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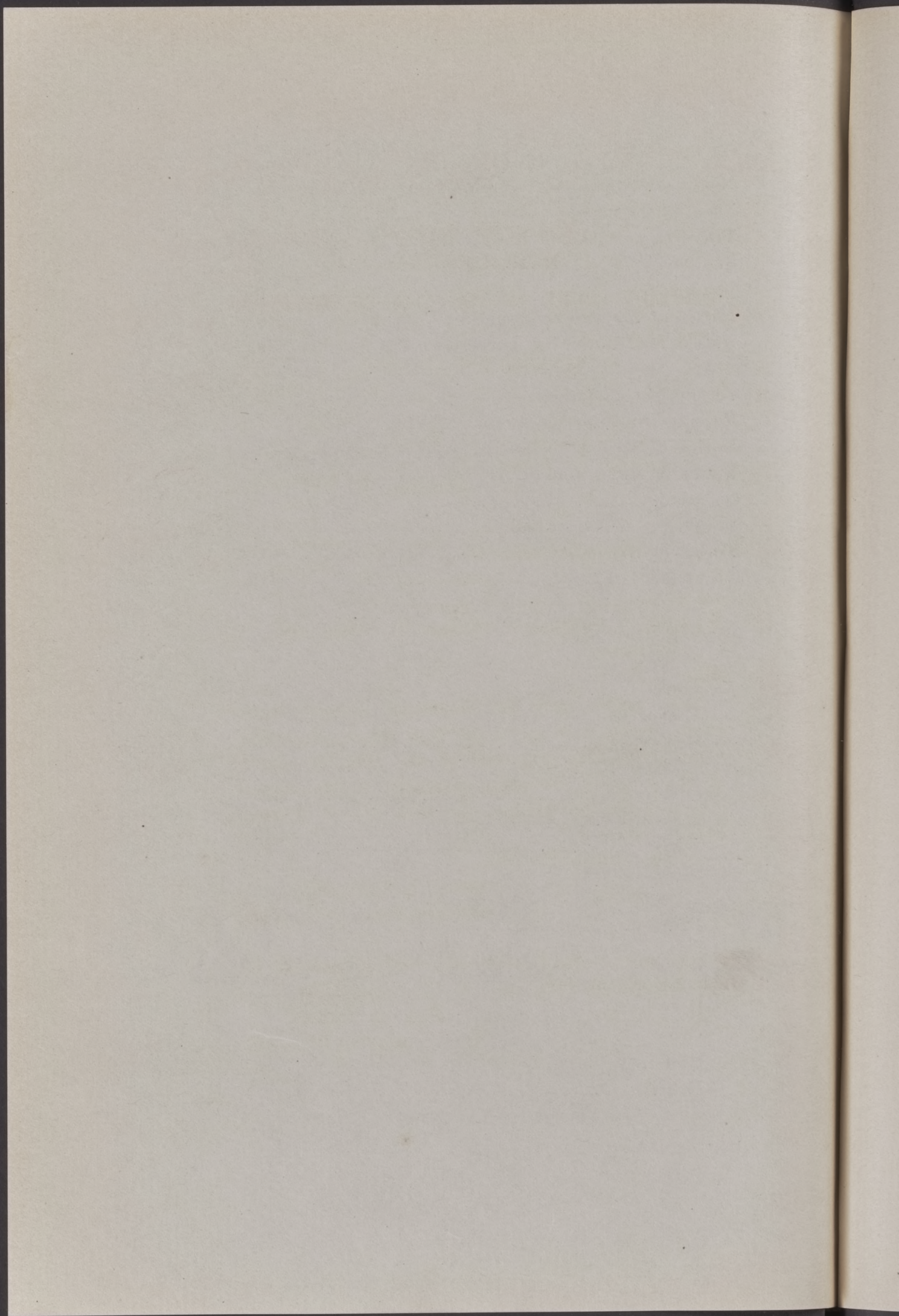
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Notice of Appeal.

(Filed March 31, 1921.)

DISTRICT COURT OF THE CITY OF HOBOKEN.

Before

J. RAYMOND TIFFANY, ESQ.,

Judge.

10

JOHN E. GALLIGAN,
Plaintiff,

vs.

GEORGE GONZALES,
Defendant.

Action at
Law.

Notice of
Appeal.

20

To John E. Galligan or William B. Stites, his
Attorney:

SIR:

Take notice that the defendant, George Gonzales, hereby appeals to the New Jersey Supreme Court from the judgment of the District Court of the City of Hoboken, rendered in the above stated action on Friday, the 18th day of March, 1921.

Dated, March 30, 1921.

30

PIERSON & SCHROEDER,
Attorneys for Defendant.

Service of the within notice is hereby acknowledged
this March 30, 1921.

WM. B. STITES,
Atty. of Plaintiff.

40

NEW JERSEY SUPREME COURT.

10 JOHN E. GALLIGAN,
 Plaintiff-Respondent,
 vs.
 GEORGE GONZALES,
 Defendant-Appellant.

On Appeal
 from Hobo-
 ken District
 Court.

State of Case.

Pierson & Schroeder, attorneys for appellant,
 84 Washington St., Hoboken, New Jersey.

William B. Stites, attorney for respondent, 77
 River St., Hoboken, New Jersey.

Transcript.

20 (Filed May 19, 1921.)
 DISTRICT COURT OF THE CITY OF HOBOKEN.

Before

J. RAYMOND TIFFANY, ESQ.,

Judge.

HARRY BENNETT,
 Clerk.

STATE OF NEW JERSEY, }
 Hudson County. } ss.:

No. 27094.

30 JOHN E. GALLIGAN,
 Plaintiff,
 vs.
 GEORGE GONZALES,
 Defendant.

Action at
 Law.
 \$500.00

Wm. B. Stites, Plff's. Atty.

Pierson & Schroeder, Deft's Atty.

40 A summons was issued, tested November 9, A.
 D., 1920. Returnable November 16, A. D., 1920,

Transcript of Judgment

at ten o'clock in the forenoon at the Court Room of said Court in the City of Hoboken. The Sergeant-at-arms returned the Summons as follows: viz: I served the within Summons and Demand on the within named defendant George Gonzales, this 10th day of November, A. D., 1920, by reading the same to him and leaving him a true copy thereof. John Solferino, Sergeant-at-arms, November 9, 1920. Plaintiff filed State of Demand & Demand for Trial by Jury. November 16, 1920, Court placed cause on the List of Causes for Trial by Jury for December 9, 1920, and by other adjournment this cause was continued to March 18, 1921. 10

March 16, 1921, Venire was issued to John Solferino, Sergeant-at-Arms. 20

March 18, 1921, The Sergeant-at-Arms returned the Venire as follows:

By virtue of the above Venire Facias I have duly summoned the following lawful Jurors to appear before the District Court of the City of Hoboken, at the time designated:

B. Braunstein, R. Cloud, F. Eichner, P. Grassman, M. Omly, Wm. J. Redding, Harry Meyer, Benjamin Leonard, Abe Bilus, John Rice & D. Besserglick, who were duly sworn.

Herschel J. Huddle was sworn as Stenographer. 30

Parties appeared and proceeded to Trial by Court and Jury.

On the part of the plaintiff the following witnesses were sworn and gave their evidence: John E. Galligan, John Crampton, Robert Lehnhoff and James Lance.

On the part of the defendant the following witness was sworn and gave his evidence: George Gonzales. 40

Transcript of Judgment

Whereupon it is, on this eighteenth day of March, A. D., 1921, by Jury considered and adjudged that said John E. Galligan, plaintiff, recover against said George Gonzales, defendant, the sum of Fifty dollars and — cents, damages, and Seventeen dollars and Eighty-five cents, cost
 10 of suit.

March 31, 1921, defendant filed Notice of Appeal and Bond on Appeal and Order extending time 15 days from date.

April 14, 1921, defendant filed Order extending time 15 days from date.

April 28, 1921, defendant filed Order extending time 15 days from date.

May 12, 1921, defendant filed Order extending
 20 time 15 days from date.

	Costs.	
	City	Al.
Summons, copy	1.50	
Service and Return		.60
Jury Fee	1.25	10.50
Trial Fee	1.50	
Atty. Fees 5 per cent.		2.50

I, HARRY BENNETT, Clerk of the District Court, of the City of Hoboken, J. Raymond Tiffany, Esq., Judge, do hereby certify that the foregoing is a
 30 true copy of the record of a judgment of said Court.

(Seal.)

IN WITNESS WHEREOF, I have hereto set my hand as Clerk of said Court and affixed the seal of said Court, this 18th day of May, one thousand nine hundred and Twenty-one.

HARRY BENNETT,
 Clerk.

Summons.

(Returned November 16, 1920.)

STATE OF NEW JERSEY, }
 Hudson County. } ss.:

To: Any constable of said County:
 or the Sergeant-at-Arms of the
 District Court of the City of
 Hoboken. 10

(Seal.) SUMMON: George Gonzales.
 to be and appear before the District Court of the
 City of Hoboken, at the City Hall, Washington
 Street, City of Hoboken, on the sixteenth day of
 November, A. D., 1920, at ten o'clock in the fore-
 noon, to answer unto

John E. Galligan
 in an action at law. 20

Damages Five Hundred Dollars.

Hereof fail not.

WITNESSS J. Raymond Tiffany,
 Esquire, Judge of said Court at
 Hoboken, aforesaid, the ninth day
 of November in the year One
 thousand nine hundred and
 twenty.

Harry Bennett,
 Clerk. 30

Wm. B. Stites,
 Attorney of Plaintiff.

Endorsed as follows:

I served the within summons on the within
 named defendant George Gonzales this 10th day of

November, A. D., 1920, by reading the same to him and leaving him a true copy thereof.

John Solferino,
Sergeant-at-Arms.

Returnable November 16, 1920, at 10 o'clock
A. M.

	Demand	\$500.
	Costs	2.10
10	Mileage	_____

Complaint.

(Filed November 9, 1920.)

HOBOKEN DISTRICT COURT.

	JOHN E. GALLIGAN, <i>Plaintiff,</i>	} Action at Law.
20	vs.	
	GEORGE GONZALES, <i>Defendant.</i>	

1. At the times hereinafter mentioned defendant was an inn-keeper and keeper of a hotel in the City of Hoboken, County of Hudson and State of New Jersey, known as the American Hotel.

2. Plaintiff has been a permanent guest at said hotel for the last four years and has paid
30 for his room by the week.

3. On or about October 12, 1920, the plaintiff was a guest of the defendant in said hotel, together with his baggage, wearing apparel and other personal property some of which consisted of a meerschauum pipe, fountain pen and suit of clothes worth \$500.00.

4. Defendant and his servants and agents so
40 carelessly and negligently conducted themselves

in regard to the same that, while the plaintiff was a guest at said hotel on said date, his room and closet therein was unlocked and entered and his wearing apparel, meerchaum pipe and fountain pen together with some neckties, were taken away from the room assigned to him by said defendant, by some person or persons to the plaintiff unknown, and thereby the same became wholly lost to the plaintiff.

10

Judgment will be claimed for the sum of Five Hundred Dollars, and costs of this suit.

WILLIAM B. STITES,
Attorney of Plaintiff.

Endorsed:

Filed

November 9, 1920.

Harry Bennett,
Clerk.

20

Testimony.

HOBOKEN DISTRICT COURT.

Before:

J. RAYMOND TIFFANY, ESQ.,

Judge.

JOHN E. GALLIGAN,
Plaintiff,

vs.

GEORGE GONZALES,
Defendant.

30

March 18, 1921.

Transcript of the testimony taken at the trial of the above entitled cause in the Hoboken District Court on the date above given, before the Court and Jury.

40

John E. Galligan—Direct.

APPEARANCES:

WILLIAM B. STITES, ESQ.,
for the Plaintiff.

PIERSON & SCHROEDER, ESQS.,
By JOHN D. PIERSON, ESQ.,
for the Defendant.

10

The Jury qualified and was sworn.
Herschel J. Huddle was sworn as stenographer.

JOHN E. GALLIGAN, duly sworn, testified as follows:

DIRECT EXAMINATION BY MR. STITES:

Q. Mr. Galligan, what business are you engaged
20 in? A. Railroad clerk.

Q. For what railroad? A. D. L. & W.

Q. Did you live at the American Hotel in Hoboken? A. Yes, sir.

Q. When did you first go there? A. Between four and five years—I think it was, in May, about five years ago.

Q. Do you know Mr. Gonzales, the defendant? A. Yes, sir.

Q. Is he the proprietor of that hotel? A. Yes, sir, as far as I know.

30 MR. STITES: I guess there is no dispute about that.

MR. PIERSON: There is no dispute; we admit that.

Q. During the month of October, 1920, were you a guest at the hotel? A. Yes, sir.

Q. What did you occupy there? A. Room number 7.

Q. And how did you pay your room rent? A.
40 In advance; weekly in advance.

John E. Galligan—Direct.

Q. Had you always paid it that way during the period that you were there? A. There was a couple of times that I didn't pay him in advance, but I paid him at the end of the week—paid up.

Q. Now, on October 12th, 1920, what time did you go to work that morning? A. The usual time, was around half-past seven.

10

Q. When you left your room, what did you do? A. The same as always I locked up my clothes.

Q. Where did you lock them? A. In the clothes press and carried the key with me; and locked the door and took the key down to the desk and gave it to the night clerk.

Q. What articles of clothing that you have that you locked up? A. There was a couple of piece suits there—one in particular I just bought; wore twice; that's the suit that was stolen; I gave seventy dollars for it, too, about two weeks before.

20

Q. You wore it twice? A. I wore it twice.

Q. What else did you have? A. They took a fountain pen that was in that suit of clothes; they took a pipe that I had been offered twenty-five dollars out of another suit in the closet.

Q. What kind of a pipe was it? A. Meerchaum.

Q. How long did you have it? A. About five years.

Q. What did you pay for it? A. I paid twelve dollars and a half, when new.

30

Q. They get better with age, don't they? A. I was offered twenty-five dollars several times for it.

Q. What kind of a fountain pen did you have? A. Waterman.

Q. How long had you had that? A. Just bought it about a week before.

Q. What did you pay for it? A. Five dollars.

40

Q. What time did you return to the hotel that

John E. Galligan—Direct.

evening? A. About ten o'clock; I had to work that night—worked all day and worked that night.

Q. Until ten? A. Well, I got back there about ten o'clock—in the neighborhood of ten, I wouldn't say exactly—ten or half-past.

Q. And when you reached the hotel, what did you do? A. Unlocked the door and went in.

Q. Was the door locked? A. Yes.

Q. What did you do then? A. As soon as I entered I went over to the clothes closet and found it open.

Q. The clothes closet was open? A. Yes, sir; and found the suit was gone.

Q. What suit was it? A. The new suit that I gave seventy dollars for.

Q. What else? A. That pipe, and there was a couple of pieces of money taken out of the pocket, also change that I had got for a couple of papers that I had gotten and brought home.

Q. Anything else? A. Well, these ties.

Q. How long had you had them? A. I had just bought the ties, I had them as samples in Scranton at a sale.

Q. What did you pay for them? A. Five dollars for the ties.

Q. When you missed these articles that you have testified to, did you do anything? A. I went outside and I found—I don't know his name; I believe he was a building painter—he was in the hall there, he had just come out of the toilet; he went to the head of the stairs and he called the proprietor's son and the night clerk, and they both refused to come up to see what was the matter.

Q. And did you state to them what had happened? A. Yes, sir.

Q. What kind of a lock did they have on the doors of the sleeping rooms? A. Ordinary lock.

John E. Galligan—Cross.

Q. What did you do? A. —a common lock, with a common key, mortised in the edge of the door.

CROSS EXAMINATION BY MR. PIERSON:

Q. This lock had a bolt so you could lock it on the inside, didn't it? A. On the inside; you can't on the outside. 10

Q. You locked it with a key on the outside? A. Yes.

Q. Was that key a Yale lock key? A. No, just an ordinary key.

Q. It had several tumblers, had it; several notches? A. I wouldn't say that. It was an ordinary key; ordinary padlock key.

Q. That key had a big plate, didn't it, so you could leave it at the desk? A. Yes, there was a piece of brass on the key, I think about six or seven inches long. 20

Q. Now, the closet key; they didn't have that? A. No, I carried that in my pocket.

Q. Had you been working all these five years at the Lackawanna? A. Yes forty years.

Q. Forty years at the Lackawanna? A. With the exception of eight or nine years.

Q. Do you work over in West Street? A. No; I work over in the Produce Exchange. 30

Q. So ever since you have been in the Produce Exchange you have been boarding with Mr. Gonzales? A. I came there—when I first came down I was sent to Mr. Gonzales; I was there the first day; and I was there the Saturday after the 12th of October—I believe the 12th was on Tuesday, I won't be positive—and my room rent was paid up until Saturday, and on Saturday I left.

Q. About four years and a half? A. Something in the neighborhood, because I had spoken to Mr. 40

John E. Galligan—Cross.

Gonzales to wait until Thursday—he was away—and called up the boy and the night clerk and they wouldn't come near me and paid no attention, I reported the matter to the police, and when Mr. Gonzales come back on Thursday, Thursday night, I went in and I seen him: I said, "George,
10 I suppose you know what happened to me?" "Yes," he said, "but not a damn thing doing with me".

Q. When you went there you boarded by the week? A. Yes, sir.

Q. You started there; you went there from the start? A. Yes, sir.

Q. You intended to live there permanently all of the time? A. I didn't live there permanently. My home is in Scranton, Pennsylvania, and I stay here five days a week; I go home on Saturday—every Saturday—and I come back on Sunday night or Monday morning. I remain down
20 all the week.

Q. I understand; you have been living there by the week for four and a half years? A. Something in the neighborhood, yes.

Q. And you lived there and made it what we might call your business home when you are down here? A. For a week.

Q. For the week; for a workday week? A. For a workday week.

30 Q. And then Saturday you would go to your home in Scranton? A. Yes.

Q. And you would come down Monday morning? A. Yes.

Q. So you stayed there ordinarily every day except Saturday and Sunday? A. Yes; and holidays if I didn't go home.

Q. You have free transportation? A. Yes, I've got an annual pass.

40 Q. Do you know whether there is any duplicate

John E. Galligan—Re-direct.

key to this closet? A. I don't know. He even rented my room when I was gone away.

Q. Had you gone away? A. No; I know when I went to my room I found my room rented when I came to transient when I was gone away.

Q. Well, now, this hotel keeps transient guests, don't it? A. I can't say. 10

Q. You have lived there four and a half years and you don't know? A. I wouldn't designate it as a hotel.

Q. Will you tell us what it is? A. A rooming house.

Q. A rooming house? It was your understanding all these years you lived there as a roomer in a rooming house? A. I was a roomer in a rooming house, yes, sir; the same as I am at the present time. 20

RE-DIRECT EXAMINATION BY MR. STITES:

Q. Mr. Galligan, what kind of a lock was on your closet? A. An ordinary lock; it had a key similar to that (indicating a key); that isn't the key, but it was similar to that, an ordinary key. It was mortised into the end of the door, the same as on the outside.

Q. Were these locks, during the period that you lived there, ever changed on the room? A. 30
Never. The only thing that was ever upon the door was a bolt on the inside, a little bolt, so you can lock it on the inside, and that was only done the last year I was there; I couldn't say just how long.

Q. This place of Mr. Gongales has a large sign, doesn't it? A. Yes.

Q. What's on the sign? A. I believe it says "Hotel." 40

John E. Galligan—Re-cross.

Q. American Hotel? A. American Hotel-Restaurant.

Q. How many rooms do they have there, do you know, about? A. Well, in the neighborhood of seventy, something like that, or seventy-five, I don't know.

10

RE-CROSS EXAMINATION BY MR. PIERSON:

Q. Just one question I omitted. Do you know whether the window was locked this day you went out? A. It was open when I went in.

Q. It was open when you went in? A. Yes; I locked—

Q. No, no; the window. A. The window? I took particular pains to fasten the catch in the morning when I went out.

20

Q. It was unlocked? A. It was unlocked, yes, sir, that catch was unlocked, and it was very poorly put on; it don't amount to much.

BY THE COURT:

Q. Do they have servants for the room? A. I couldn't say; they have several.

Q. Did you make your own bed? A. Oh, no.

Q. They were made by someone else? A. They had women, and they have had several women since I have been there.

30

BY MR. PIERSON:

Q. This window that you speak about, does it open out over the roof? A. Yes, over the kitchen; I believe it is I wouldn't be positive, or part of the dining room and the kitchen.

Q. There are other rooms also on that floor? A. Yes.

Q. Now, how do you know that you fastened that window that morning? A. How do I know?

40

Because I made a rule to fasten it in the morning

John E. Galligan—Re-direct.

and every night after the rheumatism had touched me I made a rule not to have it open.

Q. In the daytime didn't you go out frequently?

A. I never opened that window and went out; I never left it open.

Q. Isn't it possible to unlock that catch from the outside of the window? A. That I couldn't tell you. A burglar— 10

Q. —The door was locked, you are positive, and the window was unlocked when you came?

A. The closet was unlocked, and the window was locked, but the closet was unlocked.

Q. Was there anything else that was missing?

A. Of very little worth; I had a lot of stuff that I had accumulated—clothes I had, yes, sir, a week or two before that I had given away to the Blind Home, a couple of suits that I had no more use for. 20

Q. This meerschaum pipe; where was that? A. It was in one of the coat pockets.

Q. Was it in this suit that was taken? A. No, sir; in another suit.

Q. The fountain pen, where was the fountain pen? A. In the new suit.

Q. Was there a leather bag in the room? A. Yes.

Q. That was outside of the closet? A. No, sir.

Q. That was taken or not? A. No, sir. 30

RE-DIRECT EXAMINATION BY MR. STITES:

Q. Mr. Galligan, during the time you lived in this hotel, did they have what is known as a house detective there? A. Not as I know of; I never seen any.

Q. That's all.

John Crampton—Direct.
Charles Robert Lenhoff—Direct.

JOHN CRAMPTON, sworn on behalf of the plaintiff, testified as follows:

DIRECT EXAMINATION BY MR. STITES:

10 Q. Mr. Crampton, what is your business? A. Marine engineer.

Q. And where do you live? A. At the American Hotel.

Q. How long have you lived there? A. Oh, I should judge six years, five years, maybe a little longer.

Q. Did you live there during the period that Mr. Galligan lived there? A. Yes, sir.

20 Q. And prior to October, 1920, did you lose any of your valuables there at the hotel?

The Court, after asking counsel the purpose of the question, and hearing counsel's reply, excluded the question.

Exception to the ruling granted.

CHARLES ROBERT LENHOFF, sworn on behalf of plaintiff.

DIRECT EXAMINATION BY MR. STITES:

30 Q. Mr. Lenhoff, where do you live? A. American Hotel.

Q. How long have you lived there? A. Going on seven years.

Q. Did you live there during the period that Mr. Galligan lived there? A. Yes, sir.

Q. Prior to October, 1920, did you lose any of your goods or property in your room of this hotel?

MR. PIERSON: I object.

40 THE COURT: Objection sustained.
 Exception granted.

James A. Lanse—Direct.

JAMES A. LANSE, sworn, testified.

DIRECT EXAMINATION BY MR. STITES:

Q. Mr. Lanse, where do you live? A. American Hotel.

Q. How long have you lived there? A. Between five and six years. 10

Q. And did you live there during the period the plaintiff, Mr. Galligan, lived there? A. I did.

Q. And did you have your clothing, wearing apparel and valuables there? A. I did.

Q. In your room? A. Yes, sir.

Q. Prior to October, 1920, did you ever lose any of your valuables in your room at the hotel? 20

MR. PIERSON: I object.

Objection sustained.

Exception granted.

Q. Mr. Lanse, what kind of locks do they have on the doors of the hotel? Are the locks on all the rooms of the hotel the same? A. That I couldn't tell you.

Q. Are you familiar with Room 8? A. No, sir.

Q. Were you ever in the room that Mr. Galligan occupied?

BY THE COURT: 30

Q. Are you familiar with Room 7? A. No, sir.

BY MR. STITES:

Q. Were the locks on the hotel changed at any time, so far as you know, during the time that you have been there? A. That I couldn't say—

BY THE COURT:

Q. —if you know. A. —No; not that I know.

BY MR. STITES: 40

Q. What room do you occupy? A. The same as I always occupied, Room 29.

James A. Lanse—Cross.

CROSS EXAMINATION BY MR. PIERSON:

Q. You are still living there, Mr. Lanse? A. Yes, sir.

Q. And Mr. Lenhoff does also? A. Yes, sir.

Q. And Mr. Crampton? A. Yes, sir.

10 Q. All live there? A. Yes.

Q. That's all.

Counsel for plaintiff stated that he had other witnesses to prove that they had apparel missing from their rooms.

20 MR. PIERSON: If the Court please, I desire to make a motion for non-suit on the ground that the evidence in this case shows as a matter of law that the relation of lodger, or roomer, exists; and not that of the innkeeper and guest; and that being the case there must be shown negligence; and that there has been no proof of negligence, and no proof from which the jury could infer negligence in this case.

I might say further that the regulation of the key; that is customary in all hotels and boarding houses; it is a necessity; otherwise, where the house takes care of the rooms they must have duplicate keys or they couldn't do that.

30 I will urge the ground further on that, that particular Statute (Comm. Stat., p. , 3135, section 47), does not apply to this particular case because of the relation of roomer and proprietor.

THE COURT: Motion denied.

MR. PIERSON: You will allow me an exception?

THE COURT: Certainly.

George Gonzales—Direct.

THE DEFENSE.

GEORGE GONZALES, the defendant, sworn.

DIRECT EXAMINATION BY MR. PIERSON:

Q. Mr. Gonzales, you are defendant in this case? A. Yes, sir. 10

Q. And is it true that Mr. Galligan was there something like four and a half years when this occurred, as he stated? A. Yes.

Q. Do you have of your own knowledge any knowledge or information of it except what he has told you, whether there was any theft or not? A. No; I don't. In fact, I had my doubts about it; that's one of the reasons that it went as it did; that is one of my reasons only. 20

Q. You thought maybe it might be an easy way of trying to get some money in settlement? A. He wouldn't refuse in taking it wrongfully——

Q. I didn't want to go into that case. He has been there four and a half years? A. He has been there four or five years.

Q. And he came there by the week? A. Yes.

Q. And you kept him there during the war times? A. I kept him there at four dollars a week when I could get twelve——

MR. STITES: I move that be stricken out. 30

THE COURT: The latter part of that answer may be stricken out.

Q. What did he pay when he first went in? A. Three dollars.

Q. Did you raise him at all? A. I kept that right up to—I couldn't state the exact date—but the war was on—that is, they were going to Europe—and I was getting, as I say, ten dollars and a half a week and better for the same kind 40

George Gonzales—Direct.

of rooms; but on account of his being there the length of time he was I raised him one dollar, when my help and other expenses grew, and I kept him there at four dollars instead of getting the other money.

10 Q. In other words, you kept him there at a low rate, at a loss, because he was a permanent fixture there? A. I did, like some others.

Q. You looked upon him like the landlord might look upon the tenant?

MR. STITES: I object.

THE COURT: I will sustain the objection.

Q. And that is true of other tenants who had lived there in your house?

20 MR. STITES: I object to the question.

THE COURT: Objection sustained.

30 Q. Now, how was the room protected? A. The room was protected with one of the best locks that I could get, that the architect could procure for me; that is, Mr. Beyer was there, and one of the strictest orders I gave him in remodeling the building, was, that I wanted my keys so there could be no duplication, and there is no duplication. There are two houses with Dorin keys; I have got one house with the Yale keys—two houses with the Dorin keys; there is not one key will open the door of the other lock, and that was one of my strictest orders to Mr. Beyer.

Q. Well, now, how is the closet protected? A. By another ordinary lock—not the same; I wouldn't say that the closet lock was as good a lock as the others, but one of those locks don't open the other.

Q. Have you duplicate keys to the closet locks? A. No, sir.

40 Q. After you unlock the closet lock is the key

George Gonzales—Direct.

held by the person who has the room? A. Yes, sir. There may be other keys but I have never run across them they are only for the steadies; the transients don't use them.

Q. Your help has no way of getting into the closet? A. No. And the window has a bolt on, and always has had, and it also had a screen; and also one of the objections that I had was, that that window would be found open by the help, by my wife, and by others connected with the hotel. 10

Q. You have no knowledge as to whether it was open on this particular day or not? A. No; I was away at the time.

Q. Was his closet large enough for a person to put his ordinary belongings in there? A. Oh, yes.

Q. Do you also maintain a safe in the office in which he could place his valuables and that is guarded? A. Yes, sir. 20

Q. Now, you have two classes, have you? You have transients? A. Yes.

Q. People who come to you and stay two or three days, and as long as they want to? A. Yes.

Q. Now, is there any distinction between those and those who stay a long time, like some of these witnesses who have been on the stand, as to whether you give them a closet? A. No.

Q. Now, do you give everybody a closet key, or only to a certain class? A. A steady, if he wants a closet key, he gets it. Some of them don't even want a private key. 30

Q. But I mean the transient; do you give him a key? A. No, and there is once in a great while somebody will think his bags are safer by having a key to the closet, and he will ask for it and he gets it, but that is left in the door and we take that out again. 40

George Gonzales—Cross.

Q. Now, when did you first learn of this Mr. Galligan's claim that he had been robbed? A. It must have been a few days afterwards. I believe I was away; I was on a vacation at the time; it may have been two or three days, I don't just exactly remember how long.

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CROSS EXAMINATION BY MR. STITES:

Q. Mr. Gonzales, this establishment, which is operated and owned by you, is a hotel? A. Hotel and restaurant.

Q. And it is known as, Gonzales? A. Yes.

Q. It has been so known for a great many years, hasn't it? A. Yes, sir.

Q. And I understood you to say, or mention, something about the distinction of the locks, in one particular building? A. Two buildings have new locks and the building that Mr. Galligan was in had the new locks. There was no possible chance of any duplication at all.

20

Q. Well, now, will you just describe to us what kind of a lock was on Room 7; the one that Mr. Galligan occupied? A. That's the funny part of it; Mr. Galligan didn't occupy Room 7.

Q. Room 9? A. I couldn't say—Yale & Towne.

Q. Was it a Yale lock? A. Yes; Yale & Towne, I believe. We got the lock from Mr. Muzzi, down here. When I lose a key, now, I've got to go to Mr. Muzzi and wait three or four days until I get the key sent from the factory here. Every key will not fit the door.

30

Q. How long had that lock been on the door? A. Since the building was remodeled, and that was after my fire.

Q. When was that? A. That's about six years ago.

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Q. Do you know anything about the catch on

George Gonzales—Cross.

the window, or the room that Mr. Galligan occupied, being loose and broken? A. Nothing of the kind. If it was, we would have it fixed.

Q. Would you say it wasn't fixed? A. No, I might go further and say, if it was loose—I may not have fixed it on account of the reports coming in that the window was left open. I suppose he wanted air. 10

Q. Why would you bother? A. It wouldn't be necessary then. I'll promise you now if you will go down you will find it is not loose.

Q. Would some of the other guests go into his room? A. No.

Q. Were you ever in his room? A. In the beginning when he first come to the house; knowing he was only there five days—and that's one of the reasons, on the first floor it was only three dollars a week. There was a Saturday, when we knew he wouldn't be there, in case of a crowd, to accommodate people we did put people in his room, on account of the Government, you know; he had lost some neckties; I told him immediately when he came to find any there. I never meant to let the room, and it has never been let since. 20

Q. You did let it at times to other applicants while Mr. Galligan was occupying it from you? A. No.

Q. You didn't rent it at times? A. No; positively no. 30

Q. I understood you to say you just rented it? A. That's in the beginning.

Q. In the beginning; and other occasions when you rented the room to other guests were Mr. Galligan's clothes in there? A. No; if they were they would be locked up.

Q. Were any of the ties missed locked up? A. No; it was in the drawer—he can tell that story. 40

George Gonzales—Cross.

Q. Are you in the custom of renting out rooms which had been paid for by the week to other guests if the occupants of that room do not happen to be there? A. No; we do not let them out; but there is one instance I remember myself, in some way we let a room twice, when it became
 10 very late and all the rooms were occupied, two men come—it was a mistake of the clerk's. I remember that instance myself very well. Well, then, Mr. Galligan's room was let because we had no other place to put the men; but that has not happened since the loss of the neckties, and I paid him for the neckties.

Q. You tried to settle this suit, didn't you?

MR. PIERSON: I object.

20 A. I can answer that.

Q. Do you remember the conference we had in the Bank Building? A. Yes.

Q. You made it to benefit me, is that it? A. Exactly, more than anything else. I told you at the time I didn't think he had a case, and rather than to come here and take these men's time and mine I would settle with him and allow him something; yes.

Q. How much did you allow for the neckties? A. I don't remember; I think it was either one or
 30 two week's room rent; I don't remember the time, but I think it was room rent.

Q. What kind of screen was on the window? A. A wire screen.

Q. One that can be raised? A. Yes.

Q. The locks on the window are very ordinary locks? A. I wouldn't say they are ordinary; I didn't go to the great extreme of the lock as I did on the doors, when I insisted upon the very best locks on the doors. My main idea was to
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George Gonzales—Cross.

have on the doors so that one key would not duplicate the others.

Q. If a transient should have just come in for the night, Mr. Gonzales, and he wanted a key to his closet, you would furnish it, would you not, if he asked for it? A. No.

Q. Why? A. Well, if he was there only one night— 10

BY THE COURT:

Q. —If he was there and wanted to go out, would you give him a key? A. The trouble is, in going over and finding the key that would fit that particular lock, I wouldn't do it.

Q. Do you mean to say, if I came to your hotel as a guest, and say, Mr. Gonzales, I intend to remain here over night—if I feel I have some business to attend to—I have some valuables in my room, and during my absence I would like to lock them in the closet; would you give me a key? A. It is doubtful. I would first have to get the bundles, or bags, and I would have to go up to the room—and, usually, it's the last key that you would pick up. 20

Q. Wouldn't any key fit the closet? A. No.

Q. And it's an ordinary lock? A. I believe the lock, when you saw it, it would hardly—

Q. —I'm not asking you that; I am simply asking you what you know as to what it was? A. It's a Yale & Towne lock, if I remember right; it's a good lock, but not as good a lock as on the doors; it's a closet lock and as good as closet locks go. 30

Q. Mr. Gonzales, within a year's time prior to October 12th, 1920, hasn't there been considerable property of guests lost in rooms? A. No; there has not; there has not; there has been more than I wanted lost, yes; but I don't think it was con- 40

George Gonzales—Cross.

siderable when you come to figure the number of guests we have.

Q. A great many? A. Yes.

Q. Did he lose anything? A. He lost a suit of clothes.

Q. When was that? A. Well, it was only a——

10 Q. ——What occasioned that loss, do you know?

A. What occasioned that loss?

Q. Yes. A. No; I couldn't tell you. He may have left the door open.

Q. Not what he may have done; we are not interested in what he may have done. A. What I did after the Crampton loss, and I distinctly gave my instructions was, that hereafter no steady roomer would be paid for any losses they sustained through robbery.

20 Q. Why? A. For the simple reason that I was letting the room at low rates, it didn't give me the revenue enough to pay for losses such as I would sustain.

Q. Why didn't you raise the rent, Mr. Gonzales? A. Because these men had just exactly the same as he, and I didn't raise Mr. Galligan; they were with me for years and I let them go on; I didn't raise; only what I absolutely could let them have it for, because he was an old-timer. I did afterwards, and the understanding now is, 30 a man that has a steady room at the old rate and he didn't lock his doors I would not stand for it; and they understand that now, so much so that Mr. Lanse has insured his own goods; and I guess Mr. Crampton tried to insure——

Q. Did Mr. Lanse within the year prior to October, 1920, lose any of his property from the room in this hotel while a guest there?

MR. PIERSON: I object.

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THE COURT: Why?

George Gonzales—Cross.

MR. PIERSON: In the first place, it doesn't bear upon the negligence in this particular case at bar.

THE COURT: You may go into the matter on rebuttal.

MR. PIERSON: That would be saying that the testimony was competent. You cannot ask a man anything merely to see if he will deny, but it will have to be some question that is competent for some purpose of the trial. 10

THE COURT: That's competent for that purpose. I think it is admissible. I will admit it.

Q. (Last question repeated.) Did Mr. Lanse within the year prior to October, 1920, lose any of his property from the room in this hotel while he was a guest there? A. Yes, sir. 20

Q. What did he lose? A. Well, I couldn't tell you just exactly what he did lose; I don't know—some clothes; he claimed to have lost some clothes.

Q. And do you know Mr. Robert Lenhoff? A. Yes.

Q. He has also been a guest at your hotel for a long time? A. Yes, sir.

Q. Did he, prior to October, 1920, lose any property? 30

MR. PIERSON: I object to the examination.

THE COURT: I will allow him to answer it.

A. I don't think so; I didn't hear of his losing it.

Q. Now, after you learned of the loss of Mr. Lanse and Mr. Crampton of their property, what did you do as to the hotel itself? A. I don't quite understand. 40

George Gonzales—Re-direct.

Q. What precautions did you take after learning of their loss, as to any change in the hotel—any? A. There was none to take because I had already taken all the precautions as I knew.

10 Q. In other words, when you learned of the loss of Mr. Lanse and Mr. Crampton there wasn't any change made? A. Well, there is always a chance, I suppose, probably—that's the way I look at it—of going out and leaving the room door open; very often we find it that way.

Q. Would you say that Mr. Lanse and Mr. Crampton had left their doors open? A. I wouldn't be surprised; it wouldn't surprise me any.

Q. They did? A. I don't say they did—

20 THE COURT: We are not interested in anything that might have been done, or supposedly done. Let's get down to the facts in this case.

A. I don't quite get the question.

THE COURT: You have answered.

RE-DIRECT EXAMINATION BY MR. PIERSON:

Q. How did you know about these losses; they simply told you? A. They told me.

30 Q. You didn't have any knowledge that anything was lost or stolen, or how it was stolen? A. I have no knowledge that likely become evidential.

Q. Do you know of any precaution that you can reasonably take to protect your guests further than you have taken? A. No; I don't. I would only be too glad to take them.

40 Q. Have you any help that you found was taking anything? A. No. Well, on that I would like to say this; that only a few days before Mr. Galligan claimed that he had lost things, the girl

George Gonzales—Re-cross.

on his floor picked up a ten dollar bill in his room and she turned it over to my wife, who in turn brought it downstairs——

THE COURT: That may be stricken out. Let's get down to facts.

RE-CROSS EXAMINATION BY MR. STITES:

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Q. Did you make any change in the locks? A. No.

BY THE COURT:

Q. Have you a hotel detective? A. No.

BY MR. STITES:

Q. Did you ever have? A. Did I ever have? No; the clerks and my son, the nights they come there, they are the detectives; I don't know whether you call them detectives?

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Q. Clerks? A. I call them.

BY THE COURT:

Q. Are there any floor workers? A. There's a girl on each floor.

Q. What does she do? A. Takes care of the rooms.

Q. Did you discharge any of your help on or about October, 1920? A. Yes, sir; about that time; help was going pretty lively; yes.

30

Q. You did discharge some? A. I can't say, but I suppose I did.

Q. Do you remember any reasons that you had for discharging them? A. Nothing.

Q. Were there any that you suspected of being dishonest? A. I couldn't say about that.

Q. That's all.

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George Gonzales—Re-direct.

RE-DIRECT EXAMINATION BY MR. PIERSON:

Q. Did you lay off any help at that time; were you reducing your force? A. At that time they were reducing themselves, I didn't do it, they done the reducing. I was continually in trouble with help.

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MR. PIERSON: That's our case.

IN REBUTTAL.

JAMES LANSE, recalled.

DIRECT EXAMINATION BY MR. STITES:

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Q. Mr. Lanse, Mr. Gonzales has testified that during the occasion on which you lost property in the hotel that he was of the opinion that you had left your door open; did you?

MR. PIERSON: I object.

Objection sustained.

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MR. PIERSON: Now, if your Honor please, I ask for a direction of a verdict in favor of the defendant on the ground that the evidence shows plaintiff was a lodger at the hotel and that the relation of the parties was that of inn-keeper and lodger; not inn-keeper and guest—guest being a peculiar word to describe a transient or traveler, who is a common law guest—made the inn-keeper more highly responsible, where they had guests, and the inn-keeper is not liable for the loss of property of a lodger unless it has been shown he was negligent.

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And on the further ground that there must be shown that he didn't exercise care. There is no evidence in this case from which the jury can infer negligence.

And on the further ground that—even taking the statute that has been brought in this case—that the defendant was not negligent, that there is nothing to overcome that as matter of law.

THE COURT: The Court will deny your motion on each and every ground. You may have your exception on each and every ground. The question is one for the jury.

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Exception taken.

After summing up by the respective counsel, the Court charged the jury as follows:

Charge.

GENTLEMEN OF THE JURY: This is an action brought by John E. Galligan, against George Gonzales, in which the plaintiff says that the defendant was an inn-keeper and keeper of a hotel in this City, known as the American Hotel, and that he, the plaintiff, was a permanent guest at that hotel and had been for a period of the past four years, during which time he had paid for his room by the week; that on October 12, 1920, and while plaintiff was a guest of the defendant in his said hotel, and had therein his baggage, wearing apparel and other personal property (some of which consisted of a meerschaum pipe, a fountain pen, a suit of clothes), that the defendant, his servants and agents carelessly and negligently conducted themselves in regard to their duties towards him as such guest so that his room and a closet therein was unlocked and entered, and some of his wearing apparel, a meerschaum pipe and a fountain pen, together with some neckties were taken away by some person unknown to him, whereby the same were lost and he sustained

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Charge to the Jury.

monetary damage which he now seeks to have you assess to him as against the defendant.

In arriving at your conclusion in this case you will have to determine by reason of the contradictory evidence in the case, just whom you will believe, and in this regard let me say that you are
10 not to be influenced by statements or arguments of counsel for either party as to what the evidence was, or what this or that witness said, but you are to rely upon your own sense of the evidence as you recall its being adduced from the witnesses and this is also true of any statements that the Court may make, in commenting upon the testimony, in other words you are to rely entirely upon your recollection as to the statements made by
20 the various witnesses.

And I charge you that you are not to be influenced or prejudiced one way or the other, by the action of the court, in granting or denying certain motions made during the course of the trial as they were merely made in the course of the trial and have nothing whatever to do with your determination.

As I said a few minutes ago, some facts in this case are controverted, that is, witnesses have been produced by one side testifying that thus and so was the case, and witnesses on the other side testifying that those were not the facts, but that an
30 entirely different version is the truth. In determining who you are to believe, it is your privilege and duty to take into consideration the demeanor of the witnesses upon the stand, the manner in which they answered the question of counsel, their interest in the outcome of this case, if any they have, as well as the probabilities, under all the facts, of the truth of their story.

40 In this State there is a statute which has some

Charge to the Jury.

bearing upon the facts involved and I am going to read that portion of it to you that I feel is applicable. Section 4 of Paragraph 47 of An Act, known as "An Act for the Better Protection of Hotel, Inn and Boarding-house proprietors, etc", provides that, "No proprietor of any hotel, inn or boarding-house shall be liable in any sum to any guest of or traveler in such hotel, inn or boarding-house for the loss of wearing apparel, goods, merchandise or other personal property not mentioned, in the preceding section, where it shall appear that such loss occurred without the fault or negligence of such proprietor." 10

The personal property alleged to have been lost by the plaintiff is not such as is mentioned in the preceding section referred to in this paragraph. You see that the Legislature has provided this Statute for the limiting of the liability of a proprietor of the hotel as well as for the protection for the proprietors of boarding-houses and inns. You will recall that there is evidence in this case that the defendant conducted a hotel and I charge you to have in mind the Statute that I have just read to you concerning the liability of a proprietor of a hotel, and that it is necessary before you can find the defendant responsible to the plaintiff that you find that the relationship of the proprietor of a hotel, inn or boarding-house and guest existed between the parties hereto; that the loss of the plaintiff's goods, if you find that they were lost, was due to the fault or negligence of the defendant; that under this act the proprietor would not be responsible, unless such loss did occur by reason of his fault or negligence. 20 30

The questions you are to determine are, (1) was the plaintiff a guest of the defendant, (2) did the defendant conduct a hotel, inn or boarding- 40

Charge to the Jury.

house and I might say in this regard, it is admitted that he did conduct such hotel.

If you find that while the plaintiff was such a guest his wearing apparel, goods and merchandise which he has described were lost by him and that they were taken from his room or closet as testified and that such loss was sustained by reason of the fault or negligence of the proprietor, you will find for the plaintiff and if you find that the loss was sustained without the fault or negligence of the proprietor, then your verdict will be for the defendant.

In arriving at the question as to whether or not the defendant was negligent it may be of assistance to you to have me describe to you what would constitute negligence in respect to this case.

To find that the defendant was negligent you must find that he did not act as an ordinary reasonable prudent man would act under similar circumstances, having in mind that the testimony as to the plaintiff living at the hotel, what was done with the key, the condition of the room, the locks and the general situation there, as to whether or not the proprietor exercised such care in regard to the premises, etc., as a reasonably prudent man would exercise under the same circumstances. If you find that he did act as a reasonably prudent man should act and that this loss was sustained without fault of his, then your verdict would be for the defendant.

Returning to the question as to whether or not the plaintiff was a guest, I charge you that as a matter of law you must consider this man, within the meaning of the statute I have quoted, a guest at this hotel. He came there and paid his board by the week, he lived there, kept his clothes there, he surrendered his key to the proprietor when he

Charge to the Jury.

left the hotel, the proprietor took care of and kept his room and maintained it for him. Under all circumstances he was and you must consider him a guest.

The question then comes to a very narrow scope—did the plaintiff lose his property as claimed, if so, did such loss occur without the fault or negligence of the proprietor of the hotel. Once you have determined these questions your verdict will be accordingly.

As to the damages. If you find for the defendant, that is, that the defendant was without any fault or negligence, which caused the loss complained of, you will simply return your verdict for the defendant; if you find for the plaintiff, to wit: that the defendant was guilty of negligence which caused the loss complained of, then you will consider the amount of the damage to be rendered in favor of the plaintiff and against the defendant.

The plaintiff is entitled to receive, if you find in his behalf, such a sum of money as will compensate him for the loss he has sustained and no more. You are not to punish the defendant, but merely to compensate the plaintiff for the loss that he has sustained. He testified that he lost a suit of clothes; that he had only worn it twice; that it cost him \$70.00; now it was not worth \$70 at the time of the loss for it was worn and not new. There was also some talk of a fountain pen, as to what that was worth; your recollection must guide you. There was a pipe he had for four or five years and because it was a meerschäum, he claimed it had ripened and that he considered it worth \$25.00; there was some talk as to the loss of the neckties and possibly some other articles, you will have in mind the testimony of the plaintiff as to just what he testified he did lose and assess his damages if you arrive at that point

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according to the reasonable value thereof at the time of the loss.

I refuse to charge the fourth request of the plaintiff, except as charged.

10 MR. PIERSON: I except to that part of the Court's charge wherein he directed the jury that the plaintiff was a guest of the defendant as a matter of law.

The Court refused to charge the following request:

4. If the plaintiff roomed in the hotel of the defendant for a period of time of four years or more, paid his rent by the week, roomed there for his convenience in the exercise of his regularly established business and it had the effect of being
20 his home for the purpose of his steady employment during that period even though he spent his week ends with his family, then the relation of inn keeper and boarder exists in this case.

The other requests were withdrawn.

Certificate.

I, J. Raymond Tiffany, Judge of the District Court of the City of Hoboken, do hereby certify the foregoing transcript of proceedings and testimony of the case of John E. Galligan, plaintiff,
30 vs. George Gonzales, defendant, tried before me, sitting with a jury on Friday, March 18, 1921, to the New Jersey Supreme Court as the state of the case to be used on the hearing of the appeal of the said case to the New Jersey Supreme Court.

In witness whereof, I have hereunto set my hand this eighteenth day of May, one thousand nine hundred and twenty-one.

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J. RAYMOND TIFFANY,
Judge.

Reasons.

(Filed April 23, 1921.)

NEW JERSEY SUPREME COURT.

JOHN E. GALLIGAN,

*Plaintiff-Respondent,**vs.*

GEORGE GONZALES,

*Defendant-Appellant.*On Appeal **10**
from Hobo-
ken District
Court.

The defendant-appellant assigns the following reasons wherein the Court erred as a matter of law for the reversal of the judgment rendered in the Hoboken District Court in the above entitled cause: **20**

1. Because the Court refused to grant defendant's motion for a non-suit at the close of the plaintiff's case.

2. Because the Court refused at the close of the case to grant the defendant's motion for the direction of a verdict in favor of the defendant.

3. Because the Court charged the following: "I charge you as a matter of law that this man was a guest of this hotel. He came there and paid his board by the week; he lived there; he surrendered his key to the proprietor, and the proprietor took care of and maintained his room for him, and I charge you that he was a guest." **30**

4. Because the Court held that Section 47, page 3135 of the Compiled Statutes is applicable to this case.

5. Because the Court refused to charge the fourth request as requested.

Yours respectfully,

PIERSON & SCHROEDER, **40**

Attorneys for Defendant-Appellant.

Notice of Motion to dismiss Appeal.

Filed May 18, 1921.

NEW JERSEY SUPREME COURT.

HUDSON COUNTY.

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JOHN E. GALLIGAN,

*Plaintiff-Appellee,**vs.*

GEORGE GONZALES,

*Defendant-Appellant.*Action at
Law.
Notice.

To

PIERSON & SCHROEDER, ESQS.,
Attorneys for Appellant.

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PLEASE TAKE NOTICE that on June 7, 1921, at 10 o'clock in the forenoon, or as soon thereafter as counsel can be heard, at the State House, in Trenton, I shall make a motion before the Supreme Court to dismiss the appeal taken in the above entitled action, for the reason that said appeal has not been taken in accordance with law and the rules of this Court.

Dated, May 16, 1921.

Respectfully,

WM. B. STITES,

Attorney for Plaintiff-Appellee.

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Service was duly acknowledged.

This motion was regularly listed in Part III of the June Term of the New Jersey Supreme Court and was argued under the half hour rule, and the appeal was dismissed. See opinion post. The only ground on which the motion was based is, that the transcript and state of the case was not certified in time. The printed state of the case intended to be used on the argument of the appeal was used as the basis of the argument of

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the motion to dismiss the appeal.

Notice of Argument.

Filed May 26, 1921.

NEW JERSEY SUPREME COURT.

JOHN E. GALLIGAN,

*Plaintiff-Respondent,**vs.*

GEORGE GONZALES,

*Defendant-Appellant.*On Appeal
from
Hoboken
District
Court.**10**

SIR:

TAKE NOTICE that we shall move the argument of the above entitled appeal before the Supreme Court of New Jersey, to be held at the State House, in the City of Trenton, State of New Jersey, on the 1st Tuesday of June next, at 11 o'clock in the forenoon or as soon thereafter as the said court can attend to the same.

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Dated, May 21, 1921.

Yours respectfully,

PIERSON & SCHROEDER,
Attorneys of Defendant-Appellant.

To

WILLIAM B. STITES, Esq.,

Attorney of Plaintiff-Respondent.

Endorsed:

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Service was duly acknowledged.

The cause was listed as Case No. 425 in Part III of the June Term of the New Jersey Supreme Court and was marked "To be submitted on briefs" subject to the motion to dismiss.

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Opinion.

Filed, June 28, 1921.

NEW JERSEY SUPREME COURT.

JUNE TERM, 1921.

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JOHN E. GALLIGAN,

*Plaintiff-Respondent,**vs.*

GEORGE GONZALES,

*Defendant-Appellant.*On Appeal
from Dis-
trict Court.**20**Argued June 7, 1921. Decided , 1921.
BEFORE JUSTICES SWAYZE, BLACK & KATZEN-
BACH.

For Appellant, MESSRS. PIERSON & SCHROEDER.

For Respondent, MR. WILLIAM B. STITES.

Per Curiam:

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There is a motion in this case to dismiss the appeal on the ground that where there is a stenographer, the transcript shall be certified and transmitted by the party so appealing to the Clerk of the Supreme Court within fifteen days from the rendition of the Judgment: P. L. 1905, page 259. This was not done. The point is controlled by our decision in the case of *Berstecher v. Caruso*, 89 N. J. L., 426. The supplement P. L., 1916, page 385 to the District Court Act makes no change of the requirement of the Act P. L. 1905, page 259, in this respect.

The appeal is dismissed with costs.

Rule Dismissing Appeal.

Entered July 6, 1921.

NEW JERSEY SUPREME COURT.

JOHN E. GALLIGAN,

*Plaintiff-Respondent,**vs.*

GEORGE GONZALES,

*Defendant-Appellant.*On Ap-
peal from
District
Court.**10**

A motion to dismiss the appeal was heard before our Supreme Court, at the June Term, 1921, and the Court having heard the argument of counsel and considered the same, did, on June 26, 1921, Order that the appeal of George Gonzales, Defendant-Appellant, be dismissed with costs.

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Entered July 6, 1921.

On motion of

WILLIAM B. STITES,

Attorney for Plaintiff-Respondent.

**Notice of Appeal to the Court of Errors
and Appeals and Grounds Therefor.**

Filed July 27, 1921.

NEW JERSEY SUPREME COURT.**30**

JOHN E. GALLIGAN,

*Plaintiff-Respondent,**vs.*

GEORGE GONZALES,

*Defendant-Appellant.*On Appeal
from Dis-
trict Court.

DEAR SIR:

PLEASE TAKE NOTICE that George Gonzales, the defendant-appellant, appeals to the Court of

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Errors and Appeals of New Jersey from all of the order and judgment of the New Jersey Supreme Court entered in this cause dismissing the appeal taken thereto from the District Court of the City of Hoboken.

TAKE FURTHER NOTICE that the following are the grounds of said appeal.

10 1. Because the New Jersey Supreme Court dismissed the appeal taken to said Court from the District Court of the City of Hoboken in the above entitled cause and did not instead deny the motion made to dismiss the same.

2. Because the New Jersey Supreme Court dismissed the appeal referred to in the preceding paragraph and did not consider and decide the said appeal on its merits.

20 3. Because the New Jersey Supreme Court erred in holding that where there is a stenographer in the District Court the transcript should be certified and transmitted by the party appealing to the Clerk of the Supreme Court within fifteen days from the rendition of the judgment and that the supplement P. L., 1916, page 385 makes no change in this respect.

4. Because the New Jersey Supreme Court erred in holding that the said appeal was not taken and prosecuted according to law.

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Yours respectfully,

PIERSON & SCHROEDER,

Attorneys for Defendant-Appellant.

Dated, July 20, 1921.

To

WILLIAM B. STITES, Esq.,

Atty. for Plaintiff-Respondent.

Endorsed:

Service of the within notice is hereby acknowledged this 21st day of July, 1921.

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WM. B. STITES,

Attorney for Plaintiff-Respondent.

New Jersey Court of Errors and Appeals.

JOHN E. GALLIGAN,

Plaintiff-Respondent,

vs.

GEORGE GONZALES,

Defendant-Appellant.

On Appeal from
New Jersey
Supreme Court.

BRIEF FOR RESPONDENT.

Judgment was rendered in favor of the plaintiff, John E. Galligan, in the sum of \$50.00 on March 18, 1921, (State of the case, p. 4). Herschel J. Huddle was sworn as stenographer (State of the Case, p. 8), and the testimony given herein, made by said stenographer, was certified by the Judge of the Hoboken District Court as the State of the Case on May 18, 1921 (State of the Case, p. 36). The defendant owned and operated a hotel and restaurant (State of the Case, p. 22, 14) consisting of about seventy-five rooms (State of the Case, p. 14, L. 5).

POINT ONE.

THE APPEAL SHOULD BE DISMISSED FOR THE REASON THAT THE TESTIMONY TAKEN BY THE STENOGRAPHER AT THE TRIAL OF THIS CAUSE WAS NOT CERTIFIED TO BY THE JUDGE OF THE HOBOKEN DISTRICT COURT WITHIN FIFTEEN DAYS AFTER THE JUDGMENT, AS REQUIRED BY CHAPTER 138 OF THE LAWS OF 1905, p. 259.

The Supplement to the District Court Act, Laws of 1905, page 259, allowing the Judge of that Court to certify the transcript of the proceedings and testimony made by a stenographer at the trial of any cause as a state of the case to be used on the hearing of an appeal or certiorari, limits the time within which such certification may be done and transcript filed to a period of fifteen days after judgment, and such period may not be extended by the District Court.

ERVIN v. WOHLFERT, 76 N. J. L. 430.

The supplement of 1916 (Pamphlet Laws, p. 385) to the District Court Act, makes no change of the requirement of the Act of 1905 (2 Compiled Statutes, p. 1957) that, where there is a stenographer, the transcript shall be certified for appeal within fifteen days after judgment.

The Supplement of 1916 fixes no time when such transcript must be certified. This seems to leave the Act of 1905 still applicable as to this feature and that Act requires a transcript to be certified within fifteen days after judgment.

BERSTECHER v. CARUSO, 99 Atl. 410.

The State of the Case in this cause was not certified by the Judge until two months after judgment.

ment (State of Case, p. 36, line 28).

It is quite evident that the Legislature had no intention of changing the provision in the Act of 1905, p. 259, requiring the Judge of the District Court to certify the state of the case within fifteen days after rendition of judgment, as no mention is made in the supplement of 1916, p. 385, about this particular feature, which said supplement only permitted the state of the case to be filed with the Clerk of the Supreme Court on or before the opening day of the next term following the date of filing the appeal, and the reason for not making any change concerning the certification by the Judge is quite apparent, as a Judge of a District Court would not be expected to keep the evidence and testimony of a case in his memory for an unreasonable length of time, and it would be manifestly unfair to submit a state of the case to a Judge months after the trial, within which time many cases would undoubtedly come before the said Judge for trial, and it does not take any long lapse of time for evidence and testimony to pass out of the memory of a trial judge in a District Court, who has to try many cases within a month, and no one would expect a judge to retain the correctness of testimony in his memory for any great length of time.

Therefore, the Legislature very wisely left still effective and controlling the provision of certifying the state of the case by the Judge within fifteen days after rendering the judgment, within which time it could reasonably be expected that the Judge, when the proposed state of the case was presented to him, would be able to recall his charge to the jury and the correctness of the testimony appearing therein, and could with reasonable certainty determine whether the state of the case correctly and fairly stated the evidence and

testimony, for the purpose of an appeal.

The only purpose, as I construe the supplement of 1916, p. 385, was to afford attorneys more time for printing and serving copies of the state of the case and filing same with the Clerk of the Supreme Court, which is not of such great importance as the feature of procuring a correct and fair state of the case, certified to, within fifteen days, by the Trial Judge, while his charge to the jury and the testimony is fresh in his mind; otherwise attorneys could have two or three months before presenting the state of the case to a judge at a time when the facts and testimony had become stale, and no one would be able to recall the correctness of all features of the Court's charge, the evidence and testimony, and great opportunity would be given for mistakes and errors to get upon the record, and an unscrupulous stenographer, (if any there be), could wreck havoc with the evidence and testimony offered by the attorney not employing him or paying for his services.

If the appellant did not think it necessary for the judge of the District Court to certify the State of the Case before the opening day of the next term of the Supreme Court, why did he procure the orders of March 31st, April 14th., April 28th and May 12th, 1921, extending the time for such certification , (Case, p. 4, line 11).

POINT TWO.

PLAINTIFF PROVED THE LOSS OF HIS GOODS WHILE IN THE CLOSET OF HIS ROOM AT THE HOTEL OF THE DEFENDANT, WHICH MADE OUT A PRIMA FACIE CASE.

Different theories have been advanced as to the law governing the inn-keepers liability for the

goods of his guest, but whatever view has been adopted, it is agreed that, upon loss or injury to the goods being shown, the inn-keeper is *prima facie* liable, and the burden is on him for establishing such facts as will exonerate him.

22 CYC., 1082.

POINT THREE.

PLAINTIFF WAS A GUEST AT THE HOTEL OF THE DEFENDANT WITHIN THE MEANING OF THE STATUTE.

Plaintiff became a guest of the American Hotel about May, 1916 (State of the Case, p. 8), where he was a guest during the month of October, 1920, and where he had been such guest for about four years and one-half (State of the Case, p. 11).

Plaintiff did not live at the hotel permanently, his home being in Scranton, Pennsylvania, and he remained at the hotel five days a week and spent Saturday and Sunday at his home in Scranton, (State of the Case, p. 12, line 16).

A guest is defined as a traveller who lodges at an inn or tavern with the consent of the keeper.

STATE v. JOHNSON, 4 Washington 593; 30 Pac. 672.

The term "guest" includes a person who took a room in a hotel and took part of his meals there, although he only lodged and boarded there a part of the time.

DANIELSON v. ROBERSON, 26 W. V. 316 62 Am. Dec. 567.

A guest is a traveller or a wayfarer who comes

to an inn and lodges there and it makes no difference whether he stays a week, a month or longer, provided he retains his character as a traveller.

JOHNSON v. REYNOLDS, 3 Kansas, 257.

The guest comes to the inn without any bargain for time, and remains without one, and may go when he pleases, paying only for the actual entertainment which he receives, and the fact that one stayed a long time at an inn is not sufficient to make him a "boarder" and not a "guest."

SHORTCRAFT v. BAILEY, 25 Iowa, 553.

METZGER v. SCHNEBEL, 52 N. Y. Supp. 105.

Mere fixing of a price to be paid does not make a person a boarder rather than a guest, so as to render the house a boarding house rather than an inn.

In re: BREWSTER, 80 N. Y. Supp. 666.

Where a person rented a room which was cared for by the hotel people, but no particular time has been bargained for, though the price had been agreed upon in advance, he was a guest so far as the liability of the hotel keeper for loss of his effects was concerned.

METZGER v. SCHNABEL, 52 N. Y. Supp. 105.

A guest is a person who goes to an inn as a way-

farer or traveller, and is received by the inn-keeper into his inn, and neither the length of time that a person remains at an inn nor any agreement he may make as to the price of board by day or per week deprives him of his character as traveller and guest.

JAIE v. CARDINAL, 35 Wis., 118.

Anyone, away from home, receiving the accommodation of an inn, as a traveller is a guest and entitled to hold the inn-keeper responsible as such.

PULLMAN PALACE CAR CO. v. LOWE, 44 N. W. 226.

Anyone away from home, receiving accommodation at an inn as a traveller, is a guest.

WALLING v. POTTER, 35 Conn. 183.

If a person goes to an inn as a wayfarer and a traveller, and the innkeeper receives him as such he becomes the inn-keeper's guest, and the relation of landlord and guest is instantly established between them. Neither the length of time that a man remains at an inn nor any agreement he may make as to the price of board per day deprives him of his character as a traveller and a guest.

NORCROSS v. NORCROSS, 53 M. E. 163.

POINT FOUR.

THE QUESTION OF DEFENDANT'S NEGLIGENCE WAS FOR THE JURY.

The testimony shows that the sleeping rooms were equipped with ordinary locks (State of the

Case, p. 10, line 40), and that the closets in the rooms were equipped with ordinary locks and ordinary keys (State of the Case, p. 13, line 25), and that there was no hotel detective employed (State of the Case, p. 15, line 35; p. 29, line 15). The defendant testified that, on one occasion, he rented plaintiff's room without his permission, which was a mistake of the Clerk. (State of the Case, p. 24, line 1).

Plaintiff produced witnesses for the purpose of showing that, prior to the date of the loss of plaintiff's goods, other guests in the hotel of the defendant had lost their property, which was brought to the notice of the defendant, and that nothing had been done by the defendant to safeguard the property of his guests (State of the Case, pp. 16-17). This testimony was ruled out by the Court, but the defendant, on cross-examination, admitted that property of his guests was lost in their rooms prior to October 12, 1920, (State of the Case, p. 25, line 35; p. 27, line 20), and the defendant testified that he took no other precautions after learning of the losses of such guests, (State of the Case, p. 28, line 5).

The defendant was asked if any of his servants in the hotel were discharged for the reason of suspicion of being dishonest and to the question he replied that he could not say about that (State of the Case, p. 29, line 35).

IT IS RESPECTFULLY SUBMITTED that the appeal should be dismissed or that the judgment of the Supreme Court be affirmed with costs.

WM. B. STITES,

Attorney and Counsel for
Plaintiff-Respondent.

PIERSON & SCHROEDER,
84 Washington St.,
Hoboken, N. J.

New Jersey Court of Errors and Appeals.

JOHN E. GALLIGAN,

Plaintiff-Respondent,

vs.

GEORGE GONZALES,

Defendant-Appellant.

On Appeal
from New
Jersey Su-
preme
Court.

Brief in be-
half of De-
fendant-App-
pellant.

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BRIEF OF PIERSON & SCHROEDER IN BEHALF OF DEFENDANT- APPELLANT.

Statement of Case.

This case comes before the Court in the following manner:

Judgment was obtained by the plaintiff against the defendant in the Hoboken District Court on a trial before a jury. The testimony was taken by a stenographer appointed and sworn. Defendant appealed from this judgment to the New Jersey Supreme Court. The appeal was noticed for argument and was listed as Case No. 425 in Part III of the June Term of the New Jersey Supreme Court and was marked "To be submitted on briefs" subject to the motion to dismiss hereinafter referred to (Case p. 39, l. 32). Briefs on the merits were submitted by both sides subject to the motion to dismiss.

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The attorney for the plaintiff-respondent in the

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10 New Jersey Supreme Court gave notice of motion to dismiss the appeal taken to said Supreme Court "For the reason that said appeal has not been taken in accordance with law and the rules of this court." This motion was brought on for argument before the New Jersey Supreme Court, Part III, at the June term, and the appeal was dismissed on the grounds that the transcript of the stenographic proceedings in the District Court was not certified in the time required by law. The opinion of the Supreme Court will be found on page 40 of the State of the Case, and the rule dismissing the appeal on page 41. This appeal is from the judgment of the New Jersey Supreme Court dismissing the appeal in that court. The appeal, of course, was not decided on its merits.

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Grounds of Appeal.

The question brought up by this appeal is the correctness of the judgment of the Supreme Court and involves the construction of the statutes providing for the filing of the transcript of the testimony as the state of the case when a stenographer is appointed and sworn at the trial. See Grounds of Appeal, page 42 of case, where they are set forth as follows:

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"1. Because the New Jersey Supreme Court dismissed the appeal taken to said court from the District Court of the City of Hoboken in the above entitled cause and did not instead deny the motion made to dismiss the same.

"2. Because the New Jersey Supreme Court dismissed the appeal referred to in the preceding paragraph and did not consider and decide the said appeal on its merits.

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"3. Because the New Jersey Supreme Court erred in holding that where there is a stenographer in the District Court the transcript should be certified and transmitted by the party appealing to the Clerk of the Supreme

Court within fifteen days from the rendition of the judgment, and that the supplement P. L., 1916, page 385, makes no change in this respect.

"4. Because the New Jersey Supreme Court erred in holding that the said appeal was not taken and prosecuted according to law."

It is the contention of respondent, and held to be the law by the Supreme Court, that the transcript shall be certified within fifteen days after the rendition of the judgment. Appellant contends that there is no requirement of the statute that the transcript shall be certified in any particular time, provided it is so certified that it may be filed within the time required by law. 10

The only objection made below to the regularity of the appeal was, that the transcript of the proceedings and testimony was not certified in time. There is no question but that it was filed within time, if the time of certification is not fatal to the regularity of the appeal. Judgment was entered in the District Court March 18, 1921, notice of appeal was filed March 31, 1921 (p. 4 at top). The transcript was certified May 18, 1921 (p. 36 at bottom), and was filed May 19, 1921 (p. 2, l. 20). The whole case is ^{printed} ~~brought up~~ because the case as printed and served upon respondent in the Supreme Court was used on the argument of the motion to dismiss. 20

Point I of the brief of respondent in the Supreme Court is as follows: 30

"The appeal should be dismissed for the reason that the testimony taken by the stenographer at the trial of this cause was not certified to by the Judge of the Hoboken District Court within fifteen days after the judgment as required by Chapter 138 of the Laws of 1905, p. 259."

The foregoing is the only point raised in respondent's brief as to the irregularity of the prosecution 40

of the appeal, and was the only one argued. This point was discussed in the brief but was in no sense enlarged in scope, and all the other points of the brief were devoted entirely to the merits of the appeal, in case the motion to dismiss should be denied.

10 **Statement of the Law Involved.**

When the present District Court act was passed in 1898, a provision was made for a stenographic transcript to be used on appeals. This act provided for an appeal to the Circuit Court which was held unconstitutional.

Green vs. Heritage, 64 N. J. L., 567.

20 It was held in the case of *Boland vs. Kaveny*, 71 N. J. L., 488, by the Supreme Court that the provisions for a stenographer contained in Section 207 of the original act did not apply to appeals to the Supreme Court under the act of 1902 permitting such appeals.

30 This was decided in 1904, and in 1905, probably to cure this defect, the first act was passed applying to appeals to the Supreme Court, when a stenographer was appointed, *Pamphlet Laws*, 1905, page 259, 2 *Comp. Stat.*, page 1957, Sec. 13b, amended so as to include all District Courts; *Pamphlet Laws*, 1912, page 318, *First Sup. to Comp. Stat.*, page 492, Sec. 4, the language of the act in other particulars remaining the same. The act of 1905 is as follows:

40 “Whenever either party to any cause in any District Court, in any city of this state, makes application to the judge thereof for the appointment of a stenographer to transcribe the proceedings at the trial of the said cause and take down the testimony therein, it shall be the duty of the said judge to designate a stenographer to act as aforesaid in said case, at

the expense of the party so applying, which stenographer shall be duly sworn; and if an appeal shall be taken from, or a writ of certiorari allowed upon the judgment in said cause, the transcript of said proceedings and said testimony, made by said stenographer, shall be certified by said judge as the state of the case, to be used on the hearing of said appeal or certiorari, and shall be transmitted by the party so appealing or suing out said writ of certiorari to the clerk of the Supreme Court within fifteen days from the rendition of the judgment." 10

It was evidently found that fifteen days was too short a time in many cases to get the testimony transcribed and certified and filed. To remedy this a supplement was passed. *Pamphlet Laws*, 1916, page 385, in which the essential part to be considered is that if 20

"an appeal shall have been taken from the judgment in said action, and the transcript of said proceedings and said testimony, made by said stenographer, shall have been certified by the said judge as the state of the case to be used on the hearing of said appeal, the party so appealing shall file such state of the case with the clerk of the Supreme Court on or before the opening day of the next term of said Supreme Court following the date of filing said appeal."

This repeals inconsistent acts and parts of acts. 30

The question remains whether these enactments require the transcript and testimony to be certified within fifteen days, or whether they may be certified any time so as to be filed within the time required by the 1916 enactment, namely, on or before the opening day of the next term, which was done in the case at bar. The question has not been touched upon by any decision of this court.

This question was however touched upon by the 40

Supreme Court in the case of *Berstecher against Caruso*, 89 N. J. L., 426. In this case the state of the case was not filed before the opening day of the next term following the date of the appeal.

10 It was not, therefore, necessary to decide when the case had to be certified, and anything that was said on the subject is a mere dictum. There is a dictum, however, in that case which leads to the inference that the court found that the transcript must be certified within fifteen days. This is found in the following language:

“The supplement of 1916 fixes no time when such transcript must be certified. This seems to leave the act of 1905 *supra*, still applicable to that feature; and that act requires the transcript to be certified within fifteen days after judgment.”

20 An examination of the case will show that this is a dictum, first because it was not necessary for the decision of the case and second from the use of the words “it seems”.

30 It is respectfully submitted that the court had no reason to consider definitely the construction of the act of 1905 as amended in 1912, and the act of 1916 as to the time when the certificate had to be made, and that anything which was said upon the subject was not binding in any way upon the Supreme Court when the matter was directly raised and was the decisive point at issue. In the Caruso case the transcript was not filed in time. It could make no difference whether it had been certified in time or not.

It is respectfully submitted that the court below in the case at bar erred in relying upon the Caruso case as settling the matter, and that as a result the question has not been considered at any time upon its merits in the Supreme Court.

40 We think the court below erred in holding that

the act of 1916 required the transcript to be certified in fifteen days, except of course that the case must be certified before it can be filed.

This then brings the act of 1916 up for consideration in this court for the first time.

It is respectfully submitted that the act of 1905 did not require the certificate to be made within fifteen days, by any language of the act applicable to the time of the certification, but only required the testimony to be certified in time to be transmitted within the fifteen days. In other words, the phrase at the end of the first section of the statute "within fifteen days from the rendition of the judgment" modifies the verb "shall be transmitted" but does not in any sense modify the verb "shall be certified". This is a logical reading of the statute and conforms to grammatical construction. If the act of 1905 had read, "the transcript of said proceedings and said testimony, made by said stenographer, shall be certified by the said judge as the state of the case to be used on the hearing of said appeal or certiorari. Such state of the case shall be transmitted by the party so appealing or ruling out said writ of certiorari to the Clerk of the Supreme Court within fifteen days from the rendition of the judgment," the meaning would have been precisely the same. When the time for filing was extended the time for certifying would be automatically extended as it would only be necessary to get the certificate signed in time for filing

The following quotation and the cases there cited are abundant authority for this construction:

"By what is known as the doctrine of the 'last antecedent', relative and qualifying words, phrases and clauses are to be applied to the words or phrase immediately preceding, and are not to be construed as extending

to or including others more remote, unless such extension is clearly required by a consideration of the entire act."

36 Cyc., 1123.

10 The following, among other cases, specifically hold that qualifying clauses or phrases are to be applied to the modified words immediately preceding, and are not to be construed as extending to or including others more remote, unless positively required:

Summerman vs. Knowles, 33 N. J. L., 202;

Puget Sound Electric Ry. vs. Benson, 253 Fed., 710;

20 *Neb. St. R. Com. vs. Alfalfa Butter Co.*, 178 N. W., 766, 768; *Neb.* citing and quoting from *Summerman vs. Knowles*, 33 N. J. L., 205, and citing 36 Cyc., 1123;

State vs. Centennial Brewing Co., 179 Pal., 296, 298 (Mont) quoting the above paragraph from Cyc;

Wood vs. Baldwin, 10 N. Y. S., 195;

Cushing vs. Worrick, 75 Mass., 382;

Bishop vs. Victor Chem. Works, 209 Ill. App., 220;

Dagan vs. The State, 162 Wis., 353, 126 N. W., 153;

30 *City of Traverse City vs. Blair Twp.*, 190 Mich., 313, 157 N. W., 81;

People vs. Salter, 182 N. Y. S., 252, 191 App. Div., 723.

Most of the statutes referred to in the cases and the language of the courts construing them are too long to permit of convenient quotation, but some of the shorter ones are as follows:

40 "The charter of the City of Minneapolis authorizes the city council to license and regu-

late 'shows of all kinds, circuses, concerts, places of amusement and museums for which money is charged for entrance into the same.' It is *held*: That the clause 'for which money is charged for entrance into the same,' refers to 'museums' only, and does not qualify any other preceding word or subject."

State vs. Scaffer, 95 Minn., 311, 104 N. W., 139 (from syllabus by the court).

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"The rule of grammar, which is also a rule of law, is that a relative clause relates to the nearest antecedent that will make sense. The rule is as ancient as the language. Finch, in his discourse on law, (Edition 1759, bk 1, c. 3, p. 8), states it thus: 'Words of construction must be referred to the next antecedent, where the matter itself doth not hinder'; and cites cases as far back as Edward IV, 5. Com. Dig. marg., page 333, says the relative is referred to the last antecedent, and cites numerous cases. Broom in his Maxims, cites Noy, to the effect that 'relative words refer to the next antecedent', and says the 'last antecedent' is the last word that can be made an antecedent so as to make sense. Page 680."

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Wood vs. Baldwin, 10 N. Y. S., 195.

"The act * * * contains the following clause upon which this case turns: 'And also reserving to the town of Hull the privilege of the shores and of feeding all lands not comprehended within the aforementioned bonds.'

"The question is, 'whether the privilege of the shores' including of course the right to take seaweed, is limited to shores 'not comprehended within the aforementioned bounds.' And the court are of opinion that this privilege is not so limited" * * *

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"Such a clause is ordinarily to be confined to the last antecedent, unless there is something in the subject matter which requires a different construction."

Cushing vs. Worrick, 75 Mass., 382, 385, citing authorities.

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Construed in accordance with the above doctrine and in the light of the history of the legislation on the subject in a statute providing that "No person shall sell * * * liquor to any Indian or to any mixed-blood Indian, except civilized persons of Indian decent not members of any tribe" the clause "Except civilized persons of Indian decent not members of any tribe" modifies the phrase next preceding it—"to any mixed-blood Indian."

Dagan vs. The State, 162 Wis., 353, 354, citing the above from Cyc.

"The following vehicles in the order named, shall have the right of way in the use of all streets and public places, viz., apparatus of the fire department, police patrol wagons, ambulances, responding to emergency calls," etc.

Held that the words "responding to emergency calls," relate to ambulances alone.

Puget Sound Electric Ry. vs. Benson, 253 Fed., 710.

The doctrine of the above cases has been sanctioned by this court in the case of *Summerman vs. Knowles*, 33 N. J. L., 202, 205, referred to in some of the cases above cited. The court there said:

"The word (such) is descriptive, and is a relative word, and as such must be referred to the last antecedent, unless the meaning of the sentence would thereby be impaired. * * * This construction is not only in subordination to the maxim *ad proximum antecedens nisi impediatur sententia*, but is in perfect harmony with both the preceding sections of the act."

By the application of these rules, it is as absolutely certain as settled decisions can make any question certain, that the phrase, within fifteen

days of the rendition of the judgment, does not modify in any way the verb shall be certified. When then the time of filing the transcript was extended, the time within which certification might be made was automatically extended also.

The only question that can be raised as to this is whether any distinction can be made because the act of 1905 uses the words "shall be transmitted" while the act of 1916 uses the words "shall be filed". It is quite clear that these terms are used in the same sense. The Supreme Court so considered it as in the case of *Ervin vs. Wohlfert*, 76 N. J. L., 430, where this language is used referring to the act of 1905. 10

"It provides that the transcript of the proceedings and the testimony made by the stenographer shall be certified by the judge as the state of the case and filed in this court within fifteen days of the rendition of the judgment." 20

Naturally when the act was amended, the legislature used as the Supreme Court did, the word filed instead of transmitted, filed being the more usual and more precise word. Any other construction would render the Supplement of 1916 absolutely nugatory. If the law still requires the case to be certified and transmitted to the clerk within fifteen days as the court below held, it would be useless to extend the time within which it might be filed. As soon as it was transmitted to the clerk it would be his duty to file it. 30

On the other hand if any other significance was given to the words, transmitted to the clerk, there would be no provision in the act of 1905 which would require the transcript to be filed at any time. When therefore the supplement of 1912 extended the time within which the transcript might be filed, and repealed inconsistent acts, it made it possible to get the transcript certified any time provided it was certified so as to be filed in time. 40

Such a construction makes the statute entirely logical. What is the necessity of getting a transcript certified months before it is filed? Under the construction contended for by the respondent, if an appeal had been taken on the 8th day of June of this year, the transcript would have to be certified on or before the 23rd of June, and would not have to be filed until on or before the first Tuesday in November, over four months later. Suppose a certificate was not dated but made of course before filing, what harm would be done? And how would it be known? If it had to be certified and transmitted within fifteen days, say before June 23rd, in the illustration, and did not have to be filed until on or before the opening of the Supreme Court in November, the construction would be still more illogical. Such an inconsistency should be removed by the provision that inconsistent acts are repealed. It is quite apparent that the remedy which the legislature had in mind was to give appellants sufficient time to give busy stenographers opportunity to get up the minutes and to give the judge time to make a proper inspection of his statements on the questions of law involved. There was never any question of the ability to transmit or file the transcript when once certified. No construction should be placed upon the statute that will prevent the greatest possible measure of relief. The legislature passed the law with this difficulty in view, and must be presumed to have the well settled tenets of constructions in mind when enacting the supplement of 1916.

Had the Supplement of 1916 read precisely as the original act, except the words of the last phrase of the first section been changed to "on or before the opening day of the next term of said Supreme Court following the date of filing said appeal" instead of "within fifteen days from the rendition of

the judgment," the certification could then unquestionably have been made at any time on or before the opening day of the following term. It is our contention, however, that this would have not been because the last phrase modified the words, "shall be certified," which would have in that case been in the statute, but because the appellant has all the time necessary to get the case certified in time for filing. 10

It is necessary that there should be sent up with the state of case a certified transcript of the judgment record in the court below.

Katzin vs. Jenny, 74 N. J. L., 131.

It is manifest that this transcript under the act of 1905 would have to go up with the state of the case, certified by the judge and would have to be made within fifteen days after the rendition of the judgment in order to be transmitted within that time. There is nothing, however, in the act that says in words that this transcript of judgment shall be certified by the Clerk within fifteen days. It must simply be so done in order that the case may be transmitted within that time. The case to be certified by the judge had to be certified under the act of 1905 before the supplement, within fifteen days, for the same reason. There is no necessity for reading the act of 1905 so that the words "within fifteen days," etc., should modify the verb "shall be certified," and under the "last antecedent" rule the phrase would not so modify. This construction does away with most of the injustice of the law referred to in the case of *Berstecher vs. Caruso*, 89 N. J. L., 426, 428, relied on by the Supreme Court. If a judgment should be entered within twenty days of the opening of the term, the appellant, by postponing the giving of notice of appeal until after the opening of the term, would have plenty of time to get the 20 30 40

- case certified and filed under the construction claimed for by appellant. If the judgment was rendered more than twenty days, he would at least have the full twenty days to get both done, so that at the very worst his remedy would be greater than under the act of 1905. It also does away with inconsistency of putting appellant in
- 10 a position by which he would necessarily have to get his transcript certified before he need to notice his appeal. The appellant in *Berstecher vs. Caruso*, could have under the construction claimed by he appellant kept himself from his dilemma by postponing the giving of the notice of appeal. This construction also removes another inconsistency. Under the construction claimed by respondent if an appellant noticed his appeal less
- 20 than fifteen days before the next term, he would have to get his transcript certified and have to file it within less than fifteen days. Additional argument that the time of getting the transcript filed is regulated by the necessities of the case and not by any language particularly applicable to the certification.

This is a remedial statute and should be construed liberally.

Hoguet vs. Wallace, 28 N. J. L., 523;
Horner vs. Webster, 33 N. J. L., 387.

- 30 "If this case is not within the very letter of the act, it is clearly within its scope, spirit and intent.

"By an equitable construction, a case not within the letter of a statute is sometimes holden to be within its meaning because it is within the mischief for which a remedy is provided." (citing and referring to cases).

"This principle is peculiarly applicable to acts regulating the practice of law, which, as far as they are remedial in their character ought to be liberally construed."

- 40 *Hoguet v. Wallace*, *supra*.

In the face of such language as this, there cannot be any questions about the propriety of the ruling sought for by appellant.

“‘It is an established rule in the exposition of statutes’ says Chancellor Kent. ‘That the intention of the legislature is to be derived from a view of the whole, and of every part of a statute, taken and compared together. The real intention, when ascertained, will prevail over the liberal sense of terms. * * When words are not explicit, the intention is to be collected from the context, from the occasion and necessity of the law, from the mischief felt, and the remedy in view; and the intention is to be taken or presumed according to what is consonant to reason and good discretion’ Kent’s Com. 461-2.” 10

Morris Canal and Banking Co. vs. Central R. R. Co., 16 N. J. E., 419, 428. 20

It is respectfully submitted that the only requirement made as to the time of making the certificate in either the original act of 1905 or the supplement of 1916, is, that it be certified in time to be filed as required by the act then in force, and that there is no requirement that it be transmitted to the clerk previous to the required time for filing.

It is respectfully submitted that the judgment dismissing the appeal should be reversed, that the record may be transmitted to the Supreme Court and the appeal heard on its merits. 30

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