentistry for twenty eight years; president of numerous societies, and a lecturer for a dental college in the City of Philadelphia, the Medico-Chirurgical College. 30

*The Court.* The court is satisfied.

Q Did you make an examination of the plaintiff in this case at any time?

A I did, sir.

Q When.

A Last Monday morning, at my office.

Q State what the general conditions that you observed at that time were? 40

*William L. Fish, direct*

A The general conditions from a physiological standpoint of the mouth were normal, slightly tending towards pyorrhea, so far as the mucous surface of the mouth is concerned. Anatomically, there was a decided orthodontia; in other words, the teeth were irregular.

Q State what orthodontia is?

10 A The teeth were crooked throughout the mouth. The gums were congested; there was a condition of Riggs's disease developed in the lower front teeth, caused by tartar, which was under the gum. The teeth were, most of them in front, rotated, badly so in the lower. The exception that I noted was the absence of the upper left central. It appeared from the light test to be dead. The teeth were practically normal, as far as may be possible with the general condition of the mouth, so  
20 far as looseness pertained. The upper left lateral was slightly rotated, the evidence proving that it was an orthodontic condition, or a condition assumed upon eruption. The gums were slightly receded from a mechanical cause, or brushing, too hard brushing. On the lower right cuspid was a fracture; the corner had been broken off. That, I believe, covers it, sir.

Q Could this case be cleared up by scientific treatment?

30 A I believe absolutely.

Q How long do you think by proper scientific treatment this could be cleared up?

A It could be cleared up within—the roots could be absolutely sterilized, made sterile, and filled inside of two hours, by use of the scientific method in vogue to-day.

Q What would be the reasonable value of this scientific treatment that would restore these teeth?

Objected to as irrelevant.

40

*William L. Fish, direct*

*The Court.* (After argument.) I think it is outside of the pleadings.

*Mr. Chance.* If your Honor please, I offer to prove that the charges for the treatment to clear this case up would not be more than \$100.

*The Court.* As I have already ruled out the question of amount, I think it irregular to get the matter indirectly before the minds of the jury. I therefore direct that the last remark be stricken from the record. You cannot by offering to prove in the form of an offer introduce to the attention of the court and jury matter that the court has excluded. 10

Q What do you say as to the probable cause of the rotation which you have observed in this case?

A The probable cause of the rotation?

Q Yes? 20

A The cause of rotation is recognized, of the central teeth—of the lateral teeth—in her case the eruption of the lateral, in coming down the anterior point strikes the central, and it is thrown outward. It is a common case of orthodontia, found in twenty per cent. of the mouths.

*By the Court.*

Q That comes from what cause, from growth?

A There isn't room in the alveolar arch, or in the mouth, to accommodate the teeth; they cannot come down perfectly square in front, so that they come down and crowd themselves in there by eruption. 30

Q Crowding?

A Crowding.

*By Mr. Chance.*

Q Will you explain to the jury more particularly what orthodontia means, whether that is the natural condition or a produced condition? 40

*William L. Fish, direct*

A Orthodontia, or crooked teeth, would be summed up in a few words by lack of room in the alveolar arch of the mouth. The teeth when they come down are the same size; that is, the crowns of the teeth are the same size as they are in adult life. They are too large in probably forty per cent. of the cases to be accommodated; they are crowded  
 10 back in, either inward or outward, or they rotate. In the plaintiff's case the lower teeth had not within an eighth of an inch of room to come together, so that all of them came up crooked.

Q What do you mean by that?

A When they erupted, when they came through the gum, they came out twisted.

Q How old do you suppose she was when that happened?

A I don't know when she cut her teeth; she probably cut those teeth when she was about eight years  
 20 of age, between eight and nine.

Q Then you do not think it was about a year ago? You do not think it was caused by this accident that happened on the 21st of February?

A I do not, sir; it would be impossible.

Q Are there any tests by which dentists tell whether there is pain or not in a tooth?

A The only test, or tests, which the patient may combat, but which an operator of practice can tell,  
 30 when the tooth is sore or when the periodontal membrane is congested percussion on that tooth will tell, as compared with a healthy tooth, an abnormal condition always.

Q Did you make any test like that on the plaintiff's teeth?

A I did.

Q What was the result of your test?

A I found them as normal as teeth, with a tendency towards pyorrhea could possibly be.

40 Q What, in your opinion, is the cause of any

*William L. Fish, direct*

recission of the gums that you found in this case?

Objected to.

Objection overruled.

A The condition existing in the patient's mouth, from the evidence before me, was that the gums had receded through excessive brushing.

Q What effect, if any, would the conditions that you testified to having found have upon the proper function of the jaw in the future? 10

A Please state that question again.

Q (Question read.)

A None, if properly replaced.

Q You have heard the testimony of the plaintiff in this case?

9 I have.

Q Explain whether in your opinion, such a chipping as you found upon the tooth which she testified was chipped could have been caused by a blow from the left? 20

A The position of the lower right cuspid was such that a blow passing from the left would have fractured the lateral, which is in front of that cuspid, before breaking the cuspid. The lateral tooth which guards the cuspid on the right side is one of the weakest and most delicate teeth in the human mouth. A blow sufficient to break the point of the tooth which sets right below it would have fractured the other tooth. It would have been a physical impossibility to break that point, because the eye tooth is the strongest and densest tooth in the mouth, and the lateral immediately adjacent to it is the most delicate tooth, so a blow to fracture that would have had to have broken the eye tooth. 30

Q I show you an X-ray plate marked Exhibit P. 1, and ask you if an examination of that would indicate that there is any condition there which your examination would not reveal?

40

*William L. Fish, cross*

10 A There are no conditions, with the exception of a small spicula of tooth structure or bone evidently an eighth of an inch below the gum. There is no more than normal absorption to the alveolar process at the point where the tooth was lost. The rest of the teeth show a pyorrhetic condition; that is, a recession of the gum caused by the presence of a certain amount of serumal matter. Under the gum there is a little point of tooth structure or bone, but nature would ultimately throw it out.

Q Should anything be done with regard to that little piece that you testified about, and if so, what?

A That little piece would be picked out in a few seconds, and the excretion would, no doubt, heal up immediately or cease immediately.

*Cross examination by Mr. Demarest.*

20 Q Did I understand you to say that the X-ray showed some recession of the gums?

A Yes, sir.

Q The X-ray pictures show the gums?

A I said the alveolar process in my statement; that is practically the thing that shows in a radiograph.

Q But the gums do not show?

A They do not show as plainly, by any means.

30 Q But you said there was a recession of the gums shown?

A There is a recession of the gums in the upper and lower jaw; yes, sir.

Q Did you not say that was shown by that radiograph?

A I said that the alveolar process showed a recession.

Q You did not say that the gums showed?

A I said the alveolar process.

*William L. Fish, cross*

Q Would you call the condition of Mrs. Hough's mouth normal, with the exception of the loss of the tooth?

A I would consider it in a prepyhorreal condition; I would consider that it is not normal.

Q Did you discover that the upper central which is present in her mouth is dead?

A I did; from all tests of light it shows to be dead from the color. 10

Q And it is your opinion that the rotation of the upper left lateral is a natural one, through eruption?

A I do consider it such.

Q And you consider that all the lower teeth came up in the crooked condition in which they now are?

A Most emphatically.

Q And it is your opinion that the fracture of the lower lateral could not be caused by this accident? 20

A Absolutely not, from a blow from the left.

Q And do I understand you correctly to say that the teeth are crooked throughout the mouth?

A There is a malocclusion—yes, crooked, if you can call it crooked. There is a malocclusion, just the same.

Q Did you look at the teeth in the back of the mouth? 30

A The distal teeth I did.

Q I suppose you mean the back teeth?

A I did. I had her close her mouth to show the bite, and the bite is not normal.

Q Did you look at the upper teeth in the back of the mouth?

A Both upper and lower.

Q This examination took place on Monday morning, did it not?

A Yes, sir. 40

*William L. Fish, cross*

Q And it consumed about five minutes time, did it not?

A A little longer.

Q How much longer?

A It took fifteen minutes; possibly a little longer than that, even.

10 Q You mean in your office, upstairs, in Fulton street?

A Yes, sir.

Q You say that Mrs. Hough was there fifteen minutes?

A Yes, sir; I am quite sure of it.

Q How long do you say she was in your chair?

A I couldn't say absolutely; a good part of that fifteen minutes.

Q And in what you claim to be fifteen minutes you discovered all you have testified to here to-day?

20 A Yes, sir.

Q You never saw Mrs. Hough before?

A No, sir.

Q And you have not examined her since?

A No, sir.

Q And these opinions that you have given here to-day are not the result of any treatment that you gave her?

A I gave her no treatment.

30 Q They are merely the result of your observation?

A They are the result of my observation and twenty-eight years' experience, which lead me to make observations quickly.

Q I have no doubt of it. When Riggs's disease, or pyorrhea, is evident, what part of the teeth or what portion of the gums first fall prey to it?

A What is that?

Q When Riggs's disease, or pyorrhea, occurs—that is a loosening of the teeth?

40 A Yes, sir.

*Richard H. Dieffenbach, direct*

Q —what teeth submit to that disease first?

A The first teeth, the first victims, the lower six front and the upper six molars. Those teeth generally respond to the ravages of pyorrhea quicker than any others, provided that is caused by tartar, systemic causes and general loosenings throughout the mouth.

*Re-direct examination by Mr. Chance.*

10

Q What was the cause of the loosening of the teeth in this case?

Objected to as repetition.

Objection overruled.

A The slight loosening of the lower teeth was caused by the presence of a few pus sacs and serumal tartar around the laterals; there was a slight deposit of tartar, which would cause those teeth to become loosened, and they would remain loose unless that is removed and thrown off.

20

RICHARD H. DIEFFENBACH, sworn in behalf of plaintiff.

*Direct examination by Mr. Demarest.*

Q Dr. Dieffenbach, you have treated Mrs. Hough, have you?

30

A I have.

Q You are a physician of how many years experience?

A Thirteen.

Q And what was the occasion of your being called upon to treat her?

A Why, she came to my office complaining of what she described as some spells that she had at night.

Q What was the nature of those spells?

40

*Richard H. Dieffenbach, direct*

A Why, she would be awakened at night with a feeling of suffocation, and have to get out of bed and sit in a chair and gasp for breath, and have a feeling of dissolution, or impending something that was going to happen to her; something awful, she described it.

Q What do you mean by "dissolution?"

10 A Dissolution means impending death, or something of that sort, something going all wrong.

Q How many treatments have you given her, approximately, if you do not know accurately?

A I should say she called at my office about ten times, I should say.

Q And how did you diagnose her symptoms?

A Well, I diagnosed it as a nervous condition.

Q Did you get any history as to the facts that might cause such a condition?

20 A She spoke to me of an accident that she had had, and dated her symptoms to that, more or less.

Q From the history that you received from Mrs. Hough and from the observation that you made, what conclusion did you reach regarding the cause of her condition?

A Why, as I could find no fundamental organic trouble, I attributed her condition to nervousness due more or less to this accident which she had been in, or had happen to her.

30 Q Did you take into consideration the fact that it was some time past; that is, that the accident had occurred a considerable time before you treated her?

A Yes, I took that into consideration, but she told me that in the interim between my seeing her and the accident she had had more or less nervousness all the time.

Q What is her present condition?

A I think she is greatly improved.

*Richard H. Dieffenbach, cross*

Q And is it your opinion that her improvement will become perfect?

A Yes, I do think so.

Q Over how long a time will the treatment last before she is so improved?

A I haven't treated her recently for this. I don't know how long, but personally my opinion is that she will recover as soon as all the circumstances which remind her of the accident have been effaced, that it is not continually brought back to her mind; I think they will gradually wear off, so to speak. 10

*Cross examination by Mr. Chance.*

Q When did you first begin treating the plaintiff?

A Well, if you will allow me to refer to my notes, I can give you the exact date; I don't remember exactly; some time in the beginning of the year. 20

*The Court.* You may do so.

*Mr. Chance.* All right, you may refer to them.

*Witness.* (Referring to memoranda.) Well, Mrs. Hough called at my office the first time January 2d.

Q In what year?

A This year. 30

Q During that time between February 21, 1916, and that date in January did you treat her?

A No, sir.

Q How long did your treatment of her after January 1st continue?

A I last saw her in my office April 5th. Just a moment. That was really not for that particular condition. I think the 25th of March was for that nervous condition that I last saw her. It was a cold that she consulted me about April 5th. 40

*Richard H. Dieffenbach, cross*

Q (*By the Court.*) March 25th was the last?

A Yes, sir.

Q (*By Mr. Chance.*) How often did you treat her between the 1st of January and the 25th of March?

A (*Referring to memoranda.*) Ten, inclusive, both dates.

10 *By the Court.*

Q What was the general nature of your treatment?

A Well, I gave her some tonic treatment; that is about what it amounted to; I reassured her that she would get well.

Q You treated her for her nervous condition?

A Yes.

20 The court takes a recess until Monday, April 29, 1918, at ten o'clock, A. M.

30

40

*Charles Joseph O'Neill, direct*

SECOND DAY.

Monday, April 29, 1918.

Met pursuant to adjournment.

Present, counsel as before stated.

CHARLES JOSEPH O'NEILL, recalled in behalf  
of defendant.

10

*Direct examination by Mr. Chance.*

Q Mr. O'Neill, where are you employed?

A Eck Dynamo, Belleville.

Q Where were you employed on the 21st of February, 1917?

A Heller Brothers.

Q Did you see the plaintiff in this suit on that date?

20

A Yes, sir.

Q State to the court and jury the circumstances under which you saw the plaintiff?

A Why, the woman was coming down the street, and I was just taking out a case on this iron track. I said, "Just one minute, and I will let you pass," and after the driver had taken the case and took it to the front of the truck I raised the tail-board from the ground. The woman passed under my arms; she was fully clear of the tail-board, when she swung to the left sharply and struck her tooth on the corner of the tail-board. She started hollering, "My tooth! My tooth!" and in a few minutes she stepped inside and her tooth fell out on the floor, and then she fainted.

30

*By the Court.*

Q You mean on the floor?

A The tooth dropped on the floor; yes, sir.

Q The floor of what?

40

*Charles Joseph O'Neill, direct*

A The floor of the shipping room of Heller Brothers.

Q The floor of the shipping room?

A The shipping room; yes, sir.

*By Mr. Chance.*

Q Where did you stand at the time you just  
10 testified about?

A On the ground.

Q Was any employee of Heller Brothers upon the truck?

A No, sir.

Q Why did you raise the tail-board?

A Well, it is always a gentleman's place to let a woman pass.

Q At what stage was the loading process at the time you raised this tail-board?

20 A There was only about ten cases on the truck at the time.

Q And where was the crane?

A The crane was back in the room when this accident happened.

Q Was there any box on the tail-board?

A No, sir.

Q What was the next thing for you to do in connection with this loading?

30 A Go back and get another case on this crane and take it the same way.

Q Do you know Mr. Doolittle?

A Yes, sir.

Q Was he outside of the building at the time of this accident?

A No, sir.

Q Was any other employee of Heller Brothers outside of the building?

A No, sir.

40 Q Was anything said to you by anybody on the truck?

*Charles Joseph O'Neill, direct*

A Only as the wagon—

*Mr. Demarest.* I object to that. I do not think it is material, what was said to him by any one on the truck.

*The Court.* You may answer the question or no.

*Witness.* Yes.

10

Q What was said?

*Mr. Demarest.* I object to that. It is hearsay.

*The Court.* No. In the first place, it does not appear by whom the statement was made, if it was made. That isn't an important element.

Q Without stating what was said to you, state, if you know, who it was that said something to you?

20

A Why, the driver on Wright & Cobb's truck.

Q Now, what did he say?

*Mr. Demarest.* I object to that.

*The Court.* The question, then, is whether the driver of a truck such as this was, under the circumstances, empowered to make statements. What effect do you think could be given in an action against Heller Brothers' Company to a statement made by the driver of the truck of another person?

30

*Mr. Chance.* The theory on which I ask the question is that a party is liable for the acts of those whom his servant permits to assist him in the performance of his duty, and if Wright & Cobb's duty was to manage the truck, and he permitted someone else to assist him in the management of the truck—

*The Court.* You are not asking about acts; you are asking about statements.

40

Charles Joseph O'Neill, direct

*Mr. Chance.* The reason I am asking about statements was to show whether Wright & Cobb's man permitted or forbade the witness to do something.

10 *The Court.* I can think of no rule that would make a statement of the driver of this truck binding either on his employer or on anybody else, it not appearing that it was part of the *res gestae*.

(Question withdrawn.)

Q Did the man on the truck forbid you to lift the tail-board?

Objected to as immaterial.

*The Court.* I think it is hearsay. I sustain the objection.

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

Exception noted as ground of appeal.

Q Did the man on the truck see you raise the tail-board?

A No, sir; he did not.

Q (*By the Court.*) When you say "the man on the truck" do you mean the driver of the truck?

A Yes, sir.

30 Q (*By Mr. Chance.*) Was Mrs. Hough carrying anything, and if so, what?

A Carrying about four or five bundles in her arms—packages.

Q How rapidly did the tail-board come down?

A Why, I didn't let the tail-board drop at all.

40 *The Court.* The witness has not said that the tail-board came down at all; he said, "I raised the tail-board. She was fully clear of the tail-board, when she swerved sharply to the left and struck her tooth on the corner of the tail-board."

*Charles Joseph O'Neill, direct*

Q Where was the tail-board at the time she struck her face against it?

A Why, it was about six inches away from the truck.

Q How did it get to that position?

*By the Court.*

Q (Interposing.) What do you mean by that?

A I lowered it about that far.

10

Q What part of it was about six inches away from the truck?

A This corner of the tail-board.

Q Do you mean the top of it?

A Yes, sir.

*By Mr. Chance.*

Q Did the plaintiff fall after being hit?

A No, sir.

Q Where did you see her immediately after that?

20

A In the shipping room office there.

Q Did you notice any bleeding?

A No, sir.

Q What was the position of the truck with respect to the door in front of the factory?

A Not far away.

*Mr. Demarest.* I think that was testified to on the other side; it was said that it was three feet away, or something of that kind.

20

*The Court.* I see no objection to the question now.

*Witness.* About three feet clear from the factory with the tail-board raised, I should judge.

Q Where were the wheels with respect to the edges of the door?

A Why, they were just across this crossing stone that run in front, the back, the rear wheels of the truck.

40

*Charles Joseph O'Neill, direct*

Q How near was the crane to the middle of the back of the truck?

A I don't know; it was pretty near in the center, the crane, of the back of the truck.

Q Was the plaintiff knocked against the building?

A No, sir.

10 Q Where was she knocked, it at all?

A It didn't knock her at all; after she was hit she stood there for a few minutes.

Q I would like to get a little more clearly before the jury the process of this loading, and I have another picture here; I show you a picture which purports to show something with regard to that situation (photograph shown to witness). Compare the situation as shown by that picture with the situation at the time of that accident?

20 (Question withdrawn.)

Q Explain to the jury how this loading process takes place. How is that box released?

*The Court.* First let the jury see the picture, and then they will understand the testimony better.

(Photograph shown to the jury.)

*By the Court.*

30 Q With the box in that position, how was it released?

A Why, just by pulling this chain on this side, on the left side (indicating).

Q By pulling the chain on the left side?

A That releases the case.

(The photograph referred to is marked Ex. D. 3.)

*By Mr. Chance.*

40 Q Having released the box, what was the next thing that your duty required you to do in connection with the crane?

*Charles Joseph O'Neill, direct*

A Take the crane back to the room and get another box on it the same way.

Q And I believe you said the crane was inside at the time the woman's face was hurt?

A Yes, sir.

Q Well, state just what it was in the process of loading that you were doing at the time this woman's face was hurt?

10

A Well, I was just after loading the case on the truck and the driver taking it to the front, as I said, and I raised the tail-board, and I pushed the crane back in the room.

Q Was the raising of the tail-board for the purpose of pushing the box to the front?

A No.

*Mr. Demarest.* That is rather leading, is it not, Mr. Chance?

20

*Mr. Chance.* Possibly.

*By the Court.*

Q I judge from this photograph, D. 3, that the tail-board had to be down in order to admit the box?

A Why, you could push the box the way it is laid on the truck; you can just shove it like that and it will go on the truck (indicating).

Q But in order to place the box properly on the truck the tail-board had first to be down?

30

A Yes, sir.

Q As is shown on the photograph?

A Yes, sir.

*By Mr. Chance.*

Q After the tail-board had been once lowered was it necessary to effect the loading to raise it from time to time before the loading was finished?

A No, sir.

40

*Charles Joseph O'Neill, cross*

*Cross examination by Mr. Demarest.*

Q Mr. O'Neill, at what stage of this operation did you lower this tail-board for six inches?

A Why, just after the woman was clear of the tail-board, clear of the end.

10 Q On which side of the truck were you standing, the side from which Mrs. Hough approached or the side to which she was going?

A I was in the center of the tail-board as I raised it.

Q Which way were you facing, towards her or with your back to her, as she approached the truck?

A Towards her; I was facing her.

Q Did you turn around?

A No, sir.

Q You stood facing that way?

20 A Yes, sir.

*By the Court.*

Q Was she coming from your right or from your left?

A From my left.

Q Which corner, or end, of the tail-board was it that hit her teeth?

A Why, the north corner, I guess it is.

Q The right or left?

A The right.

30 *By Mr. Demarest.*

Q That is, facing toward the front of the truck?

A Facing toward the rear of the truck.

Q The first corner that she approached?

A No, sir; the other corner.

*By the Court.*

Q As you stood there back of the truck, facing toward the driver of the truck—that is the way you stood, is it not?

40 A Yes, sir.

*Charles Joseph O'Neill, cross*

Q She came from your left?

A Yes, sir.

Q Now, which corner of the tail-board was it that struck this lady's teeth?

A The furthest one.

Q The right hand corner?

A Yes, sir.

10

*The Court.* That is what you said before.

*By Mr. Demarest.*

Q Do I understand that you lifted this tail-board up and held it that way with your arms (illustrating)?

A Yes, sir.

Q And she passed through between you and the truck?

A She passed under my arms.

Q And there was how much space back of you, between you and the building?

20

A Why, I would judge, about a foot between me and the building.

Q And you took up the rest of the three feet and the rest of the space representing the width of the tail-board; is that right?

A I think there was only three feet clear with the tail-board raised.

Q With the tail-board raised?

A Yes, sir.

30

Q So you took up two feet and there was one foot back?

A Yes, sir.

Q Is that right?

A Yes, sir.

*By the Court.*

Q That is, with the tail-board down there was about one foot clear back?

A Yes, sir.

40

*Charles Joseph O'Neill, cross*

*Mr. Demarest.* I must have understood the witness to say that there was three feet there.

Q With the tail-board down there was three feet clear; is that it?

A Yes, three feet clear with the tail-board raised.

10 Q Well, the tail-board was only two feet wide, was it not?

*Mr. Demarest.* I do not think it is in the testimony how wide the tail-board was.

*The Court.* There is something about it, I think. Well, go on and find out about it.

*By Mr. Demarest.*

Q Now, Mr. O'Neill, is it easier to load one of these trucks when it is close up to the building than  
20 it is when it is farther away?

A No, sir; it is just the same.

Q Is it easier to load when the iron track overhead projects over the truck or when it just barely reaches the tail-board?

A It is about just the same; it is really harder when the truck is up against the building than it is when it is away from the building.

Q I refer you to D. 3, and ask you whether it  
30 would be easier to load that truck if the tail-board should project up to these wooden beams on the side of the door so as to make the crane and the track project over the truck (photograph shown to witness)?

A It is easier this way, because I wouldn't have no room to pull the chain up, if it was up against the building tight.

Q But suppose you stood inside of the door, would you have room then?

A No, sir; not if the truck was backed tight to  
40 the building, I wouldn't.

*Charles Joseph O'Neill, cross*

Q You would not have room, even if you stood inside of the door?

A I would have room, but it would be pretty tight quarters to pull it down.

Q Did you see Mrs. Hough turn around and swerve sharply to the left, as you said?

A Yes, sir.

Q And did she strike her mouth or did she strike her chin? 10

A Her mouth was open at the time, open at the time, and her teeth struck the corner of the tailboard.

Q How far open?

A Oh, I couldn't judge that.

Q Do you know Mr. Doolittle here?

A Yes, sir.

Q Did you talk to him after this accident happened about the accident? 20

A No, sir.

Q Do you know a young man named McCoy that worked up there?

A Yes, sir.

Q Did you talk to him about the accident afterwards?

A No, sir.

Q Whom did you first talk to about it?

A Mr. Wanamaker.

Q Whom did you talk to about it after that? 30

A Well, nobody in particular, only Mr. Heller; he asked me questions about it.

Q Did you not say to Mr. Doolittle just after this accident happened that you had dropped the tailboard and hit this lady in the mouth?

A No, sir.

*The Court.* State the time and place. You say "just after the accident." Now, the place.

Q Inside of the factory of Heller Brothers, just inside of the shipping house, or near the office of 40

*Charles Joseph O'Neill, cross*

Mr. Wanamaker. Did you say any such thing at that time?

A No, sir.

*The Court.* What are the words you are asking the witness whether he used. Let us have your question again.

10 *Mr. Demarest.* I included those in the question, your Honor.

(Former question and answer read as follows: "Q Did you not say to Mr. Doolittle just after this accident happened that you had dropped the tailboard and hit this lady in the mouth?

A No, sir.")

Q You did not?

A No, sir.

20 Q Did you say the same thing or similar words to Mr. McCoy?

A No, sir.

*The Court.* At what time and place?

*Mr. Demarest.* At the same time and place?

*Witness.* No, sir.

Q Did you say the same thing to Mr. McCoy on the street three days after this accident happened?

A Three days after? No, sir.

30 *By the Court.*

Q Let me ask you a question. You said, if I understood you correctly, Mr. O'Neill, that "I raised the tail-board to let the woman pass."

A Yes, sir.

Q That is right, is it?

A Yes, sir.

40 Q Then I understood you to say following this statement, which was that the top or the corner of the tail-board was six inches away from the truck, "I lowered it that far?"

*Charles Joseph O'Neill, cross*

A Yes, sir.

Q First you say you raised it and then you lowered it?

A Well, the woman was past the tail-board when I started lowering it; I just lowered it about six inches when she turned sharp and hit her tooth on it.

Q When you say you raised it to let her pass just what did you do? 10

A I took hold of the tailboard and raised it up with my arms.

Q How far?

A Against the truck.

Q How far?

A As far as it would go.

Q All the way up?

A Yes, sir.

Q So that it was straight? 20

A Yes, sir.

Q Up and down?

A Yes, sir.

Q You raised it all the way?

A Yes, sir.

Q And what was the next thing that you did?

A Why, when I saw her clear the tail-board I started lowering it and just lowered it about six inches, when she turned around and she said, "Thank you," and she struck her mouth on the corner of the truck. Her mouth was open at the time. 20

Q In what way did you lower it?

A The same way I raised it; I had both my hands on it and was lowering it easily, or slowly, rather.

Q When that tail-board is raised to the full extent, as you say you raised it, is there anything that holds it in place?

A There is with chains there, or hooks, rather; on each corner there is a hook, like, through a staple. 40

*Charles Joseph O'Neill, cross*

Q Is there any spring or catch?

A No, sir.

Q The chains working in the hooks, do they show on this photograph, D. 3?

A There they are (indicating on photograph).

Q What is it that holds it there?

A That chain has to be tightened.

10 Q How is it tightened?

A There is a ring there and there is sort of a hook, like; you pull this chain through the ring, like, and turn it back.

Q Is it one of these chains that you say you pull?

A Yes, sir.

Q Which one do you pull?

A This here (indicating).

20 Q Do not say "here." When you want to hook it you pull the chain that shows nearest to you on the photograph or the other one?

A You see, this chain runs under there; this one goes there (indicating).

Q Which chain do you pull?

A The one on this side (indicating).

Q On which side?

A On the left side of the truck.

Q On the side nearest to you in the photograph?

A Yes, sir.

30 Q And what effect does that have?

A That tightens the tail-board to the truck and holds it there.

Q And then there is a ring and a hook that fastens it?

A Yes, sir.

Q You did not do any of those things?

A No, sir.

Q You pushed it up?

A Yes, sir; and held it there.

40 Q And held it upright?

*James H. Trainor, direct*

A Yes, sir.

Q And then let it come down to the point that you mentioned?

A Yes, sir.

*By Mr. Demarest.*

Q Do you know how much this tail-board weighs?

A About 300 or 400 pounds, I guess. 10

Q About how much?

A About 300 pounds.

Q (*By the Court.*) The tail-board itself?

A I don't know how much it weighs.

Q (*By Mr. Demarest.*) You don't know how much it does weigh, then?

A No, sir.

JAMES H. TRAINOR, sworn in behalf of defendant. 20

*Direct examination by Mr. Chance.*

Q Doctor, you are a practicing physician of this State?

A Yes, sir.

Q Where did you receive your training?

A College of Physicians and Surgeons, New York, Columbia University.

Q Did you ever examine the plaintiff in this suit? 30

A I did.

Q When?

A Last Monday morning.

Q Where?

A At the office of Dr. Fish, in Fulton street, in Newark.

Q Were you present at the time of Dr. Fish's examination?

A Yes. 40

*James H. Trainor, direct*

Q About how long did that consume?

A The actual examination, I should judge, about fifteen minutes. I was in Dr. Fish's office thirty-five minutes.

Q In what condition did you find the plaintiff at that time?

A Dr. Fish conducted the examination; I was  
10 present. The examination was directed almost entirely to her mouth, her lips and teeth. I found that one tooth was absent—she wore an artificial tooth with a plate, and that was removed for the examination—one of her left upper teeth was absent; the one alongside of that, the central upper incisor, had a filling on its inner side; that had been damaged; and the tooth to the left of that was crooked, as were a number of other teeth in her mouth; the lower right cuspid—that is, the canine  
20 tooth—had the very tip knocked off; that had been repaired.

Q What can you say as to nervousness or the symptoms of it?

A I had been told in taking the history that Mrs. Hough had suffered considerable nervous symptoms following her accident, but that was over a year before I saw her. I didn't consider her nervous during the examination. Considering the  
30 circumstances of the examination, the presence of four men, three of whom were strangers, Mr. Jones, Dr. Fish and myself, she underwent the examination very well.

Q Well, judging from what you saw at the examination that you have just testified about and her demeanor while on the stand, do you think that she is suffering at the present time from any nervousness as the result of the blow which she sustained on the 21st of February, 1917?

A I don't consider her nervous now; I think  
40 her demeanor on the stand was quite wonderful

*Armand G. Heller, direct*

for her first appearance in court, as she told me it was.

*Cross examination by Mr. Demarest.*

Q Doctor, you did not see Mrs. Hough outside of Dr. Fish's private office that morning, did you?

A I saw her in the waiting-room both before and after the examination.

10

Q I mean immediately after the examination, in the hallway upstairs; you did not see her then, did you?

A Immediately after the examination she came downstairs with me and was with me for ten minutes before you came down in the waiting-room; Mrs. Hough came downstairs with me.

ARMAND G. HELLER, sworn in behalf of defendant.

20

*Direct examination by Mr. Chance.*

Q Mr. Heller, are you connected with Heller Brothers?

A Yes.

Q In what capacity?

A Vice-president and secretary.

Q Are you familiar with the relations which existed between your company and Wright & Cobb on February 21, 1917?

30

A Yes.

Q What were those relations?

A Why, they did the carting for us in connection with the coastwise steamers, in New York City; they carted our goods to them, to their dock on the river, and from there lightered it to New York.

Q Did your company own the trucks with which they did this carting?

A No.

40

*Charles Wanamaker, direct*

Q Did your company furnish the trucks?

A No.

Q Who did?

A Wright & Cobb.

Q Did your company pay the driver of Wright & Cobb?

A No.

10 Q Did you have any control over Wright & Cobb—

*Mr. Demarest.* I object. All these questions are leading.

*The Court.* The objection is sustained to the question last asked. The other questions were allowed to pass without objection.

Q Had you any relations between the driver of the truck and your company?

A No.

20

Cross examination waived.

CHARLES WANAMAKER, recalled in behalf of defendant.

*Direct examination by Mr. Chance.*

30 Q Mr. Wanamaker, do you recall the truck which was in front of your building on the 21st of February, 1917, at the time of this accident that is in suit?

A I do.

Q To whom did that truck belong?

A Wright & Cobb.

Cross examination waived.

DEFENDANT RESTS.

*Howard Lewis Doolittle, rebuttal*

HOWARD LEWIS DOOLITTLE, recalled in behalf of plaintiff in rebuttal.

*Direct examination* by Mr. Demarest.

Q Mr. Doolittle, do you know Charles O'Neill, who was here on the stand?

A Yes, sir.

Q On the day that this accident happened did he come inside of the factory after the accident happened? 10

A He did.

Q And were you there?

A Yes, sir.

Q And did he say something to you with reference to the tail-board of the truck?

A He did.

Q What did he say? 20

*The Court.* No, that is not the way to put the question. Did he say certain words, the specific words?

Q Did he say to you that he dropped the tail-board of this truck and that it hit this woman on the mouth?

A Yes, sir.

*Cross examination* by Mr. Chance.

Q Was anybody else present at the time of this conversation? 30

A Mr. McCoy.

Q Is that all?

A That is all that I remember of.

*Alita E. Hough, rebuttal*

ALITA E. HOUGH, plaintiff, recalled in her own behalf in rebuttal.

*Direct examination* by Mr. Demarest.

10 Q Mrs. Hough, there has been some question raised as to the condition of your lower teeth before the accident. Were they before the accident crooked or straight?

A They were crooked.

Q Were they substantially the same as they are now or otherwise?

A About the same as they are now.

Q There has also been some question raised as to the position of the tooth to the left of where one was knocked out; that is, the upper left lateral. What condition was that in before the accident?

20 A That was the same; that was the same as the one on the right side.

Q That is practically straight?

A No, it is slightly crooked.

Q But that tooth that I first mentioned is different now than it was before?

A Yes, sir; entirely.

Q In what way is it different?

A It is very much rotated.

Q Turned around, you mean?

A Yes, sir.

30 Q Mrs. Hough, you remember being examined by Dr. Fish?

A I do.

Q Do you know at what time you got to Dr. Fish's office?

A About 10.30.

Q And did your examination take place at once?

A It did not.

40 Q Tell us about it, how it was conducted?

*Alita E. Hough, rebuttal*

A I waited a few moments, and finally a man came in and introduced himself as Dr. Trainor; he called upstairs, or he had the assistant call upstairs and mention that Dr. Trainor was there. Then I waited for Mr. Demarest and Mr. Jones to come in, and then we waited a few minutes, and went upstairs to his office.

Q Go on and tell us what the Doctor did?

10

A Then I was introduced to him, and Mr. Demarest and Dr. Trainor and Mr. Jones came into his office, where he has his chair, and he told me to be seated, and I did, and he took a mirror, which the dentists use to examine your teeth. He looked at my bottom teeth and he looked at my upper teeth, and then he took an instrument and knocked the remaining central and the one tooth that I spoke of that was rotated, and then he took an instrument with a light attached to it and he looked at my teeth, and then he left me in the chair and went off with Dr. Trainor.

20

Cross examination waived.

*Mr. Demarest.* It is stipulated by counsel that the plaintiff is a married woman, living with her husband, George W. Hough.

PLAINTIFF RESTS.

30

40

*Motion for Direction of Verdict*

*Mr. Chance.* If your Honor please, at this time I move for the direction of a verdict. The ground, in general, is that, taking the evidence which was produced, in favor of the plaintiff as true, and drawing therefrom all the legitimate inferences that can be drawn, there is not enough to suffice in finding a verdict for the plaintiff. It does not appear that  
10 the injury was the result of any act of Heller Brothers or of any employee of theirs acting within the line of his employment.

If we take the plaintiff's statement as true, her story of what happened as being true, it appears from her testimony that she went by the truck because some man on the truck raised the tail-board, and he dropped it against her. There is nothing which shows any duty on the part of any of the  
20 employees of Heller Brothers to be on the truck, nor is there anything that shows that the raising and lowering was for the purpose of doing Heller Brothers' business. It was not at all connected with the loading or unloading; it was not necessary to raise the tail-board to permit pedestrians to go by to get the boxes on the truck, nor was it necessary to raise or lower it to get the boxes to the front. So that, even if you take her testimony as the way it took place, there is nothing to show that  
30 it occurred as the result of any employee of Heller Brothers acting within the line of his employment; whereas, if you take the story of Mr. O'Neill that he raised it to let her go by because it was a gentleman's duty to do so, that is not negligence on the part of Heller Brothers. As I understand, it must be done in executing Heller Brothers' orders and doing Heller Brothers' work and while actually serving Heller Brothers. Now, being polite and doing a gentleman's duty is not, so far as appears,  
40 doing Heller Brothers' work or executing their

*Argument*

orders, and for that reason there should be a verdict directed for the defendant.

I also insist that there should be the direction of a verdict because the only inference that can be drawn is that the negligence of the plaintiff contributed to her injury, and for the further reason that the evidence shows that the Wright & Cobb Company was employed as an independent contractor. The truck was that of an independent contractor, and it being the duty of an independent contractor to exercise care in the management of his truck, it was the duty of Wright & Cobb to manage the truck and not the duty of Heller Brothers.

For those reasons I ask for the direction of a verdict for defendant.

*The Court.* On a motion to direct a verdict the question for the court is whether on the whole case there is presented evidence tending to show that some agent of the defendant, Heller Brothers, acting within the line of his agency, by some carelessness occasioned, either in whole or in part, the injury to the plaintiff. If the answer to that question is yes, it does appear that some negligence of an agent of the defendant acting within the line of his employment was the sole cause of the injury to the plaintiff, then the verdict should be in favor of the plaintiff and against the defendant. If it appears from the whole case that there is evidence tending to show that some negligence of an employee of the defendant was partly responsible for the injury to the plaintiff, but that some negligence of the plaintiff herself was partly responsible for her own injury, contributing to it, then the verdict should be for the defendant. I think those are questions for the jury.

Whether the person whose act occasioned the injury to the plaintiff was on the truck or was off the

*Argument*

truck is a matter as to which the witnesses do not agree. The plaintiff thinks he was on the truck. Mr. O'Neill says that he was on the ground; that it was he who raised the tail-board and who lowered it again, and witnesses have been called to say that he admitted in conversation that he let it fall, and so the plaintiff was injured—that he dropped the tail-board. That he denies; he denies that he said  
 10 that, but says that the accident happened, not because he dropped the tail-board, because he did not drop it at all; the tail-board was stationary at the point to which he had lowered it; but that the plaintiff was injured because she ran into it.

So that there are various questions of fact here that the court could not properly take from the jury. The motion to direct a verdict is therefore denied.

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

Exception noted as ground of appeal.

Mr. Chance sums up for defendant.

Mr. Demarest sums up for plaintiff.

The court charged jury and verdict was rendered as above shown.

30

40



EXHIBIT P. 2.

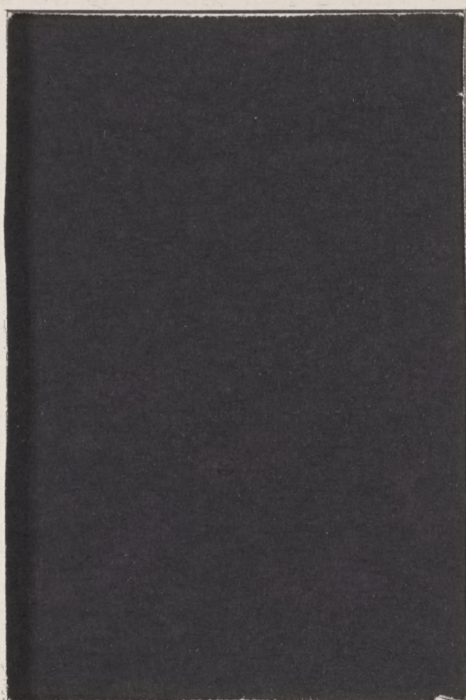
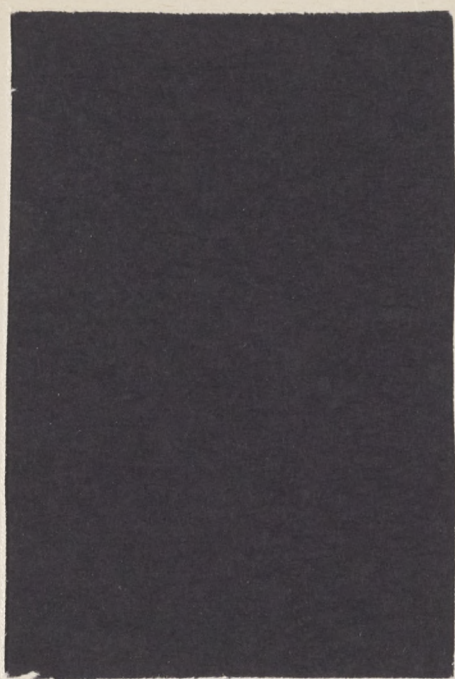


EXHIBIT P. 3.

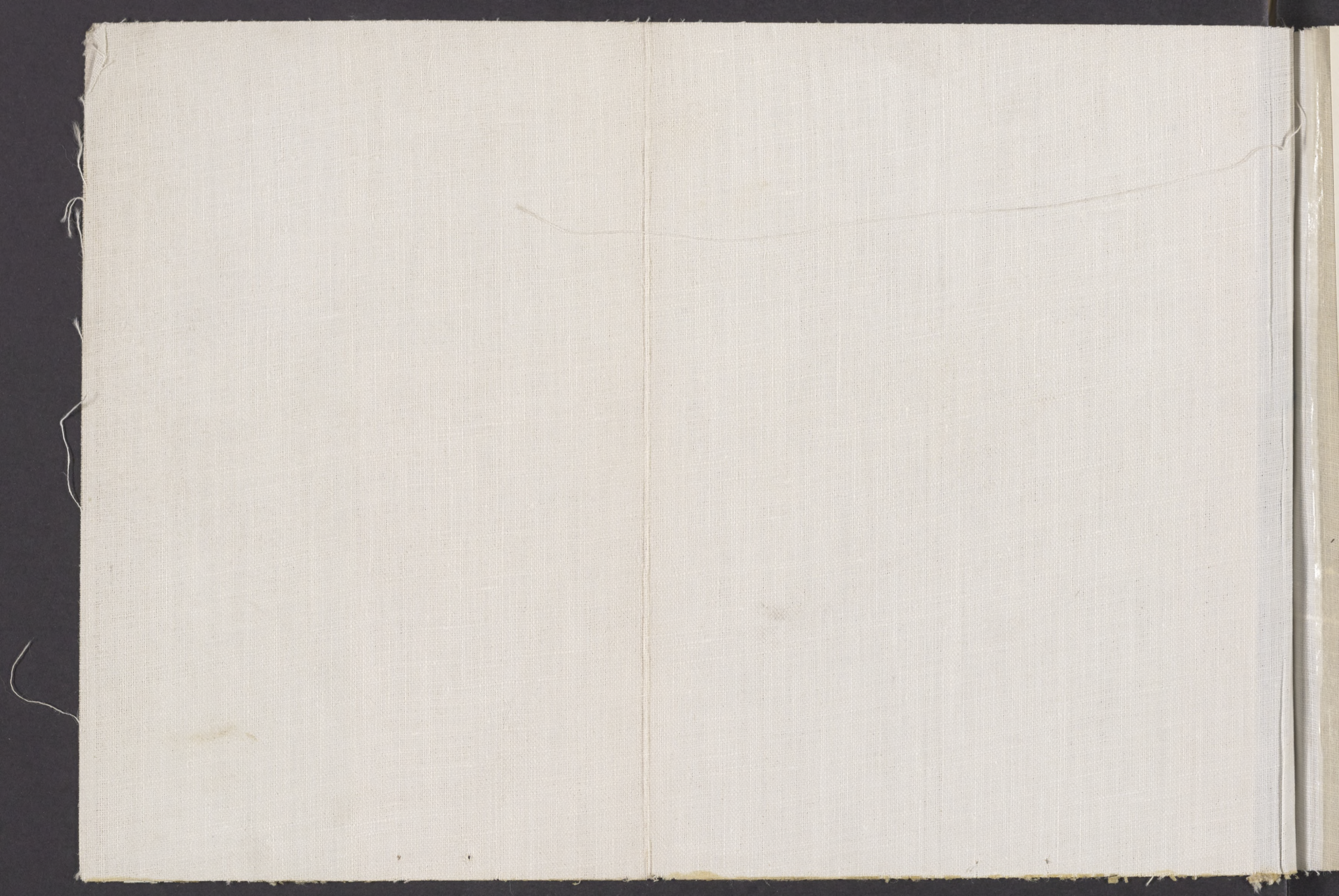


EXHIBIT P. 4.

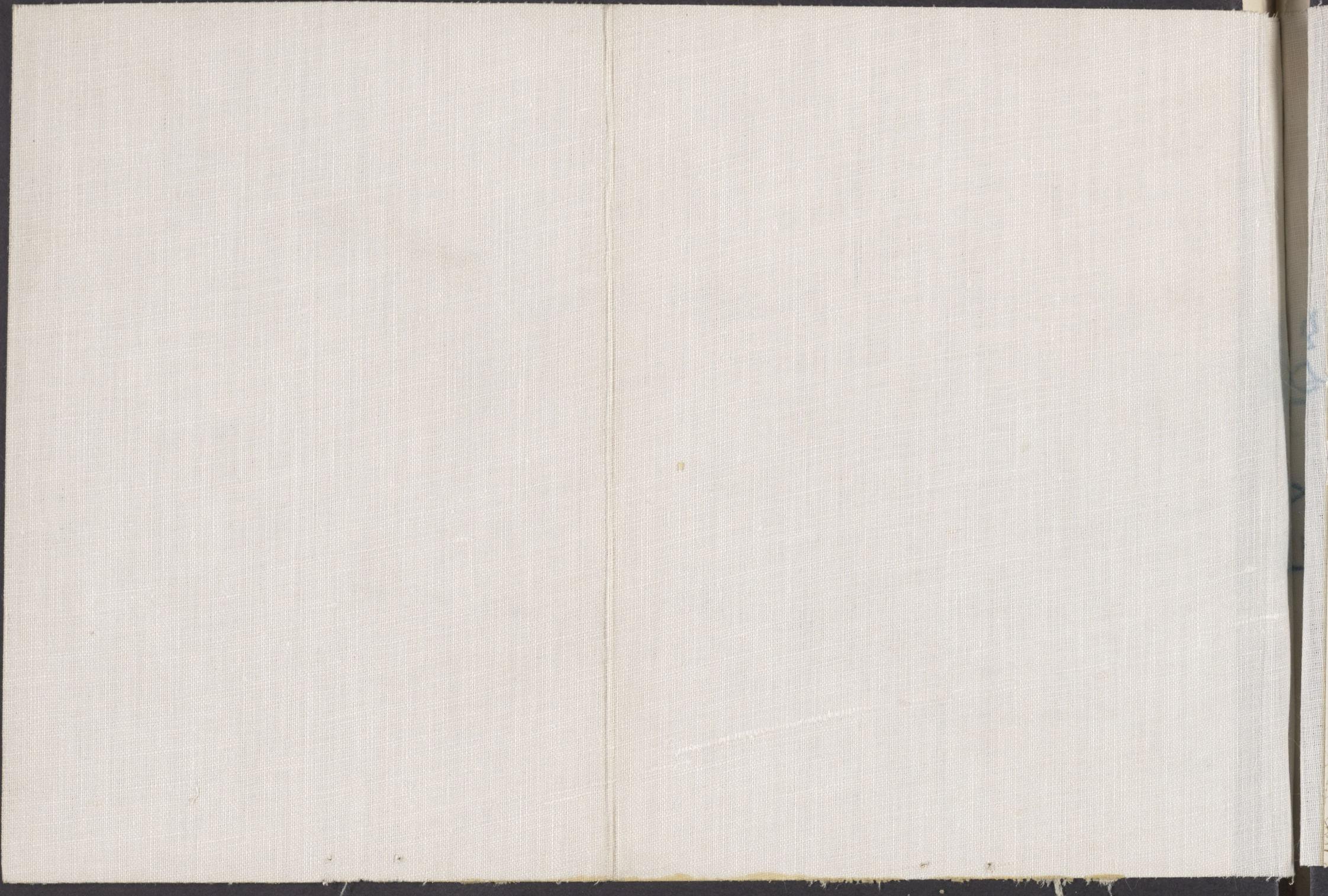


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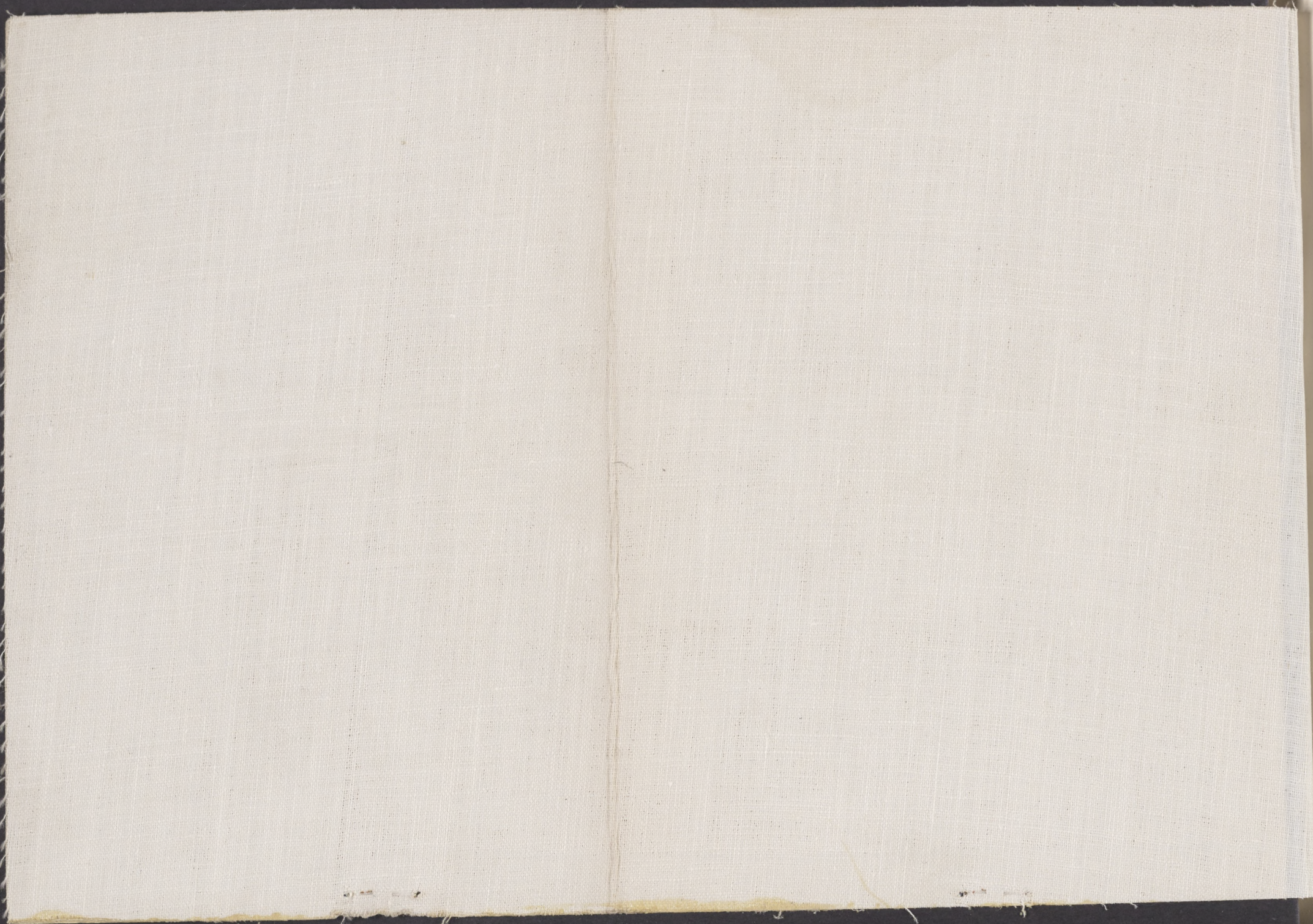












## New Jersey Court of Errors and Appeals

ALITA E. HOUGH,

*Plaintiff-Appellee,*

*vs.*

HELLER BROTHERS COMPANY,

*Defendant-Appellant.*

*On Appeal  
from Essex  
Circuit Court.*

### **Supplemental Brief in Reply to Brief for Plaintiff-Appellee.**

The reasoning of the brief for appellee is faulty in at least four particulars. (I) IT SEEKS TO ANSWER AS APPELLANT'S CONTENTION SOMETHING THE APPELLANT NEVER CONTENDED; (II) IT SEEKS TO SUBSTITUTE A "FANTASTIC CONCLUSION" AS TO WHAT O'NEILL'S STATE OF MIND WAS FOR WHAT HE TESTIFIED IT WAS; (III) IT DEALS AT LENGTH WITH AN ALLEGED VIOLATION OF THE TRAFFIC LAW WHEN SUCH VIOLATION (ASSUMING THERE WAS ONE) WAS IN FACT IMMATERIAL AS IT WAS NOT AND COULD NOT HAVE BEEN THE NATURAL AND PROXIMATE CAUSE OF THE PLAINTIFF'S INJURY; and (IV) IT MISTAKES THE SIGNIFICANCE OF CASES CITED IN THE APPELLANT'S MAIN BRIEF.

#### I.

That the appellee seeks to answer as appellant's contention something the appellant never contended will appear from page 3 of the appellee's

brief where a line of argument is concluded by the statement that the appellant "says it is not liable because it authorized no one to perform its legal duty." Probably the court could not be misled by a fallacy of this sort, but no harm can come from the re-statement of what the appellant really contends. It is that the act which caused the injury was not in the line of the employment of him who did it.

## II.

That effort is made by appellee's counsel to substitute a "fantastic conclusion" as to what O'Neill's state of mind was for what he testified it was appears from page 2 of the appellee's brief. It is there admitted that the explanation of the party who raised the tailboard as to why he did it was "well it is always a gentleman's place to let a woman pass," which statement shows that the act which did the damage was not for the purpose of doing Heller Brothers Company's work, or executing Heller Brothers Company's orders or serving Heller Brothers Company, but for his own affair of attempting to be polite to a lady. How does the appellee's counsel seek to evade the effect of this testimony? Solely by a "fantastic conclusion" as to an alleged and supposed "accompanying thought" of O'Neill for the existence of which thought on the part of O'Neill we find no foundation in the evidence. Says the plaintiff-appellee's counsel "it is urged that stress should be laid upon the accompanying thought, namely that the plaintiff had a right to pass which he and his employer must recognize," but we search the State of the case in vain for any evidence which shows that O'Neill had any such "accompanying thought."

## III.

As to the alleged violation of the Traffic Law we would point out that a careful analysis of the issue before this court will show that all the appellee's counsel says on this subject is immaterial on this appeal. If it is assumed that the defendant was under a duty to keep Wright & Cobb's truck off the sidewalk, still the plaintiff's case is not benefited by this assumption. This is so because the failure to keep the truck off the sidewalk was not and could not have been the proximate cause of the plaintiff's damage. The truck could have stood on the sidewalk until doomsday and the tailboard would never have raised and lowered itself against the plaintiff as it was raised and lowered in this case. An intervening human agency or cause was necessary to do the damage. It is settled in this State that a thing is not the natural and proximate cause of an injury where there is intervening between that thing and the injury an efficient culpable human agency. *Wiley vs. West Jersey R. R. Co.*, 44 N. J. L., 247, 251. O'Neill who both sides admit did the damage was the efficient culpable human agency which in this case prevented the failure to keep the truck off the sidewalk from being the proximate cause of the plaintiff's injury. It is, therefore, insisted that the appellee's counsel's discussion of alleged violation of duties arising from the Traffic Act is irrelevant to this appeal. That did not cause the damage.

## IV.

There are only a few suggestions which we care to make showing appellee's counsel mistakes the significance of cases cited in appellant's main brief. It is noted that he seeks to make distinction between cases in which the act was willful and where it was merely negligence as in this case. There is in fact no such distinction. See *Doran vs. Thom-*

sen, 76 N. J. L., 754, at page 759, where it is said speaking of another case, "while in that case the act was malicious, yet an act not malicious is within the enunciated principle, etc." Appellee's counsel further fails to recognize the distinction of misconduct in the line of employment, that is doing what the employe was hired to do in a wrong way and misconduct outside of the line of the employment, that is doing things the employe was not hired to do. Raising and lowering the tail-board of Wright & Cobb's truck and being polite to ladies was not what O'Neill was hired to do and so belongs in the latter class. In connection with the *Bennett vs. Busch* case (75 N. J. L., 240, 243) quotation by the appellee there are stars showing omitted matter and a reading of the omitted matter shows that it was a part of the employe's duty to get oil for the lamps so that the employe was really doing what he was employed to do in a wrong way and not as in the case at bar doing something not hired to do. The matter omitted from the quotation also shows that the duty arose from the authorization of the master and not because of a duty imposed by statute that lights be displayed as the appellee's brief might leave one to believe.

From these considerations and those of our main brief reversal of the judgment is prayed.

Respectfully submitted,

KELLOGG & CHANCE.

# New Jersey Court of Errors and Appeals

ALITA E. HOUGH,

*Plaintiff-Appellee,*

*vs.*

HELLER BROTHERS COMPANY,

*Defendant-Appellant.*

*On Appeal  
from Essex  
Circuit Court.*

## Brief of Plaintiff-Appellee.

All grounds of appeal save one are abandoned by defendant. The one retained is whether defendant's servant, O'Neill, was acting in the line of his employment.

## Facts.

An automobile truck, owned by Wright & Cobb Transportation Company, was backed up over the sidewalk on the easterly side of Mt. Prospect avenue, Newark, in such a manner that only one foot of space remained between the tailboard, when lowered to a horizontal position, and the wall of the building of defendant (case, pp. 26, 27, 68, 69). The truck was backed up at a place specially provided for such occasions (case, p. 54, l. 30, to p. 55, l. 34). See also Exhibit D. 2.

Plaintiff had been shopping and had three bundles and a small silk bag in her right hand (p. 36). She could not pass through this one-foot space, and the street and gutter were muddy (p. 35), so she awaited an opportunity to pass behind the truck. An employee of defendant, Charles J. O'Neill, told plaintiff: "One moment and I will let you go through" (p. 27, l. 35). He put a box on the truck and lifted the tailboard to a vertical position for plaintiff to pass through. Before plaintiff was clear of the truck O'Neill lowered or dropped the tailboard upon plaintiff, causing the injuries complained of (case, p. 28, ll. 32-33; p. 87, ll. 1 to 15).

## Testimony Concerning the Employment.

O'Neill is admittedly the person who dropped the tailboard after having raised it (case, p. 94, l. 30, to p. 95, l. 35). He testified that he had no specific duties (p. 66, l. 24, *et seq.*), but that he was "hired to do floor work and packing and everything." Wanamaker, his superior, gave him no particular instructions. It was his duty in part to load the trucks (p. 66, ll. 31-34).

Howard L. Doolittle was an employee having the same work as O'Neill. His instructions were also vague, not including the details connected with the work (p. 49, ll. 15-18).

Charles Wanamaker, shipping clerk, under whom the last named witnesses worked, was called by both plaintiff and defendant. He said it was his duty to direct them what to do. Nevertheless, defendant did not cross-examine on this point (case, p. 52, ll. 22-23).

### Argument.

The testimony on the question of the employment was elicited from employees of defendant. Two of them, O'Neill and Wanamaker, were called by defendant as well as by plaintiff. Their testimony on plaintiff's case is practically that of hostile witnesses and should be construed accordingly. On the defendant's case, O'Neill, in explaining why he raised the tailboard, said (p. 84, l. 16): "Well, it is always a gentleman's place to let a woman pass." The young man, doubtless, subconsciously thought of courtesy, but the reason given, if genuine, would have prompted the use of the term "lady" instead of "woman." It is urged that stress should be laid on the accompanying thought, viz., that the plaintiff had a right to pass which he and his employer must recognize.

Nothing in the testimony of these witnesses for the defense, nor of A. G. Heller, the defendant's secretary and treasurer, touches upon the duty, practice, instruction or authority of the offending employee. As the case stands, then, the only conclusion that the evidence fully supports is that the defendant failed to outline to O'Neill the *modus operandi*, and that he and the others doing like work were at liberty to use their own means for the prosecution of the master's work and the attending incidentals. In so doing O'Neill, realizing that the truck, which it was his duty to load, obstructed plaintiff's progress, concluded that he should remove the obstruction. This was no fantastic conclusion. The law requires that the sidewalk be kept clear (P. L. 1915—285, par. 23). Defendant had been in the habit of obstructing this part of the sidewalk for years, and had protected its building against damage from the trucks by heavy 2x12-inch planks, and had specially laid cobbles and crossing flagging at the spot. Exhibit D. 2 and case, pp. 54-55.

The Traffic Act of 1915 (par. 23) provides:

"No person shall drive or back any horse or vehicle across, or allow same to stand upon, any sidewalk unless it be in crossing same to go into a yard or lot, and then not without the consent of the owner of the premises."

In the case in hand there was no yard or lot, hence the consent of the owner is immaterial. But the owner-defendant, by full preparation, aided and invited the violation of this section and allowed the truck in question to stand upon the sidewalk adjoining his premises. Under *Evers v. Davis*, in 90 Atl. 677, this duty when violated is not the foundation of negligence which is actionable *per se*, but the statutory duty is substituted for the common law duty. Hence Heller Bros. Co. was bound not to allow the backing up of this truck across the sidewalk. If any employee had been entrusted with the duty of preventing such obstructions the defendant surely would have proved it. But no such proof is offered. Consequently, we have an employee who was not told how to perform his tasks, which included the loading of the trucks; no one is named who had authority to perform the legally imposed duty of keeping the sidewalk clear for pedestrians, and a physical performance of that duty devolved upon the man nearest the scene, legitimately employed to place defendant's goods

on the offending hired truck. Unless it be concluded that this employee acted for his master, and in the line of his employment, we must conclude that the defendant can escape liability by saying that it failed to obey the law. In other words, the defendant says it is not liable because it authorized no one to perform its legal duty.

But the law supports plaintiff's contention. In *Bennett v. Busch*, 75 L. 240-243, the Court says:

"The law requires that after dark lights shall be displayed, and a failure to observe this rule would subject not only the defendant but the driver to arrest." \* \* \* "The master's purpose was to get the oil, and there is a legitimate inference that the servant was justified in going to the garage for the purpose."

### Cases Cited by Defendant.

The cases cited in defendant's brief include the leading cases in this state. Considered as a whole, those which are in point are favorable to the plaintiff. They are consequently commented upon separately.

*Holler v. Ross*, 68 Law, 324:

Here the servant of defendant surmised that the plaintiff was one seeking to do him personal harm and shot him. At the time of the shooting the plaintiff, with others, was not approaching defendant's property, but was running away from it. Hence the servant was not actually protecting his master's property when he unreasonably followed and fired upon the retreating plaintiff. This was not in any sense negligence; it was rather an assault *vi et armis*. It is, therefore, not in point.

\* \* \*

*Evers v. Krouse*, 70 Law, 653:

This is a case where a wholly malicious and mischievous act was the cause of the injury, *i. e.*, wilfully turning a hose upon a horse. This is also outside the present issue.

\* \* \*

*Bennett v. Busch*, 75 Law, 240:

A servant deviated from specific instructions, but in order to accomplish his master's purposes performed the act in a different manner, resulting in the injury.

This case is properly a decision in favor of the plaintiff and is cited elsewhere herein.

The Court held that where different inferences might be drawn from the facts, the question at issue should go to the jury.

\* \* \*

*McCann v. Consolidated Traction Co.*, 59 Law, 481:

The gravamen of this action is that the swaying of coats on a sprinkling car of defendant company frightened plaintiff's horse. There was no evidence as to whose coats they were, or by whom they were hung on the car, yet the Court says the case should have been

given to the jury. *Vide* page 486, where, after commenting that if the coats were hung up by outsiders, the existence of them was known to defendant's employees, the Court says:

"Besides, the master is liable for all incidental acts of his employee in the course of his employment, and if the coats were worn by the motorman or other employees as necessary to be worn in the work of operation of the sprinkler, then the act of hanging them upon this projection was an act incidental to their employment."

In other words, when an instrumentality furnished by the employer is made dangerous through some act of an employee for his own comfort or convenience, while using it in furtherance of the master's business, the master is liable (*Id.* 488). This is just what occurred in the case in hand.

\* \* \*

*Doran v. Thomsen*, 76 Law, 754:

This is the familiar case in which a daughter, using her father's motor car, is held not to be his servant unless driving at his direction and on his business. The facts are so entirely different from those of the case in hand that it is not in point.

\* \* \*

*Rhinesmith v. Erie R. R. Co.*, 76 Law, 783:

The dispute was whether defendant's conductor placed a torpedo on the rail. There was some testimony that he did, but this was met by emphatic denials by him and other witnesses for defendant. Defendant also contended that its rules forbade placing of torpedoes as this one was, close to a station. Held, that the case properly went to the jury, because "this situation created an issue of fact."

\* \* \*

*Teer v. Miller*, 80 Law, 691:

Sheds no further light on the subject. The facts involve the question of violation of orders only.

\* \* \*

*Jennings v. Okin*, 88 Law, 659:

Merely deals with the admissability of a *res gestae* declaration.

\* \* \*

*Missell v. Hayes*, 86 Law, 348:

This case is entirely out of point, merely distinguishing the facts from those in *Doran v. Thomsen*.

\* \* \*

*Ward v. Erie R. R. Co.*, 89 Law, 525:

Is a case similar to *Holler v. Ross*, *supra*, and is not in point.

\* \* \*

*Klitch v. Betts*, 89 Law, 348:

This case was tried by me in the Essex Circuit and the defendant was held responsible for the act of his servant performed in the evening after office hours, on the ground that the act was incidental to the

employment, and that defendant ratified the act by subsequently treating the plaintiff's injury. On appeal the Court said (p. 351):

“—the master will be responsible, although the servant's act was not necessary for the proper performance of his duty to his master, or was even contrary to his master's orders.”

Also on p. 352:

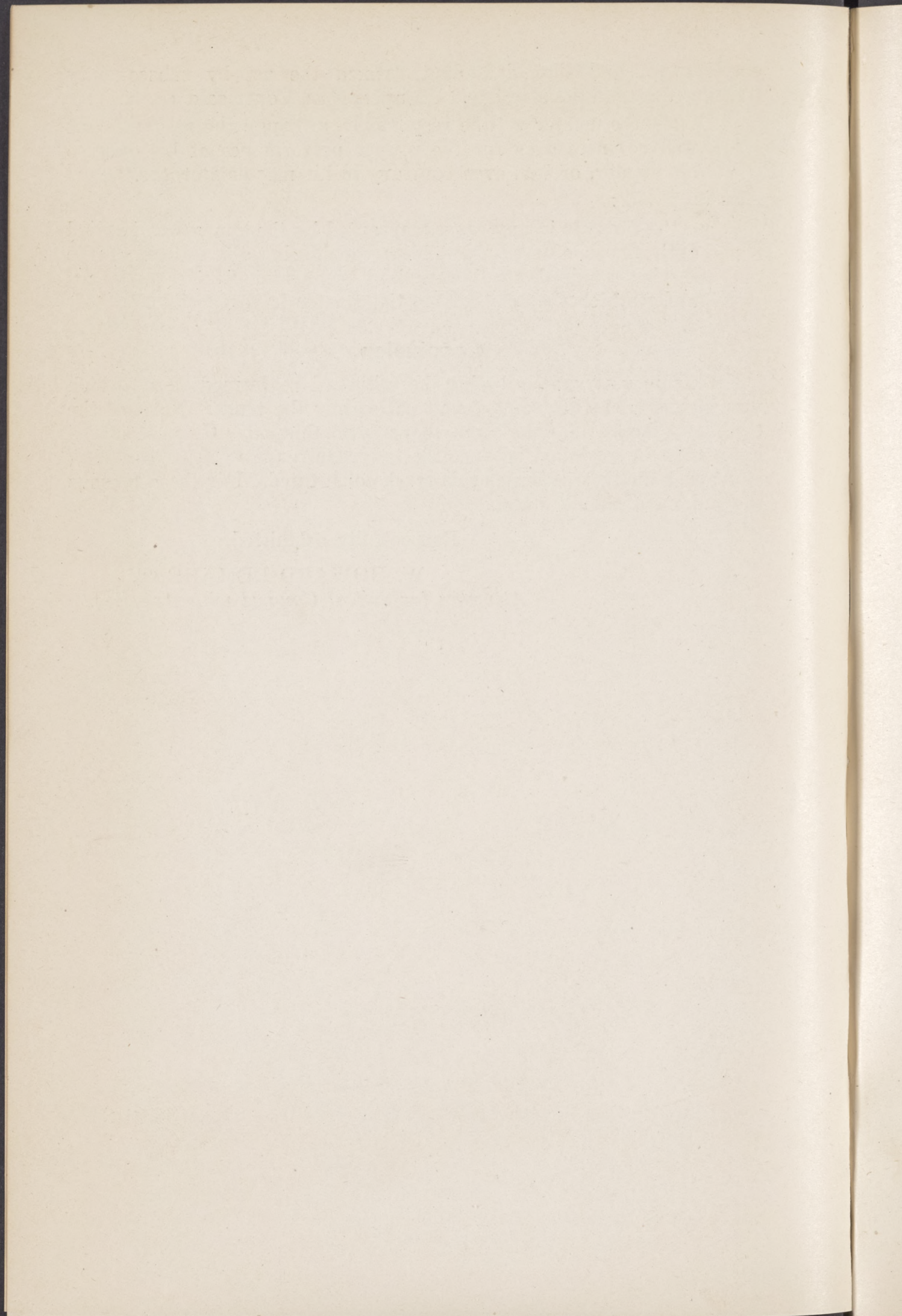
“—for acts in any sense warranted by the express or implied authority conferred upon him; considering the nature of the service required, the instructions given and the circumstances under which the act is done, the master is responsible.”

### Conclusion.

Defendant's servant in lifting the tailboard performed an act which was incidental to his employment of loading the truck. None of the testimony denies him the right to perform this act. He also served his master in so doing, because the law requires that *no person shall allow* such an obstruction as this truck constituted. For these reasons the judgment should stand.

Respectfully submitted,

W. HOWARD DEMAREST,  
*Attorney for and of Counsel with Appellee.*



# New Jersey Court of Errors and Appeals

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*from Essex*

*Circuit Court.*

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## BRIEF FOR APPELLANT.

### Preliminary Statement.

This is an appeal from the Essex Circuit Court. The suit in the court below was instituted against Heller Brothers Company and Allen Cobb, trading as Wright & Cobb Transportation Company. The last named defendant was dropped from the suit on the plaintiff's motion at the opening of the trial. From the judgment for the plaintiff the defendant appeals.

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### Facts.

The defendant Heller Brothers Company has a plant located on Mt. Prospect avenue in Newark (Case, page 26, line 10). It employs Wright & Cobb as independent contractor to haul its product from its factory (Case, page 99, line 28 to page 100, line 20).

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On February 21, 1917, as the plaintiff was attempting to pass between Wright & Cobb's truck and Heller Brothers Company's building, she was injured by her face coming in contact with the tail-board of the truck (Case, page 28, line 32, and page 83, line 32).

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According to the plaintiff, the tail-board of Wright & Cobb's truck was raised by someone on the truck who told her to pass and while she was so doing dropped the tail-board against her (Case, page 28). According to another version given by one O'Neill, an employee of Heller Brothers Company, the manner of the occurrence was that O'Neill while standing on the ground raised the tail-board to  
 10 allow the plaintiff to pass, that the plaintiff passed under his arm and was injured by suddenly turning to the left against the tail-board after she had passed the truck (Case, page 83, lines 29 to 32).

There is no testimony showing that any employee of Heller Brothers Company had any authority or business on the truck. The young man O'Neill testified positively that no employee of Heller Brothers Company was upon the truck (Case, page 84, line 14).

20 The testimony as to O'Neill's duties will appear in the following questions and answers:

Case,

	Page	Line	Q	"Did he give you any particular instructions as to how your work was to be done?"
	66	26		
			to	
		30	A	When I was hired there before Wanamaker was there I was hired to do floor work and packing and everything * * *."
30		33	Q	"Was it part of your duty to load these trucks?"
			and	
		34	A	Yes, sir."
	67	9	Q	"In your direct examination to you stated something about your duties being 'and everything,' what was included by 'and everything?'"
			to	
		17		

40 A Packing and nailing and pulling out the cases and getting out parcels post and wrapping them up and things like them—taking empty cases.

Case, Q Anything else?  
Page Line A No, sir.”

68 5 Q “Describe the method in which  
to the trucks were loaded?  
24 A Why I was just saying there  
was a chain with a wheel, and he was  
standing there hooking—there is two  
teeth on each hook; he would hook  
those on, and then I would pull it out 10  
on the chain and take it out, and he  
would stand there until I came back.

Q How would you pull it out?  
A By pulling one chain it pulls  
the case up and by pulling the other  
chain, that lowers it down.

Q From what position would you  
pull these chains, inside of the building  
or outside, or where?  
A Inside of the building we would 20  
pull the chain.

Q Where were you when you would  
release the boxes?  
A Outside, right this side of the  
tail-board, like.

Q On the truck or on the ground?  
A On the ground.”

This outline of the duties of O'Neill does not  
include raising the tail-board of Wright & Cobb's  
truck, and further testimony given by O'Neill 30  
emphasizes that the tail-board was not raised be-  
cause of any duty of O'Neill's employment for  
Heller Brothers Company, such testimony follows:

Case,  
Page Line Q “Why did you raise the tail-  
84 15 board?  
to A Well it is always a gentleman's  
30 place to let a woman pass.

Case, Q At what stage was the loading  
Page Line process at the time you raised this tail-  
board?

A There was only about ten cases  
on the truck at the time.

Q And where was the crane?

A The crane was back in the room  
when this accident happened.

10 Q Was there any boxes on the  
tail-board?

A No, sir.

Q What was the next thing for  
you to do in connection with this load-  
ing?

A Go back and get another case  
on this crane and take it the same  
way."

89 15 Q "Was the raising of the tail-  
20 to board for the purpose of pushing the  
17 box to the front?

A No."

89 35 Q "After the tail-board had been  
to once lowered was it necessary to effect  
40 the loading to raise it from time to  
time before the loading was finished?

A No, sir."

### 30 Grounds of Appeal.

The grounds of appeal stated are first that the  
trial court erred in denying defendant's motion for  
a non-suit, and second that the trial court erred in  
denying defendant's motion for direction of a  
verdict in its favor.

40 Only the latter ground need be considered par-  
ticularly. This is so because the motion for direc-  
tion is upon the evidence produced by both parties.  
If a defect in the proof at time of denial of non-suit  
is later supplied any error in refusing non-suit

is cured, while if there is a failure of proof considering the evidence produced by both parties, the refusal to direct verdict for defendant results in reversal regardless of motion for non-suit.

### Argument.

There is only one question that need be decided in order to determine this appeal. That question is whether under our law the act which caused the injury in this case was of such a nature that the defendant-appellant, the employer of the party who did it, is responsible therefor. 10

Among the authorities dealing with the law as to what acts on the part of an employe will render his employer liable to third persons and in general supporting appellant's view that it was not liable are the following:

- Holler vs. Ross*, 68 N. J. L., 324. 20
- Evers vs. Krouse*, 70 N. J. L., 653.
- Bennett vs. Busch*, 75 N. J. L., 240.
- McCann vs. Consolidated Traction Co.*, 59 N. J. L., 481.
- Doran vs. Thomsen*, 76 N. J. L., 754.
- Rhinesmith vs. Erie R. R. Co.*, 76 N. J. L., 783.
- Tier vs. Miller*, 80 N. J. L., 691.
- Jennings vs. Okin*, 88 N. J. L., 659.
- Missel vs. Hayes*, 86 N. J. L., 348. 30
- Ward vs. Erie R. R. Co.*, 89 N. J. L., 525.
- Klitch vs. Betts*, 89 N. J. L., 348.

The precise principle applicable to this case may be clearly stated by a quotation from the decision of this court in *Doran vs. Thomsen*, 76 N. J. L., 754, 759. In the opinion by Mr. Justice Voorhees it is said defining the acts for which the employer is liable:

"The act must be done for the purpose of executing the master's orders and doing his 40

work, and while actually engaged in serving the master, and it is not enough to say that the injuries complained of would not have been committed without the facilities afforded by the servant's relation to his master."

10 Constantly bearing these requirements in mind let the evidence be considered. Of course it must be considered in the light most favorable to the  
 20 appellee, but this is immaterial because the most favorable view to the appellee leaves the case lacking any proof whatsoever showing the injury to have been by an act done for the purpose of executing Heller Brothers Company's orders, or doing Heller Brothers Company's work or actually serving Heller Brothers Company. As shown by the statement of facts given the witnesses are in substantial accord as to how the injury occurred, except that the  
 20 plaintiff said the tail-board was dropped against her (Case, page 28, line 32), while the young man who handled it said the plaintiff turned into the tail-board (Case, page 83, line 32), and the plaintiff's recollection was that the young man who handled the tail-board was on Wright & Cobb's truck (Case, page 28, lines 6 and 21), while the young man said he was on the ground (Case, page 84, line 11).

30 This conflict was (as will be shown) such that neither of the two possible views of it made out a case of liability so the rule relating to the need of submitting to the jury conflicting evidence on material issues is inapplicable. In other words conflict on immaterial matters need not be submitted to the jury. *James vs. Fowler*, 90 Ind., 563 at . 565.

40 It must be conceded for present purposes that the tail-board was dropped against plaintiff as the view that she turned into it would be most unfavorable to her as showing contributory negligence. Whether the party who handled the tail-board was

on the truck or on the ground is immaterial, except as it bears upon whether the act was within the line of the duty of an employee of the appellant Heller Brothers Company. As appellant views it, the light most favorable to appellee places the young man on the ground, because there is nothing which shows that any employee of the appellant, Heller Brothers Company had any authority or business on Wright & Cobb's truck.

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The crux of the matter is not the location of the young man; it is in the decision whether what he did was, under the rule of *Doran vs. Thomsen*, an act within the line of his duty as an employee of Heller Brothers Company. Consider the young man to have been upon the truck or upon the ground as you prefer and there is still nothing showing that any order was ever given by the appellant Heller Brothers Company, which would authorize raising Wright & Cobb's tail-board for the convenience of pedestrians, or that raising the tail-board of that independent contractor's truck was doing appellant, Heller Brothers Company's work, or that appellant Heller Brothers Company was served by that being done. The evidence shows that it was part of the duty of the young man to assist in loading the truck by bringing boxes on the crane to a position over the truck and then lowering them so the truckmen would get them, but the evidence shows that raising the tail-board from time to time in the process of loading was not required (Case, page 89, lines 35 to 40).

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That there were only about ten boxes on the truck (Case, page 84, line 20); that raising the tail-board in this case was not for the purpose of pushing the box to the front (Case, page 89, lines 15 to 17).

The undisputed fact of the matter is as shown by the testimony above printed that the young man

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raised the tail-board because he thought that it was  
 a performance of a gentleman's duty to be polite  
 to ladies (Case, page 84, lines 15 to 17). Now being  
 polite to ladies was his own business and not ap-  
 pellant, Heller Brothers Company's business.  
 There is no evidence of any order from appellant  
 Heller Brothers Company to the young man in  
 question to be polite to ladies; there is nothing  
 10 which shows that being polite to ladies was doing  
 appellant Heller Brothers Company's work, and  
 there is nothing which shows that when the young  
 man was being polite to ladies he was actually serv-  
 ing Heller Brothers Company. On the contrary it  
 would seem that the more time he spent in being  
 polite to ladies the less service he would render  
 Heller Brothers Company for the wages paid him.

**Conclusion.**

20 From these considerations it is apparent that  
 under the rule of the above quotation from *Doran*  
*vs. Thomsen*, there was nothing showing any re-  
 sponsibility on the part of appellant for the act of  
 the young man in attending to his own business—  
 endeavoring to be polite to a lady. And accord-  
 ingly THE DENIAL OF THE MOTION FOR  
 DIRECTION OF A VERDICT WAS ERROR  
 FOR WHICH THE JUDGMENT SHOULD BE  
 30 REVERSED.

Respectfully submitted,

KELLOGG & CHANCE,  
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*with Appellant.*

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