INDEX.

TESTIMONY.

EXHIBITS.

Summons issued: August 20, 1932.

ESSEX COUNTY CIRCUIT COURT.

HERBERT L. HACKNEY,
Plaintiff,
vs.
MUTUAL THEATRE COMPANY, a corporation, LEDIRK AMUSEMENT CO. INC., a corporation, KATHERINE MCCLURG, individually and trading as MCCLURG'S GIFT SHOP,
Defendants.

Action at Law.
COMPLAINT.

The plaintiff, Herbert L. Hackney, says that:

FIRST COUNT.

1. On or about April 17, 1932, the defendant, Mutual Theatre Company, a corporation, was the owner of a theatre building, sidewalk, entrances, exits, equipment, and other buildings and premises located at and known and designated as 2-4 Main Street, in the City of Orange, County of Essex, and State of New Jersey.

2. That at said time, the said defendant, Mutual Theatre Company, a corporation, was in control of the said building and other premises aforesaid, including the theatre building, sidewalk, entrances, exits, and other parts of said premises.

3. That in and upon said premises and upon the aforesaid sidewalk, there was constructed, in-

serted, erected and maintained in the front part of said premises a cellar entrance, with iron doors, so constructed as to encroach upon the public street, known as Main Street, which is a public street in the City of Orange, aforesaid.

4. On or about December 22, 1930, the defendant, Mutual Theatre Company, a corporation, did enter into an Agreement of Lease with the defendant, Ledirk Amusement Co. Inc., a corporation, whereby the defendant, Mutual Theatre Company, a corporation, did demise, lease, rent and hire to the defendant, Ledirk Amusement Co. Inc., a corporation, the aforesaid theatre building, sidewalk, entrances, exits, equipment, cellar-way, cellar-door, and cellar entrance in the premises aforesaid, for a period of twenty-one (21) years.

5. On or about April 17, 1932, the plaintiff was invited by the defendant, Mutual Theatre Company, a corporation, its agents, servants and/or employees, to come upon, enter and walk in, over and upon the aforesaid premises, theatre, entrances, exits, sidewalk, and cellar doors, and on said date, the said plaintiff was lawfully in and upon the premises of the defendant.

6. It was the duty of the defendant, Mutual Theatre Company, a corporation, by its agent, servants and/or employees, to so maintain the aforesaid theatre building, entrances, exits, sidewalks, and cellar doors encroaching upon the public street, in a safe and harmless condition so that the aforesaid premises, building, theatre, entrances, exits, sidewalks, and/or cellar-doors and cellar-ways encroaching as aforesaid, did not become dangerous and injurious to the health, safety

and comfort of persons invited upon the premises of the defendant, and persons lawfully in and upon the premises of the defendant, and particularly the plaintiff herein.

7. Notwithstanding such duty on the part of the defendant, Mutual Theatre Company, a corporation, the sidewalk, entrances, exits, cellar-doors and cellar-ways were negligently permitted to become and did exist in a condition injurious and harmful to the health, safety and comfort of the persons invited upon the premises of the defendant, and persons lawfully in and upon the said premises, and particularly the plaintiff herein; and at the aforesaid time and place, the aforesaid cellar-doors encroaching upon the public street as aforesaid, were negligently, carelessly and recklessly permitted to remain open, exposing a large, deep, unprotected cavity, and/or orifice in the aforesaid sidewalk, entrance, and exit and premises of the defendant.

8. By reason of the aforesaid negligence, carelessness, recklessness and violation of the duties in their behalf, the plaintiff, while lawfully upon the premises of the defendant, and while crossing and walking in, over and upon the said public sidewalk, entrance, exits of the premises of the defendant, and cellar-doors encroaching upon the public street as aforesaid, was caused to fall and was precipitated into the aforesaid cavity and orifice, cellar-entrance and cellar-way, and fell down the steps leading into the cellar of the aforesaid premises of the defendant, and fell in such a manner that his head struck one of the portions of the cellar-way, which was left open, throwing the plaintiff bodily into the opening aforesaid.

9. As a further result of said aforesaid, negligence, carelessness and violation of duties and recklessness of the defendant, the plaintiff was severely injured and hurt, sustaining severe bruises, cuts, wounds and abrasions in and upon his body, head, face, arms, cheeks, shoulders, and sustained cuts and lacerations of his shoulders, lips, legs and knees, and a number of his teeth were broken off, and he sustained a concussion of the brain, and injury to his spine.

10. As a further result of the negligence of the defendant as aforesaid, the plaintiff became nervous and disordered, and was permanently injured, and was confined in the hospital, and was further confined to his bed, and was further compelled to receive medical attention, and has expended great sums of money, and in the future will be compelled to expend large sums of money in attempting to cure himself of the injuries as aforesaid.

11. As a result of said negligence as aforesaid, the said plaintiff was unable to continue his occupation and duties, and became permanently disabled and disfigured, and has lost and in the future will lose great sums of money by virtue of his inability to continue said employment.

By reason of the aforesaid, plaintiff demands as damages of the defendant, Mutual Theatre Company, a corporation, the sum of Fifty Thousand ($50,000.00) Dollars, on the first count.

SECOND COUNT.

1. On or about April 17, 1932, the defendant, Mutual Theatre Company, a corporation, was the owner of a theatre building, sidewalk, entrance,

exits, equipment, and other buildings and premises located at and known and designated as 2-4 Main Street, in the City of Orange, County of Essex, and State of New Jersey.

2. That at said time, the said defendant, Ledirk Amusement Co. Inc., a corporation, was in control of the said building and other premises aforesaid, including the theatre building, sidewalk, entrances, exits, and other parts of said premises.

3. That in and upon said premises and upon the aforesaid sidewalk, there was constructed, inserted, erected and maintained in the front part of said premises a cellar entrance, with iron doors, so constructed as to encroach upon the public street, known as Main Street, which is a public street in the City of Orange, aforesaid.

4. On or about December 22, 1930, the defendant, Mutual Theatre Company, a corporation, did enter into an Agreement of Lease with the defendant, Ledirk Amusement Co. Inc., a corporation, whereby the defendant, Mutual Theatre Company, a corporation, did demise, lease, rent and hire to the defendant, Ledirk Amusement Co. Inc., a corporation, the aforesaid theatre building, sidewalk, entrance, exits, equipment, cellar-way, cellar-door, and cellar entrance in the premises aforesaid, for a period of twenty-one years.

5. On or about April 17, 1932, the plaintiff was invited by the defendant, Ledirk Amusement Co. Inc., its agents, servants and/or employees, to come upon, enter and walk in, over and upon the aforesaid premises, theatre, entrances, exits, sidewalk and cellar doors, and on said date, the said

plaintiff was lawfully in and upon the premises of the defendant.

6. It was the duty of the defendant, Ledirk Amusement Co. Inc., a corporation, by its agent, servants and/or employees, to so maintain the aforesaid theatre building, entrances, exits, sidewalks, and cellar doors encroaching upon the public street, in a safe and harmless condition so that the aforesaid premises, building, theatre, entrances, exits, sidewalks, and/or cellar doors and cellar ways encroaching as aforesaid, did not become dangerous and injurious to the health, safety and comfort of persons invited upon the premises of the defendant, and persons lawfully in and upon the premises of the defendant, and particularly the plaintiff herein.

7. Notwithstanding the duty on the part of the defendant, Ledirk Amusement Co. Inc., a corporation, the sidewalk, entrances, exits, cellar doors and cellar ways were negligently permitted to become and did exist in a condition injurious and harmful to the health, safety and comfort of the persons invited upon the premises of the defendant, and persons lawfully in and upon the said premises, and particularly the plaintiff herein; and at the aforesaid time and place, the aforesaid cellar doors encroaching upon the public street as aforesaid, were negligently, carelessly and recklessly permitted to remain open, exposing a large, deep, unprotected cavity and/or orifice in the aforesaid sidewalk, entrance, and exit and premises of the defendant.

8. Plaintiff repeats the allegations contained in paragraphs 8, 9, 10 and 11 of the first count, and makes the said paragraphs 8, 9, 10 and 11 of

the first count, a part of this count, as if set forth herein at length.

By reason of the aforesaid, plaintiff demands as damages of the defendant, Ledirk Amusement Co. Inc., a corporation, the sum of Fifty Thousand ($50,000.00) Dollars, on the second count.

THIRD COUNT.

1. On or about April 17, 1932, the defendant, Mutual Theatre Company, a corporation, was the owner of a theatre building, sidewalk, entrances, exits, equipment, and other buildings and premises located at and known and designated as 2-4 Main Street, in the City of Orange, County of Essex, and State of New Jersey.

2. The defendant, Katherine McClurg, individually and trading as McClurg's Gift Shop, was a tenant of one of the stores in the premises aforesaid, and as such tenant, said defendant was in control of the said store premises, and the sidewalk, entrances, exits, cellar ways and cellar doors in front of said store premises.

3. That in and upon said premises and upon the aforesaid sidewalk, there was constructed, inserted, erected and maintained in the front part of the said premises a cellar entrance, with iron doors, so constructed as to encroach upon the public street, known as Main Street, which is a public street in the City of Orange, aforesaid.

4. On or about said date, the said plaintiff was lawfully in and upon the premises of the defendant, and the cellar ways, exits, entrances and sidewalk in front of the premises occupied by the said defendant.

5. It was the duty of the defendant, Katherine McClurg, individually and trading as McClurg's Gift Shop, to so maintain the aforesaid building, entrances, exits, sidewalks and cellar doors encroaching upon the public street, in a safe and harmless condition so that the aforesaid premises, building, theatre, entrances, exits, sidewalks, and/or cellar doors and cellar ways encroaching as aforesaid, did not become dangerous and injurious to the health, safety and comfort of persons invited upon the premises of the defendant, and persons lawfully in and upon the premises of the defendant, and particularly the plaintiff herein.

6. Notwithstanding such duty on the part of the defendant, Katherine McClurg, individually and trading as McClurg's Gift Shop, the sidewalk, entrances, exits, cellar doors and cellar ways were negligently permitted to become and did exist in a condition injurious and harmful to the health, safety and comfort of the persons invited upon the premises of the defendant, and persons lawfully in and upon the premises of the said premises, and particularly the plaintiff herein; and at the aforesaid time and place, the aforesaid cellar doors encroaching upon the public street as aforesaid, were negligently, carelessly and recklessly permitted to remain open, exposing a large, deep, unprotected cavity, and/or orifice in the aforesaid sidewalk, entrance and exit and premises of the defendant.

7. Plaintiff repeats the allegations contained in paragraphs 8, 9, 10 and 11 of the first count, and makes the said paragraphs 8, 9, 10 and 11 of the first count a part of this count, as if set forth herein at length.

By reason of the aforesaid, plaintiff demands as damages of the defendant, Katherine McClurg, individually and trading as McClurg's Gift Shop, the sum of Fifty Thousand ($50,000.00) Dollars on the third count.

FOURTH COUNT.

1. On or about April 17, 1932, the defendant, Mutual Theatre Company, a corporation, was the owner of a theatre building, sidewalk, entrances, exits, equipment, and other buildings and premises located at and known and designated as 2-4 Main Street, in the City of Orange, County of Essex, and State of New Jersey.

2. That at said time, the said defendant, Mutual Theatre Company, a corporation, was in control of the said building and other premises aforesaid, including the theatre, building, sidewalk, entrances, exits and other parts of said premises.

3. That in and upon said premises and upon the aforesaid sidewalk, there was constructed, inserted, erected and maintained in the front part of said premises a cellar way and entrance, with iron doors, so constructed as to encroach upon the public street, known as Main Street, which is a public street in the City of Orange, aforesaid.

4. On or about December 22, 1930, the defendant, Mutual Theatre Company, a corporation, did enter into an agreement of lease with the defendant, Ledirk Amusement Co. Inc., a corporation, whereby the defendant, Mutual Theatre Company, a corporation, did demise, lease, rent and hire to the defendant, Ledirk Amusement Co., Inc., a corporation, the aforesaid theatre building, sidewalk, entrances, exits, equipment, cellar way, cellar door

and cellar entrance in the premises aforesaid, for a period of twenty-one (21) years.

5. The defendant, Katherine McClurg, individually and trading as McClurg's Gift Shop, was a tenant of one of the stores in the premises aforesaid, and as such tenant, said defendant together with the other defendants, was in control of the said store premises, and the sidewalk, entrances, exits, cellar ways and cellar doors in front of said store premises.

6. On or about April 17, 1932, the plaintiff was invited by the defendants, their agents, servants or employees, to come upon, enter and walk in, over and upon the aforesaid premises, theatre, entrances, exits, sidewalk, and cellar doors, and on said date, the said plaintiff was lawfully in and upon the premises of the defendants.

7. It was the duty of the defendants, Mutual Theatre Company, a corporation, Ledirk Amusement Co. Inc., a corporation, and Katherine McClurg, individually and trading as McClurg's Gift Shop, their agents, servants, or employees, and/or either of them, to so maintain the aforesaid theatre building, entrances, exits, sidewalks, and cellar doors encroaching upon the public street, in a safe and harmless condition so that the aforesaid premises, building, theatre, entrances, exits, sidewalks, and/or cellar doors and cellar ways encroaching as aforesaid, did not become dangerous and injurious to the health, safety and comfort of persons invited upon the premises of the defendants, and persons lawfully in and upon the premises of the defendants, and particularly the plaintiff herein.

8. Notwithstanding such duty on the part of the defendants, Mutual Theatre Company, a corporation, Ledirk Amusement Co. Inc., a corporation, and Katherine McClurg, individually and trading as McClurg's Gift Shop, their agents, servants or employees, and/or either of them, the sidewalk, entrances, exits, cellar doors and cellar ways were negligently permitted to become and did exist in a condition injurious and harmful to the health, safety and comfort of persons invited upon the premises of the defendants, and persons lawfully in and upon the said premises, and particularly the plaintiff herein; and at the aforesaid time and place, the aforesaid cellar doors encroaching upon the public street as aforesaid, were negligently, carelessly and recklessly permitted to remain open, exposing a large, deep, unprotected cavity, and/or orifice in the aforesaid sidewalk, entrance and exit and premises of the defendant.

9. Plaintiff repeats the allegations contained in paragraphs 8, 9, 10 and 11 of the first count, and makes the said paragraphs 8, 9, 10 and 11 of the first count, a part of this count, as if set forth herein at length.

By reason of the aforesaid, plaintiff demands as damages of the defendants, Mutual Theatre Company, a corporation, Ledirk Amusement Co., Inc., a corporation, and Katherine McClurg, individually and trading as McClurg's Gift Shop, and/or either, each or all of them, the sum of Fifty Thousand ($50,000.00) Dollars, on the fourth count.

FIFTH COUNT.

1. Plaintiff repeats the allegations of paragraphs 1, 2, 3, 4 and 5 of the first count, and makes

the same paragraphs 1, 2, 3, 4 and 5 of this count, as if set forth herein at length.

6. By virtue of the nuisance so created and maintained on the part of the defendant, Mutual Theatre Company, a corporation, its agent, servant and/or employee, the plaintiff while lawfully using the aforesaid premises, exits, entrances, public street as aforesaid, was caused to fall and was precipitated into the aforesaid cavity and/or orifice, and fell down the steps leading into the cellar of the aforesaid premises.

7. As a further result of the nuisance erected and maintained, the plaintiff was severely injured and hurt, sustaining severe bruises, cuts, wounds and abrasions in and upon his body, head, face, arms, cheeks, shoulders and sustained cuts and lacerations of his shoulders, lips, legs and knees, and a number of his teeth were broken off, and he sustained a concussion of the brain, and injury to his spine.

8. As a further result of the nuisance erected and maintained, the plaintiff became nervous and disordered, and was permanently injured, and was confined in the hospital, and was further confined to his bed, and was further compelled to receive medical attention, and has expended great sums of money, and in the future will be compelled to expend large sums of money in attempting to cure himself of the injuries as aforesaid.

9. As a further result of the nuisance erected and maintained, the said plaintiff was unable to continue his occupation and duties, and became permanently disabled and disfigured, and has lost

and in the future will lose great sums of money by virtue of his inability to continue said employment.

By reason of the aforesaid, plaintiff demands as damages of the defendant, Mutual Theatre Company, a corporation, the sum of Fifty Thousand ($50,000.00) Dollars, on the fifth count.

SIXTH COUNT.

1. Plaintiff repeats the allegations of paragraphs 1, 2, 3, 4 and 5 of the second count, and makes the same paragraphs 1, 2, 3, 4 and 5 of this count, as if set forth herein at length.

6. By virtue of the nuisance so created and maintained on the part of the defendant, Ledirk Amusement Co. Inc., a corporation, its agent, servant and/or employee, the plaintiff while lawfully using the aforesaid premises, exits, entrances, public sidewalks, and cellar doors, encroaching upon the public street as aforesaid, was caused to fall and was precipitated into the aforesaid cavity and/or orifice, and fell down the steps leading into the cellar of the aforesaid premises.

7. Plaintiff repeats the allegations of paragraphs 7, 8 and 9 of the fifth count, and makes the same paragraphs 7, 8 and 9 of this count, as if set forth herein at length.

By reason of the aforesaid, plaintiff demands as damages of the defendant, Ledirk Amusement Co. Inc., a corporation, the sum of Fifty Thousand ($50,000.00) Dollars, on the sixth count.

SEVENTH COUNT.

1. Plaintiff repeats the allegations of paragraphs 1, 2, 3 and 4 of the third count, and makes

the same paragraphs 1, 2, 3 and 4 as if set forth herein at length.

5. By virtue of the nuisance so created and maintained on the part of the defendant, Katherine McClurg, individually and trading as McClurg's Gift Shop, the plaintiff, while lawfully using the aforesaid premises, exits, entrances, public sidewalks, and cellar doors, encroaching upon the public street as aforesaid, was caused to fall and was precipitated into the aforesaid cavity and/or orifice, and fell down the steps leading into the cellar of the aforesaid premises.

6. Plaintiff repeats the allegations of paragraphs 7, 8 and 9 of the fifth count, and makes the same paragraphs 7, 8 and 9 as if set forth herein at length.

By reason of the aforesaid, plaintiff demands as damages of the defendant Katherine McClurg, individually and trading as McClurg's Gift Shop, the sum of Fifty Thousand ($50,000.00) Dollars, on the seventh count.

EIGHTH COUNT.

1. Plaintiff repeats the allegations of paragraphs 1, 2, 3, 4, 5, and 6 of the fourth count, and makes the same paragraphs 1, 2, 3, 4, 5 and 6 as if set forth herein at length.

7. By virtue of the nuisance so created and maintained on the part of the defendants, Mutual Theatre Company, a corporation, Ledirk Amusement Co. Inc., a corporation, Katherine McClurg, individually and trading as McClurg's Gift Shop, their agents, servants, or employees, and/or either of them, the plaintiff, while lawfully using the aforesaid premises, exits, en-

trances, public sidewalks and cellar doors, encroaching upon the public street as aforesaid was caused to fall and was precipitated into the aforesaid cavity and/or orifice and fell down the steps leading into the cellar of the aforesaid premises.

8. Plaintiff repeats the allegations of paragraphs 7, 8 and 9 of the fifth count, and makes the said paragraphs 7, 8 and 9 of the fifth count a part of this count as if set forth herein at length.

By reason of the aforesaid, plaintiff demands as damages of the defendants, Mutual Theatre Company, a corporation, and/or Ledirk Amusement Co. Inc., a corporation, and/or Katherine McClurg, individually and trading as McClurg's Gift Shop, and/or either, each or all of them, the sum of Fifty Thousand ($50,000.00) Dollars, on the eighth count.

SAMUEL DRESKIN,
Attorney for plaintiff.

(Filed Sept. 23, 1932.)

ESSEX COUNTY CIRCUIT COURT.

HERBERT L. HACKNEY,
Plaintiff,
vs.
MUTUAL THEATRE COMPANY, a corporation, LEDIRK AMUSEMENT CO. INC., a corporation, KATHERINE MCCLURG, individually and trading as MCCLURG'S GIFT SHOP,
Defendants.

Action at Law.
ANSWER.

Defendant, Ledirk Amusement Co. Inc., answering the complaint of the plaintiff herein, says that:

SECOND COUNT.

1. Paragraph one is admitted.
2. Paragraph two is denied.
3. Paragraph three is denied.
4. Paragraph four is denied.
5. Paragraph five is denied.
6. Paragraph six is denied.
7. Paragraph seven is denied.
8. Paragraph eight is denied.

FIRST SEPARATE DEFENSE TO SECOND COUNT.

Plaintiff, Herbert L. Hackney, caused or contributed to his injuries and damages in that he failed and neglected to exercise reasonable care to protect his own safety under the circumstances

and conditions which existed at the time of the alleged accident.

FOURTH COUNT.

1. Paragraph one is admitted.

2. Paragraph two is admitted.

3. Paragraph three is denied.

4. Paragraph four is denied.

5. Paragraph five is denied insofar as it may be directed against this defendant.

6. Paragraph six is denied insofar as it may be directed against this defendant.

7. Paragraph seven is denied insofar as it may be directed against this defendant.

8. Paragraph eighth is denied insofar as it may be directed against this defendant.

9. Paragraph nine is denied.

FIRST SEPARATE DEFENSE TO FOURTH COUNT.

Plaintiff, Herbert L. Hackney, caused or contributed to his injuries and damages in that he failed and neglected to exercise reasonable care to protect his own safety under the circumstances and conditions which existed at the time of the alleged accident.

SIXTH COUNT.

1. The answers to paragraphs one, two, three, four and five of the second count are repeated.

2. Paragraph six is denied.

3. Paragraph seven is denied.

Answer.

First Separate Defense to Sixth Count.

Plaintiff, Herbert L. Hackney, caused or contributed to his injuries and damages in that he failed and neglected to exercise reasonable care to protect his own safety under the circumstances and conditions which existed at the time of the alleged accident.

Eighth Count.

1. The answers to paragraphs one, two, three, four, five and six of the fourth count are repeated.

2. Paragraph seven is denied insofar as it may be directed against this defendant.

3. Paragraph eight is denied.

First Separate Defense to Eighth Count.

Plaintiff, Herbert L. Hackney, caused or contributed to his injuries and damages in that he failed and neglected to exercise reasonable care to protect his own safety under the circumstances and conditions which existed at the time of the alleged accident.

Coult, Satz & Tomlinson,
Attorneys for Defendant,
Ledirk Amusement Co. Inc.

ESSEX COUNTY CIRCUIT COURT.

HERBERT L. HACKNEY, Plaintiff, *vs.* MUTUAL THEATRE COMPANY, a corporation, LEDIRK AMUSEMENT CO. INC., a corporation, and KATHERINE MCCLURG, individually and trading as MCCLURG'S GIFT SHOP, Defendants.	Action at Law. REPLY.

The plaintiff joins issue on the answer and separate defenses filed by the defendants in the above matter.

SAMUEL DRESKIN,
Attorney for Plaintiff.

ESSEX COUNTY CIRCUIT COURT.

61464

HERBERT L. HACKNEY,
Plaintiff,
vs.
MUTUAL THEATRE CO., a corporation, LEDIRK AMUSEMENT CO. INC., a corp., KATHERINE MCCLURG, indiv. and trading as MCCLURG'S GIFT SHOP,
Defendants.

Action at Law. Non-Suit by Order of the Court and Verdict by a Jury.

Judgment Entered March 7, 1934.

Deft.	
Costs	$ 81.45
Damage	5,000.00
Pltff.	
Costs	120.89
Total	$5,120.89

Judge WILLIAM A. SMITH.

HOWE & DAVIS,
Attys. for Deft.—Mutual Theatre Co.

SAMUEL DRESKIN,
Atty. of Plaintiff.

On Motion of the Attorney for the defendant the Court granted a Non-Suit in favor of the defendant Mutual Theatre Co. and against the plaintiff.

This Action was tried before Judge William A. Smith with a jury at the Essex Circuit Court on March 7, 1934.

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

They find in favor of the plaintiff Herbert L. Hackney and against the defendants Ledirk Amusement Co. Inc. a corporation and Katherine McClurg for the sum of Five Thousand Dollars ($5,000.00) damage.

Whereupon it is adjudged that the defendant Mutual Theatre Co. a corporation recover of the plaintiff the sum of Eighty-one Dollars and Forty-five Cents Costs on the Non-Suit. The plaintiff

recover of the defendants the sum of Five Thousand Dollars ($5,000.00) damage and costs which are taxed at One Hundred Twenty Dollars and Eighty-nine Cents making in the whole the sum of Five Thousand One Hundred Twenty Dollars and Eighty-nine Cents. Judgment Signed and Entered March 7, 1934.

C. W. PARKER,
A. J.

Book 121, Page 285, Circuit Court Judgments.

ESSEX COUNTY CLERK'S OFFICE.

[COAT OF ARMS.]

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

I, JOHN H. SCOTT, Clerk of the Circuit Court, in and for the County of Essex in the State of New Jersey, DO HEREBY CERTIFY that the foregoing is a true and correct copy of the record of judgment in the case of HERBERT L. HACKNEY, Plaintiff *vs.* MUTUAL THEATRE CO., a corp., LEDIRK AMUSEMENT CO. INC., a corp., KATHERINE MCCLURG, indiv. and trading as MCCLURG'S GIFT SHOP, Defendants. Judgment signed and entered March 7, 1934, and the same is taken from and compared with the record in Book 121, Page 285 of Circuit Court Judgments and as the same now remains on the files of said Court.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the official seal of said Court & County at Newark, N. J., this fifth day of April, A. D., 1934.

JOHN H. SCOTT,
Clerk.

(SEAL)

(Filed March 23, 1934.)

ESSEX COUNTY CIRCUIT COURT.

HERBERT L. HACKNEY, Plaintiff, *vs.* MUTUAL THEATRE CO., a corporation, LEDIRK AMUSEMENT CO. INC., a corporation, and KATHERINE MCCLURG, individually and trading as MCCLURG'S GIFT SHOP, Defendants.	Action at Law. NOTICE OF APPEAL.

To: SAMUEL DRESKIN, Esq.,
Attorney for Plaintiff,
20 Branford Place,
Newark, N. J.

Sir:

PLEASE TAKE NOTICE, that the defendant, LEDIRK AMUSEMENT CO. INC. appeals from the whole of the judgment entered in the above entitled cause against said defendant, and every part thereof, to the New Jersey Supreme Court.

Dated: March 19, 1934.

COULT, SATZ & TOMLINSON,
Attorneys for Defendant, LEDIRK AMUSEMENT CO. INC.

Service of the within notice is hereby acknowledged this 20th day of March, 1934.

SAMUEL DRESKIN,
Attorney for Plaintiff.

(Filed April 6, 1934.)

NEW JERSEY SUPREME COURT.

HERBERT L. HACKNEY, Plaintiff-Appellee, *vs.* MUTUAL THEATRE CO., a corporation, LEDIRK AMUSEMENT CO. INC., a corporation, and KATHERINE MCCLURG, individually and trading as MCCLURG'S GIFT SHOP, Defendants, LEDIRK AMUSEMENT CO. INC., a corporation, Defendant-Appellant.	Action at Law. On Appeal from Essex County Circuit Court. GROUNDS OF APPEAL.

To: SAMUEL DRESKIN, Esq.,
Attorney for Plaintiff-Appellee:

Sir:

TAKE NOTICE, that the following are the grounds upon which the appellant, LEDIRK AMUSEMENT CO. INC. appeals to the New Jersey Supreme Court from the whole of the judgment entered in this cause:

1. The Court erred in denying the motion for nonsuit made in behalf of the defendant, Ledirk Amusement Co. Inc.

2. The Court erred in denying the motion for a direction of verdict in favor of the defendant, Ledirk Amusement Co. Inc.

3. The Court erred in charging the jury as follows:

"One proposition is: Was it during the course of his employment? I can illustrate that by saying that if he went in his own hook after hours and went down to the cellar, the Ledirk Amusement Company, as master, would have no responsibility in this case, because it was not done in the course of his employment but was after hours and on his own time. Of course, you all know that you have a right, when you are employed by somebody, to do as you please when you are on your own time. But you cannot render the master responsible for that if he did something while he was working in front of the place—it would be during the course of his employment, but it might not be something which he was doing which would render his master responsible; it might not be something which arose out of his employment. There are things which we do when we are employed by somebody, while we are on our employment, which are disconnected with the employer's business, and we cannot render him responsible for that."

4. The Court erred in charging the jury as follows:

"If it was done during the hours of his employment and done with knowledge on the part of his employer that he was doing this service—to illustrate this: Suppose he left the doors open to get in touch with his place of employment so that he would be able to see what was going on, or to get closer connection between what he was doing and going back to

his position, and left the doors open, that would indicate that he was still in the course of his employment; that is, that he was still acting for his employer, although he was doing something else. I do not say that that is what he did it for, but it illustrates to you something which might have happened."

5. The Court erred in charging the jury as follows:

"If the defendant Ledirk Amusement Company is to be held responsible, then it must be through the negligence of its agent, Battles. If that is established in that way, and it does not appear that the plaintiff is guilty of contributory negligence, then your verdict may also be returned against the Ledirk Amusement Company."

COULT, SATZ & TOMLINSON,
Attorneys for Defendant-Appellant,
Ledirk Amusement Co. Inc.

STATE OF NEW JERSEY }
COUNTY OF ESSEX } ss.:

FRANCIS O. COULT, being duly sworn according to law upon his oath deposes and says: On the 4th day of April 1934, he served the within Grounds of Appeal upon Samuel Dreskin, attorney for plaintiff, by leaving a true copy thereof at his office, 20 Branford Place, Newark, N. J., with the young lady in charge thereof.

FRANCIS O. COULT.

Sworn and subscribed to before me,
this 5th day of April, 1934.
EMMA J. HUEBNER,
Notary Public of New Jersey.

Case.

ESSEX CIRCUIT COURT.

MONDAY, MARCH 5, 1934.

HERBERT L. HACKNEY,
Plaintiff,
vs.
MUTUAL THEATRE COMPANY, a corporation; LEDIRK AMUSEMENT COMPANY, INC., a corporation; KATHERINE MCCLURG, individually, and trading as MCCLURG'S GIFT SHOP,
Defendants.
} Action at Law.

Before Hon. William A. Smith, J., and a jury.

For plaintiff appears Samuel Dreskin.

For defendant Mutual Theatre Co. appear Howe & Davis (by Edward L. Davis).

For defendant Ledirk Amusement Co., Inc., appear Coult, Satz & Tomlinson (by Gerald T. Foley).

For defendant McClurg appear Stickel & Stickel (by Harry W. Lindeman).

A jury is called and sworn.

Mr. Dreskin opens for plaintiff.

Mr. Davis opens for defendant Mutual Theatre Co.

Mr. Foley opens for defendant Ledirk Amusement Co.

Mr. Lindeman opens for defendant McClurg.

Mr. Dreskin: There are a number of admissions to be made at this time, if the Court please. The ownership of the property at 2-4 Main Street in front of which the accident happened, is admittedly owned by the Mutual Theatre Co.

Mr. Davis: Ownership by the Mutual Theatre Co. is admitted in the pleadings.

Mr. Dreskin: I offer in evidence lease between the Ledirk Amusement Company and the Mutual Theatre Company, dated December 26, 1930.

[The same is received in evidence and marked Exhibit P-1.]

Mr. Dreskin: I offer in evidence the lease between the Mutual Theatre Company and Miss McClurg.

[The same is received in evidence and marked Exhibit P-2.]

Mr. Dreskin: I offer in evidence two photographs admitted on behalf of the plaintiff as being the true representations on the date of the accident of the premises in front of which this accident occurred.

[The same are received in evidence and marked Exhibits P-3 and P-4.]

Mr. Dreskin: I offer the map in evidence.

[The same is received in evidence and marked Exhibit P-5.]

HERBERT L. HACKNEY, plaintiff, sworn in his own behalf.

Mr. Dreskin: May I withdraw the witness for a moment? We have the engineer and we have the photographer here.

The Court: Yes.

WILLIAM W. SHEFFIELD, sworn in behalf of plaintiff.

Mr. Dreskin: I think we can excuse Mr. Sheffield. There are certain measurements that both counsel wanted.

Mr. Foley: I told you this morning that I would admit your map. I didn't say anything about measurements.

Mr. Dreskin: I am satisfied to withdraw Mr. Sheffield.

The Court: Are there any measurements on the map that are questioned?

Mr. Foley: As far as I know the map is a correct representation.

The Court: Are the measurements stated on there?

Mr. Foley: I think so. I think there is just one thing I would like to ask this witness. May I have this photograph marked for identification?

[The same is marked Exhibit DL1 for identification.]

By Mr. Foley:

Q. Mr. Sheffield, there is a point which I mark X on the map. As far as you know, is this the

point which I have marked X on the photograph? A. Yes, sir.

Mr. Foley: I will mark an X on Exhibit DL1 for identification.

KENNETH CRANE, sworn in behalf of plaintiff.

Direct examination by Mr. Dreskin:

Q. Mr. Crane, what is your business? A. Engineering.

Q. What position do you hold in the Town of Orange, N. J.? A. I hold the position of City Engineer for the City of Orange.

Q. How much experience have you had in that field? A. I have been working for the City since 1914; that is twenty years.

Mr. Foley: Qualifications admitted.

Q. Will you look at that sketch, Exhibit P-5, and tell us whether the cellar doors on the lower left side of the drawing encroach over the building line onto the street? A. Yes, they do.

Q. Will you tell us for what distance they encroach? A. 4.55 feet.

Q. From what point to what point? A. That is from the property line to the extreme of the cellar door.

Q. Will you indicate for the jury with the pointer as to from what point to what point they encroach? A. The building line is represented by the heavy line located on this side [indicating]. The encroachment is 4.55 feet to the cellar door—the street side of the cellar door.

Q. Just what do you mean by the encroachment? A. That is the portion of the cellar door that is on the public sidewalk or on the public street.

Q. How long has that condition existed that you know of? A. Well, for many years, to my knowledge.

Q. Before 1930? A. Oh, yes.

Q. Before 1932? A. Oh, yes.

Q. And for many years before that? A. Yes.

Cross examination by Mr. Davis:

Q. Did you examine the door yourself? A. I didn't examine it; I measured the distances.

Q. But you were there when you looked at it? A. Yes, sir.

Q. When you examined it, was it closed? A. Yes, sir.

Q. How does the cellar door lie with relation to the sidewalk?

Objected to on the ground that the witness was asked only as to the encroachment.

Mr. Davis: I mean with relation to whether it sticks above the sidewalk at all.

A. There is a very slight projection above the sidewalk, about the thickness of the metal in the door, which is about 3/16 of an inch.

Q. Not as much as a quarter? A. No, I wouldn't say that.

Cross examination waived by Mr. Foley.

Cross examination by Mr. Lindeman:

Q. Isn't it a fact that when you mention the word "encroachment" you don't mean that that

was there without the consent of the municipal authorities; isn't that so? A. No. The cellar doors when applied for are generally approved for construction by the inspector for the municipality.

[Adjourned until tomorrow, Tuesday, March 6, 1934, at ten o'clock a. m.]

SECOND DAY.

TUESDAY MARCH 6, 1934.

Continued pursuant to adjournment.

Present, counsel as before stated with the exception that in the absence of Mr. Lindeman, Mr. Harold M. Kain appears for the defendant McClurg.

Mr. Dreskin: I would like to have the Court's permission to recall Mr. Crane, who testified yesterday.

The Court: Very well.

KENNETH CRANE, recalled in behalf of plaintiff.

Direct examination by Mr. Dreskin:

Q. Mr. Crane, you testified yesterday that the cellar door stuck up over the sidewalk for a distance of about 3/16 of an inch. A. Yes, sir.

Q. Did you examine it as to whether the framework also stuck up over the sidewalk at any point over those cellar doors? A. Yes, sir.

Q. Will you point to the chart, Exhibit P-5, and indicate where the framework and the cellar door

extended above the sidewalk? A. The framework extends above the sidewalk at this corner, partly on this front and partly on this corner.

By the Court:

Q. The two front corners, then? A. Yes, sir.

By Mr. Dreskin:

Q. Is it possible to construct those cellar doors and framework so that they are flush with the sidewalk?

Mr. Foley: I object to that.
Objection sustained.

Q. Have you had any experience in the engineering and erection of various construction work? A. Yes, sir.

Q. From your experience would you say that it was possible to erect that cellar door and framework so that it was flush with the sidewalk?

Mr. Foley: I object to that.
Objection sustained.

Q. Was that cellar door and framework, as it was constructed, proper construction?

Mr. Foley: I object to that.
Objection sustained.
Plaintiff's counsel prays an exception to this ruling of the Court.
Exception noted as ground of appeal.

Q. Is that sidewalk the usual width of an ordinary sidewalk? A. For a business sidewalk it is narrow.

Kenneth Crane—For Plaintiff—Recalled—Direct.

Q. What is the usual width of a business sidewalk?

Mr. Foley: I object to that.

Objection sustained.

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

Exception noted as ground of appeal.

Q. Is it possible for a person walk along the sidewalk on a dark night, unaware of the rising of that cellar door or framework above the sidewalk, to trip?

Mr. Foley: I object to that.

Objection sustained.

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

Exception noted as ground of appeal.

Q. How far do those corners on that framework stick up above the sidewalk? A. About the thickness of the metal.

Q. Is that same condition true on both ends of the cellar door and framework? A. Yes, sir.

Q. So that the framework sticks up the thickness of the metal in addition to the cellar door, which also sticks up over the sidewalk? A. Yes, sir.

By the Court:

Q. Just how much is that? A. The metal frame itself is 1/8 of an inch, and the cellar door is 3/16 of an inch.

Q. Then it is a little more than a quarter of an inch altogether. A. Yes, sir.

By Mr. Dreskin:

Q. It is 5/16 altogether? A. Yes.

Q. For what distance along the front and side on both corners does that protrusion extend over the sidewalk? A. On the front side it is about a foot from either corner, and on the west side it is about 8 or 10 inches in from the corner.

Q. Is that condition the result of construction?

Mr. Foley: I object to that.

Objection sustained.

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

Exception noted as ground of appeal.

Q. From your examination of the cellar doors was there anything to indicate whether that was the condition of the construction or any other condition?

Mr. Foley: I object to that. I think that this man can testify to what the construction was; then it would be for the jury to say whether or not the condition was the result of construction or otherwise.

The Court: I suppose so; it calls for a conclusion on his part.

Q. Could you tell from the examination of that cellar door and framework as to whether it was due to construction or to any other cause?

Mr. Foley: I object to that.

Objection sustained.

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

Exception noted as ground of appeal.

Q. Could you tell by the condition that existed there as to whether the cellar doors were constructed that way?

Mr. Foley: I object to that.

Objection sustained.

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

Exception noted as ground of appeal.

Cross examination waived by Mr. Foley.

Cross examination by Mr. Davis:

Q. The rising of this cellar door above the sidewalk is about the thickness of the average rug above the average floor. A. It all depends on the kind of rug you have.

Q. But there are many rugs that are as thick as that.

Mr. Dreskin: I object to that.

Objection sustained.

Q. Would you say that this cellar door as it is there is of standard construction?

Mr. Dreskin: I object to that.

Objection sustained.

Q. Would you say that as it exists there it is a menace or danger to the public?

Mr. Dreskin: I object to that.

Objection sustained.

Mr. Dreskin: I would like to read into the record the answers to the interrogatories propounded——

Mr. Foley: I do not believe the interrogatories would be binding on my client. We did not answer any interrogatories.

Mr. Dreskin: Interrogatories served upon Howe & Davis, attorneys for the defendant Mutual Theatre Co.: "No. 5. Were

the cellar ways and cellar doors in front of said premises in existence at the time the said Mutual Theatre Co., a corporation, acquired title to the aforesaid premises? If not, when were they erected and installed, and by whom? A. Answer: Yes."

The Court: They were there, then.

Mr. Dreskin: They were there.

The Court: It does not show how long they have owned it.

Mr. Dreskin: There is another question.

The Court: You had better put that in too. If they got title to it the day before the accident they would be absolved from remedying any defect.

Mr. Dreskin: "No. 1. Who was the owner of the premises known and designated as 2-4 Main Street, City of Orange, County of Essex, State of New Jersey? Answer: Mutual Theatre Company." Question: If the answer to question 1 is "Mutual Theatre Company, a corporation, when did said company acquire title to said premises, and by what instrument? A. Answer: 1920, by warranty deed from Louis Finger."

Herbert L. Hackney, plaintiff, recalled in his own behalf.

Direct examination by Mrs. Dreskin:

Q. Mr. Hackney, where do you live? A. 534 Park Avenue, East Orange.

Q. How long have you lived there? A. For about two and a half years; a little over two years.

Q. Are you married? A. Yes.

H. L. Hackney—Plaintiff—Recalled—Direct.

Q. Have you a family? A. Yes, wife and daughter.

Q. Where do you work? A. Kresge Department Store.

Q. What is your position? A. Division superintendent.

Q. On April 17, 1932, did you go to the Palace Theater? A. I did.

Q. Who accompanied you? A. My wife and daughter.

Q. What time did you arrive there? A. About four o'clock in the afternoon.

Q. This Palace Theater is located at Main Street near Harrison Street isn't it? A. Yes.

Q. 2 and 4 Main Street, Orange? A. 2 and 4 Main Street, Orange, yes.

Q. And it is the building of which that sketch, Exhibit P-5, is a portion? A. Yes.

Q. How did you arrive at the theater? A. By cab.

Q. Did you see the performance? A. I did.

Q. You paid for the admission? A. I did.

Q. And your wife and daughter accompanied you there? A. Yes, my wife and daughter were with me.

Q. What time did you leave the theater? A. Between seven and seven-fifteen.

Q. Was it night or day when you left? A. It was night.

Q. Who came out of the theater with you? A. My wife and daughter came as far as the lobby with me.

Q. What did you do? A. I left them in the lobby while I went to the 'phone for a cab.

Q. Did you have any appointment to hurry you in any way? A. No.

Q. What did you do after leaving your wife in the theater to 'phone for the cab? A. I left the lobby of the theater and turned to the right going toward Harrison Street, East Orange.

Q. Will you indicate on the sketch which way you were walking? A. I came out this way and turned to go this way [indicating].

Q. As you came away from the lobby of the theater was it light or dark? A. It was dark.

Q. How many steps did you take when something happened? A. I would say about seven or eight steps.

By the Court:

Q. Seven or eight steps from where? A. From the lobby of the theater.

By Mr. Dreskin:

Q. Which part of the sidewalk were you walking on? A. About the middle.

Q. Were you able to see ahead of you? A. Yes.

Q. Did you see anything in front of you in the form of an open cellar way or cellar door? A. I did not.

Q. Did you see any cellar door in front of you? A. I did not.

Q. Is the sidewalk there wide or narrow at that point? A. Narrow.

Q. What happened after you took the seven or eight steps? A. I had gone about seven or eight steps when my foot caught in the door and iron work of an open cellar way. My body was thrown forward, throwing me at this angle [indicating] into the doorway. I went with the full weight of my body across the doorway, my face striking the upper edge of the door on the far side.

By the Court:

Q. Were both doors open? A. Both doors were open.

By Mr. Dreskin:

Q. Was there any light in that cellar way to indicate any open cellar way? A. No.

Q. Was there any guard on that cellar door? A. No.

Q. Which foot if you remember, caught in that? A. My left foot.

Q. Can you indicate in that diagram just about where you caught, if you know? A. Right along here [indicating].

By the Court:

Q. From the outside in on the inner side? A. Yes, sir.

By Mr. Dreskin:

Q. Which way did you fall? A. I fell in toward the building line.

Q. How far did you fall down? A. Possibly four or five steps.

Q. What parts of your body struck this open door? I interrupted you when you described it. A. The upper part of my mouth struck the open edge of the door on the opposite side.

Q. What happened as your mouth struck the open door? A. Shearing off three of my teeth and knocking one out completely by the roots, and driving it into my mouth. Then I fell into the cellar, grabbing with my hand at the door, and missed it and hurt my hand, and fell into the cellar. I was dazed, and after a moment or so man-

aged to drag myself up to the sidewalk. As I got up to the sidewalk, the gentleman, whose name I learned later was Mr. Rogow, assisted me up to the sidewalk. As I got up to the sidewalk a man came up from the cellar way and said something to me about——

Mr. Foley: I object to that.
The Court: Don't tell us what he said.

Q. Just tell us what happened to you. A. I got in front of the theater, and I was bleeding—covered with blood—and I told this gentleman that my wife and daughter were waiting for me—

Mr. Foley: I object to that.

By the Court:

Q. You sent word to your wife and daughter. A. I sent word to my wife and daughter.

By Mr. Dreskin:

Q. Where were you taken? A. I was taken to the Homeopathic Hospital.

Q. What was your condition at that time when you were taken to the Homeopathic Hospital, if you know? What were the injuries you sustained? A. My head was hurting me; my mouth was bleeding; my lip was split open. I thought I had knocked all of my teeth out. I was nervous. I felt a sharp pain in my right groin and my right hand. My right leg and my knee was cut. My trousers were torn; my overcoat was torn. I had two bruised places; one just below my knee and one on my knee. My left hand and little finger were in bad shape. The skin was off my little finger, and off the back of my hand.

H. L. Hackney—Plaintiff—Recalled—Direct.

Q. How did you happen to strike the hand? A. As I went forward this way [indicating] I reached up and tried to grab with this hand [indicating].

Q. By whom were you taken to the hospital? A. Mr. Rogow.

Q. As you fell down the stairs, did anyone come up from the cellar? A. A man came up from the cellar.

Q. Did he come all the way up? A. No.

Q. What about the condition of the light around that particular part of the cellar way? A. It was fairly dark; it was very poorly lighted.

Q. I show you these pictures marked Exhibit P-3 and Exhibit P-4 and ask you to indicate on those pictures as to just where your foot caught. A. My foot caught right along here [indicating].

By the Court:

Q. Point it out to the jury. A. My foot caught right along here [indicating], throwing my body this way [indicating]. It caught on the iron work first, and then against the door, and I lost my balance and it threw me over to the right.

By Mr. Dreskin:

Q. Were the doors open or closed at that time? A. The doors were closed.

Q. The doors, I said. A. Pardon me. The doors were open.

Q. What day of the week was this? A. On Sunday night.

Q. And this happened about what time? A. Between seven and seven-fifteen, I should say.

Q. As you were walking along the street and took the seven or eight steps, you say what happened to your foot? A. My foot caught against

the iron work—the framework, and then as it got loose, it hit the doorway.

Q. Was the iron work extending above the sidewalk? A. It was.

Q. Did you examine the iron work afterward? A. I did, when I was able to be out.

Q. How long afterward was it you examined it? A. I would say about four weeks or a little over.

Q. Was the cellar door extending above the level of the sidewalk? A. It was.

By the Court:

Q. As I understand it, the two doors were open that way [indicating]? A. Yes, sir.

Q. And when you hit your foot you went into the door? A. Yes, sir.

By Mr. Dreskin:

Q. Your foot first caught, you say, on the framework? A. On the framework.

Q. And then hit the door? A. Yes, sir.

Q. How tall are you? A. 6 feet 1-¾.

Q. Your head caught the second doorway, is that right? A. Yes, sir.

Q. What part of your body hit the first doorway? A. My legs hit the first doorway.

Q. Was that after your foot caught in the framework or before? A. After.

Q. In other words, your foot caught first. A. My foot first caught and then my body started forward.

By the Court:

Q. When you say it caught, you mean you hit it? A. Yes, sir.

H. L. Hackney—Plaintiff—Recalled—Direct.

By Mr. Dreskin:

Q. After your foot hit that framework your leg struck the doorway and then your head struck the other doorway? A. My head struck the door on the opposite side.

Q. How long were you in the hospital? A. Until the next afternoon.

Q. What happened to you at the hospital? A. I was taken to the emergency room as soon as I got there, and I had them send for my dentist and my family doctor. In the meantime, before they got there, Dr. Stoddard at the hospital treated my lip. It was split open and he put four stitches in my lip.

Q. Did you have much pain at that time? A. I was suffering from my head; my back; the lower part of my spine was hurting me where I fell, and the back of my head was hurting me, and a pain in my right groin.

Q. How about your teeth and your mouth? A. Two of my teeth were broken off about two-thirds of the way and one was knocked out completely. It was kind of back into the roof of my mouth, and the fourth one was knocked off just a part of the way.

Q. What was the condition of your teeth just before the accident? A. Very good.

Q. What was your general condition before this accident? A. Very good.

Q. How was your eyesight before this accident? A. Good.

Q. Where did you go after leaving the hospital? Where were you taken? A. I was taken home.

Q. How did you get home? A. I was taken home in a car.

Q. How long did you stay at home? A. I was home in bed ten days; I was up and down for four weeks.

Q. Why did you stay in bed? A. I was nervous; I couldn't raise my head up. My head hurt me; I was in a dazed condition and dizzy when I tried to move it.

Q. During that time were you being treated by the doctors? A. I was.

Q. What doctors treated you? A. Dr. Leonard H. Smith and Dr. Joseph Walsh. Dr. Etheridge saw me on the night I was in the hospital. I was suffering with the lower part of my back and spine, and he examined it and strapped my back from just above my hips down to my legs.

Q. How many times did he treat you? A. Dr. Etheridge saw me that night and Dr. McCloskey saw me the next morning.

Q. What did Dr. Etheridge do besides? A. He told me to stay in the hospital until the next day.

Q. Were you treated by any other doctors? A. Yes, Dr. Beling and Dr. White.

Q. You say that you were in good health before this accident? A. I was.

Q. Had you missed any working time for the last three or four years before the accident? A. I had not.

Q. Did you have anything wrong with your groin before this accident? A. Not before, no.

Q. Was there anything wrong with your head? A. No.

Q. Were you nervous before the accident? A. No.

Q. Did your back pain you? A. No.

Q. In what capacity were you employed by the Kresge Department Store? A. Division superintendent.

H. L. Hackney—Plaintiff—Recalled—Direct.

Q. How much was your salary? A. $50.

Q. How much salary did you lose as a result of this accident? A. $200.

Q. How many weeks' salary is that? A. Four.

Q. After the four weeks what was your condition as a result of this accident? A. I was in a very nervous condition. I had lapse of memory; I couldn't remember things. My eyes hurt me; I suffered with my eyes a great deal. I had a blurriness of the vision. I suffered with the lower part of my back. When I turn my head I get a cracking sensation now, turning my head. I still suffer with headaches and dizziness.

Q. By whom were you treated during all this time? A. Dr. Leonard H. Smith, Dr. White and Dr. Beling.

Q. What did Dr. Beling treat you for? A. Nervousness.

Q. How is your ability to sleep and do all the other things? A. I am working under a handicap. I don't sleep—very little.

Q. How about your condition during working hours? A. I work under a handicap.

Q. You testified as to the conditions which existed four weeks after the accident. A. Yes.

Q. What is your present condition? A. I suffer with headaches, nervousness, and blurriness of my vision. I still have trouble with my teeth. The work has not been completed.

Q. Who did the work on your teeth all this time? A. Dr. Walsh.

Q. Coming back to the hospital, did Dr. Walsh do anything for you there? A. Dr. Walsh attended me the night I was in the hospital, and he extracted the tooth that was back into the roof of my mouth.

Q. Will you tell us what else you are suffering from now? A. I have a hernia in the right side.

Q. Did you have that hernia before the accident? A. I did not.

Q. How do you know you did not have a hernia? A. Because I was operated three years ago on the same side for one.

Q. How do you know you have one now? A. Because I have a bulging there, and I complained to Dr. Smith, and he examined it.

The Court: Don't tell us what he said.

Q. What else are you suffering from? A. Nervousness and dizziness, and I suffer with my head. As I say, when I turn my head I get a cracking sensation in the back of my head, and the lower part of my spine when I go to sit down.

Q. So you feel that you have not recovered from this accident? A. I have not.

Q. Have you made any estimate as to what it would cost to perform this operation? A. Yes.

Q. What work have you had done on your teeth? A. I have had a gold bridge put in my mouth and I had two caps put on there, which were temporary, and there is still other work to be done.

Q. Have you had an estimate as to the amount that it would cost to still complete the work on your teeth? A. Yes.

The Court: Don't tell us how much.

Q. What expenses have you incurred as a result of this accident? A. Is it permissible for me to look?

Q. Have you your bills with you? A. I have, yes.

Q. Suppose you tell us what they are. A. Homeopathic Hospital, $51.50; Dr. Leonard H. Smith, $284; Dr. Joseph Walsh, $300; Dr. Beling, $50; Dr. J. W. White, $40; Dr. Etheridge, $3; Dr. McCloskey, $3.50; Wexler Drug Store, $127.20, and practical nurse, $30.

Q. How long did you have the practical nurse? A. Two weeks.

Q. What else? A. Miscellaneous, $25.

Q. What does that consist of? A. That consists of my glasses that I broke; my scarf, that was covered with blood and that was ruined, and for taxicabs to and from the doctors.

Q. What other expenses did you have? A. Suit of clothes that was torn. I listed it at $50. It was a $65 suit, practically new. My overcoat was $50. I listed it for $35. Photographs——

By the Court:

Q. What was the photograph for? A. I had a photograph made of myself.

The Court: Don't tell us about that.

By Mr. Dreskin:

Q. You mentioned something about a photograph. Did you have a photograph taken of your mouth at the time? A. I did.

Q. Where was this taken? A. At my home.

Q. Is this a true representation of your condition immediately after this accident? A. It was.

Q. Of course, you were there when it was taken. A. I certainly was.

Mr. Dreskin: I offer it in evidence.

Mr. Foley: I object to that.

The Court: I will sustain the objection.

He does not live the rest of his life that way.

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

Exception noted as ground of appeal.

Cross examination by Mr. Davis:

Q. What time of the day was it when you came out of the theater? A. Between seven and seven-fifteen.

Q. You say it was dark at that time? A. It was.

Q. Was the marquee over the theater lighted? A. So far as I know, it was.

Q. It is a very brightly lighted marquee, is it not, that has a great many electric lights and has the name of the attractions on it? A. It has colored lights——

Mr. Dreskin: I object to that as calling for a conclusion. He is asking about the various attractions. We are not concerned with the attractions.

The Court: He is referring to the lights that light up the name of the attractions. I think it is admissible. The witness has already testified it was dark.

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

Exception noted as ground of appeal.

Q. As far as you know, the marquee was lighted? A. As far as I know.

Q. And it is a brightly lighted marquee such as the usual movie theater has.

Mr. Dreskin: I object to the "usual".

Q. Do you know what I mean by a marquee? A. I certainly do.

Q. It was light enough to illuminate a considerable distance around. A. I couldn't tell you.

Q. As you turned to the right you did not look where you were going, did you? A. I did.

Q. But you never saw anything until you fell? A. I did not.

Q. So that you don't know that the cellar doors were open. A. No.

Q. If you had known that you would have stopped. A. I saw nothing on the sidewalk.

Q. I understood you to say that both doors were open. Is that correct? A. Yes.

Q. How do you know they were both open? A. Because my foot hit against the second one.

By the Court:

Q. Your head hit the first one? A. Yes, sir.

By Mr. Davis:

Q. At what angle were they open? A. Up-right.

Q. You mean at right angles to the sidewalk? A. This way [indicating]. Here is the sidewalk and the doors were open this way [indicating].

The Court: That is at right angles.

Q. They were not leaning backward or forward? A. No, sir.

Q. After you fell did they both remain open or did you knock one down as you fell? A. That I can't say.

Q. How wide is each cellar door?

Mr. Dreskin: I think the sketch speaks for itself. It is in evidence.

The Court: I know, but he may test this witness' recollection of it.

A. I would say something around two feet.

Q. Wide enough for you to fall through if one alone was open? A. I suppose if I would fall lengthwise.

Q. You did fall through, didn't you? A. Yes.

Q. You went down several steps? A. Yes.

Q. I understood you to say that your foot caught in the framework.

The Court: I think he made it more specific. In answer to my question he said it hit the framework.

Q. It hit the framework as you went down? A. I hit the framework before I went down.

The Court: When I said "hit" I meant it as distinguished from "caught".

By the Court:

Q. You didn't mean that your foot got underneath and caught in it, did you? A. No, sir.

By Mr. Davis:

Q. It hit the framework at the same time as you hit the door? A. Yes.

Q. Because the door was standing straight up?

Mr. Dreskin: I object to that. The witness did not testify to that.

The Court: He is asking him whether it was or not.

Q. You hit the door at the same time? A. My foot hit the iron work first and then hit the door.

H. L. Hackney—Plaintiff—Recalled—Cross.

Q. Do I understand that you would have fallen if the doors had been closed? A. I possibly would have.

Q. But you don't know? A. I was falling as it was.

Q. But the door was perfectly straight up, wasn't it? A. Yes.

Q. And you fell over the door? A. Yes, I fell over the door.

Q. And you fell into the cellar. A. I did.

Q. Can you show me on this photograph just where it was that you first hit? A. Just about here [indicating].

Q. Out at the corner there? A. Yes.

Q. And as you fell your face hit the open door? A. Yes.

Q. And it was that fact that caused you most of your injuries, wasn't it?

Mr. Dreskin: I object to that.

Objection sustained.

Q. You say you have had hernias before? A. I had one.

Q. And you were operated for it? A. Yes.

Q. When did you notice that this hernia had come back? A. I noticed a sharp pain on the night I was hurt.

Q. But you got out of the cellar yourself? A. I dragged myself up to the sidewalk.

Q. Did you stand around for some time? A. I did not.

Q. What did you do? A. I was taken to the hospital from the front of the theater.

Q. In an ambulance? A. In Mr. Rogow's car.

Q. Were you treated for the hernia that night? A. No. I was put right to bed.

H. L. Hackney—Plaintiff—Recalled—Cross.

Q. Did you walk into the hospital? A. I believe I did.

Q. You were not carried in on a stretcher? A. No. I was helped in.

Q. And in the ambulance were you sitting up or lying down? A. In the car? I was sitting up in the back.

Cross examination by Mr. Foley:

Q. I understand you to say that this sidewalk is a narrow sidewalk? A. It is.

Q. You understand, do you, that the sidewalk is 9 feet 6 inches wide? A. That's right.

Q. That is considerably wider, is it not, than most sidewalks? A. No.

Q. You think most sidewalks are wider than that?

Mr. Dreskin: I object to that.

The Court: I don't think it makes much difference whether the sidewalk is wide or narrow.

Q. But there is no question about its being 9 feet 6 inches wide, is there? A. No.

Q. You had come out of the theater door designated on the map as "main entrance"? A. That's right.

Q. And turned to your right at this point (indicating)? A. That's right.

Q. You said you walked down the center of the sidewalk? A. That's right. About in the center.

Q. I want to show you a picture which is marked Exhibit DL1 for identification and ask you whether that is a correct photographic transcription of the buildings and sidewalks as they appeared at the time of this accident. A. It is.

Q. You observe, do you not, that there are three rows of lights running across the upper edge of the sign; that there are three rows of lights at the lower edge of the sign; that there is a row of lights at the edge of the sign nearest the building, and that these rows of lights extend all the way around at the top and all the way around at the bottom? A. Yes, sir.

Q. Then these words we see here: "Vanishing Era—Corinne Griffith——

Mr. Dreskin: I object to that. They were not there at the time.

Q. Whatever the attractions may have been at the time, they were also in lights?

Mr. Dreskin: I object to that. He has not testified that there were any lights or figures.

Objection overruled.

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

Exception noted as ground of appeal.

A. I couldn't say whether there were any lights there or not two years ago.

Q. You have testified, have you not, that you believe the lights were lighted? A. I believe the lights were lighted, yes.

Q. There was such a marquee at that time, was there not? A. Yes.

Q. Then up at the top of the marquee is a very large sign upon which the name of the theatre appears, "Palace." A. That's right.

Q. And that is all lighted? A. It flashes on and off.

Q. The lower lights remain lighted at all times, don't they? . A. Yes.

Q. Where were you going when this happened? A. Going to call a cab.

Q. Where were you going to call a cab? A. Two or three doors below the theater.

Q. In which direction were you looking as you walked down the street? A. In a general forward direction.

Q. Were you looking in a general forward direction at all times from the time you left the theater? A. Yes.

Q. So that as you came down the center of this sidewalk walking in this direction toward the cellar door, you were looking straight ahead? A. Yes.

Q. There is another light at this point (indicating), is there not; that little circle indicates a light, does it not? This is also a light, is it not [indicating]? A. That is not a light; that is a globe there, but it does not burn.

Q. Not at any time? A. Not at any time. I have noticed it numbers and numbers of times. That is a globe that might have been a light at one time, but it didn't burn.

Q. When did you notice it before the accident? A. I noticed it several times before I came out of there.

Q. You mean that on several occasions when you came out of this theater you paid particular attention to the fact that it was not lighted? A. I didn't pay particular attention, but I noticed that it never burned.

Q. Did you have a recollection of it before the accident happened? A. I have seen it many times, but never noticed the light burning.

H. L. Hackney—Plaintiff—Recalled—Cross.

Q. You spoke of a number of bills that you have. I notice you got it from a piece of paper? A. That's right.

Q. Where did you get those amounts? A. Off the bills I have.

Q. You have all the bills right there? A. I have them right here.

Mr. Dreskin: I am going to offer them.

The Court: It is not necessary. He has testified to them. I will instruct the jury as to the amounts.

Q. Do you expect to have Dr. Walsh here?

Mr. Dreskin: We are going to have Dr. Walsh and Dr. Beling.

Mr. Foley: They will all be here?

Mr. Dreskin: Yes.

Cross examination by Mr. Kain:

Q. When you came out of the Palace Theater you immediately turned to your right and walked off to get a cab, is that right? A. I did.

Q. Was your vision perfectly clear at that time? Could you see perfectly clearly? A. Yes.

Q. Were the street lights on? A. Yes.

Q. You were familiar with the Palace Theater and the vicinity there? You had been there a good many times before? A. I had been to the Palace Theater before. I had been up there just a few times.

Q. You had lived there before that? A. I lived there since January 23 of that year.

H. L. Hackney—Plaintiff—Recalled—Re-direct.

Re-direct examination by Mr. Dreskin:

Q. Counsel asked you about the hernia which you felt. When did you feel that? How long after the accident was it? A. I had a sharp pain in my side after I got up to put—just before I got into the car.

Q. Did you notice any bulging at that time? A. Not until a few days afterward. After I was able to get up I noticed the bulge.

Q. When you examined Exhibit DL1 for identification, did you notice any other cellar doors in front of those premises at any time immediately after this accident?

Mr. Foley: I object to that on the ground that it does not make any difference how many cellar doors there are there.

Mr. Dreskin: It is important to show that there was another cellar way erected and that existed the same way as this cellar door did. I don't want to tell the Court at the present time, but I think the following question will bring it out.

The Court: I don't think it makes any difference now. It may become important later, but not now.

Mr. Dreskin: It is important in this respect: that there was a change made on the other cellar door, and I wanted to show the condition of that cellar door.

Objection sustained.

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

Exception noted as ground of appeal.

Q. Counsel asked you whether you were looking straight ahead and whether you could see ahead of

you. Did you see any obstruction in front of you or any cellar way or any cellar framework? A. I did not.

Q. You were looking in a general forward direction? A. A general forward direction.

Q. Mr. Rogow helped you out of that cellar, didn't he? A. He did.

Q. Did you try to get Mr. Rogow to come here and testify today? A. I did.

Q. Where is Mr. Rogow today? A. He is out of the——

Q. Where is he? A. In Bermuda.

Q. Were you looking for a cab on the street? A. I was not.

The Court: He testified he was going to 'phone for one.

Re-cross examination by Mr. Foley:

Q. Do you see this circle marked "pole"? A. Yes, sir.

Q. That is a pole with a city arc light on, isn't it? A. I presume so, yes.

Q. That is approximately the width of this driveway away from the cellar door?

The Court: The map shows it.

Q. You were walking in the center of the sidewalk toward the cellar door and you say the doors were standing at right angles to the sidewalk and were about 2 feet high? A. Something like that, yes.

Q. And you didn't see them? A. No.

Re-cross examination by Mr. Davis:

Q. There is nothing the matter with your memory now, is there? A. No.

Q. Who came out of the cellar? A. I don't remember.

Q. Was it a colored man? A. Yes.

Q. You don't know whether it was Mr. Battles or not? A. I don't know.

Q. Would you know him? Do you see him in court? A. Yes, I can see his head back there [indicating].

Mr. Davis: Mr. Battles, stand up, please.

Q. Is that he? A. That is he.

Q. You talked to your lawyer about this case, didn't you? A. I did.

Q. Did he tell you you could not hold the owner of the building unless the cellar doors, closed, constitute some obstruction? A. No.

Mr. Dreskin: I object to that.

The Court: Objection overruled.

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

Exception noted as ground of appeal.

Mr. Dreskin: With the Court's permission I will have Dr. Smith testify now.

Leonard H. Smith, sworn in behalf of plaintiff.

Direct examination by Mr. Dreskin:

Q. Dr. Smith, you are a licensed practising physician and surgeon of the State of New Jersey? A. I am.

Q. And engaged in the practise of your profession? A. Yes, sir.

Q. Where is your office? A. 32 Washington Street, East Orange.

Q. How long have you been in practise? A. Since 1903.

Q. Are you connected with any public institution in your professional capacity? A. I have a surgical service in the Memorial Hospital in Orange.

Q. Do you recall being called in to treat Mr. Hackney in the month of April, 1932? A. I do.

Q. Can you tell us the date and what you found existing at that time? A. I saw him on the 19th of April, 1932. I had a history of an accident sustained on the 17th, with preliminary treatment at the Homeopathic Hospital in East Orange. He was lying in bed in a condition of profound shock, and suffering from lacerations about the face and contusions of the body and leg. He had four sutures in his upper lip, and one tooth that had been broken off—knocked out—and two that were broken off. He had a bruise on his back and one on his leg, the right leg, below the knee, and a right side rupture—hernia—which had been repaired previously. He had an impulse behind the scar. He complained a good deal of dizziness, was unable to move his head from the pillow on account of that. I think that is all at that time.

Q. What about his head? A. He complained a good deal of headache.

Q. Did he complain of anything else? A. Headache, dizziness, and mental confusion.

Q. Was his condition a cause of pain which he had at that time? A. Yes.

Q. To what extent? A. To an extent sufficient to produce shock.

Q. Did you prescribe any treatment for him?

A. The main treatment was rest, with attention to his local injuries.

Q. How long did you continue to treat him? A. I have treated him at intervals ever since.

Q. How long was he confined to his bed? A. I should say around two weeks.

Q. Did you continue treating him after that? A. Yes.

Q. Where? A. At his house and at my office.

Q. How long in all was he confined to his home, if you know? A. I couldn't tell you that exactly.

Q. Do you recall what was the last date you visited him at his house? A. No, I couldn't tell you that.

Q. How many times did you come? How many treatments did you give him? A. I couldn't tell you that.

Q. What was your bill for the entire treatment? A. $284.

Q. Is that charge reasonable for the treatment you have given him? A. I consider it so.

Q. When he came to your office did you examine him? **A. Yes.**

Q. Had his hernia condition improved? A. That will never improve.

Q. What is necessary to make it improve? A. An operation.

Q. Assuming that he had a hernia three or four years before that, and that the operation for the removal of the hernia was successful, is it possible that an accident such as falling down cellar steps would cause a recurrence of the hernia?

Mr. Foley: I object to that.

Objection sustained.

Q. Assume that the plaintiff, previous to the 12th of April, 1932 had been enjoying good health

and had no hernia and had nothing wrong with his teeth, had no injuries and was in good health generally; that he had nothing wrong mentally; that on that date he fell into an open cellar way and down four or five steps, striking his head on the open cellar way with great violence and thereupon sustained injuries and developed the condition which you found upon your examination. Can you state with reasonable certainty whether such an accident was a competent, producing cause of the injuries which you found? A. Yes, it would have been.

Q. Would your answer be the same as to the hernia? A. It would.

Q. Were all these facts a competent and producing cause of all these injuries sustained? A. I don't understand.

Q. All these facts I recited to you, were they a competent and producing cause of the injuries you have referred to? A. Would they all be due to the fall?

Q. Yes. A. Yes.

Q. Will you tell us what it would cost for the operation for the removal of this hernia?

The Court: You had better ask him whether he would advise it.

Q. Have you advised the operation for the removal of this hernia? A. No, I have not.

Q. Did he consult you about the hernia? A. About whether it would be advisable to operate?

Q. Yes. A. No, he has not.

Q. From your observation of the condition of the hernia, can you tell us whether it is necessary to be removed?

Mr. Foley: I object to that.

The Court: Objection sustained.

Q. Can you tell us whether it is necessary, in order to put him back into proper health? A. It is.

Q. What would be the cost of the operation?

Mr. Foley: I object to that.

The Court: He may not advise his having it done.

Q. Would you advise his having the operation performed? A. I have not advised it.

Q. Would you advise having the operation performed? A. You mean to fix him the same as it was before?

Q. Yes. A. Yes.

Q. How much would such an operation cost?

Mr. Foley: I object to that. He does not contemplate having the operation done. He has never spoken to the doctor. It is perfectly obvious that he is going to be the same as he was before.

The Court: Now he is asking him whether he would advise having the operation, and the doctor says yes.

By the Court:

Q. So that we can get it clear, Doctor; regardless of whether it would fix him the way it was before, would you advise having an operation for the reduction of that hernia? A. I have not advised it.

Q. Would you advise it? A. Do you mean to be in good health?

Q. Sometimes a doctor advises an operation and sometimes he does not.

Mr. Dreskin: I think the doctor misunderstood.

A. I am only answering it by saying that I have not advised it.

By Mr. Dreskin:

Q. Would you advise it? A. If I would, I would have already done it.

Q. If he asked you what treatment was necessary to reduce the condition of this hernia, would you advise an operation to reduce it?

Mr. Foley: I object to that. It is based upon a false hypothesis. There is no evidence that he has ever asked him.

Objection sustained.

Q. In what manner can a hernia be removed? A. By operation.

Q. What is the normal cost of such an operation?

Mr. Foley: I object to that.

Objection sustained.

Q. Did you give Mr. Hackney any estimate as to the cost of such an operation?

Mr. Foley: I object to that.

Objection sustained.

Q. Do you recall Mr. Hackney's visit to your office just before this trial? A. Yes.

Q. Do you recall telling Mr. Hackney about the cost of the operation? A. Yes.

Q. What did you give him as the cost of this operation?

Mr. Foley: I object to that.
Objection sustained.

Q. Why did you tell him about the cost of the operation at that time?

Mr. Foley: I object to that.
Objection sustained.

Q. Did Mr. Hackney ask what it would cost for the operation?

Mr. Foley: I object to that.
Objection sustained.
Mr. Dreskin: I pray an exception to these points, if the Court please.
Exception noted as ground of appeal.

Q. From your observation of the case and your experience as a physician are you able to state with any degree of certainty whether any of these injuries are permanent or not? A. Yes.

Q. Which injuries are permanent? A. The hernia.

Q. Any others? A. None that I can be sure of.

By the Court:

Q. Except the teeth, of course. A. Yes, sir, the teeth.

Q. And the scars, I suppose? A. Yes, sir.

By Mr. Dreskin:

Q. Did he complain to you about any pain? A. He complains of pain in his back.

Q. Have you examined the back? A. Yes.

Q. Have you found any condition there? A. No.

Q. What additional services will be necessary to be rendered to put him back in proper health, so far as you know? A. I would like to understand that question a little better.

The Court: I think it is rather general. I think you should direct his attention to some specific complaint.

Q. When you last examined him, you say that you found the condition of hernia. Can you tell us what treatment, if any, will be necessary to remedy that condition? A. To remedy his existing condition, the troubles that are left over from his accident?

Q. That's right. A. An operation for a hernia.

Q. Can you tell us what that will cost?

Mr. Foley: I object to that.

The Court: I will sustain the objection. He has not yet said that he would advise an operation. He said that an operation is necessary in order to reduce the hernia, but he has not said he would advise such an operation. That is the point; that is the reason for my ruling.

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

Exception noted as ground of appeal.

Q. Aside from the hernia, did he complain of any other condition resulting from this accident the last time you saw him? A. He still complains of headache and dizziness.

Q. What about the cracking in his head?

Mr. Foley: That is very leading.

A. I have no remembrance of that.

Q. Did he complain to you about his teeth?

The Court: The doctor did not treat him for his teeth.

A. No.

Q. Did he complain about any nervousness? A. Yes.

Q. Is there any twitching of his face? A. I don't remember that.

Cross examination by Mr. Davis:

Q. You first saw Mr. Hackney about two days after the accident? A. Correct.

Q. And at that time you found a rupture? A. Yes.

Q. On the right side, did you say? A. On the right side.

Q. Is that where he had previously had the operation for rupture? A. Yes.

Q. It is true that when a man has a rupture once he is more apt to have another one more than when he has not had one before? A. No.

Q. I understand that there are two kinds of rupture: one coming from the gradual weakening of the abdominal wall and the forcing of the intestines through; and one called a "traumatic rupture" caused by sudden violence and external force? A. I don't think you can differentiate it into two classes just that way. The whole structure down there is normally weak in anybody. That is the reason that ruptures occur. A rupture that is properly repaired is a stronger proposition than it was in the beginning, and a repaired rupture that was properly repaired cannot occur again without external violence. Does that answer your question?

Q. There are two kinds of ruptures, however, aren't there: the ones occurring from internal force and those occurring from external force? A. No. What do you mean by internal force?

Q. Forcing of the structures——

The Court: Do you mean internal pressure?

Mr. Davis: Yes.

Q. The man puts some extra force on the muscles of his abdomen, and the thin muscular wall gives way, and the intestines force their way through. Isn't that one type of rupture?

Mr. Dreskin: I object to that.

Objection overruled.

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

Exception noted as ground of appeal.

A. Yes.

Q. Something that the man does himself. A. Yes.

Q. He tears part of the wall and the intestines protrude. A. Yes.

Q. Another kind comes from without; the application of some violent force. A. Such as what?

Q. Such as being impaled on a picket fence. A. That is not a rupture.

Mr. Dreskin: I object to that.

The Court: I will sustain the objection. Of course, if the picket fence goes through, there is a rupture.

Q. One kind of rupture comes from within and another kind comes from without. A. That is what you say.

Q. Isn't that true? A. I don't know what you mean. You say "some force comes from within." What do you mean? Do you mean movement of the bowels, or something like that?

Q. From muscular force within the man. A. There is no muscular force possible within the man.

Q. What do you call a rupture caused by the application of sudden and violent force from the outside? A. What do you mean?

Q. Do you do any rupture work? A. Lots of it.

Q. What is rupture due to? A. Lifting something very heavy.

Q. It is due to a violent injury, isn't it? A. No.

Q. How long is it since you have read up on the subject of rupture? A. Have I got to answer questions like that?

The Court: I guess you do.

Witness: Absolutely read? It may be matter of years.

Q. I understand that when a rupture is caused by some outside force that it causes sudden and great pain and collapse. Is that true? A. Ordinarily.

Q. And that the man cannot walk if he has sustained a rupture as a result of external force. Is that true? A. As a rule they can walk.

Q. If you knew that Mr. Hackney had gotten up and walked out of the cellar into which he had fallen; that he had walked into the hospital from the ambulance, would you say that he had just sustained a sudden and violent rupture?

Mr. Dreskin: I object to that.

Objection sustained.

Cross examination by Mr. Foley:

Q. Did I understand you correctly to say that where there has been a rupture which has been properly mended, the wall becomes stronger than it has been before? A. Yes.

By the Court:

Q. You mean at that point. A. That particular rupture.

By Mr. Foley

Q. And that following that, the only kind of rupture a man could have would be one which came from the application of external force? Did you say that? A. Traumatic, yes.

Q. What do you mean by external force? A. Usually it is an unnatural, sudden twist of the body, or sudden violent muscular strain. Can I give a concrete example here of how it may have happened?

Q. Anything might have happened. A. Surely.

Q. You don't necessarily mean the application of a blow. A. Not a blow.

Q. A rupture can come from that, can it not? A. That is the rarest way in the world for it to come.

Q. Ordinarily ruptures are not traumatic in origin, are they? I mean the great majority of them are the result of natural progress over a period of years. A. Yes. There is original weakness in that part.

Q. The rare example is where one has come from an accident. A. I wouldn't say it is rare; it is less common than the other one.

Q. In this case, in order for you to come to the conclusion that this rupture from which this man is suffering was the result of the accident, you have to assume, do you not, that he came to his injuries in a manner which could produce a rupture? A. Yes.

Q. In other words, you did not see him before this accident, did you? A. Never.

Q. You don't know whether he had a rupture or not; you simply take his word for the fact that he did not have a rupture, and then you find a rupture afterward, and you assume that in this accident he twisted or turned in some way to produce a rupture. A. Yes.

Q. Which may or may not be true. A. Correct.

Q. Necessarily his word to you that he did not have this rupture before the accident is of great importance, isn't it? A. Yes.

Q. In order for you to make this diagnosis. A. Yes.

Q. And his statement to you is practically the foundation for your opinion, or a necessary basis for your opinion. A. You mean that the rupture occurred at that time?

Q. Yes. A. Yes.

Q. This man complained to you of many things, did he not? A. Yes.

Q. And among those things of which he complained, was pain in the back? A. Yes.

Q. And following his complaint to you of pain in the back you examined his back, didn't you? A. Yes.

Q. And you found no reason for this man to complain of it. A. He had tenderness there for some length of time.

Q. Tenderness is something which he expresses

to you when you touch his back, isn't it? A. Yes, correct.

Q. There is nothing which you could demonstrate to yourself, without any expression from this man whatsoever, which would lead you to believe that there was an injury or not an injury. A. A bruise in the beginning.

Q. How long did it take for the bruise to clear up? A. Well, a bruise is only shown by discoloration and swelling, and I would say offhand that that particular thing had cleared up within two or three weeks.

Q. He complained of this pain in the back as recently as last week when he came to see you? A. Yes.

Q. And you examined him at that time, didn't you? A. Yes.

Q. And you found no reason at that time for any complaint of pain? A. Yes.

Q. Aside from the bruise, you found nothing else in that region, did you? A. You mean in the beginning?

Q. At any time. A. Tenderness.

Q. Tenderness, as we said before, is his expression to you, isn't it? A. That is not strictly true. You can tell a little bit beyond just what the patient tell you about tenderness. There is contraction of the muscles, and things like that. I wouldn't say tenderness was a thing that you had to rely on the patient's word for.

Q. Aside from the statement of the patient to you that he is tender, or his giving you some expression of pain, there is little else upon which you can base a determination. Isn't that so?

Mr. Dreskin: He has answered that two or three times.

The Court: I think so.

Q. When did you see him before last Saturday? A. I should think three or four weeks ago.

Q. How long before that? A. Possibly a couple of months.

Q. How long before that? A. At fairly long intervals for some time.

Q. In other words, you treated him frequently in the beginning, but after about a month or six weeks, would you say—— A. [Interrupting] No, longer than that.

Q. Two months. A. Maybe three or four months.

Q. You have a record of your treatments, have you not? A. Not with me, but I saw him frequently for the first three or four months, either at his house or at my office; and then infrequently after that.

Q. When he came to see you last Saturday to make his complaints to you, he also told you at that time that his case was coming up for trial, did he not? A. I knew that.

Q. And he told you that he expected you to be his witness? A. Yes.

Cross examination by Mr. Kain:

Q. I believe you said on direct examination that the hernia was on the right side and that you found an impulse behind the scar. What did you mean by that? The scar of the former operation? A. The scar of the operation.

Q. You also testified, I believe, that where there has been an operation the wall is really stronger than it was before if it is done properly, is that correct? A. Yes.

Q. So that this hernia was in exactly the same place as the prior hernia had been. A. I don't know. I didn't see the prior hernia.

Q. What do you mean by the "impulse"? A. On coughing, the impulse shows a weak spot in the wall, which is a hernia.

Q. Then the impulse was directly in the wall behind the scar? A. Yes.

By the Court:

Q. Does that mean that the damage to the wall was directly behind the scar? A. Yes.

Recross examination by Mr. Davis:

Q. One other question, Doctor. Did I understand that you could not tell by looking at that rupture how long it had been there? I am talking of the new one behind the scar. A. No, you couldn't tell that.

Q. It might have been there for some time? A. Yes.

Q. And your only source of information was Mr. Hackney? A. Yes, sir.

By Mr. Dreskin:

Q. That, and your experience in hernia cases, told you it had been there? A. Yes. He had a hernia all right.

Mary E. Hackney sworn in behalf of plaintiff.

Direct examination by Mr. Dreskin:

Q. Mrs. Hackney, you are the wife of Mr. Hackney, the plaintiff in this case? A. I am.

Q. Do you recall the night of April 17, 1932? A. I do.

Q. What time did you arrive at the Palace Theater that night? A. Around between four and four-thirty.

Q. Who was with you? A. Mr. Hackney and my daughter.

Q. Did you see the performance? A. I did.

Q. You paid for the admission? A. Yes.

Q. What time did you get through with the performance? A. We came out about seven or seven-fifteen.

Q. Was it night or day at that time? A. It was night.

Q. Where did Mr. Hackney go? A. He left daughter and I in the lobby, and he went to telephone for a cab.

Q. How did you arrive at the theater? A. By cab.

Q. How long had Mr. Hackney been gone when you saw him again? A. It seemed only a very short time.

Q. Did you have an appointment that evening? A. We did not.

Q. Was there any question of being in a hurry? A. No, indeed not.

Q. Did you have any engagement? A. No.

Q. When you saw Mr. Hackney next, who was with him? A. He appeared at the doorway of the theater.

Q. Who was with him? A. A man. Of course, I didn't know at the time who he was—Mr. Rogow. He was holding him and he was just almost covered with blood. The blood was just pouring from his mouth, and the only thing he could say to me was, "My teeth are all gone."

Q. Did you ask him what happened? A. Some lady ran up to me and said to me, "Is that your husband that has just fallen outside?"

Q. What happened to Mr. Hackney after that? A. My first thought was to get him to the hospital. I saw he was badly injured, and Mr. Rogow offered to take him. He had just come out of the theater to turn on the lights on his car.

Q. Your husband went to the hospital in Mr. Rogow's car? A. Yes.

Q. Did you accompany him to the hospital? A. I did not. My daughter went.

Q. What did you do? A. I remained to know just exactly what had happened to Mr. Hackney. I went back across to the theater and I met this couple in front, Mr. and Mrs. Bradley, and I asked them if they saw what had happened.

Q. Had you crossed the street? A. I had crossed the street to the car and saw that Mr. Hackney was in it.

Q. So that you came back again to the side of the theater? A. To the theater.

Q. After Mrs. Bradley told you what had happened what did you do? Where did you go? A. I walked down to the doors.

Q. Will you indicate, please, on that map where you were first standing when Mr. Rogow came and where you walked after talking to Mr. and Mrs. Bradley? A. Here where the ticket office is [indicating]

Q. Which way did you walk? A. I walked down to the cellar door.

Q. As you left the lobby of that theater, was it light or dark on that sidewalk? A. It was dark.

Q. As you came to these cellar doors, what did you find the condition of those cellar doors to be?

Mr. Foley: I object to that.

Q. Were they open or closed? A. A colored man was just closing those doors.

Q. Would you recognize the colored man if he was here in court? A. I would.

Mr. Dreskin: Mr. Battles, will you stand up, please?

Q. Is that the man? A. Yes.

Q. Did he have on any different clothing? A. Yes, sir; he had on a dark uniform with gold braid and buttons.

Q. Did you see him at the theater? A. Yes.

Q. What was he at the theater? A. A doorman, because he had opened the cab door for us on arriving at the theater.

Q. On that night or on other nights? A. On other nights. I don't remember that evening.

Q. Was there any guard there at the door when you arrived there at the door? A. No.

Q. Did you notice any lights inside the cellar way? A. I did not.

Q. Were the lights from the lobby or from the theater sufficient to light up that particular part of the cellar way or the cellar door? A. No.

Mr. Foley: I object to that.

The Court: I will sustain the objection. Strike it out.

Q. Was it light or dark in the immediate vicinity of those cellar doors? A. It was dark.

Q. Who came over with the colored man while he was closing these cellar doors? A. Some man came out of the theater and asked me if I would not come inside, and offered to get me a glass of water.

Q. Would you recognize this gentleman in court? A. I am afraid I would not.

Q. Did you observe any stains or any marks around that cellar door? A. I did. They were dark stains that I took to be blood.

Q. Where were those stains? A. Right around the framework.

Q. Will you show us on that sketch where those stains were? A. Right on the edge here (indicating).

Q. Did you call the Orange Police Department? A. I did.

Q. Who came over? A. There was an officer, Mr. Dietrich.

Q. That gentleman came over? A. Yes.

Q. Before that time what was Mr. Hackney's condition so far as health was concerned? A. Very good.

Q. Had he been ill during the last three or four years? A. He had not missed a day.

Q. How long was he in that hospital? A. He stayed that evening and we brought him home the next afternoon.

Q. Did he walk home? A. He did not.

Q. After the accident what did he complain of? A. Of his back and head and his limbs. He was very, very nervous, and there was a twitching in his face. He was very nervous. We couldn't leave him, and he imagined a lot of things. If the 'phone would ring he would think there were people plotting against him, and he was in a condition we could never leave him alone. He threatened to destroy himself.

Q. Was he that way before that time? A. No, indeed.

Q. Did you observe anything about his ability to sleep? A. He didn't sleep.

Q. How about his mouth and the condition in his mouth? A. His teeth were gone and he could eat only liquids.

Q. What doctor attended him in the hospital?

The Court: He has testified to that. It is not disputed.

Q. How long did he remain in bed? A. Ten days.

Q. How long did he remain at home? A. He was at home four weeks in all.

Q. Did he go back to work after the four weeks? A. He went back to business because Dr. Smith advised it, and he could only work part of the day.

Q. How long did he work part of the day? A. That I couldn't say.

Q. For a week or more? A. He would rest at the hospital in the store.

Q. Was his condition improved, if you know, at the end of the four-week period? A. Well, of course, it had improved some.

Q. Has he complained since that time up to the present time? A. Indeed he has.

Q. What is his condition so far as you have been able to notice? A. He had had a loss of memory and he is very irritable and nervous, and he takes something now to make him rest at night.

Q. Did that condition exist before that? A. No.

Q. Coming back to the sidewalk and that cellar door, was it possible for you to see that cellar door as you emerged from the theater?

Mr. Foley: I object to that.

The Court: You had better find out whether she looked first.

Q. Did you look toward Harrison Street? A. At what time?

Q. After Mr. and Mrs. Bradley told you what had happened, you came out of the lobby and walked in this direction (indicating), is that right? A. I did.

Q. Rather, you testified you went across the street first. A. To see Mr. Hackney off to the hospital.

Q. Then you came back? A. I did.

Q. Then you walked in the direction toward Harrison Street, Harrison Street being this way (indicating)? A. Yes.

Q. When you came here were you able to see these cellar doors distinctly as you were walking?

Mr. Foley: I object to whether she could see them distinctly or not.

Q. Were you able to see them at all? A. No. You couldn't see them; it was dark.

By the Court:

Q. That is when you were under the marquee, covering over the sidewalk? A. Yes, sir.

Q. From there you say you could not see them? A. I could not see them.

By Mr. Dreskin:

Q. When was the first time you could see those cellar doors as you were walking in that direction? A. I couldn't say how close I was.

Q. Was it from far away or from close? A. Well, I must have been half way from the entrance of the theater to the doors.

Cross examination by Mr. Foley:

Q. Do you have in mind that the distance from the main entrance, this part of the main entrance

(indicating) to the cellar door, is approximately 25 feet? A. That is not from the main entrance; that is from the corner, isn't it, where you are pointing?

Q. The corner of what? A. Of the theater.

Q. This is the beginning of the entrance way, isn't it? A. This would be the main entrance to the theater, if I remember correctly (indicating).

Q. The point which I indicate as being that point, that is there on the picture, is it not (indicating)? A. Yes, sir.

Q. That is the entrance way to the theater, isn't it? A. Yes.

Q. From there to the door is approximately 25 feet. A. I don't know the distance.

Q. With all this sign lighted up, it is your opinion you would have to walk half way from this point to the doors before you could see the entrance way? A. Yes, because it was dark.

The Court: You mean the cellar way, don't you?

Mr. Foley: The cellar way, yes, sir.

Q. And there is a light at this point on a pole, isn't there, across the way from this driveway? A. A city light?

Q. Yes. A. Yes, there is.

Q. And the cellar way lies approximately half way between the theater entrance and that light. A. That I don't know.

Q. But you do say you had to walk half way down before you could see them? A. I had to walk half way down before I saw those doors.

Q. Will you indicate on the map again where it was you saw these stains? A. Around the edge of the doorway. I imagine the blood was lost when

he came up out of the cellar on his way back to me.

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

Q. Will you indicate it again? A. The edge of the cellar doors around here (indicating).

Q. Indicating the corner of the cellar entrance way?

Mr. Dreskin: I don't agree with counsel.

Mr. Foley: Suppose you state what it is.

Mr. Dreskin: That pointer is about a quarter of an inch in thickness.

Mr. Foley: I don't want to argue with you. I would like to have it indicated on the record.

By the Court:

Q. Can you describe it without pointing to it? A. Right at the edge of the frame.

By Mr. Foley:

Q. Which edge? The first edge you come to? A. Just the one as he comes out of the cellar. Perhaps I don't make it plain enough.

By the Court:

Q. You point to the frame which is nearest the street? A. Yes.

Mr. Foley: And she indicates the corner nearest to the theater.

Mr. Dreskin: But she does not limit herself to that.

The Court: Let her do the testifying.

Cross examination waived by Mr. Kain.

Mary E. Hackney—For Plaintiff—Re-direct—Re-cross.

Redirect examination by Mr. Dreskin:

Q. At the time you came out of the theater, were you looking for these cellar doors that Mr. Hackney fell down? A. I went down to see them, yes.

Q. Was that the reason you were able to see those cellar doors from that point half way down?

Mr. Foley: I object to that.

Objection sustained.

Mr. Foley: I have one more question I should like to ask this witness. She spoke of the loss of memory. I would like to ask a question regarding that.

The Court: Very well.

Recross examination by Mr. Foley:

Q. You say that at the present time your husband seems to be suffering from an impairment of his memory? A. Yes.

Q. As far as you know, is there anything which he neglected to tell on the witness stand this morning and which occurred on April 17, 1932?

Mr. Dreskin: I object to that. She does not know what he knows about the situation.

The Court: You mean with regard to this occurrence?

Mr. Foley: Yes, your Honor.

Mr. Dreskin: I object to it.

Objection overruled.

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

Exception noted as ground of appeal.

Q. So far as you know, has he described this occurrence as you understand it? A. Of course,

he didn't tell about the loss of memory. You wouldn't expect him to, would you?

Q. We want to know whether he described the occurrence—— A. [Interrupting] They asked Dr. Smith that he come two days later to take charge of Mr. Hackney as we had been in East Orange a short time. We did not have him before. Dr. McCloskey told us he needed a surgeon, and he called Dr. Smith for it.

By Mr. Foley:

Q. You heard your husband testify, didn't you? A. I did.

Q. Was there anything in his testimony regarding either his injuries or what happened on April 17, 1932, which indicated to you that he has any impairment of memory with respect to that incident? A. Of course, there is a lot of things he was not going to volunteer.

Christopher C. Beling sworn in behalf of plaintiff.

Mr. Foley: Qualifications admitted.

Mr. Dreskin: I would rather prove them, if the Court please.

Direct examination by Mr. Dreskin:

Q. Dr. Beling, you are a licensed physician of the State of New Jersey? A. I am.

Q. Are you engaged in the practise of your profession? A. Yes.

Q. How long have you been practising? A. I have practised medicine since 1897.

Q. Where is your office located? A. In Newark.

Q. Are you connected with or have you been connected with any public institutions in the State of New Jersey? A. Yes.

Q. Will you name them? A. You mean the ones I am connected with now?

Q. Yes. A. I am visiting neurologist at the Newark City Hospital, St. Michael's; consulting neurogolist, St. Barnabas, Presbyterian Hospital, the Irvington General, the Mountainside Hospital at Montclair, and a number of other hospitals.

Q. Are you engaged in the practise of any specialty? A. Yes.

Q. What is that specialty? A. Nervous and mental diseases.

Q. Do you recall being called in to treat Mr. Hackney sometime after April, 1932? A. Yes, sir.

Q. Have you been engaged by the State in your capacity as a neurologist, and so forth? A. By the State?

Q. By the State of New Jersey to testify in any trials. A. Well, I have testified in a great many trials.

Q. Do you remember the exact date when you first saw Mr. Hackney? A. On May 11, 1932.

Q. Where did you see him? A. In my office.

Q. Did you make an examination of him? A. On May 12. I saw him both on the 11th and the 12th.

Q. Will you describe to the Court and jury the condition in which you found the plaintiff, Mr. Hackney? A. My examination revealed that he had a number of subjective symptoms. He was irritable and very nervous. There was a healed scar on the upper lip, about the center of the lip. The backgrounds of his eyes showed changes

around the margins of the optic nerves. The arteries of the backgrounds of the eyes were very narrow. There was some irregular area of pigmentation in the eyegrounds. There was irregular, jerky movement of the eyeballs and a rotational movement of the eyes when he looked from right to left. The hearing in his right ear was impaired, and he favored his left ear. His ear drums were normal. There was a tenderness over the groin where he had been operated on for a hernia, and there was a slight recurrence of the hernia, he having stated that the hernia had been operated on and cured. There was a twitching of his facial muscles. His central and lateral incisor teeth were broken. Those were the objective findings. His blood pressure was low. He had a blood pressure of 105 over 72.

Q. Did you find his condition to be a producing cause of pain? A. He complained of pain and headaches. That could give rise to headaches.

Q. When did you next see him? A. Then I saw him again on September 29, 1933. He was again referred to me by Dr. Smith. I had seen him the first time at the request of Dr. Smith and recommended treatment. Then I saw him again on September 29, 1933.

Q. What did you find his condition to be at that time? A. At that time I ascertained that he had returned to work about four or five weeks after the accident; that he had worked under a strain and he suffered from pains in the lower back and the back of the head and neck, and that the site of the hernia operation gave him some trouble; that there was some pain and tenderness. His memory had improved, but he still suffered from headaches. He had gained somewhat in weight, and his blood pressure was better.

But his optic discs—the eyegrounds—showed more marked changes, atrophic changes. The nystagmus—the jerky movements—was still present. On the whole, he had improved somewhat.

Q. When did you see him again? A. On February 21, 1934. He still had the jerky movements of the eyeballs present, and his visual fields were contracted; they were narrowed down. The optic discs showed a widening of the band of pallor that I noticed at the first examination around the discs. There was still some twitching of the facial muscles, and there was some of the scowl on his face.

Q. Would the narrowing of the visual fields cause the blurring of the vision that he complains of? A. Yes.

Q. Assume that Mr. Hackney, previous to the 12th day of April, 1932, had been enjoying good health and had no trouble with his teeth or with his head or with his eyes or with his back or with his groin, or any of the conditions which you have described; assume that he was operated for the hernia and that the operation had been successful and the hernia reduced; assume that on the 12th day of April, 1932, he fell into an open cellar way, falling down five or six steps, striking his head on the open doorway and striking his body against the other part of the doorway, and striking the bottom with great violence; that he thereupon sustained the injuries and thereafter developed the condition you found on your examination. Can you state with reasonable certainty whether such accident is the competent, producing cause of the conditions which you found? A. Such an accident could produce the condition I found.

Q. From your observation of the case and your experience as a neurologist, are you able to state

with reasonable certainty whether any of these injuries are permanent or not? A. I think the condition of his eyes is permanent. As to his mental state, that might improve and it might not. But I could not say as to the permanency of that. But the objective signs with regard to the eyes I think will be permanent.

Q. How about his nerves? Will that condition improve? A. He will be more or less nervous.

Q. And how about his headaches or dizziness that he complains of? A. Sometimes headache and dizziness persist for a long time and sometimes they pass off; one cannot say too definitely about them.

Q. Would you say he would need additional medical services to try to cure himself of his injuries? A. I presume he would probably need that.

Q. Can you tell with reasonable certainty as to what his future condition may be? A. I could not say more than what I have already said.

Q. How many of these neurological cases have you treated, approximately?

The Court: I think you have covered the qualifications.

Q. How much was your bill for the services you rendered? A. I don't know. I didn't figure it out.

The Court: He has testified to it, without objection, as $50.

Cross examination by Mr. Foley:

Q. When you first saw this man, I understand that the only complaint of pain which he made to you was of headaches. A. Yes. At that time

he complained of pains and headaches off and on, nervousness and pain in the back of the head and neck, and pain at the site of the hernia.

Q. I understood you to say that he complained of pain in the back and complained of pain at the site of the hernia at your examination in September, 1933. A. No, in my first examination, I limited myself strictly to the objective findings. When I was asked further about the case and the treatment of the case, I mentioned the pain. But on the first examination the history I had given me was that he had pain, headaches off and on, and pain in the back of the head and neck and pain at the site of the hernia.

Q. With regard to the hernia, you have described it as being a condition which indicated a slight recurrence of a previous hernia. A. Yes.

Q. That is your description of it? A. That is what I thought it was.

Q. And when you say "a slight recurrence," the use of the word "slight" is to indicate both the size and the severity of the hernia? A. Yes; that if the hernia had been there. I don't know what it was before, but that there had been some recurrence of the hernia; that you could feel an impulse there which would indicate that the hernia had come back to a slight extent.

Q. May that hernia remain in that particular condition for the rest of this man's days? A. That depends on what he does. If he does not exert himself, it may remain; but if he exerts himself, it may become worse. But it can give him some discomfort and pain. If he lies down and does not get up and hustle around, he will be more comfortable; if he walks, he will have some pain in the scar and the wound in that region.

Q. But if he indulges in no heavy work it is likely that the hernia itself will not get any larger or descend any further? A. Probably not. The only condition under which the hernia would become aggravated would be by strain, either by coughing or by lifting weights, or by physical exertion.

Q. Had this man worn eye glasses prior to this accident, do you know? A. I don't know. Probably he should wear glasses.

Q. If you assume that he did wear glasses, and have in mind that you never examined him before this occurrence, there is no way for you to tell, is there, Doctor, to what extent his eyes were impaired prior to this accident?

Mr. Dreskin: I object to that on the ground that being a hypothetical question, all the facts in connection with the hypothetical question are not included.

Objection overruled.

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

Exception noted as ground of appeal.

A. I couldn't tell what the condition of his eyes was before the first time I saw him.

Q. You may assume, because it is a fact, that this man wore eye glasses before this accident. A. Yes. I thought I had told you that.

Q. You said that you assumed so. A. Yes.

Q. You may assume so because as a matter of fact it is true. There is no way for you to tell for what particular condition those eye glasses were prescribed, is there? A. For his vision.

Q. There is no way for you to tell, is there, to what extent the conditions which you found at the

time of your first examination, existed prior to this accident. A. No, I couldn't tell what it was prior to the accident; I could only tell what I saw, and I could only tell what I saw the first time and what I saw the second time and what I saw the third time.

Q. And having in mind that this man wore eye glasses before the accident, it is entirely possible, is it not, that the conditions which you found at the time of your first examination, preexisted this accident? A. I couldn't say that.

Q. You can't say whether they did nor can you say whether they did not. A. I couldn't say anything about something I had never seen before.

Q. When you were asked the hypothetical question and asked to state your opinion as to whether or not these conditions which you found were the result of an accident, there was not included in that hypothetical question, was there, the statement that this man had something wrong with his eyes which caused him to wear eye glasses prior to this accident?

Mr. Dreskin: I object to that.

The Court: The question speaks for itself. He said he was in perfectly good health. I don't suppose it is perfectly good health if he had bad eyesight.

Q. I suppose you would not be in perfectly good health if you had poor eyesight. A. Of course, lots of people in perfectly good health are wearing glasses. Glasses are usually prescribed for reading, because a person is either short sighted or long sighted. It has nothing to do with the backgrounds of the eyes; it has to do with the curve of the cornea and the way the eyes refract.

whether you can see near or whether you can see far.

Q. The condition of impaired eyesight may be one that attributes that condition which you found; in other words, the condition which you found would produce bad eyesight. A. Yes.

Mr. Dreskin: What is that?

Witness: The backgrounds.

Q. What I mean is this: The conditions which you found might produce impaired eyesight. A. Yes, they will produce impaired eyesight.

Q. Having in mind that this man had impaired eyesight prior to this accident, and that glasses were prescribed for the correction of that impaired eyesight to the extent that it could be corrected, how can you tell whether the conditions which you found were the result of this accident or existed prior to the accident, as perhaps may be evidenced by the fact that he had impaired eyesight and by the fact that he wore glasses?

Mr. Dreskin: I object to that. There is no testimony that he wore glasses.

Objection overruled.

A. I told you about twice before that I could not tell you because I had not seen him before and I didn't know anything about it.

Q. Then why, if that is true, do you say that you believe that it is a result of the accident?

The Court: He didn't say that. He said it could produce those things.

Q. You did not say that the accident did produce those things, did you? A. I did not. I said that the condition of his eyes the first time I ex-

amined him, could be produced by the accident; that the second and third times I examined him I found that the conditions were worse, so they were progressive.

Q. It is not your intention to convey to us that it is your opinion that this accident did actually produce the conditions which you found? A. No.

Redirect examination by Mr. Dreskin:

Q. But it could have produced the conditions which you found?

Mr. Foley: I object to that.

Objection sustained.

Q. You said on cross-examination that a person could continue with the hernia condition without having it reduced or taken care of. A. That's right.

Q. Assume that he was a division superintendent and that that particular job required his walking about and being constantly on his feet all day.

Mr. Foley: There is no evidence of that.

Mr. Dreskin: I will have him back on the stand to prove what his duties are.

The Court: What is the question you want to ask? I don't think you need any special testimony as to people being on their feet.

Mr. Dreskin: Whether he needed to be operated on for this hernia or could continue that way.

The Court: Ask him whether he advises an operation.

Q. Would you advise an operation to reduce the hernia? A. No. I think he will have to get

along with that. I am not a surgeon, but I have some knowledge of those things, and I would rather leave it alone and not operate on it.

ELIZABETH H. BRADLEY sworn in behalf of plaintiff.

Direct examination by Mr. Dreskin:

Q. Mrs. Bradley, where do you live? A. 31 Lafayette Avenue.

Q. On April 17, 1932, where did you live? A. 85 Halstead Street.

Q. Prior to April 17, 1932, had you visited the Palace Theater? A. Yes.

Q. From which direction did you come to visit the theater? Will you indicate with the pointer, please? A. From Harrison Street [indicating].

Q. Harrison Street is which way? A. Over that way [indicating].

Q. Which way did you come? A. Down Harrison Street.

Q. You came across in front of the theater building? A. That's right.

Q. About what time did you generally go to the movies? A. Anywhere between seven and seven-thirty.

Q. At that point in front of the theatre building, the point I indicate on this map with my finger, was the sidewalk wide or narrow?

Mr. Foley: I think the map speaks for itself, I object to it.

The Court: I will sustain the objection. You have proved the width. It is for the jury to say whether it is wide or narrow.

(Question withdrawn.)

Q. In walking over that part of the sidewalk, what portion of the sidewalk do you have to use? A. We have to use——

Mr. Foley: I object to that.

By the Court:

Q. What portion did you use? A. The narrow part of the sidewalk.

By Mr. Dreskin:

Q. Did you ever observe the conditions of the lighting in the immediate vicinity of those cellar doors? A. Yes, I have.

Q. What was that condition?

Mr. Foley: I object to that.

The Court: Confine it to this night.

Mr. Dreskin: I want to show that she had been there before.

The Court: We are interested only in this night.

Q. Who accompanied you to the movies on this night? A. Mr. Bradley.

Q. Which way did you come? A. From Harrison Street and down to this particular doorway.

Q. What did you observe, if anything, about those doorways? A. They were open.

Q. Was there any light down there? A. No, there was not.

Q. Was there a guard there? A. No.

Q. Could you see those cellarways until you were—— A. (Interrupting) Not until I got right onto them.

Mr. Foley: I object to that.

Q. When did you first see those cellar doors?

Mr. Foley: I object to that.

Objection overruled.

Counsel for defendant Ledirk Amusement Co. prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

A. Not until I was right upon them.

Q. What did you have to do in order to pass those cellar doors? A. Mr. Bradley walked ahead and I walked in back. We had to walk single file because the sidewalk is narrow there.

Q. Had you ever observed that before? A. Yes, many times.

Q. How many times?

Mr. Foley: I object to that.

Q. After you arrived where did you go? A. Mr. Bradley went in to purchase tickets and I stood out on the sidewalk.

Q. Did you see Mr. Hackney come out? A. Yes.

Q. Which way did he walk? A. He walked toward Harrison Street.

Q. How far did you see Mr. Hackney go when something happened to him? A. I couldn't exactly say how many feet or how far he walked. He didn't walk hardly any distance, it didn't seem, before I heard a scream, and I seen him fall into this open doorway or open cellar way.

Q. Were you able to see the cellar way from where you were standing? A. No, I was not; I could not see them open.

Q. From what distance could you see the cellar doors open? A. As I said before, when I walked

to the theatre I could only see them when I got onto them.

Mr. Dreskin: I want to show the nuisance and the conditions which created a nuisance by the encroachment on a public highway by reason of the faulty construction and negligent maintenance.

The Court: There is no question but that they had been there for a number of years. It all depends on who opened them.

Mr. Dreskin: I contend that the testimony as to these previous occasions should be permitted.

The Court: The testimony that what? That they were open or closed?

Mr. Dreskin: The testimony that the cellar ways were in a dangerous condition before this day and constituted a nuisance.

The Court: I don't understand what you want to ask her; whether they were open or whether they were closed. It is admitted that they were there.

Q. After seeing Mr. Hackney drop into the cellar, what did you do? A. I went into the theater lobby. I saw a woman standing there with her daughter and I asked whether her husband had just left the theater. She said, "Yes." I told her that some gentleman had fallen down this open cellar way. We both walked out of the theater together, and as we did, Mr. Hackney was just—at least, he was walked toward the edge of the Palace Theater.

Q. With whom? A. With some gentleman that was holding him up by the arm.

Q. What was his condition at that time? A. I couldn't really tell. He had his hands over his

face and he said that all his teeth were knocked out.

Mr. Foley: I object to that and ask that it be stricken out.

The Court: Strike it out.

Q. Did you see a colored man in the immediate vicinity of the doors at that time? A. Yes, I did. Some gentleman came out of the theater with a colored man in a uniform and he told him, "For God's sake——

Mr. Foley: I object to that.

The Court: Don't tell us the conversation.

Q. You saw a colored man? A. Yes.

Q. And he had a uniform on? A. Yes.

Q. What kind of uniform? A. One that the ushers wear at the Palace, with gold braid and dark color.

Q. Do you know who came out with him? A. I don't remember.

Mr. Dreskin: Mr. Kridell, will you please stand up?

Q. Is that the gentleman? A. I wouldn't really want to say definitely.

Q. What did the colored man do after coming out of the theater? A. Closed the doors.

Q. Prior to that time they were both open? A. Yes.

Q. Was there any light at that time in the cellar? A. No.

Q. Was there any guard at that time? A. No.

Q. Did you see any blood stains? A. No, I did not.

Cross examination by Mr. Foley:

Q. Will you indicate for me on the map; you may do this by looking at Exhibit DL1 for identification; will you indicate the end of the Palace Theater entrance way? A. This is what I call the entrance (indicating).

Q. Will you indicate that again? A. Right here (indicating).

Q. The McClurg store window begins at this point, doesn't it (indicating)? A. That's right.

Mr. Foley: I will mark that X1.

Q. So that from the point XI down to the end of the building you have the store front of the McClurg store? A. That's right.

Q. And this cellar stair is located in front of the McClurg window? A. That's right.

Q. You had walked along in this direction with your husband? A. That's right.

Q. You say that you had to walk in single file? A. The door was open, because I stopped. I was stopped in front of it and realized that the door was open, and I was frightened, and I spoke to Mr. Bradley——

The Court: Don't tell us that.

Q. You got up to in front of the cellar doors, and you say the space was so narrow that you walked single file? A. Yes, it appeared so narrow.

Q. That distance is about 4 feet 5 inches? A. I couldn't tell you.

Q. Neither you nor Mr. Bradley fell down the cellar? A. No, because I stopped just before I got there.

Redirect examination by Mr. Dreskin:

Q. Had you prior to that date been in danger of falling into the cellar way?

Mr. Foley: I object to that.

Objection sustained.

The Court [after argument]: I will not change my ruling. I will sustain the objection.

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

Exception noted as ground of appeal.

Mr. Dreskin: I would like to have the same objection noted to the other question whether she had been there before.

The Court: I don't see any reason for it now.

Grover A. Dietrich sworn in behalf of plaintiff:

Direct examination by Mr. Dreskin:

Q. Officer, you are attached to the Orange Police force? A. Yes, sir.

Q. On April 17, 1932, at about 7:30 p. m., as a result of instructions, did you go to Main Street, Orange, to the Palace Theater Building? A. Yes, sir.

Q. When you got there, what did you find? A. I found out that a man had fallen down the cellar way and that the doors of the cellar way were just being closed by an attendant there.

Q. Which cellar doors are you referring to, and will you point them out, please? A. Right there [indicating].

Q. About what time did you arrive there? A. Oh, about 7:32 or 7:33.

Q. Was either of the cellar doors fully open at the time when you came there? A. No. They were just letting this here one down when I got there [indicating].

Q. Who was doing the closing? A. A man by the name of Battles, Mr. Battles.

Mr. Dreskin: Mr. Battles, will you stand up, please?

Q. Is that the man? A. Yes, sir.

Q. What kind of uniform did he have on? A. A dark uniform with gold braid.

Q. Was there any light in the cellar way when you came there? A. No, sir.

Q. What is the general lighting condition in the immediate vicinity on those cellar doors? A. Why, it is rather dark down at this corner here [indicating].

Q. Had you passed that place before? A. Yes, sir.

Q. Did that condition exist on previous nights? A. Yes, sir, when that store was closed.

Q. This was on Sunday night, and the store in front of that cellar was closed, wasn't it? A. Yes, sir.

Q. Did you speak to Mr. Battles? A. I spoke to him and asked him what the trouble was, and he said——

The Court: Don't tell us what he said.

Q. What did Mr. Battles say to you?

Mr. Foley: I object to that.

Objection sustained.

Q. Did he tell you whom he was working for?

Mr. Foley: I object to that.
Objection sustained.

Q. You say he had the uniform of the theater on? A. Yes, sir.

Q. Did you have any conversation with Mr. Kridell? A. Yes, sir.

Q. Which Mr. Kridell? A. J. Kridell, I think it was.

Q. When did you have this conversation with him? A. As soon as I went inside the theater, right after I found out what had happened.

Q. Will you tell us what you said to him?

Mr. Foley: I object to that.

Mr. Dreskin: Mr. Kridell is one of the members of the corporation.

The Court: I don't know about that.

Mr. Dreskin: May I have permission to withdraw the witness and call Mr. Kridell to the stand?

The Court: I don't know that it is necessary. You would have to prove he had authority to make admissions for the corporation. I think you had better prove your case in the regular way.

Q. Did you speak to him about the cellar doors? A. Yes.

Q. Did he also speak to you about the cellar doors? A. Yes.

Q. What time did you leave the place? A. I got back to headquarters after eight o'clock.

Cross examination waived by all defendants.

Doris Hackney—For Plaintiff—Direct.
Howard J. Bradley—For Plaintiff—Direct.

DORIS HACKNEY sworn in behalf of plaintiff.

Direct examination by Mr. Dreskin:

Q. Miss Hackney, you are the daughter of Mr. Hackney, the plaintiff in this case? A. I am.

Q. On Sunday, April 17, 1932, did you accompany your father to the theater? A. Yes.

Q. What time did you leave the theater? A. About seven or seven-fifteen.

Q. Was it night or day-time when you left? A. It was night.

Q. Where did your father go after the performance? A. He went to call a cab.

Q. Where did you and your mother stay? A. In the lobby.

Q. How long had your father been away when you next saw him? A. A very few moments.

Q. What was his condition when you next saw him? A. He was bleeding and he was being helped by a man by the name of Mr. Rogow.

Q. Did you accompany your father to the hospital? A. I did.

Q. What was your father's condition just before this accident? A. Very good.

Q. Was he in good health before the accident? A. Yes.

Cross examination waived by all defendants.

HOWARD J. BRADLEY sworn in behalf of plaintiff.

Direct examination by Mr. Dreskin:

Q. Mr. Bradley, you are the husband of Mrs. Bradley who testified before on the stand? A. Yes, sir.

Q. Did you know Mr. Hackney prior to April 17, 1932? A. No.

Q. On April 17, 1932, at about 7:30 p. m., where were you going? A. As far as I can recall, I am not certain as to the specific hour of 7:30, but along that time, we were going to the Palace movies.

Q. Which way were you coming? A. From Harrison Street toward the movies.

Q. In going to that point did you pass any cellar doors or cellar ways? A. Yes, sir.

Q. Will you indicate on the map just where those cellar doors and cellar ways were? A. Right there [indicating].

Q. How much of the sidewalk did those cellar ways and cellar doors take up with respect to the sidewalk? A. I should say over half.

Q. What was the condition of those cellar ways or cellar doors at the time you were passing there? A. Open.

Q. Was there any light on the cellar doors? A. Not that I noticed.

Q. Was there any guard rail there? A. No.

Q. What occurred to you as you were passing there? A. I seen it was rather dangerous to leave those doors open.

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

The Court: Strike it out.

Q. What occurred to you, if anything, as you were passing the open cellar doors? What actually happened? Did anything happen to you as you passed the cellar doors? A. I don't follow your question.

Q. Did you do anything as you were passing those cellar doors? In other words, what were

you compelled to do as you were passing the cellar doors? A. That's different. We had to walk over this way [indicating] toward the curb in order to avoid the doors.

Q. What about the light in the immediate vicinity of those cellar doors? A. My general impression is that it was not well lighted in the vicinity of the cellar doors.

Q. Were you able to see those cellar ways or cellar doors any distance?

The Court: That isn't very clear.
[Question withdrawn.]

Q. How close did you have to get to the cellar doors before you were able to see them?

Mr. Foley: I object to that.

Q. How close did you get to the cellar doors before you were able to see them? A. I should say 8 or 9 feet.

Q. That was coming from Harrison Street? A. Yes.

Q. Did you ever pass that cellar way before that time? A. Yes.

Q. Did you ever see those cellar doors open?

Mr. Foley: I object to that.
Objection sustained.
Plaintiff's counsel prays an exception to this ruling of the Court.
Exception noted as ground of appeal.

Cross examination by Mr. Foley:

Q. You say that as you walked along that sidewalk approaching that theater you saw the cellar

doors open when you were 8 or 9 feet from where they were? A. I don't recall the exact distance.

Q. That is to the best of your recollection? A. Yes, sir.

EUGENE ZODA sworn in behalf of plaintiff.

Direct examination by Mr. Dreskin:

Q. Mr. Zoda, where is your place of business? A. At the present time, 598 Main Street, East Orange.

Q. How long have you been located in business on Main Street? A. I have been around the same block for, I guess, nearly fifteen years.

Q. Were you ever a tenant in the Palace Theater Building? A. Yes, I was.

Q. Which store did you occupy? A. The westerly store of the building.

Q. Was there a doorway erected in front of your store? A. Yes, sir.

Mr. Foley: I object to that. He said he had the westerly store.

The Court: I will sustain the objection. I don't think it makes any difference whether there was another cellar door. If there is any particular point you want to prove, all right, but just because there is another cellar door does not make any difference.

Mr. Dreskin: I want to show knowledge on the part of these people as to the existence of this nuisance and the acts which occurred.

The Court: The explanation as to the reason is too general. You have to direct

your question to something specific. Now you are directing your questions as to another cellar door. They may be very negligent as to the other cellar door and it may be a terrible nuisance and have nothing to do with this case.

Q. Do you know whether the theater used the cellar underneath your store?

Mr. Foley: I object to that.
Objection sustained.

By the Court:

Q. As I understand it, your store was not where this gift shop was. A. My store was at the westerly end.

Q. That is, the other store. A. The other store.

By Mr. Dreskin:

Q. During your occupancy of those premises did you ever receive any complaints or know of any person falling over those cellar ways or cellar doors?

Mr. Foley: I object to that.
Objection sustained.

Q. Did any person within your knowledge fall over those cellar doors? A. Yes.

Mr. Foley: I object to that and ask that the answer be stricken out.

The Court: I will sustain the objection and strike out the answer.

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

Exception noted as ground of appeal.

Q. Did anyone fall down any one of those cellar ways?

Mr. Foley: I object to that.

Objection sustained.

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

Exception noted as ground of appeal.

Q. Did anyone to your knowledge fall down the cellar doors or trip over the cellar doors in front of the Palace Theater Building?

Mr. Foley: I object to that.

Objection sustained.

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

Exception noted as ground of appeal.

Q. How high does this cellar way in front of the store extend above the sidewalk?

Mr. Foley: I object to that. There is no proof that it extends the same height at the present time as it did at that time. There is no proof that he saw it at the time of the accident or at any time immediately before.

The Court: He said he had been around that block for the past fifteen years. Mr. Dreskin, address your remarks to the time of the accident.

Q. How much did they extend above the sidewalk?

The Court: When they were open?

Mr. Dreskin: No, sir. When they were closed.

The Court: You already have testified as to that by actual measurements made by an engineer.

[Question withdrawn.]

Q. How much of the sidewalk did those cellar ways occupy? A. About 2½ feet from the iron door to the curb.

Cross examination waived by all defendants.

FRANK BATTLES sworn in behalf of plaintiff.

Direct examination by Mr. Dreskin:

Q. Mr. Battles, on April 17, 1932, whom were you employed by? A. Palace Theater.

By the Court:

Q. Is that the Ledirk Amusement Company? A. Yes, sir.

By Mr. Dreskin:

Q. Were you also employed by Miss McClurg on that night? A. I was taking care of her furnace, yes.

Q. On April 17, 1932, while acting in that capacity——

Mr. Foley: In what capacity?

Q. [Continuing] In the capacity of working for the Palace Theater and the McClurg Gift Shop, did you open the cellar door?

Mr. Foley: I object to that.

Objection sustained.

Q. Did you open the cellar doors on April 17, 1932? A. Is that the date of the accident?

Q. Yes. A. I did.

Q. What time? A. A little after seven.

Q. Why did you open those cellar doors? A. To bank the fire in the furnace.

Q. For whom? A. Miss McClurg.

Q. Did she instruct you to bank the fire in the furnace? A. She asked me if I would, and I done it as a favor for her.

Q. But was done with her knowledge and consent, wasn't it? A. Yes.

Q. Did the Palace Theater people know about your doing this?

Mr. Foley: I object to that. It doesn't make any difference whether they did or not.

Objection sustained.

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

Exception noted as ground of appeal.

Q. During the time that you opened those cellar doors, was that during your working hours for the Ledirk Amusement Company? A. Yes.

Cross-examination by Mr. Foley:

Q. You had been doing this taking care of this furnace for Miss McClurg for some time, hadn't you? A. Yes.

Q. She paid you a stated sum for it, didn't she? A. Yes.

Q. $5 a month? A. Yes.

Q. And that money you got independent of any money you got from the Ledirk Amusement Company? A. Yes.

Q. On that night you went down to take care of the furnace pursuant to the arrangements you had with Miss McClurg? A. Yes.

Cross-examination by Mr. Kain:

Q. Was the sole purpose of your going into the cellar to bank the fire? A. Yes, sir.

Q. Did you ever go in there for any other purpose? A. No, sir.

Re-direct examination by Mr. Dreskin:

Q. Was this during the working hours that were regularly prescribed for you?

The Court: He has already testified it was during the theater's working hours.

[At one o'clock p. m. the court takes a recess until two o'clock p. m.]

After Recess.

Frank Battles resumes the stand.

Direct examination by Mr. Dreskin:

Q. Mr. Battles, for how long prior to April 17, 1932, had you been taking care of the boiler for Miss McClurg? A. I think it was the winter before.

By the Court:

Q. This was the spring. Do you mean the preceding winter, or the winter preceding that? A. The winter preceding that.

Q. That would be the winters of 1930-1931 and 1931-1932. A. Yes, sir.

By Mr. Dreskin:

Q. Was that during the working hours of the Ledirk Amusement Company? A. Yes, sir.

Q. So that this was about a year and a half before this accident happened that you were taking care of the boiler for Miss McClurg. A. Somewhere around that, I think.

Cross-examination waived by all defendants.

Mr. Dreskin: If Dr. Walsh comes in, may I put him on?

The Court: Yes.

PLAINTIFF RESTS.

Counsel for defendant Mutual Theatre Company moves that plaintiff be nonsuited as to this defendant on the following grounds:

1. That there is no proof that the defendant Mutual Theatre Company maintained a nuisance;
2. That there is no proof of improper workmanship or any defect except what might arise from the fact that the metal of the cellar doors is 5/16 of an inch above the level of the sidewalk.

The Court: [After argument] I am satisfied that the rise of 5/16 of an inch above

the sidewalk level is not a structural defect; that its being there is not the cause of the fall; that the fall was due to the open door that was caused by this colored man leaving it open unguarded, and I think upon that you cannot hold the owner of the building. I will grant the motion for non-suit.

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

Exception noted as ground of appeal.

Counsel for defendant Ledirk Amusement Company moves that plaintiff be non-suited on the ground that there is no proof to connect the defendant Ledirk Amusement Company with this hapening.

The Court: [After argument] I do not think the case is so clear as to warrant my granting a non-suit, considering that at the time he was working for the defendant Ledirk Amusement Company. It is true that the testimony shows that he was doing something else, but he was on duty for that defendant at the time that he was on or at these premises. There may be a question here as to what his duty was in regard to those premises, but in so far as this defendant was concerned, he was on duty in front of the building. I will deny the motion.

Counsel for defendant Ledirk Amusement Company prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

Jerome L. Kridell—For Defendant Ledirk Amusement Company—Direct.

JEROME L. KRIDELL sworn in behalf of defendant Ledirk Amusement Company.

Direct examination by Mr. Foley:

Q. What is your connection with the Ledirk Amusement Company? A. Secretary and treasurer of the corporation.

Q. Are you familiar with the agreement with the witness Battles, who testified this morning, with regard to his employment by your company? A. Yes.

Q. Incidently, he is no longer employed by you? A. No.

Q. At the time of the accident he was employed by you? A. Yes, sir.

Q. What were his duties? A. In the morning he was janitor and porter and did the cleaning in the Palace Theater itself, and any general maintenance work that had to be done he did in the afternoon; at night he acted as a footman out front between the hours of 7:30 and 10:30.

Q. Did he at any time in the course of any of his duties for you have any occasion to go into the cellar beneath the McClurg store? A. Never.

Q. Was there anything down there that you exercised any control over? A. Nothing.

Q. How was the basement of the McClurg store separated from the cellar of the Palace Theater? A. By a brick foundation wall.

Q. Is there any door in that wall? A. Nothing. It runs the length of the two cellars.

Q. Is there a separate heating plant in each of them? A. Yes, sir. There are four separate heating plants in the building.

Q. How many does the theater use? A. One.
Q. And McClurg's uses one? A. Yes, sir.

By the Court:

Q. And your plant is not connected with this cellar? A. In no way whatsoever.

By Mr. Foley:

Q. I show you a picture marked DL1 for identification and ask you whether that is a correct photographic transcription of the conditions present at the time of this accident. A. Yes.

Mr. Foley: I offer it in evidence.

[The same is received in evidence and marked Exhibit DL1.]

Mr. Foley: I understand you will also admit the pictures showing the wall on the McClurg side.

Mr. Dreskin: No objection.

Q. Did your company have any control over any portion of the sidewalk other than that directly in front of your theater?

Mr. Dreskin: I object to that. The lease speaks for itself.

Q. Did you exercise any control over the sidewalk? A. Never past the point marked by the no parking sign at the end of our building. In the recent storms we did not clean any portion of the snow and ice except in the front and under our marquee.

Mr. Dreskin: I object to that and ask that it be stricken out.

The Court: I will let it stand.

Jerome L. Kridell—For Defendant Ledirk Amusement Company—Cross.

Q. Will you mark with a letter K the easterly end of your frontage? A. Yes, sir.

Q. Will you mark with a letter K and a No. 1 beneath it the westerly end of your frontage? A. Yes, sir.

Q. Did you have any knowledge that Battles had entered into some arrangement with McClurg's to take care of their furnace for a consideration? A. None at all.

Q. Did you ever instruct him to go into that cellar for any purpose whatsoever? A. Never.

Q. Did you ever go into that cellar yourself? A. Never.

Q. I think you have already stated that none of his duties would have taken him in there. A. None at all.

Cross examination by Mr. Lindeman:

Q. Isn't it a fact, Mr. Kridell, that you suggested the name of Mr. Battles to Miss McClurg as a party who would take care of the furnace at the time? A. I have never had a conversation with Miss McClurg other than to purchase a postal card in her store.

Q. The lights of the theater were going at the time of the alleged accident, were they not? A. I was not on the premises.

Q. You managed the theater? A. Yes, I do.

Q. Aren't the lights ordinarily on at that time?

Mr. Dreskin: I object to that.

Objection sustained.

Q. How many lights are there operating when they do operate?

Mr. Dreskin: I think it ought to be limited to that particular night.

A. I wasn't there at that time. I was there that night, but later.

By the Court:

Q. How many lights did you have at that time? A. Several hundred; close to a thousand on that side of the premises alone. There are several thousand all around.

By Mr. Lindeman:

Q. What can you say as to the reflection the lights show on the sidewalk in front of the McClurg Gift Shop?

Mr. Dreskin: I object to that.

Objection overruled.

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

Exception noted as ground of appeal.

A. The reflection is very bright and throws a great deal further than the length of the building. When those lights are out at night, the entire street in the whole vicinity is dark.

Q. Do you know whether or not there are some pipe lines that run along the ceiling of the basement under the McClurg store?

Mr. Foley: I object to that. I don't see what difference it makes.

Mr. Lindeman: There may be some question as to whether he was down there tending the furnace or doing something else.

Jerome L. Kridell—For Defendant Ledirk Amusement Company—Cross.

The Court: If it is directed to that feature, I will allow it.

Q. Were there any pipe lines that you know of there running along the ceiling of the McClurg basement? A. There are pipe lines of different kinds, I imagine.

Q. Are they utilized by the theater? A. They carry heat or electrical current, probably, to different portions of our building.

Q. If they are out of order, is there any way of getting to them other than through the McClurg basement? A. To those particular lines there would be no way of getting to them except through the McClurg store and down the back stairs. There is a back stairway from McClurg's store to the McClurg cellar that can be used.

Q. Wasn't that locked at all times? A. What?

Q. The back stairway. A. No, it is right in the store and it is an open stairway.

Q. It is in the McClurg store. A. It is in the McClurg store.

Q. Then the Mutual Theater Company had only one way of getting into the McClurg cellar other than through the store itself, and that is the opening of the sidewalk. A. Yes.

Q. There is only one way outside of the store property. A. That's right.

Cross examination by Mr. Dreskin:

Q. The name "Ledirk" is your name spelled backward, isn't it? A. That's right.

Q. What office do you hold in that corporation? A. Secretary and treasurer.

Q. How many shares of stock do you hold in that corporation?

Mr. Foley: I object to that.

The Court: He says he is an owner and a stockholder, and also manager of a theater. That is being interested enough.

Q. How long was Mr. Battles working for you in April, 1932? A. Since we took possession of the premises in December, 1930. He had been working there prior to that time.

Q. How much was he getting a week? A. $35 a week from me.

Q. Did you know that he was earning $5 a month from Miss McClurg? A. No.

Q. You say that he was doorman from the hour of 7:30—— A. [Interrupting] From approximately 7:30 to 10:30. He stayed to lock up the building at night, but he wasn't out there continuously. When we closed our box office around ten o'clock he didn't stand there every night.

Q. When did he put on his doorman's uniform? A. When he came back from his supper about seven o'clock.

Q. Who had the key to that cellar of Miss McClurg? A. I don't know.

Q. Did Battles have a key to the cellar?

Mr. Foley: If he knows of his own knowledge.

A. I know he always got into the cellar and there was a padlock on it, but I never knew he had a key. On that particular night I knew it because I was told of it after the accident.

Q. Did you know it before that? A. No.

Jerome L. Kridell—For Defendant Ledirk Amusement Company—Cross.

Q. Did Miss McClurg ever speak to you about his activities in that cellar? A. Never.

Q. Isn't it a fact that you made an arrangement with Miss McClurg to have Mr. Battles take care of the furnace for her?

Mr. Foley: I object to that. Is counsel going to prove the agreement? He has no right to question on it unless he is going to offer such proof.

The Court: I will allow it. The purpose of the cross examination is to find out whether or not there was any such arrangement.

Counsel for defendant Ledirk Amusement Company prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

Q. How long was Miss McClurg a tenant in that store? A. Longer than I have been there.

Q. Were you connected with that theater in any way prior to 1930? A. No, sir.

Q. Did you have anything to do with it? A. Nothing at all.

Q. When it snowed on Sundays, who took care of the removal of the snow and ice?

Mr. Foley: I object to that.

Objection overruled.

A. The only snow and ice we took care of was in front of our own entrance.

Q. How much of the second floor did your theater company occupy? A. The second floor covers the length of the stores and the length of

the lobby, which we don't have at all. That was a miniature golf course which has been vacant ever since I have been there. The back of the second floor is the only thing. It cannot be reached from the street.

Q. Do you occupy any of the offices on the second floor at all? A. No, sir.

Q. Are there three theater exits in the driveway as indicated on this map? A. There are two exits. This does not run along the length. There is one way down here and one further down, leading to a vacant lot, and also out into Harrison Street.

Q. Was it the understanding that that driveway was also to be used by your theater from the exits?

Mr. Foley: I object to that. It speaks for itself.

The Court: But he may ask him whether they did use it.

Q. Did you use that alleyway there for exits from the theater? A. There had not been any occasion to use an emergency exit at any time.

By the Court:

Q. In discharging people from the theater did you open those doors? A. We never open those doors to let people out of the theater. If they open them, it is of their own volition.

By Mr. Dreskin:

Q. Are they open or locked? A. The fire laws do not permit us to lock them.

Jerome L. Kridell—For Defendant Ledirk Amusement Company—Cross.

Q. Can they use the entrance to Main Street? A. Either to Main Street or to Harrison Street.

Q. Who took care of the snow removal in the alleyway? A. We cleared snow only in the front. We never touch the driveway to remove snow and ice at any time, except directly in front of the exits.

Q. You say all you did was clear the entrances in front of the exists and leave the snow there in the driveway? A. We never shoveled the snow out of the driveway.

Q. Who shoveled the snow in front of the other premises? A. In front of our opening, either the janitor or the porter, or if he did not have time, we had one of the inside men shovel it.

Q. Did you give them instructions to touch any other part? A. No, sir.

Q. Was that store vacant at any time during your occupancy of the theater? A. Which store?

Q. Miss McClurg's store.

Mr. Foley: I object to that.

Objection overruled.

Counsel for defendant Ledirk Amusement Company prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

A. McClurg's store was never vacant as long as I have been there.

Q. Did any of your porters ever clean the snow from in front of Miss McClurg's store? A. Not from my instructions and not to my knowledge.

Q. But it might have been cleared for her by one of your porters?

Mr. Foley: I object to that.
Objection sustained.

Q. On that particular night, April 17, 1932, were you there? A. I was there after this accident had occurred.

Q. Were you there about seven to seven-thirty? A. No.

Q. So that you don't know whether the lights were on or off at that particular time of your own knowledge? A. The lights were on when I arrived.

Q. Of your own knowledge.

The Court: He said he wasn't there and they were on when he arrived.

A. I can make one addition to that. The lights were on——

Q. Never mind. What were Mr. Battles' hours? A. His duty was to be there at eight.

Q. What were his hours? A. From approximately eight until two; then in the afternoon he came back if there was anything necessary. Otherwise he did not get back until quarter to five.

Q. And stayed until when? A. And stayed until probably—well, until he cleaned and straightened up.

Q. I asked you the time. A. It may be six and it may be six-thirty. We opened the theater again at 6:30. Then Mr. Battles went back and had his supper and then came back and put on his uniform and acted as footman.

Q. Weren't his hours from eight o'clock in the morning until eleven o'clock at night? A. He was there with the exception of the time he had for his meals.

Jerome L. Kridell—For Defendant Ledirk Amusement Company—Cross.

Q. So that with the exception of his meals his job was—— A. (Interrupting) General utility man.

Q. From eight o'clock in the morning until eleven o'clock at night? A. That's right.

Q. What were your hours in that theater? Did you have any regular hours? A. Specific hours, no.

Q. Were you there in the evening? A. Generally.

Q. Were you there in the afternoon? A. Yes, generally.

Q. Why did you discharge Mr. Battles?

Mr. Foley: I object to that.

Objection sustained.

Mr. Foley: I desire to offer in evidence three photographs which consist of three successive views of the solid wall separating the McClurg cellar from the Palace Theater cellar.

(The same are received in evidence and marked Exhibits DL2, DL3 and DL4.)

Mr. Foley: The first represents the first section, nearest the street; the second repsents the center section, and the third represents the one in the rear. It is stipulated they were taken in the McClurg cellar.

I also offer in evidence a sketch which differs from the sketch on the board in the respect that this partition wall is shown.

[The same is received in evidence and marked Exhibit DL5.]

DEFENDANT LEDIRK RESTS.

KATHERINE MCCLURG, one of the defendants, sworn in her own behalf:

Direct examination by Mr. Lindeman:

Q. Miss McClurg, you operate this store under what name? A. McClurg's Gift Shop.

Q. That is what kind of a store? A. It is a sort of stationery and gift shop.

Q. Is there any other person connected with that store than yourself? A. No. I am alone.

Q. How long have you been in that store as a tenant? A. In that particular store, four years.

Q. And at the time of the happening of this accident you were the sole proprietor of that store? A. Yes.

Q. Was anybody working for you outside of yourself, or were you running the store yourself? A. At that time?

Q. Yes. A. I was alone.

Q. You use the cellar entrance door, do you? A. Yes, of course; it goes with the store.

Q. How do you get down into the cellar? A. I get down from inside. There is a trapdoor in the back of the store.

Q. One can also get into the cellar through the opening in the sidewalk? A. Yes.

Q. Were there any instructions at all given you by the landlord as to the use of those? A. No, no instructions. The cellar door just went with the store.

Q. Was the store open at the time of the happening of this alleged accident? A. No, sir. It was a Sunday. The store was closed.

By the Court:

Q. You had the place locked up? A. Yes, sir.

By Mr. Lindeman:

Q. So that you know nothing about the happening of this accident except what has been told to you by others? A. Yes, sir, that's right.

Q. Did Mr. Battles work for you? A. He did take care of my furnace, yes.

Q. Is he still taking care of your furnace? A. No. I can't afford it.

Q. Who is? A. I am doing it myself.

Q. What were the arrangements that you had with Mr. Battles? A. Why, I paid him $5 a month for taking care of the furnace for me.

Q. You don't know whether or not he was taking care of the furnace for you on this evening, do you? A. No. I wasn't there.

Cross examination by Mr. Foley:

Q. It was customary for him to go into your cellar to take care of your furnace several times a day, wasn't it? A. Yes, sir.

Q. At any stated times? A. No, no particular time. He took care of the furnace. I didn't tell him when to go.

Q. How late is your store open? A. Until six, usually.

Q. Did he usually bank the fires about that time? A. Right after I left.

Q. He usually banked the fire at about the time that this accident occurred on that particular night? A. I should say so, yes; about that time.

Q. This cellar door marked "cellar door" on the map, leads directly down into your cellar, doesn't it? A. That's right.

Q. Your cellar is entirely shut off from every other cellar? A. Yes.

Q. And the cellar to which this door leads is entirely yours? A. That's right.

Cross examination by Mr. Dreskin:

Q. You say your instructions to him were to take care of your furnace several times a day? A. Yes, sir.

Q. And those instructions included Sunday as well? A. Those fires had to be kept going over Sunday.

Q. Did you have any conversation with Mr. Kridell about taking care of the furnace? A. No.

Q. How long had Mr. Battles been taking care of your furnace? A. Since the winter of 1930.

Redirect examination by Mr. Lindeman:

Q. Do you know of your own knowledge whether Mr. Battles went down into your cellar for any other purpose than to fix the furnace? A. No, I don't, unless, of course——

The Court: If you don't know, don't tell us.

Witness: I don't know; I wasn't there.

DEFENDANT MCCLURG RESTS.

HERBERT L. HACKNEY, plaintiff, recalled in his own behalf in rebuttal:

Direct examination by Mr. Dreskin:

Q. Mr. Hackney, prior to this accident what was the condition of your eyesight? A. Good.

Herbert L. Hackney—Plaintiff—Recalled in Rebuttal—Cross.

Q. Why did you wear glasses? A. Just to relieve the strain on my eyes in the store.

Q. There was some testimony about this hernia that you sustained in this accident. What is your job in the Kresge Department Store? A. Division superintendent.

Q. What does that consist of? A. On the floor, standing on my feet all the time.

Q. What is the ordinary, common term used in that situation? What is your job commonly called? A. Floorman.

Q. Does it require your standing on your feet all day? A. Yes, sir.

Q. What happens when you feel the hernia? A. It is a kind of pushing sensation. It tires me out.

Q. How is your eyesight since the accident? A. Not very good.

Cross examination by Mr. Foley:

Q. How long have you been wearing glasses? A. Quite a few years; since I have been in department store work.

Q. How long is that? A. Possibly fifteen years.

Q. Did you have occasion to change them during that time? A. Why, I have not changed my glasses for several years until this accident.

Q. You changed them several years before the happening of the accident? A. That's right.

Q. How long before that had you changed them? A. That I couldn't say. I did not have to change them often because I did not have to wear them all the time. I wore them at times. Outside I didn't and at home I didn't.

Herbert L. Hackney—Plaintiff—Recalled in Rebuttal—Cross.
Motion for Direction of Verdict.

Cross examination by Mr. Lindeman:

Q. Up to the time of the accident your sight was good? A. Very good.

Q. There is no question about the lights being on at the time you came out of the theater? A. No question.

PLAINTIFF RESTS IN REBUTTAL.

Counsel for defendant Ledirk Amusement Company moves for a direction of a verdict on the ground that there is no evidence to connect the Ledirk Amusement Company with this accident.

The Court: [After argument.] I think I will deny the motion. I have in mind the point that this janitor, or doorman, as you might call him, was still on duty at that time. He was on duty, and in his hours of employment he left and went this short distance, opened these doors with the expectation of coming back onto his job. It seems to me that it is a question for the jury to pass on as to whether in doing what he did he was still acting for his master to such an extent that the jury might hold him responsible for negligence in creating this condition when he was going from his post to this spot which was contiguous, with the purpose of coming back again.

Mr. Foley: Does your Honor feel that there is any evidence to show we had any control over the doors?

Charge of the Court.

The Court: No, I don't think so. It is not on that issue at all; it is because he was still your servant acting for you. When he leaves his post and goes down and comes back, leaving the doors open, he was acting for you at the time he was coming back, and he left the doors open contiguous to the entrance way. It is for the jury to say whether his relationship was such that they might or might not hold the master responsible for his dereliction.

Counsel for defendant Ledirk Amusement Company prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

Mr. Lindeman sums up for defendant McClurg.

Mr. Foley sums up for defendant Ledirk Amusement Company.

Mr. Dreskin sums up for plaintiff.

[Adjourned until tomorrow, Wednesday, March 7, 1934, at ten o'clock a. m.]

THIRD DAY.

WEDNESDAY, MARCH 7, 1934.

Continued pursuant to adjournment.
Present, counsel as before stated.

The Court charges the jury as follows:

SMITH, WILLIAM A., C. C. J.

Members of the Jury:

This case which we have been trying has been somewhat simplified and is now about to be sub-

mitted to you for your determination on the issue raised in a suit by Mr. Hackney against the Ledirk Amusement Company, Inc., and Katherine McClurg, trading as the McClurg Gift Shop. The defendant Mutual Theatre Company has been disposed of. It is not held to be responsible in this particular case. The suit is now submitted to you as against these two defendants.

The plaintiff claims that on the night of April 17, 1931, he attended the performance at the Palace Theater, which was operated and leased by the Ledirk Amusement Company. After having attended the performance he left the lobby, turned to his right, and passed in front, or part way in front, of the store which was leased to Katherine McClurg, and while walking along the sidewalk there his foot first came in contact with a rise of about 5/16 of an inch in the metal surrounding the doors in the sidewalk; that the doors were up and raised in front of him about 2 feet; that he did not see the doors; that it was dark after leaving the place where he was; that when his foot came in contact with the metalwork, he also came in contact, directly or immediately following that, with the door that was up; that he was thrown over the door that was up and his face hit the other door that was up, and then he fell into the opening on the stairs leading into the cellar, and that his injuries were received in that manner, and he asks damages against these two defendants and asks that you hold them responsible for his injuries.

As I said to you, the suit was formerly against the owner of the building as well as these two defendants, the charge being that these doors were so constructed as to be a nuisance. I have held that they were not; the mere fact that they pro-

jected 5/16 of an inch above the sidewalk level when closed, is not enough to establish them as a nuisance. We all know that there is unevenness in sidewalks. That is not a sufficient rise, in my view, under the law, to call it a nuisance. The Courts have sustained a nuisance where there has been three inches projecting, but that is a much greater projection than 5/16 of an inch. I think when you walk along any sidewalk, especially where there are flagstones, you will find on every flag at least some rise of about 5/16 of an inch. The law recognizes the putting of doors flush in the sidewalk, which form part of the sidewalk, for the purpose of getting an entrance to a cellar. That, as I say, is recognized by the law, so that the landlord, when he leased this property, he leased the property with these doors in it and with the doors, I assume, closed. The operation of the doors is then up to the person who leases the property. If that person opens them, then he is charged with a duty with regard to opening, and that is to protect the public, and it is the duty of the tenant then, he having the jurisdiction over the doors, to protect the public when the doors are in operation, because the landlord does not operate them. They are supposed to remain closed except when they are open for the purpose of use. When they are open for the purpose of use, then it is up to the tenant to protect the public against injury by reason of the use of those doors. So that closed, they are not held to be a structural defect, and that is the reason the landlord has been excused from any responsibility in this case.

The liability which is charged against each of these defendants is as to the action of Battles. It is also against Miss McClurg for not furnishing proper guards or warnings for these doors when

up. That is in addition to the action of Battles. The other defendant, the Ledirk Amusement Company, it is urged here in the way I submit the case to you, is responsible only by reason of the actions of Battles. Battles left his place at the theatre and opened these doors. I say "left his place." I assume so; it is for you to decide whether he had already started his work there or not. I think he had, but that is a matter for your determination. At any rate, he opened these doors and went down to fix the furnace for Miss McClurg, her furnace being in the cellar of the gift shop, and while these doors were up—and I am under the impression that it was while he was down there, but that is still another matter for your determination—this accident happened. He went down there for the purpose of fixing the furnace, and he was down there performing work for Miss McClurg, by whom he was employed for that work of looking after the furnace. In so far as his going down there and doing that work is concerned, he was an employee of hers, and she was responsible for his actions in the way that an employer is responsible for the employee o the servant.

It is also a duty devolving upon Miss McClurg, if she has her servants put these doors to use, to protect the public so that they will not be involved by them, and that involves the nuisance rule which I will refer to later. I will also refer to this case as against the Ledirk Amusement Company after I have charged you in reference to the case as against Miss McClurg, who operated the gift shop.

There can be no dispute that Battles, when he went down there to open these doors, was the servant or agent for Miss McClurg at that time, and she is charged with his actions in reference to the performance of the service for her which

he did; that is, the master is responsible for the improper conduct of the servant in performing the work for the master.

The plaintiff here asks a judgment against Miss McClurg for the negligence of the servant, which is chargeable to her, and for her own failure to properly arrange for the protection of the public from injury by these doors.

The burden is upon the plaintiff to establish his case against the defendant or defendants held liable; that is, the evidence must weigh in the plaintiff's favor; he must establish his case by a fair preponderance of the evidence. If he fails in this, he is not entitled to a verdict. The determination of the facts rests upon you. Where there are controverted questions of fact, you are the judges of the facts, and you determine the facts from the testimony as you have heard it here.

The first question is: Was or was not the defendant Miss McClurg responsible as negligent in this matter?

The rule of negligence is this: that she, through herself and her agent, are charged with the exercise of reasonable care, such care as an ordinarily prudent person would take under the circumstances as they exist at the time. In order to hold a person responsible as negligent, the negligence must be a proximate cause of the happening of the accident or the incurring of the injuries on the part of the plaintiff; that is, an efficient, producing cause.

That requires you, in passing on the question of negligence, to consider what was done with reference to these doors. The doors were open, and it was night time. It is not for me to tell you what the servant should have done with re-

gard to these doors; that is for you to say. It is for you to take all the circumstances surrounding the matter and determine whether or not in his handling of these doors and his leaving them open in the way that they were, it was negligence; and if so, whether that negligence was the proximate cause of the happening of the accident.

The care which a person should take with regard to opening doors upon the street is for you to consider. You may consider whether that would require more caution in the night time. Changed conditions require different treatment, as you can well realize. Therefore, it is a question for you to pass on as to whether or not there was negligence in the way these doors were handled and left.

Now, in reference to the question of nuisance. As I have said before, the law does recognize the use of an areaway or a cellar way which is covered up and run over the sidewalk. There is an old case in which this rule is stated:

"An area opening into a public footway, or so near thereto that a person lawfully using the way, with ordinary caution, might, by accident, fall into it, is, per se, a nuisance; and only ceases to be such, when proper means are adopted, either by enclosing it, or maintaining a light to warn persons of danger, to guard against the occurrence of such accidents."

Now, I go one step further and say that where it was an open place such as this, the guarding can also include the putting on of doors so as to close up and come flush with the sidewalk. These doorways in the sidewalk are of course meant for temporary use only. A person is allowed to have them there so that he can get in and out of the building. But they are supposed

to be only for the purpose of getting in and out, and when not in use, are supposed to be down so as to be open to the public; that is, the public right is paramount. The property holder has a right to have them for the purpose of getting in and out, but his use of them must be with the necessary precaution and protection to the public so that they will not be injured. Therefore, if the defendant Miss McClurg failed in properly protecting the public in the use of those doors, she is responsible to the person injured for maintaining a nuisance.

As to the question of the responsibility of the Ledirk Amusement Company, the tenant of the theatre, for Battles' actions in reference to these doors; the Ledirk Amusement Company, as a tenant, is not responsible as such for these doors or the areaway from the gift shop to the cellar. In other words, it did not rent that part of the property; it did not, by reason of its being a tenant, have any responsibility with regard to these doors. It was not its sidewalk and it was not an entrance to any part of the building. So that it is not responsible for the upkeep of those doors. The question is as to whether that defendant is responsible for any of Battles' actions in opening these doors and leaving them the way he did. The liability of the defendant Ledirk Amusement Company for his actions must be established by the burden of proof; that is, by a fair preponderance of the evidence.

The rule as to the master's responsibility for his servant I might quote in this way from one of our decisions:

"If the act resulting in the injury complained of was within the scope of the servant's employment, the master will be liable therefor, although

the act was in violation of the master's instructions as to the method of performing the work or expressly forbidden by him, and without regard to the servant's motive. This is so, because the test of the master's responsibility for the acts of his servants is not whether such act was done in accordance with the instructions of the master to the servant, but whether it was done in the prosecution of the business that the servant was employed to do."

You will see the distinction. If a servant is working on his master's business and does something negligently, the master is responsible for his negligence.

"If the master undertakes to determine for himself the manner in which his servant shall perform his prescribed duties, the obligation is on him to see that such instructions are carried out and that the servant does not substitute his own methods for those of his master."

That means also that the servant was on the master's business at the time. That must be proved.

The defendant Ledirk Amusement Company, through the testimony of Mr. Kridell, who was the manager there, denies knowledge of the fact that Battles was doing this service of tending the furnace for the owner of the gift shop. This testimony is not conclusive upon you as to this fact. You may, if you find that this service was continued for so long, and was so notorious and during Battles' working hours that the Ledirk Amusement Company was charged with knowledge of the fact that he was doing it. If you find that this defendant is charged with knowledge of the fact that he was doing it, you may find that by not stopping Battles from doing it, it consented

to the service he was doing during working hours. That raises questions of fact for your determination as to whether or not they knew it and permitted it during Battles' working hours.

If you find that Battles committed a wrong, in order to hold the Ledirk Amusement Company responsible for his actions, two things must exist: First, the wrong must have been committed during the course of his employment; that is, that it was committed while he was doing the work. The second is: The wrong must have arisen out of his employment.

Those are rules of law which you apply to the facts in the case. You have here a peculiar arrangement. Here is a man, Battles, who was employed during a large part of the day and part of the night, and he had his off hours; he parted his service. At or about the time this accident happened, he was to be stationed in the front of the theater building as a doorman. It is not for me to say to you just the limits of his duties as a doorman. It is for you to say what the term "doorman" means as applied to him under the situation as you find it in this case. It is for you to take these facts and apply these particular rules as to what renders an employer responsible for his servant's actions.

Let me illustrate that. And in illustrating, I do not mean that I am telling you that these are facts in the case or that you should find these facts or find them one way or the other. I just want to illustrate them to you so that you will understand this rule.

One proposition is: Was it during the course of his employment? I can illustrate that by saying that if he went on his own hook after hours and went down to the cellar, the Ledirk Amuse-

ment Company, as master, would have no responsibility in the case, because it was not done in the course of his employment but was after hours and on his own time. Of course, you all know that you have a right, when you are employed by somebody, to do as you please when you are on your own time. But you cannot render the master responsible for that if he did something while he was working in front of the place —it would be during the course of his employment, but it might not be something which he was doing which would render his master responsible; it might not be something which arose out of his employment. There are things which we do when we are employed by somebody, while we are on our employment, which are disconnected with the employer's business, and we cannot render him responsible for that.

If it was done during the hours of his employment and done with knowledge on the part of his employer that he was doing this service—to illustrate this: Suppose he left the doors open to get in touch with his place of employment so that he would be able to see what was going on, or to get closer connection between what he was doing and going back to his position, and left the doors open, that would indicate that he was still in the course of his employment; that is, that he was still acting for his employer, although he was doing something else. I do not say that that is what he did it for, but it illustrates to you something which might have happened.

You have to apply this rule as to the relationship between the master and the servant which would render the master responsible for the servant's actions, and you have to apply that rule to this particular case. You take all the testimony

in the case and find the facts. Then you apply that rule and see whether or not the defendant Ledirk Amusement Company is to be held responsible for the actions of Battles with regard to these doors being left open. Then you still apply the rules with regard to whether or not Battles was negligent in doing what he did, because if the defendant Ledirk Amusement Company is held responsible for his negligence, still the negligence must be proved under the rules I have laid down.

The affirmative defense of contributory negligence is set up in this case. That is a charge by the defendants that the plaintiff himself was guilty of negligence which contributed to the happening of the accident. The burden of establishing that defense is upon the defendants, and it must be established by a fair preponderance of the evidence. If that defense is established, it bars the plaintiff from recovering in this case. He is charged with the duty of exercising ordinary care for his own safety, such care as an ordinarily prudent person would take under the circumstances. If he failed in that duty, and it contributed in any way to the happening of this accident, he is not entitled to recover in this case.

Of course, you want to apply that rule to the use which persons make of a sidewalk. We are not expecting things to be in our way on the sidewalk. A sidewalk is ordinarily expected to be open to the public, and you are not required to use the same caution in walking along the sidewalk as you would use if you left the sidewalk and walked on other parts of the street used for other things.

It is no excuse to the plaintiff, however, if his eyes were affected by coming out of the dark of

the theater and into the light of the lobby and going out there. It is no xecuse on his part if he could not see in walking along. It is his duty to wait until he can see. I mean that a person would be guilty of contributory negligence if he walked blindly along the street when he could not see. At least, it would be for you gentlemen to say.

If, after considering this case, you come to the conclusion that the defendant Miss McClurg had not failed in her protection of this opening, your verdict would be for the defendant either through Battles' action, or through her own; that is, if she had guarded it properly. If Battles was guilty of a nuisance or of negligence, then the plaintiff would be entitled to recover against the defendant Katherine McClurg, provided, of course, the defense of contributory negligence had not been sustained and provided that the negligence, if it was established, was a proximate cause, or if the nuisance was a proximate cause of the accident. That is as to Miss McClurg. In other words, in order to establish a case against her, the nuisance or negligence must be established, and that such nuisance or negligence was a proximate cause of the accident. And it must appear that the defendant has not established the contributory negligence of the plaintiff. So, if there is no contributory negligence established, and Miss McClurg is to be held responsible because of the nuisance or negligence for which she is responsible either through herself or through her agent, then the plaintiff is entitled to recover a verdict against her.

If the defendant Ledirk Amusement Company is to be held responsible, then it must be through the negligence of its agent, Battles. If that is established in that way, and it does not appear

that the plaintiff is guilty of contributory negligence, then your verdict may also be returned against the Ledirk Amusement Company. I just want to call your attention to one thing: A verdict against the Ledirk Amusement Company and not against Katherine McClurg would be inconsistent, because as you realize, both those defendants are asked to be charged with the guilt by reason of the action of Battles. If you hold the defendant Ledirk Amusement Company responsible because of Battles' action, why, he was also acting for the defendant Katherine McClurg, and she would also have to be held responsible. So that, so far as your verdict is concerned, you may or may not hold Katherine McClurg, but if you do hold Katherine McClurg you may or may not hold the Ledirk Amusement Company. If you hold the defendant Ledirk Amusement Company responsible, then the defendant McClurg must also be held responsible. In other words, you cannot bring in a verdict against the Ledirk Amusement Company and not against Miss McClurg. It would be inconsistent, and your verdict could not stand.

In so far as the question of damages is concerned, this is a suit to recover damages for personal injuries. The plaintiff, if entitled to your verdict, would be entitled to compensation in money damages, in so far as money can compensate him, for the bodily injuries he has sustained, for the pain and suffering he has undergone, for the effect upon his health according to its degree and duration. In that connection you may consider whether it is temporary or permanent. He would also be entitled to the expenses which he has incurred in the care and treatment of himself for his injuries, and also for any loss of earnings proximately due to this accident.

He had a laceration on the face and had some stitches taken in that laceration. He may have a scar there. He had two teeth broken and had two teeth knocked out. He had bruises on the back and legs, and it is claimed that he suffered an injury there; that is, from the bruise on the back. He also claims to have had injury to his eyes and also injury by reason of a recurring hernia.

In order to recover for any of these conditions which follow an accident, it must be established to your satisfaction by a fair preponderance of the evidence that the accident was the efficient, producing cause of these conditions or injuries. Just because there is an accident and then later you have some abnormal physical condition or illness, it does not mean that just because of that compensation may be obtained from the defendant because of what followed. It must follow as a result of the accident, and that ought to be borne in mind by you.

The plaintiff was in the hospital until the next afternoon and says that he was then taken home and remained at home in bed for ten days. He was away from his work for four weeks. He claims that the after effects of this injury was nervousness and dizziness, blurring of his eyes and trouble with his back. His business requires him to stand a great deal, and he suffers more on that account. His loss of salary was $200, and his expenses, consisting of doctor bills and so forth which have been testified to, were approximately $1050. I think they total $1049.20, as I recall it.

If your verdict is against both these defendants, you cannot divide the sum between them, of course. If your verdict is for the plaintiff you fix

one sum as the amount of damage that the plaintiff is entitled to recover, and you assess that sum against the defendant or defendants responsible, and the law takes care of the collection of it.

I have been asked to charge certain requests on behalf of the plaintiff.

The first request I will charge: "A street, and every part of it, by force of the common law, is so far dedicated to the public that any act or obstruction that unnecessarily incommodes or impedes its lawful use by the public, is a nuisance."

I will deny the second, third, fourth, fifth, sixth, seventh, eighth, ninth, and tenth requests.

I think I have covered the eleventh request, so I do not think I need charge it.

I will deny the twelfth and thirteenth requests.

I will charge the fourteenth request: "A pedestrian is not obliged to look constantly where he is going, nor to give unremitting attention to his steps; and it follows that he is not guilty of contributory negligence as a matter of law merely because failing to do so he falls into a hole or trips over an obstruction in the way."

I will charge the fifteenth request: "A pedestrian has a right to rely on the presumption that the sidewalk is in a reasonably safe condition and free from obstructions, and he need not keep his eyes constantly fixed on the road or look far ahead for defects which should not exist."

I will deny the sixteenth request.

I have been asked to charge some requests on behalf of the defendant McClurg. The first I think I have covered; the second and third I will deny.

[The jury retires.]

Exceptions.

Counsel for defendant Ledirk Amusement Company prays an exception to the Court's charging the plaintiff's first request. Exception prayed on the ground that it permitted the jury to find that this defendant would be guilty of maintaining a nuisance; whereas, by the law of the case as made by the Court's charge, the question of nuisance as to the defendant Ledirk Amusement Company was eliminated.

Exception noted as ground of appeal.

Counsel for defendant Ledirk Amusement Company prays as exception to that portion of the Court's charge wherein the Court, after saying that it must appear that the accident happened in the course of the employment, illustrated the course of the employment in words to the effect that if the employee on his own hook, after hours and on his own time, were to do an act, the defendant would not be responsible. Exception prayed on the ground that such an illustration limits the interpretation of "course of the employment" to mean that the accident, in order to be said not to be in the course of employment, must happen after working hours.

Exception noted as ground of appeal.

Counsel for defendant Ledirk Amusement Company prays an exception to that portion of the Court's charge wherein the Court said that the defendant Ledirk Amusement Company would be responsible in damages by

reason of the negligence of Battles if he performed a negligent act during his working hours. Exception prayed on the ground that this limits the scope of responsibility under the doctrine of respondeat superior.

Exception noted as ground of appeal.

Counsel for defendant Ledirk Amusement Company prays an exception to that portion of the Court's charge wherein the Court, in referring to the responsibility of the defendant Ledirk Amusement Company, instructed the jury that if the plaintiff proves that Battles was negligent and proves that there was agency, if there was no contributory negligence, the plaintiff would be entitled to recover. Exception prayed on the ground that this eliminates the burden of proof secondly, it eliminates the charge of proximate cause, and thirdly, it submits to the jury the question of the agency of Battles when there is, in fact, no proof that he was the agent of the defendant Ledirk Amusement Company at the time of the accident.

Exception noted as ground of appeal.

Counsel for defendant McClurg prays an exception to the Court's refusal to charge the defendant McClurg's second request.

Exception noted as ground of appeal.

Counsel for defendant McClurg prays in exception to the Court's refusal to charge the defendant McClurg's third request.

Exceptions.

Exception noted as ground of appeal.

Plaintiff's counsel prays an exception to that portion of the Court's charge wherein the Court stated that the elevation over the sidewalk of the cellar way of 5/16 of an inch in thickness was not a nuisance. Exception prayed on the ground that that was a question of fact for the jury to determine.

Exception noted as ground of appeal.

Plaintiff's counsel prays an exception to that portion of the Court's charge wherein the Court stated that when the cellar doors were closed it was held not to be a structural defect.

Exception noted as ground of appeal.

Plaintiff's counsel prays an exception to that portion of the Court's charge wherein the Court stated that the defendant Ledirk Amusement Company could be held responsible only because of Battles' action. Exception prayed on the ground that it should have been left to the consideration of the jury whether the defendant Ledirk Amusement Company was not also responsible for the existence and maintenance of the encroachment of the cellar doors above the level of the sidewalk, thereby making it a question of fact whether this was or was not a nuisance which was being maintained and under the control of the defendant Ledirk Amusement Company by reason of the lease which was offered in evidence.

Exception noted as ground of appeal.

Exceptions.

Plaintiff's counsel prays an exception to that portion of the Court's charge wherein the Court instructed the jury that the tenant did not rent that portion of the property and that it was not on their sidewalk and was not part of the entrance of the theater. Exception prayed on the ground that the lease offered in evidence between the Mutual Theater Company and the Ledirk Amusement Company, under which lease said tenant occupied the premises, clearly set forth that the lease also included rights of way, ingress and egress, exits and entrances and cellar ways, and therefore it was a question for the jury to determine as to whether this cellar way was a portion of the premises included in the aforeasid lease.

Exception noted as ground of appeal.

Plaintiff's counsel prays an exception to that portion of the Court's charge wherein the Court instructed the jury that there can be no dispute that at the time Battles opened the door he was the servant of the defendant McClurg. Exception prayed on the ground that this was a question of fact for the jury.

Exception noted as ground of appeal.

Plaintiff's counsel prays an exception to that portion to the Court's charge wherein the Court instructed the jury that a verdict against the defendant Ledirk Amusement Company and not as against the defendant McClurg would be inconsistent because both

charges are based on the action of Battles. Exception prayed on the ground that the verdict may be brought in separately against the defendant Ledirk Amusement Company, who were charged with being guilty of maintaining a nuisance which was under its control and was covered by the terms of the lease for the premises occupied by it.

Exception noted as ground of appeal.

Plaintiff's counsel prays an exception to the Court's refusal to charge the plaintiff's second request.

Exception noted as ground of appeal.

Plaintiff's counsel prays an exception to the Court's refusal to charge the plaintiff's third request.

Exception noted as ground of appeal.

Plaintiff's counsel prays an exception to the Court's refusal to charge the plaintiff's fourth request.

Exception noted as ground of appeal.

Plaintiff's counsel prays an exception to the Court's refusal to charge the plaintiff's fifth request.

Exception noted as ground of appeal.

Plaintiff's counsel prays an exception to the Court's refusal to charge the plaintiff's sixth request.

Exception noted as ground of appeal.

Plaintiff's counsel prays an exception to the Court's refusal to charge the plaintiff's seventh request.

Exception noted as ground of appeal.

Plaintiff's counsel prays an exception to the Court's refusal to charge the plaintiff's eighth request.
Exception noted as ground of appeal.
Plaintiff's counsel prays an exception to the Court's refusal to charge the plaintiff's ninth request.
Exception noted as ground of appeal.
Plaintiff's counsel prays an exception to the Court's refusal to charge the plaintiff's tenth request.
Exception noted as ground of appeal.
Plaintiff's counsel prays an exception to the Court's refusal to charge the plaintiff's twelfth request.
Exception noted as ground of appeal.
Plaintiff's counsel prays an exception to the Court's refusal to charge the plaintiff's thirteenth request.
Exception noted as ground of appeal.
Plaintiff's counsel prays an exception to the Court's refusal to charge the plaintiff's sixteenth request.
Exception noted as ground of appeal.

PLAINTIFF'S REQUESTS TO CHARGE.

1. A street and every part of it by force of the common law is so far dedicated to the public that any act or obstruction that unnecessarily incommodes or impedes its lawful use by the public is a nuisance.

2. Encroachments on a street such as stoops, area-ways, bay windows, cellar doors, etc., are primarily a nuisance at common law.

3. If you find that the cellar door in this case encroached on the street, and that said condition

of encroachment existed at the time of the execution of the lease between the Mutual Theater Company, a corporation as landlord, and Ledirk Amusement Co., Inc., a corporation, as tenant, then the owner as well as the tenant is responsible for any damages sustained to the plaintiff herein as a result thereof.

4. It is for you to decide whether the cellar doors and condition of the sidewalk amounted to a nuisance at the time of the accident.

5. It is for you to further decide whether these premises and portion of the sidewalk remained in possession and control of the Mutual Theatre Co., a corporation, or were leased to the Ledirk Amusement Co., Inc., a corporation, or were in their joint control. If you find that the premises were in the possession or control of the landlord as well as the tenants at the time of this accident, then the landlord as well as the tenants are responsible to the plaintiff for his damages and injuries.

6. If you find that by the terms of the lease entered into between the landlord and the tenants of the said premises, the landlord, Mutual Theatre Company, a corporation, retained any jurisdiction or control of the cellar ways or cellar doors in conjunction with the said tenants and the plaintiff has sustained the damages and injuries complained of, then you must find that both the landlord and each of the tenants are responsible for the damages and injuries caused by the maintenance of the cellar way encroaching in the street beyond the building line.

7. The public and pedestrians lawfully using the sidewalk are entitled to the free use of the sidewalk without any impediment or obstructions thereon. If you find that the Ledirk Amusement

Co., Inc., a corporation, maintained the cellar doors beyond the building line in front of its premises, and leased said premises to the tenants while said cellar doors existed in that condition, the landlord as well as the tenants are responsible for the damages caused to the said pedestrians.

8. Where the cellar entrance to a building encroaches on the public street, the doors to such entrance being so constructed as when closed to form a part of the sidewalk, the owner of the property is under a duty to the public to use reasonable care in seeing that such entrance is kept reasonably safe in all cases where the entrance is part of the permanent structure of the building, or where he retains control of such entrance.

9. If you find that the Ledirk Amusement Co., Inc., a corporation, or tenants, failed to keep the cellar ways and cellar door in a safe condition, and failed to use proper safeguards and failed to provide proper light when opened so that pedestrians lawfully using said street would not fall over said cellar door, or into said cellar way, then you must find that both the landlord as well as the tenant are responsible for the damages and injuries sustained by the plaintiff herein.

10. If you find that the person who opened the cellar door was in the employ of Ledirk Amusement Co., Inc., a corporation, and that said cellar door was opened by him, with the knowledge of the said Ledirk Amusement Co., Inc., a corporation, or its agent, then the Ledirk Amusement Co., Inc., a corporation, is responsible for the damages and injuries sustained by the plaintiff herein.

11. If you find that the cellar way or cellar doors were opened by an agent of any of the tenants in said buildings, and were negligently per-

mitted to remain open without any proper safeguard or light, and said opening was in the scope of the employment of the said servant, then the tenant is responsible for the damages and injuries sustained by the plaintiff.

12. If you find that the cellar way or cellar doors were permitted to become in a dangerous condition and the said landlord or tenant had knowledge thereof, or that such condition existed for such a long period, that the said owner or tenant was deemed to have knowledge thereof, the landlord as well as the tenant is liable for the damages and injuries sustained by the plaintiff.

13. If you find that the cellar door or framework around the cellar way were constructed and maintained so that they were not flush with the sidewalk and were raised above the level of the sidewalk, and thereby became a nuisance and the plaintiff herein tripped over said cellar way or cellar door, then the landlord, as well as the tenants who were jointly in control and possession of the said cellar way and cellar entrance, were responsible for the damages and injuries caused to the said plaintiff.

14. A pedestrian is not obliged to look constantly where he is going, nor to give unremitting attention to his steps, and it follows that he is not guilty of contributory negligence as a matter of law, merely because failing to do so, he falls into a hole or trips over an obstruction in the way.

15. A pedestrian has a right to rely on the presumption that the sidewalk is in a reasonably safe condition and free from obstructions and he need not keep his eyes constantly fixed on the road or look far ahead for defects which should not exist.

16. If you find that the plaintiff was lawfully upon the sidewalk and the property owned by the Mutual Theatre Company, a corporation, and in the possession of Ledirk Amusement Co., Inc., a corporation, and Katherine McClurg, individually and trading as McClurg's Gift Shop, it became the duty of all the defendants to keep the cellar ways, cellar doors, and sidewalk at that point safe for the use of the public, and the first question for you to consider is whether they fulfilled that obligation or not.

REQUESTS TO CHARGE OF DEFENDANT KATHERINE MCCLURG.

1. It was the duty of the plaintiff to exercise ordinary care for his own safety.

2. If you find that plaintiff failed to exercise ordinary care for his own safety your judgment should be for the defendant.

3. If you find that the plaintiff on coming out of the Palace Theater was so blinded by the lights on the street that he could not see clearly and that while so blinded he fell over the cellar door without seeing it, he is contributorily negligent and your verdict should be no cause of action as far as the defendant Katherine McClurg is concerned.

Exhibit P-1.

THIS INDENTURE made this 22nd day of December, 1930, between MUTUAL THEATRE Co., a New Jersey corporation, having its principal office at #4 Main Street, Orange, New Jersey, (hereinafter called the landlord), party of the first part, and LEDIRK AMUSEMENT Co. INC., a corporation of the State of New Jersey, (hereinafter called the Tenant), party of the second part;

WITNESSETH: That the Landlord, in consideration of the rents, covenants and agreements hereinafter reserved and contained, on the part of the Tenant to be paid, kept and performed, has granted, demised and to farm let, unto the Tenant, the Palace Theatre, in the Palace Theatre building at #Main Street, in the City of Orange, County of Essex, State of New Jersey, together with the lobbies, halls, entrances, exists, rights of way and of ingress and egress, and the equipment, personal property and fixtures contained in or annexed to said theatre and used in connection with said theatre business, a detailed list of which is more particularly set forth in Schedule "A" hereto annexed.

TO HAVE AND TO HOLD said premises and said personal property for the term of years commencing on the twenty-second day of December, 1930, and ending on the Twenty-second day of December, 1951, unless sooner terminated as herein provided, yielding and paying therefor unto the Landlord, the following yearly rental or sum:

Eighteen Thousand ($18,000.) Dollars per annum for the first five years of said term.

Twenty-twoThousand ($22,000.) Dollars per annum for the next five years of said term.

Twenty-six Thousand Dollars ($26,000.) per

annum for the next five years of said term. Thirty Thousand ($30,000.) Dollars per annum for balance of said term, or six years.

Such yearly rental to be payable in equal monthly installments of one-twelfth (1/12th) of the annual rental for each respective year, on the Twenty-second day of each and every month during said term, in advance.

And it is hereby mutually covenanted and agreed, by and between the parties hereto, that this letting is upon the following conditions:

1. That the tenant will promptly pay to the landlord, without any previous demand, the said rent as hereinbefore and hereinafter specified, at the office of the landlord or at the office of Howe & Davis, 282 Main Street, Orange, N. J.

2. That the tenant will pay all water, gas and electricity rates and charges that may be assessed during said term, within thirty (30) days after the same shall become due and payable; and if not so paid, the amount shall be added to and collectible as rent under this agreement, provided the Landlord presents said water bills to the tenant.

3. That the tenant will take proper care of and use and occupy the demised premises, and every part thereof, only as and for the purposes of theatre and moving pictures, and for no other purpose whatsoever. The tenant shall not, without written consent of the landlord, which shall not be unreasonably withheld, make any structural alterations in the real property; deface the walls therein, injure or remove any tree or shrub; sell, or permit to be sold on the premises any kind of malt, vinous or spirituous liquors; and will comply with all the rules, orders and regulations of all

Exhibit P-1.

National, State, County and Municipal boards, departments, bodies or officers applicable to said theatre, which the landlord hereby represents have been complied with in full to the date of these presents; and will yield and deliver up the quiet and peaceable possession of the same at the expiration of the said term, or at any earlier determination of this lease in as good condition and repair as the same are in when entered upon or taken possession of; damage or ordinary wear and tear and by the elements only excepted. The proper care of the premises and fixtures hereby demised shall include the care of entrances, lobbies and alleys; the removal of ice, snow, grass and weeds and other obstructions from the gutters and sidewalks in front of theatre entrance; the compliance in all respects with the municipal ordinances relating to the above, and to all other matters incidental to the occupancy of said premises by said tenant, and saving the landlord harmless from all penalties for violation thereof. In the event that the landlord shall pay for any of the above expenses (agreed to be done or performed by the tenant), then the amounts so paid by the landlord shall be added to and collectible as rent, under this agreement. In case the tenant shall assign this lease or sublet said theatre, it shall not be relieved of any obligation hereunder, and the acceptance by the landlord of rent from such assignee or sub-tenant shall not be deemed a release or waiver of such obligation.

4. That the tenant will, at its own cost and expense, make all interior repairs to the theatre and permit the landlord or its agent to enter said premises to examine them, so as to make such repairs and alterations therein as the landlord shall

deem necessary for the preservation thereof, which shall be done in a reasonable manner, in case the tenant refuses or neglects to do so; and to exhibit said premises at any time during the last six months of said term to persons, until rented or sold, between the hours of 10 A. M. and 5 P. M. and to allow ordinary notices "To Let" or "For Sale" on any part thereof, to remain thereon without hindrance or molestation, during such last six (6) months. All outside repairs and structural repairs and changes to said premises shall be made by the landlord, excepting that the landlord shall be under no obligation to repair the marquee, electrical signs or lobbies.

5. In case of default in any of the covenants, or in case the said premises shall become vacant and remain vacant for a continuous period of thirty days, the landlord may resume possession of the premises, either by force or otherwise, without being liable to any prosecution therefor, and re-let the same during the remainder of the term, at the best rent that can be obtained, for account of the tenant, who will make good any deficiency; this provision shall be subject, however, to the terms of paragraph fourteen of this lease.

6. That the landlord shall not be liable to the tenant for any loss or damage of any kind happening on or about said premises to the person or property of the tenant or of any other person from any cause whatever, except the wilful acts of the landlord.

7. That the tenant shall keep the personal property and fixtures in a good state of repair during the continuance of this lease as the same are in when entered upon and taken possession of, and shall replace any personal property or fixtures

which may become worn out, injured or destroyed, except by fire; and any personal property or fixtures placed in or upon the said premises during the said term in replacement of personal property now therein or thereon shall become and be the property of the landlord and subject to all of the terms of this lease.

8. In case the tenant shall make default in the payment of the rent herein reserved, after the time of grace as herein provided, or in the performance of any of the terms and conditions hereof, subject to the notices herein specified, the landlord shall have the right and privilege to take whatever proceedings may be necessary to dispossess the said tenant and resume possession of the said premises, and the maintenance of any action or proceeding by the landlord to dispossess the said tenant or to recover possession of said premises shall not preclude the landlord from thereafter instituting and maintaining subsequent actions or proceedings for the recovery from the tenant of any subsequent installment or installments of rent or additional rent, or any other moneys that may be due or become due from the tenant, provided the premises remain unoccupied or provided the rent derived from a subsequent tenant is less than the amount specified in this lease, in which event action shall be for only the deficiency, and the landlord shall be permitted to remove the said tenant as in the case of a tenant whose term has ended.

9. The tenant hereby expressly waives, for itself, and for all persons claiming under it, all right to redeem the demised premises that may at any time exist, after a warrant to dispossess him or them from the recovery of the possession of the

demised premises, in any action of ejectment or after entry by the landlord by process of law or otherwise, as herein provided, after the right of the tenant shall have been determined by a court of last resort, should the tenant decide to appeal to such court.

10. The tenant further covenants and agrees to indemnify and save the landlord harmless for and against any and all liability, losses, damages and expenses, causes of action, suits, claims and judgments caused by or arising or resulting from injury to person or property of any and every nature, and for any matter or thing growing out of the occupation of the demised premises, the construction or alteration of any part thereof, or caused by, arising or resulting from or growing out of the use, occupation, management, possession or control of the demised premises or of the entrances, foyer, hallways, stairs, approaches, exits, fire-escapes or of sidewalks, in front of said theatre entrance, occasioned or caused by or resulting from the acts or negligence of the tenant, his agent, employes, sub-lessees, their agents or employes respectively.

11. Should any changes, additions, alterations or modifications in said property hereby demised be required to be made by any National, State, County or Municipal department, board, body or officer, the landlord shall be relieved from any duty to make the same, and the tenant shall be permitted to make the same.

12. The tenant shall, at his own expense, and for the benefit of the landlord, insure the fixtures, equipment and personal property contained in said Theatre, against loss or damage by fire in a sum not less than Fifteen Thousand ($15,000.)

Dollars. In the event that the tenant shall fail to effect such insurance and to pay the premiums thereon, the landlord shall have the right and privilege to obtain same, and the amount thereof shall be added to and collectible as rent under this agreement.

13. In case of damage to said premises and/or chattels by fire or otherwise, the tenant shall give immediate notice thereof to the landlord. The landlord agrees to collect insurance moneys covering such loss and damage and turn same over to the tenant for the purpose of repairing the damage; and the tenant agrees to make such repairs at its own cost to the extent of such moneys so received and the landlord agrees at its own cost to complete said repairs of damage if the insurance fund should be inadequate for that purpose. The landlord shall keep the buildings on said premises fully insured against loss by fire and shall pay the insurance premiums thereon. Should the tenant desire to carry insurance on said buildings in a greater sum than the above, he shall have the privilege of so doing, but shall be liable to pay the premiums thereon. All accident and other liability insurance shall be carried and paid for by the tenant. Upon the failure of the tenant to carry such liability insurance, any accident insurance paid for by the landlord, shall be repaid to him by the tenant. In the event of the total destruction by fire of the demised premises and the chattels hereby demised, this lease shall remain in full force and the landlord will rebuild the same with all convenient speed at his own cost and expense, such new building or buildings and chattels to be similar to the building or buildings and chattels destroyed. Should fire occur to any

of the leased premises and chattels, and render the same untenantable, the rent shall cease until the premises and/or chattels shall have been reconditioned as hereinabove provided. Should only a part of the leased premises be rendered untenantable, a proportionate abatement of the rent shall be made until the premises and/or chattels shall have been rendered tenantable.

14. The said tenant hereby covenants and agrees to observe, keep and perform all the covenants and agreements on its part herein to be observed, kept and performed, at the times and in the manner herein stated; and in case of default in the payment of the rent for ten days after the 22nd day of each month, and for more than thirty days by the tenant in the performance of the covenants and agreements herein contained, or any or either of them, except as to the rent, after written notice is served upon the tenant by the landlord calling the attention of the tenant to such default, and requiring the tenant to remedy or comply with such default, and if the tenant shall fail within thirty days after the receipt of the notice to remedy such default, the term, interest and estate of such tenant hereby created in and to the said premises, shall, at the option of the said landlord, its successors or assigns, at the expiration of thirty days after such written notice and inactivity of the tenant to remedy the default, thereupon cease, determine and expire, and that the said tenant shall and will thereafter yield and deliver up the quiet and peaceable possession of said premises unto the said landlord, its successors and/or assigns, who shall thereupon be entitled to re-enter and take possession of the same, and every part thereof, anything hereinbefore contained to the contrary notwithstanding.

Exhibit P-1.

15. The landlord covenants, represents and guarantees that there are no violations existing against said theatre building and chattels in any federal, state, county and/or municipal department or bureau, and that all fire and liability insurance requirements have been fully complied with, and that all legal requirements necessary for the procurement of a license to operate said theatre have been complied with, and the landlord will execute and deliver an assignment of said license to the tenant, which will be acceptable to the department having jurisdiction thereof; any sums required to be paid by the tenant to comply with such violations, if any, existing at or prior to the date hereof, may be deducted from any rent hereafter to become due hereunder, until fully repaid with interest to the tenant.

16. Anything to the contrary notwithstanding, the failure of the tenant to comply with any law or ordinance prohibiting or restricting the operation of theatres on Sundays or holidays, or after hours, shall not be deemed a default on the part of the tenant hereunder unless the landlord's estate and interest in the demised premises be thereby endangered.

17. The tenant agrees to heat the demised premises at its own cost and expense.

18. The tenant, upon paying the rent as above agreed, and performing all the other conditions and covenants herein contained, shall and may peaceably and quietly hold and enjoy the demised premises for the term aforesaid.

19. Any equipment added to said premises in replacement of existing equipment shall be considered the property of the landlord.

Exhibit P-1.

20. Any notice herein provided to be given or served shall be a written notice and shall be sent by registered mail, in the case of the landlord, to the landlord, addressed to it in care of Howe & Davis, 282 Main Street, Orange, New Jersey, and in the case of the tenant, to the tenant, addressed to it, at No. 4 Main Street, Orange, New Jersey.

21. The tenant shall pay all taxes on personal property or equipment on the leased premises. The landlord agrees to pay all taxes on the land and buildings hereby demised when the same shall become due, and upon its failure to do so and should the same remain unpaid for a period of ninety days, thereupon the tenant shall have the right to pay said taxes to the proper authorities and deduct the amount so paid from the rent becoming due thereafter. In like manner, the tenant, in case of default by the landlord to pay any installments or interest on the mortgage covering the demised premises, the tenant may pay said installment or interest when the same shall become due within the default period provided in said mortgage and deduct the amount so paid from the rent becoming due thereafter.

22. The tenant agrees that the leased premises shall not be closed continually for more than thirty days in any six months period without the written consent of the landlord. Any period of time during which the said premises shall be closed with the written consent of the landlord shall not be considered a part of said thirty days. In the event of the violation of this provision the landlord shall have the right to resume possession of the said premises as hereinbefore provided in paragraphs five, eight and fourteen.

23. All written contracts for films and all film franchises now held by the landlord shall be taken

over as exhibited to the tenant as appears in Schedule B herein, and assumed by the tenant upon the execution of this lease.

24. The tenant shall have the right to assign or under-let said premises or any part thereof, provided the lease is at such time in good standing.

25. Should the landlord desire to place a mortgage on the theatre building, consisting of the theatre proper, two stores and ball room, during the term hereof, it shall have full power and authority to do so to the extent of Eighty Thousand Dollars ($80,000.00), which mortgage shall be a first lien on the said property; and shall have the full power and authority to replace any mortgage for said amount on such real estate for the above amount respectively during said term; and in the case of placing or replacing of any such mortgage the tenant agrees that this lease is subsequent and subject to such mortgage to the amount above stated, and agrees, if required to do so, to execute any instruments in writing which may be necessary or proper or called for by the mortgagee, or his or their attorneys, for the purpose of subordinating the lien of this lease to the lien of such mortgage; and for establishing the priority of such mortgage over this lease. Full power and authority is given to the landlord, however, to make and execute any mortgage within the limits described in this paragraph without the written subordination or postponement.

26. Security Clause. As security for the faithful performance by the tenant of all of the terms and provisions of this lease, the tenant shall deposit with the landlord, cash as follows:

Exhibit P-1.

(a) $8,200.00 upon the execution hereof,
4,100.00 on or before June 22, 1931,
4,100.00 on or before December 22, 1931,
4,100.00 on or before June 22, 1932, making

$20,500.00

in all a security fund of $20,500.00; said security fund shall be retained by the landlord to secure the proper performance in every particular by the tenant of all the terms and provisions of this lease. In case no default occurs the said deposit shall be returned to the tenant by the landlord in the following manner: one-third (1/3rd) thereof or Sixty-eight Hundred Thirty-three Dollars and Thirty-three cents ($6833.33) during the sixth year of this lease, to be deducted from the annual rental during said sixth year in monthly installments of Five Hundred Sixty-nine Dollars and Forty-four Cents ($569.44); one-third (1/3rd) thereof or Sixty-eight Hundred Thirty-three Dollars and Thirty-three Cents ($6833.33) during the eleventh year of this lease, to be deducted from the annual rental during said eleventh year in monthly installments of Five Hundred Sixty-nine Dollars and Forty-four Cents ($569.44); one-third (1/3rd) thereof or Sixty-eight Hundred Thirty-three Dollars and Thirty-three Cents ($6833.33) during the sixteenth year of this lease, to be deducted from the annual rental during said sixteenth year in monthly installments of Five Hundred Sixty-nine Dollars and Forty-four Cents ($569.44).

(b) The landlord shall be entitled to use and invest the said security fund as it may see fit, but said security fund shall remain a lien upon the

demised premises herein. The landlord shall, however, pay to the tenant six per cent interest upon the said fund from the time the same is received, said interest payments to be made semi-annually during the continuance of said lease on the conclusion of each six months period.

(c) In case the tenant shall make default in the payment of its said rent as the same becomes due hereunder or in case the tenant shall make default in any of the other terms and conditions herein contained and said default shall continue for a period herein specified, giving the right to the landlord to declare this lease null and void, that thereupon the security herein paid or any part thereof held by the landlord shall become the absolute property of the landlord as liquidated damages hereunder, and furthermore, that any and all terms and provisions herein contained in regard to re-possession and in regard to deficiency shall also remain in full force and effect.

27. Bankruptcy Clause. In the event of any levy, lien or attachment being made against the interest of the said lessee or their successors in interest in the leasehold hereby created on the said premises and said levy, lien or attachment shall have been contested by the said tenant and determined adversely to it, or if any other proceeding at law or in equity be instituted to subject said premises or any part thereof to the payment of any claim, debt, liability or damages of or against the lessee and said proceeding, after being contested by the tenant, shall have been decided adversely to it, or if the lessee shall become insolvent or bankrupt, after having contested said insolvency or bankruptcy proceeding and the same being determined adversely to it, or if proceedings for

receivership or bankruptcy shall be instituted against it and shall have been determined adversely to it, or if the tenant shall make an assignment for the benefit of creditors, or in any manner seek, permit or suffer the fee of the leasehold interest hereby created to be transferred or incumbered by operation of law, or otherwise jeopardized or incumbered, then and in any such event, or of any event of the same or similar legal or equitable consequence or effect, such event shall be deemed to constitute a breach of this lease, at the option of the lessor, so as to terminate all rights, privileges and interest of said lessee herein and hereunder, unless, however, the said lessee, or its successor in interest hereunder, shall without the necessity of demand or notice from the lessor, obtain and procure within thirty days after the same shall have been done, instituted, filed or made or asserted, a discharge, release, cancellation or withdrawal thereof or within like period bond the same off from said premises, and leasehold interest and relieve said leasehold interest and the lessor's interest herein and in the said premises therefrom.

28. It is understood between the parties hereto that the landlord will contribute the sum of Five Thousand Dollars ($5000.) towards the installation of chairs covering the entire orchestra floor. The present seats may be removed by the tenant from the said premises and delivered to the Colonial Theatre, belonging to the landlord herein. The Five Thousand Dollars ($5,000.00) is to be contributed by the landlord on the following conditions, viz: the tenant is to remove the said orchestra seats as aforesaid and deliver the same to the Colonial Theatre and in its place, he is to

order new seats from the American Seating Co. or any other company, which new seats are to cost not less than $7.50 each. Upon the installation of the new seats at the theatre, the seats shall be a part of the theatre and belong to the landlord herein, any payments made thereon are to be assumed by the tenant until fully paid. The said sum of Five Thousand Dollars ($5,000.00) is to be paid in the following manner: Twenty-five Hundred Dollars ($2,500.00) is to be paid upon the execution of this lease, and the additional sum of Twenty-five Hundred Dollars ($2,500.00) is to be paid by the landlord to the tenant at the expiration of one year from this date, provided, however, that the security of Forty-one Hundred Dollars ($4,100.00) which becomes due six months from this date is fully paid, and furthermore, that the additional security of Forty-one Hundred Dollars ($4,100.00) due one year from this date is also paid. The said second sum of Twenty-five hundred Dollars ($2,500.00) shall be paid by the landlord to the tenant simultaneously with the second payment of Forty-one Hundred Dollars ($4,100.00) as security one year from the date hereof. The payment of $5000.00 by the landlord towards the installation of the new seats shall in no way affect the security deposited hereunder, in other words, if the tenant pays the full amount of the security mentioned herein, namely, Twenty Thousand Five Hundred Dollars ($20,500.00), it is to get credit for the said amount and it is to be repaid to it as herein provided.

In witness whereof, the parties hereto have caused these presents to be signed by their respective President, attested by their respective Secretary and caused their respective corporate seal

to be hereunto annexed this Twenty-second day of December, 1930.

MUTUAL THEATRE CO.,
By GEO. W. CUFF,
President.

(SEAL)

Attest:
DENNIS J. SHEPHERD,
Secretary.

LEDIRK AMUSEMENT CO., INC.,
By MOE M. KRIDEL,
President.

(SEAL)

Attest:
JENNIE L. KRIDEL,
Secretary.

Schedule A.

INVENTORY—PALACE THEATRE—ORANGE, N. J.
NOVEMBER 29TH, 1930.

OUTER BUILDING.

Marquis and letters
Upright Sign. (PALACE)

OUTSIDE LOBBY.

Four 3 Sheet Frames 37x78 (Inside Measurements)
Two Display Frames 17x80
Three Frames 28x57

Exhibit P-1

INSIDE LOBBY.

One Ticket Chopper
Two Brass Cuspidors
Two Mats "
One Rubber Lobby Mat
Six 1 Sheet Wall Frames 41x38
Two Wall Frames 24x30

BOX OFFICE.

One Natl. Electric Ticket Register #D 536—Four Unit
One Grand Automatic Cashier #85—38055
Drapes
One Electric Heater
One Stool

AUDITORIUM.

Chairs. 1496 Orchestra 1192
Balcony 304 1496

Carpet. Entire back of Auditorium and four isles
Seventeen Electric Fans 16′ Oscillating
Three Wall Mirrors 35x27
One Wall Mirror 40x28
Twenty six Box Chairs
Box Drapes
One Organ
One Orchestra Rail and Drapes
Two Stage Annunciators
One Veloure Entrance Drape
Four Glass Parapet 34x27
One Cup Container

MENS ROOM.

One Cup Container.

Exhibit P-1.

OFFICE-AUDITORIUM.

One Hoover Sweeper
One Oak Chair
One Inter Telephone System—Booth—Back Stage—Mangrs. Off.
Carpet Entire Floor.

LADIES ROOM.

Two Wall Mirrors 57x22
One Wall Mirror 23x63
Carpet Entire Floor
Sanitary Container
Wall Drapes
Window Drapes
Console Table
One Wicker Settee
One Oak Chair

STAGE.

Fully Equipped Electrically
One Front Asbestos Curtain
One Veloure Front Curtain
One Street Drop
One Eleo Drop
One Picture Sheet Drop
One Garden Set. Six Side Wings
Three Borders
One Back Drop
One Fancy Set Complete
One Horn Tower 15x20
Five Endless Sets Lines
One Red Stage Carpet
Twenty two Sets Stage Lines
Stage Braces
Sand Bags

Three Safety Fire Buckets
Thirty Orchestra Chairs
Three Display Frames 28x57
One Bunch Light
Six Miscellaneous Drops
One Ticket Box Reserve.

Dressing Room.

Fourteen Oak Chairs
Equipped with Mirrors 22x22
One Hall Mirror 24x70

Private Office.

One Flat Top Desk 48x60
Two Desk Chairs

Booth.

Two H. I. Peerless Machines
Two Simplex Heads and Upper Magazines
One House Dimmer
One Dworskey Rewinders
One Transverter Control
Two Rheostats
One Hertner Generator #9455 and Starting Box

General.

Entire Auditorium, Lobby, Marquis and Hanging Signs and Fixtures Lamped completely

Marquis Letters.

A—B—C—D—E—F—G—H—I—J—K—L
M—N—O—P—Q—R—S—T—U—V—W—
X—Y—Z

Total

Exhibit P-1.

The landlord hereby expressly represents that all of the aforesaid fixtures have been duly paid for and there are no liens or encumbrances or claims of any kind thereon.

MUTUAL THEATRE CO.
By GEO. W. CUFF,
Prest.

DENNIS J. SHEPHERD,
Secy.

(SEAL)

Schedule B.

KENNEDY COOLER CO. Contract for ice cooler.

UNIVERSAL FILM EXCHANGE, contract for "Indians are Coming" serial

UNITED ARTISTS FILM, contract for three remaining features and nine featurettes.

TIFFANY FILM CORPORATION, eight Tiffany Productions.

R.K.O. FILM EXCHANGE, four features, two single reels, and one two-reel Mickey Daniels Comedy.

PARAMOUNT contract unplayed features.

NATIONAL SCREEN SERVICE, contract.

FOX FILM CORPORATION four features.
Electrical research contract and Exhibitor's reliance agreement.

COLUMBIA FILM EXCHANGE, four features.

The landlord hereby represents that all of the terms and conditions contained in the above men-

tioned contracts and franchises have been duly complied with by it to the date of this lease.

MUTUAL THEATRE CO.
By GEO. W. CUFF,
Prest.

DENNIS J. SHEPHERD,
Secy.

(SEAL)

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

BE IT REMEMBERED, That on this 22nd day of December, Nineteen hundred and Thirty, before me the subscriber, a Master in Chancery of New Jersey, personally appeared Dennis J. Shepherd, who being by me duly sworn on his oath, says that he is the Secretary of The Mutual Theatre Co. the corporation named in the foregoing Instrument; that he well knows the corporate seal of said corporation; that the seal affixed to said Instrument is the corporate seal of said corporation; that the said seal was so affixed and the said Instrument signed and delivered by George W. Cuff, who was at the date thereof the President of said corporation, in the presence of this deponent, and said President, at the same time acknowledged that he signed, sealed and delivered the same as his voluntary act and deed, and as the voluntary act and deed of said corporation, and that deponent, at the same time, subscribed his

name to said Instrument as an attesting witness to the execution thereof.

DENNIS J. SHEPHERD.

Sworn and subscribed before me at Orange, N. J. the date aforesaid

EDWARD L. DAVIS
A Master in Chancery of
New Jersey.

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

BE IT REMEMBERED, That on this 22nd day of December, Nineteen hundred and Thirty, before me the subscriber, a Master in Chancery of New Jersey personally appeared Jerome L. Kridel, who being by me duly sworn on his oath, says that he is the Secretary of Ledirk Amusement Co. Inc., the corporation named in the following Instrument; that he well knows the corporate seal of said corporation; that the seal affixed to said Instrument is the corporate seal of said corporation; that the said seal was so affixed and the said Instrument signed and delivered by Moe M. Kridel, who was at the date thereof the President of said corporation, in the presence of this deponent, and said President, at the same time acknowledged that he signed, sealed and delivered the same as his voluntary act and deed, and as the voluntary act and deed of said corporation, and that deponent, at the same time, sub-

scribed his name to said Instrument as an attesting witness to the execution thereof.

JEROME L. KRIDEL.

Sworn and subscribed before me
at Orange, N. J.
the date aforesaid

.....
A Master in Chancery of
New Jersey.

Received in the Register's Office of the County of Essex, N. J. on the 11th day of December A. D., 1931 at 10:29 o'clock in the forenoon, and Recorded in Book V. 83 of Deeds for said County, on pages 81-91.

GEORGE STICKEL,
Register.

Exhibit P-2.

LEASE.

(Plain)

WITH WATER CLAUSE

From

MUTUAL THEATRE CO.

To

KATHERINE McCLURG

From March 1st, 1930

To Feb. 28th, 1940

Bring this Lease when you pay your Rent.

PUBLISHED BY

THE NEWARK NEWS COMPANY,

231 WASHINGTON STREET,

Newark, New Jersey.

THIS INDENTURE OF LEASE, made this First day of March in the year One Thousand Nine Hundred Thirty

BETWEEN MUTUAL THEATRE CO. of the City of Orange in the County of Essex and State of New Jersey party of the First Part:

AND KATHERINE McCLURG of the City of in the County of Essex and State of New Jersey party of the Second Part;

WITNESSETH, that the said party of the First Part, ha agreed to let, and hereby do demise and let, and the said party of the Second Part ha agreed to take, and hereby do take

known as No. 2 Main Street, in the City of Orange for the term of Ten Years commencing the First day of March 1930 and ending the Twenty Eighth day of February 1940, at 10 o'clock in the forenoon of that day, at the yearly rent of 1st Year 1000.00—2nd Year 1300.00—3th—1600.00—4th—1900.00—5th—2100.00—Last 5—2300.00 Dollars, yearly to be paid in equal payments of

THIS LEASE is upon the following conditions and covenants, all and every of which the said party of the Second Part agree to perform and keep. That she will pay the rent at the times aforesaid, and will not let, sell, under-let or assign the premises, or any part thereof, and she will not use them, nor permit any part thereof to be used, for any other business or purpose than McClurg's nor for any business or purpose extra-hazardous, without the written consent of the party of the First Part, Mutual Theatre Co. heirs, assigns, agents or attorneys.

AND will permit the said party of the First Part or their agent to enter the said premises at reasonable hours in the day time, to examine or to make such repairs and alterations therein as shall be necessary for the preservation thereof; the party of the First Part not being bounden, however, to make any repairs unless it be elsewhere in this Lease expressly so agreed; and will permit the said party of the First Part to exhibit the premises after
to persons, and to put and maintain notices "To Let" or "For Sale," on the walls thereof; and if the premises, or any part thereof, shall become vacant or deserted during the said term, will permit the party of the First part, or their agent to re-enter, without being liable to any prosecution

Exhibit P-2.

thereof, and re-let the same and receive and apply the rent, first, to the payment of the expense of re-entering and then to the payment of the rent due by these presents; and will preserve the said premises and quit and surrender them at the expiration of said term in as good condition as reasonable use and wear thereof will permit, damages by the elements excepted.

And it is agreed that upon the breach of any of said covenants or conditions, the party of the Second part shall forfeit said term, and the party of the First Part may, at their option, re-enter and recover immediate possession of said premises, and shall also have an action for all damages arising from such breach.

And the said party of the Second Part doth further agree to pay all the water rates assessed upon said property during said term as additional rent, payment to be made promptly when said water rents fall due and before any penalties or interest are chargeable thereon, and if the party of the Second Part fails herein, the party of the First Part may pay the same and recover the same on demand or evict the said party of the Second Part as in other cases of non-payment of rent.

The sum of Five Hundred Dollars ($500.00) advanced for the fixing of the store front by Katherine McClurg is to applied to the last years rent.

In witness whereof, the parties hereto have set their hands in duplicate, the day and year first above written.

Signed, Sealed and Delivered)
in the presence of)

Mutual Theatre Co. [L. S.]
D. J. Shepherd, Treas. [L. S.]

Exhibit P-2.

SURETY.

In consideration of One Dollar to in hand paid, and the letting of the within named premises to

Katherine McClurg

do hereby covenant and agree, to and with

Mutual Theatre Co.

and their legal representatives, that if default shall at any time be made in the payment of the rent or the performance of any covenant or condition within contained, then they will pay the said rent and water rents or any arrears thereof, that may remain due unto

on demand; and also, all damages arising from the non-performance of any or all of the said conditions and covenants hereby waiving notice of any such default.

Witness, hand and seal this 17th day of March Nineteen Hundred Thirty.

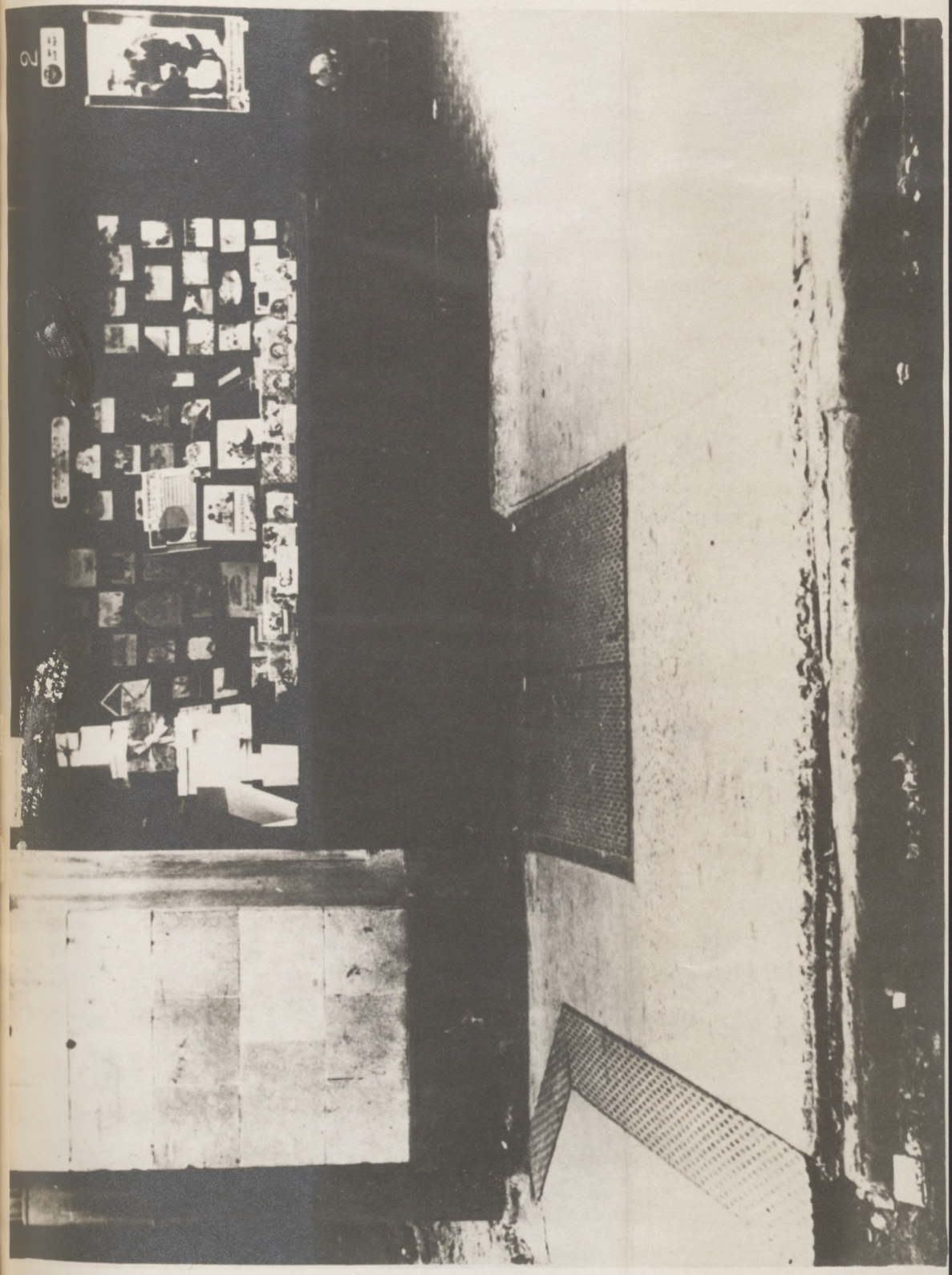
Witness:

Surety.

PAYMENT of the rent mentioned in the annexed Lease is acknowledged to have been received as follows.

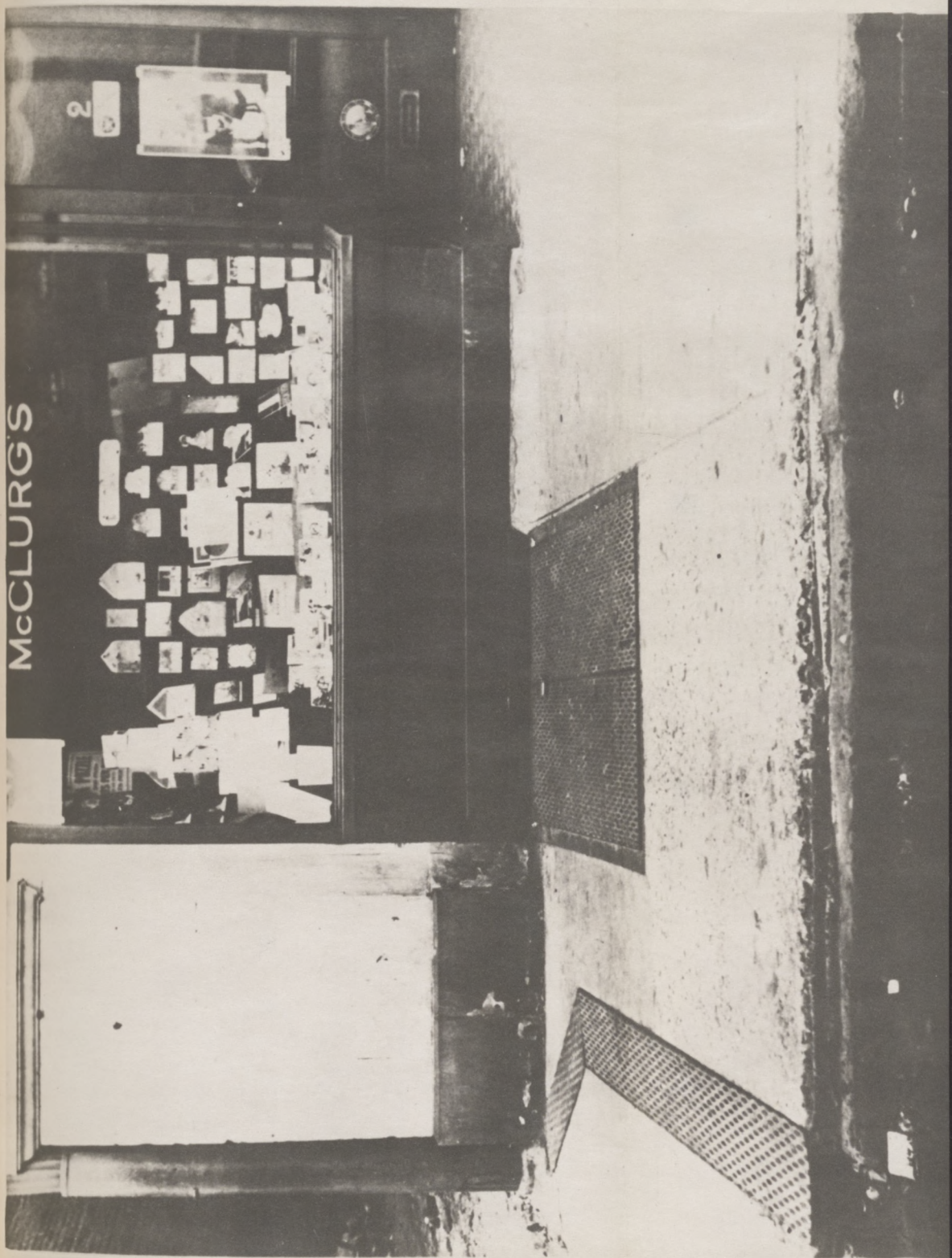
Date of Receipt.	Amount Received	Dollars.	Cts.	For What Time.	Owner's, Agent's or Attorney's Signature.

Exhibit P-3.

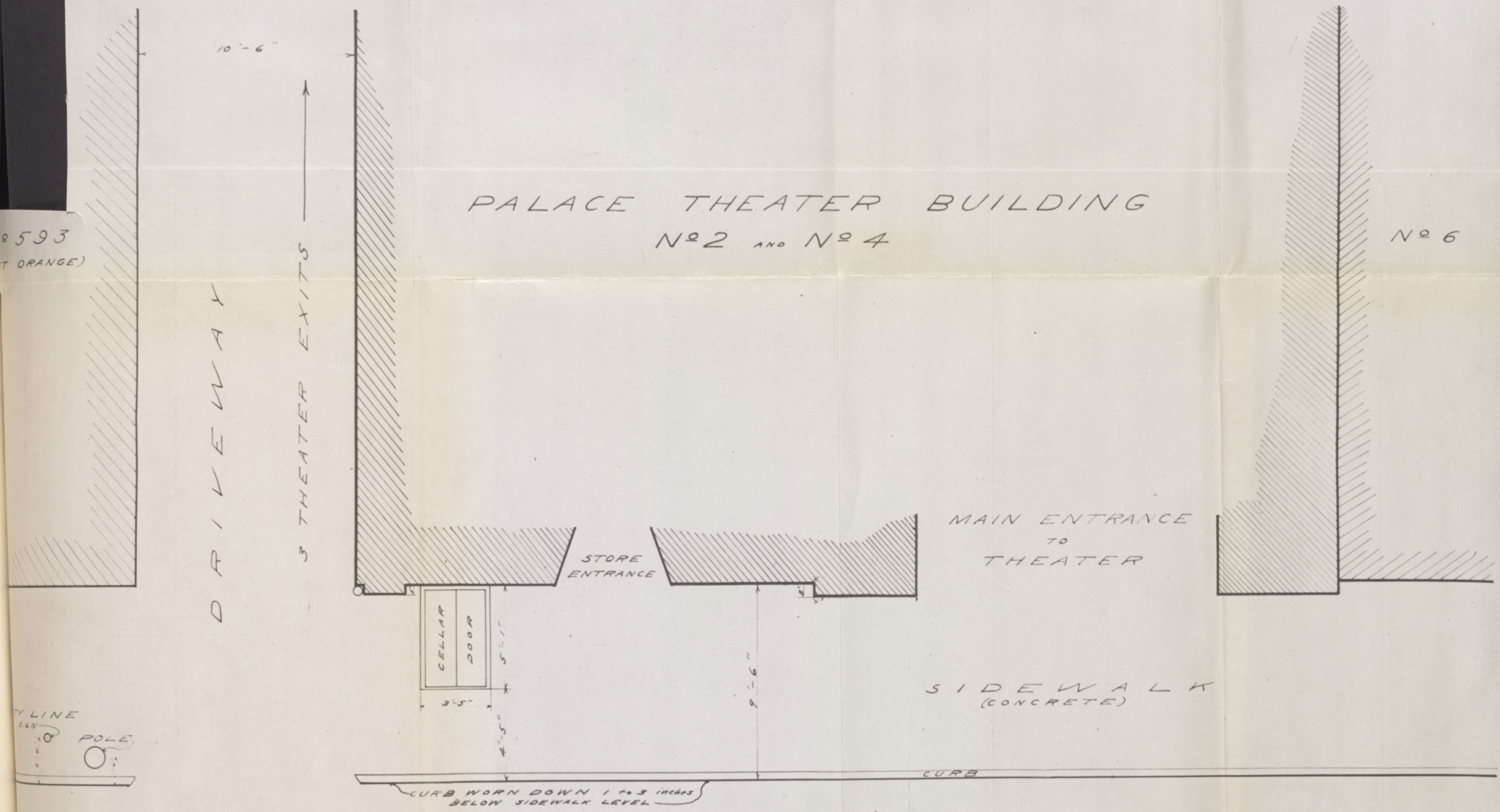


McCLURG'S

Exhibit P-4.



DETAIL OF SIDEWALK
IN FRONT OF
PALACE THEATER BUILDING
ORANGE N.J.



N. SHEFFIELD

SCALE ÷ ½ in. = 1 ft.

This Drawing Reduced to Half Size. (½ Size)

NEWARK, N.J. — 11-5-33.


McCLURG'S

Exhibit D-L2.

Exhibit D-L3.

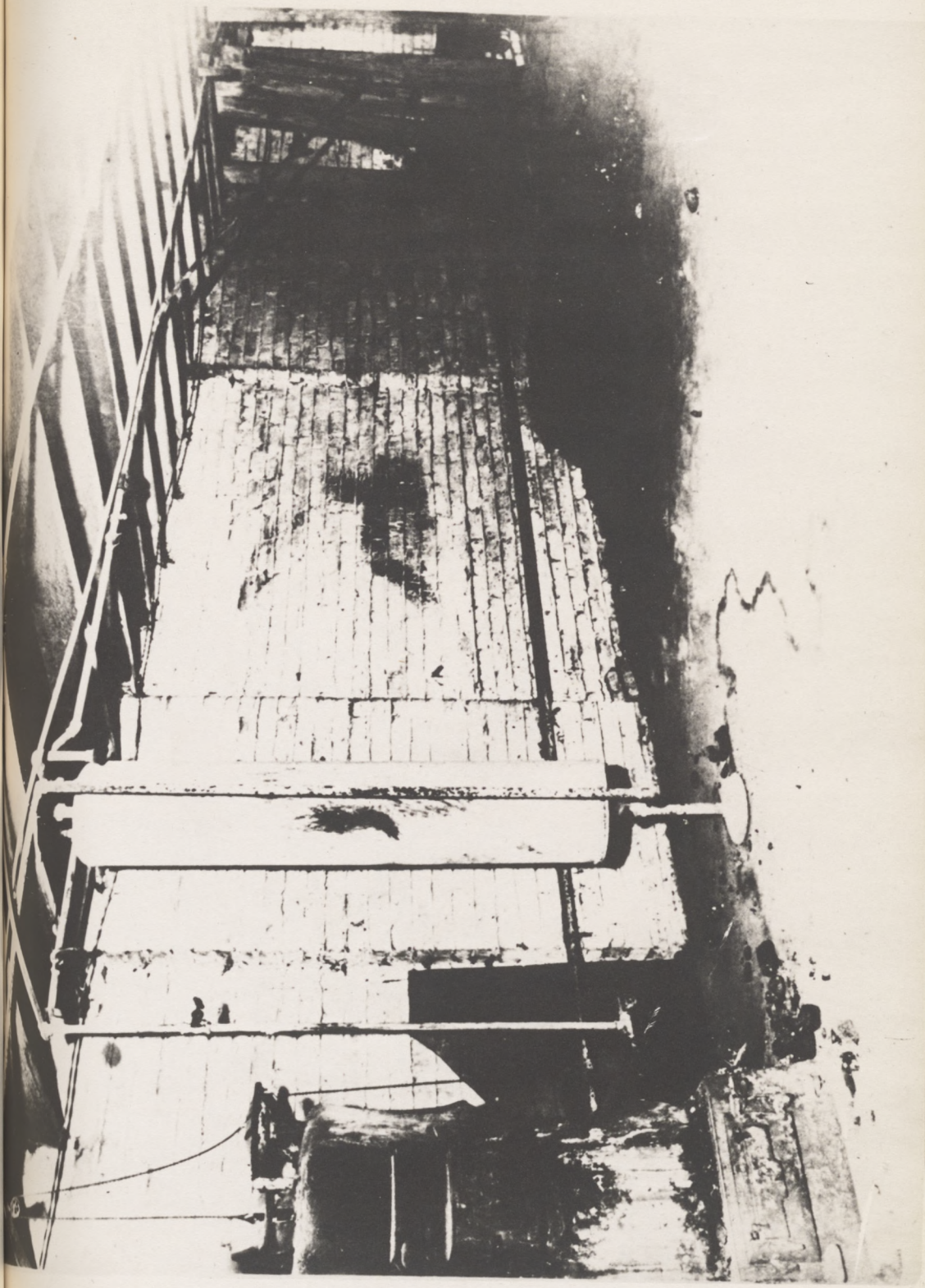
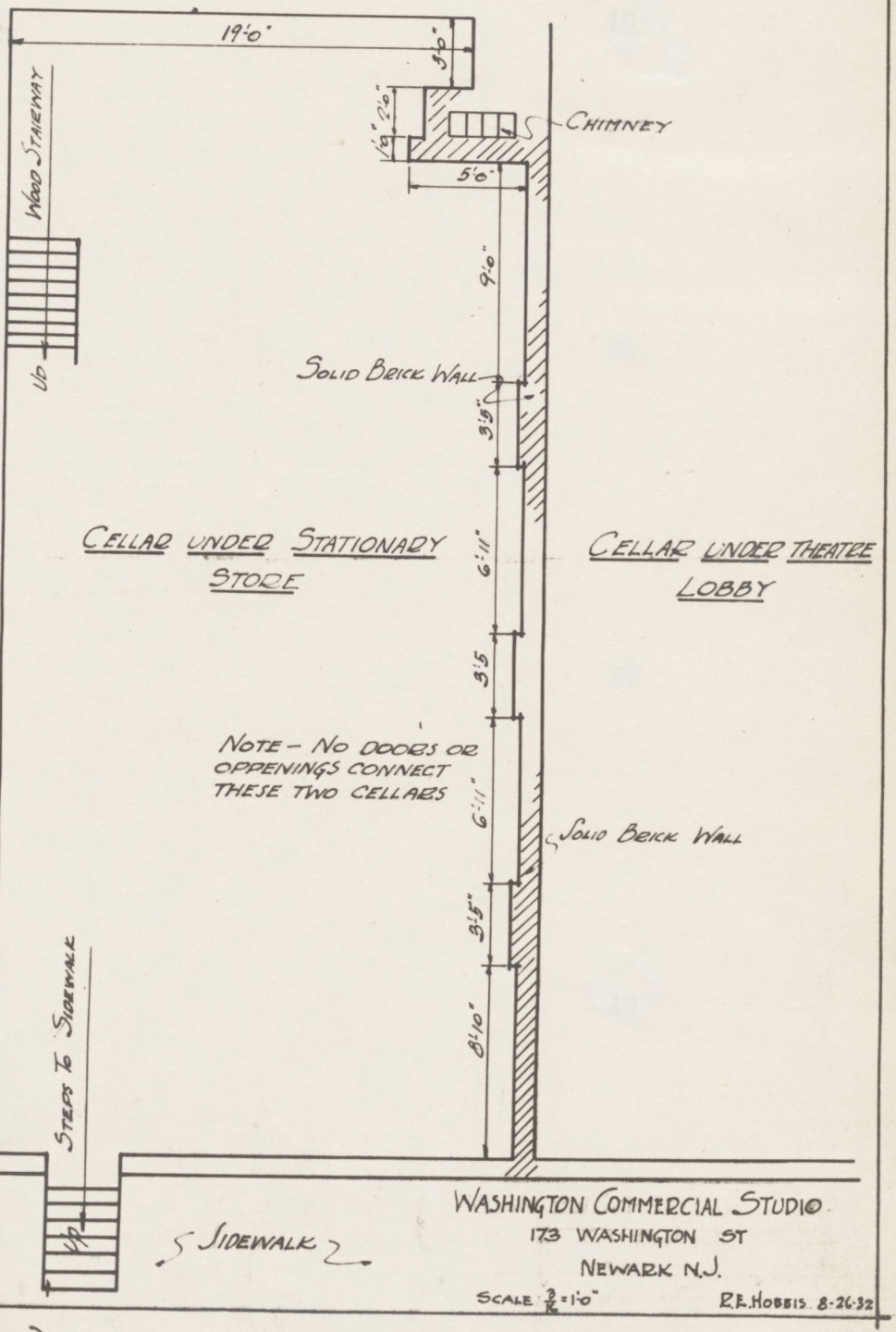


Exhibit D-L4.

PLAN SHOWING SOLID BRICK PARTITION WALL SEPARATING THEATRE CELLAR FROM STORE CELLAR



WASHINGTON COMMERCIAL STUDIO
173 WASHINGTON ST
NEWARK N.J.

SCALE $\frac{3}{8}$"=1'-0" R.E. HOBBIS 8-26-32

File 703

Opinion of Supreme Court.

(Filed October 2, 1934.)

NEW JERSEY SUPREME COURT.

No. 27, May Term, 1934.

HERBERT L. HACKNEY,
Plaintiff-Appellee,

vs.

MUTUAL THEATRE COMPANY, a corporation, LEDIRK AMUSEMENT CO. INC., a corporation, and KATHERINE MCCLURG, individually and trading as MCCLURG'S GIFT SHOP,
Defendants,

LEDIRK AMUSEMENT CO. INC.,
a corporation,
Defendant-Appellant.

OPINION.

Submitted May Term, 1934; decided October 2, 1934.

On appeal from the Essex County Circuit Court.

Before BROGAN, Chief Justice, and Justices PARKER and BODINE.

For the appellant, GERALD FOLEY.

For the respondent, SAMUEL DRESKIN.

The opinion of the Court was delivered by PARKER, J.

The question for decision is whether the trial court erred in refusing a nonsuit or a direction

of verdict for the appellant; and the determination of this depends upon whether there was any evidence to justify a jury in finding that an employe of appellant, named Battles, was within the scope of his employment in doing the negligent act which resulted in the injury to the plaintiff.

Said plaintiff attended a cinema show at the theatre owned by the Mutual company and leased by it to the Ledirk company, appellant. Next to the theatre was a store also owned by the Mutual company and leased by it to Miss McClurg. The theatre and store had separate cellars and separate heating apparatus therein, and there was a solid masonry wall between the two cellars. Access from the front sidewalk to the McClurg cellar was by a pair of iron doors of the usual type, forming part of the sidewalk when closed, and of course normally in that condition. It was dark when Mr. Hackney emerged from the theatre. He turned to his right and presently fell over one of the open iron doors, and struck the other, sustaining severe injuries, and brought this action. The court nonsuited as to the Mutual company, and that action is not before us. The jury found against Miss McClurg, who, so far as appears, does not appeal, and against the Ledirk company whose appeal is before us.

The evidence showed, concededly beyond dispute, that the doors had been opened and left open by Battles in connection with his visit to the cellar to bank up Miss McClurg's furnace for the night. In doing that work he was obviously her servant, and the jury properly so found. In fact she paid him $5 per month for that service. But his general employment was as a servant for the Ledirk company. In that capacity (to quote the brief for

respondent) his duties were those of doorman, footman, janitor and porter. He also did the cleaning of the Palace theatre (leased to the Ledirk concern) and any general maintenance work that was required to be done, and did take care of the said premises of the defendant-appellant between the hours of eight A. M. until eleven P. M. * * * It further appears that said Battles was at the time of the accident in the employ of the Ledirk Amusement Company during his working hours for them, and that he wore the theatre uniform at the time of the accident.

There seems to be some dispute as to whether the Ledirk company had knowledge of the fact that Battles was also attending to Miss McClurg's furnace in his working time at the theatre. On a motion to nonsuit or direct, this must be resolved in favor of the plaintiff.

But giving the plaintiff the benefit of all relevant matters of fact in dispute, we are unable to sustain a submission of the case to the jury. As we read the evidence, no inference is possible other than that Battles, perhaps with the consent of his general employers, perhaps without their knowledge, became, by agreement with Miss McClurg, her servant to the extent of looking after her furnace and entering and leaving her premises for that purpose. He himself testified, as plaintiff's witness, that she requested his services and agreed with him on the compensation to be paid. What he did for her was of no benefit, but rather a detriment, to the appellant, who received nothing for this outside service performed by him.

The evidence meets without contradiction the test laid down in Delaware, Lackawanna and Western Railroad Co. *v.* Hardy, 59 N. J. L. 562,

565, of a servant having expressly transferred his services *pro hac vice* to a new master by agreement with the latter, and it lacks any scintilla of proof that Battles was accountable to the appellant as general employer for anything that he did for Miss McClurg. There should have been a nonsuit or a direction.

The judgment will be reversed to the end that a *venire de novo* issue.

NEW JERSEY SUPREME COURT.

HERBERT L. HACKNEY,
Respondent,
vs.
MUTUAL THEATRE COMPANY,
KATHERINE MCCLURG,
Defendants,
LEDIRK AMUSEMENT COMPANY,
Defendant-Appellant.

ORDER OF REVERSAL and REMITTITUR.

This cause having been duly submitted on briefs at the May Term, 1934 of this Court, by Messrs. Coult, Satz & Tomlinson, of counsel for defendant-appellant and Samuel Dreskin, of counsel with respondent, and the court having inspected the record and judgment below and considered the causes assigned for error and the grounds of appeal therein, and being of the opinion that the said judgment should be reversed;

It is thereupon, on this 6th day of October 1934, ORDERED, that the judgment of the Essex County Circuit Court be reversed and that the record be remitted to the Essex County Circuit Court to be proceeded with in accordance with this judgment and the practice of this Court.

Entered Oct. 6, 1934

On Motion of:

COULT, SATZ & TOMLINSON,
Attorneys for Defendant-Appellant.

A true copy

FRED L. BLOODGOOD,
Clerk.

NEW JERSEY SUPREME COURT.

HERBERT L. HACKNEY,
Plaintiff-Appellant,

vs.

MUTUAL THEATRE CO., a corporation, LEDIRK AMUSEMENT CO. INC., a corporation, and KATHERINE MCCLURG, individually and trading as MCCLURG'S GIFT SHOP,
Defendants,

LEDIRK AMUSEMENT CO. INC., a corporation,
Defendant-Respondent.

Action at Law.

NOTICE OF APPEAL.

To: COULT, SATZ & TOMLINSON, ESQS.,
Attorneys for Defendant-Respondent,
LEDIRK AMUSEMENT CO. INC.,

Sirs:

Take notice that the plaintiff-appellant, Herbert L. Hackney, appeals to the Court of Errors and Appeals of New Jersey from the whole of the judgment entered in the above named cause in the Supreme Court of New Jersey reversing the judgment of the Essex County Circuit Court.

SAMUEL DRESKIN,
Attorney for Plaintiff-Appellant.

Dated: December 19, 1934.

Service of a copy of the within Notice of Appeal is hereby acknowledged this 19th day of December, 1934.

COULT, SATZ & TOMLINSON,
Attorneys for Defendant-Respondent.

NEW JERSEY COURT OF ERRORS AND APPEALS.

HERBERT L. HACKNEY,
Plaintiff-Appellant,

vs.

MUTUAL THEATRE CO., a corporation, LEDIRK AMUSEMENT CO. INC., a corporation, and KATHERINE MCCLURG, individually and trading as MCCLURG'S GIFT SHOP,
Defendants,

LEDIRK AMUSEMENT CO. INC., a corporation,
Defendant-Respondent.

Action at Law.

GROUNDS OF APPEAL.

The plaintiff-appellant, Herbert L. Hackney, sets forth the following as his ground of appeal taken herein from the New Jersey Supreme Court to the New Jersey Court of Errors and Appeals:

1. The said New Jersey Supreme Court erred in all respects in reversing the judgment entered in the Essex County Circuit Court on March 7th, 1934.

SAMUEL DRESKIN,
Attorney for Plaintiff-Appellant.

Dated: January 15, 1935.

Service of a copy of the within Grounds of Appeal is hereby acknowledged this 15th day of January, 1935.

COULT, SATZ & TOMLINSON,
Attorneys for Defendant-Respondent.

New Jersey Court of Errors and Appeals

HERBERT L. HACKNEY,
Appellant,
vs.
MUTUAL THEATRE COMPANY, a corporation, LEDIRK AMUSEMENT CO. INC., a corporation, and KATHERINE MCCLURG, individually and trading as McClurg's Gift Shop,
Defendants,
and
LEDIRK AMUSEMENT CO. INC., a corporation,
Respondent.

(Italics ours except where otherwise noted.)

BRIEF ON BEHALF OF APPELLANT.

Statement.

This is an appeal from a judgment entered in the New Jersey Supreme Court on October 2, 1934, reversing a judgment of the Essex County Circuit Court, in favor of the appellant, and against the respondent. The case was tried before the Honorable William A. Smith and a jury,

on March 5th, 6th and 7th, 1934. The judgment appealed from is found on C p. 194, the opinion of the Supreme Court is found on C p. 190.

Facts.

Herbert L. Hackney, appellant, (hereinafter referred to as the plaintiff), on April 17, 1932, accompanied by his wife, and daughter, went to the Palace Theatre, located at Main Street, near Harrison Street, in the City of Orange, and State of New Jersey, to witness a moving picture performance.

It was admitted that the theatre was owned by the Mutual Theatre Company, who leased it to the Ledirk Amusement Company, Inc., respondent (hereinafter called the defendant). The lease Ex. P 1 is found on C p. 154, etc.

In the building which housed the theatre there was a store, which was adjacent to the entrance of the theatre. This store had been leased by the Mutual Theatre Company to a Miss McClurg. The theatre and store had separate cellars, and separate heating apparatus, and between the two cellars there was a solid masonry wall. In order to enter the McClurg cellar, from the sidewalk, one was required to raise a pair of iron doors of the usual type, which when closed formed a part of the sidewalk, and of course were normally closed.

The plaintiff, his wife and daughter arrived at the theatre by cab at about four o'clock in the afternoon. They paid their admission and entered the theatre. After the performance they left the theatre, between seven and seven-fifteen at night. It was already dark. The iron cellar doors were open, unlighted and unguarded.

Plaintiff left his wife in the lobby and went to telephone for a cab. He turned to the right, going in the direction of Harrison Street, Orange, and took only about seven or eight steps from the lobby of the theatre, and fell over one of the open iron doors, and struck the other, sustaining very severe injuries, which included a serious loss of memory from which he still suffers. He was assisted to the sidewalk by a Mr. Rogow, bleeding profusely from the mouth, and he stated that while he did not remember, he thought a colored man came up from the cellar at about the time he fell. He identified one, Battles (whom we will discuss later) as the colored man.

However, many disinterested witnesses testified that after Mr. Rogow accompanied the plaintiff to the theatre entrance, a colored man dressed in a dark uniform with gold braids and buttons, identified as the footman or doorman and attendant of the theatre, came out of the theatre accompanied by someone, apparently in charge, and walked to the cellar doors and closed them.

The evidence further showed that the doors had been opened by Battles (the doorman, footman and attendant) in connection with his visit to the cellar to bank up Miss McClurg's furnace for the night. There was testimony to show that for doing this work, she paid him Five Dollars a month. There was evidence to show that he was a servant for the Ledirk Amusement Company, working as a doorman, footman, janitor, porter, and other general maintenance work that was required, and that he took care of the theatre premises and the surrounding area between the hours of 8:00 A. M. and 11:00 P. M. for which services he was paid $140 a month by the defendant.

It is undisputed that Battles wore the theatre uniform at the time of the accident, and at that

time was in the employ of the Ledirk Amusement Company, during his usual working hours for them.

There was medical testimony offered to prove that the injuries suffered by the plaintiff were severe and extensive in their nature, and resulted wholly from the accident.

There was some dispute as to whether the Ledirk Amusement Co., had knowledge of the fact that Battles was also tending to Miss McClurg's furnace in his working time at the theatre. However, it was undisputed that he had been performing this service for Miss McClurg openly and notoriously for a period of eighteen months, while in the employ of the defendant, and during his regular working hours for them.

The duties of Battles in his employment by Ledirk Amusement Company brought him in contact with almost every part of the premises. The store in question was located between the lobby and the exits on the easterly side of the building, so that the cellar way was practically a contiguous part of the building.

An inspection of the lease from the Mutual Theatre Co., to the defendant, Ledirk Amusement Co., discloses that therein the Ledirk Amusement Co., agreed:

> "The tenant further covenants and agrees to indemnify and save the landlord harmless for and against any and all liability, losses, damages and expenses, causes of action, suits, claims and judgments caused by or arising or resulting from injury to person or property of any and every nature, and for any matter or thing growing out of the occupation of the demised premises the construction or alteration of any part thereof, or caused by, arising or resulting from or growing out of the use, occupation, management, posses-

> sion or control of the demised premises or of the entrances, foyer, hallways, stairs, approaches, exits, fire-escapes or of sidewalks, in front of said theatre entrance, occasioned or caused by or resulting from the acts or negligence of the tenant, his agent, employees, sub-lessees, their agents or employees respectively". (C p. 159, l. 10.)

There was evidence in the form of maps and photographs from which the jury could infer that that portion of the sidewalks wherein the iron doors were located, were in such proximity to the theatre entrance as to constitute an "approach" to the entrance of the lobby of the theatre.

There were motions made for a non-suit, and direction of verdict which were denied by the trial court, which said:

> "No, I don't think so. It is not on that issue at all; it is because he was still your servant acting for you. When he leaves his post and goes down and comes back, leaving the doors open, he was acting for you at the time he was coming back, and he left the doors open contiguous to the entrance way. It is for the jury to say whether his relationship was such that they might or might not hold the master responsible for his dereliction." (C. p. 129, top of page.)

The court left the issue to the jury, and it returned a verdict in the amount of Five Thousand ($5,000.00) Dollars. From the judgment entered on this verdict, the Ledirk Amusement Company, the defendant, appealed, and the Supreme Court reversed. From this judgment of reversal the plaintiff appeals.

POINT ONE.

There was evidence giving rise to the legal inference that the accident was due to the negligence of Battles while he was acting within the scope of his employment by the defendant and therefore the Supreme Court erred in reversing the judgment.

We believe that the Supreme Court fell in error because it assumed that the proximate cause of the accident was the failure of Battles, the uniformed doorman and attendant to close the cellar doors while performing a mission for Miss McClurg. In so doing it apparently overlooked evidence and circumstances from which the legal inference could be drawn that the accident was in fact due to the negligence of Battles while he was acting within the scope of his employment by the defendant.

We submit that the evidence was susceptible of the inference that the accident did not result *from the opening of the cellar doors and leaving them open while he (Battles) was attending the furnace,* but in fact *happened while engaged in his employment as a footman and doorman for the Ledirk Amusement Company, and that his failure to close the doors while so engaged rendered them liable for his failure.*

The Supreme Court failed to consider testimony from which it could have been inferred that as footman and doorman it was within the scope of the duties of Battles to keep the "approaches" to the entrance and lobby of the theatre in such a safe condition as not to give rise to claims or demands against his employer or the Mutual

Theatre Co., based upon their neglect in that regard.

It is elementary that the Trial Court, upon the motion of non-suit for a directed verdict, is not permitted to weigh the evidence, but is constrained to take as true all testimony which supports the view of the plaintiff against whom the motion is made, and give to the plaintiff the benefit of all legitimate inferences which can be drawn therefrom in his favor.

> *Schreiber* v. *Public Service Co-ordinated Transport, et al.,* 112 N. J. L. 199, 169 A. 629.

It is also true that disputed matters of fact arise not only from contradictions in testimony, but from opposite inferences which may be reasonably drawn from uncontradicted testimony.

> *Smith* v. *Mountain Ice Company,* 74 N. J. L. 26, 64 A. 956.

It is also true that if the relation of employer and employee has been once established as having been entered into, the relationship is presumed to continue until the contrary appears. (10 R. C. L. 872.)

The evidence in this case is susceptible of the inference that the iron doors were within that area which might be reasonably termed the "approach" to the theatre entrance, exits or lobby.

An examination of the map Exhibit P 5, C p. 184, discloses that the cellar doors are practically at the corner of the driveway which led to the three theatre exits. They were only about nine (9) feet from the main entrance to the theatre. They are a part of the sidewalk which lies between the exits and the main entrance to the theatre.

The entrance was about six and one-half feet (6½) wide and was identified as such by a marquee, which extended over the sidewalk. See Ex. L 1, C, p. 185.

The evidence in this case shows that the plaintiff had only walked about seven or eight steps from the lobby of the theatre when the accident happened (C, p. 38, l. 33). It is submitted, therefore, that the jury might reasonably have found that the iron doors in question formed part of the sidewalk which constituted the "approach" to the theatre, its entrance, exits and lobby.

The Courts have recognized that the word "approach" when used in a lease, statute, or contract, has a distinct and peculiar meaning. It has been defined as:

> "A passage or avenue by which anything is approached; an access." 4 C. J. 1454.

As applied to a bridge, it has been defined to mean not only the physical structures immediately connected with the roadway of the bridge, but to those contiguous and converging streets and avenues through and over which the public are to give access to the bridge.

> In re: *Harlem River Bridge,* 174 N. Y. 26.

It has been held to include the sidewalks surrounding a railroad station.

> *Smith* v. *Boston Elevated Railway Co.* (Mass.) 159 NE 501.

An examination of paragraph 10 of the lease, Exhibit P 1, discloses that the defendant had undertaken to indemnify and save its landlord harmless from any and all liability, losses, causes

ADDENDA TO BRIEF OF APPELLANT.

Insert on page 8, after "SMITH *v.* BOSTON ELEVATED RAILWAY Co. (Mass.) 159 N. E. 501" the following citations:

Compare also Board of Chosen Freeholders, etc. *v.* Strader, 18 N. J. L. 108; Township Committee, etc. *v.* Ballantine, 54 N. J. L. 194; City of Chicago *v.* Pittsburgh, etc. Ry. Co. (Ill.) 247 Ill. 319, 93 N. E. 307.

of action, suits, etc., arising from injury to person, resulting from the use * * * management of the demised premises, or the entrance, foyer, * * * *"approaches"*, exits * * * occasioned or caused by or resulting from acts of negligence of its * * * employees * * * etc.

It is clear that the word "entrance" has a distinct and separate meaning from the word "approaches" as used in this lease. The word "entrance" refers to that portion of the theatre identified and designated as such, by the marquee. The word "approach" can only mean that portion of the sidewalk or contiguous property required to be used in order to gain access to and from the entrance or exits of the theatre.

It is not contended that the plaintiff could found an action upon the covenant contained in the lease. It is contended, however, that from this covenant, together with other evidence in this case, the jury were at liberty to draw legal inferences that it was part of the duty of Battles as doorman, footman and attendant for the defendant, to keep the "approaches" to the entrance of the theatre safe for those who were invited to use them while entering or leaving the theatre. This very question the Trial Court left to the jury to determine, when it said (C, p. 137, l. 18):

> "Here is a man, Battles, who was employed during a large part of the day and part of the night, and he had his off hours; he parted his service. At or about the time this accident happened, he was to be stationed in the front of *the theatre building as a doorman. It is not for me to say to you just the limits of his duties as a doorman. It is for you to say what the term 'doorman' means as applied to him under the situation as you find it in this case. It is for you to take these facts and apply these particular rules as to what renders an*

employer responsible for his servant's actions."

It must be borne in mind that it was undisputed that this accident occurred while Battles was in the employ of the defendant company, and during the usual hours of his employment by them, and while he was dressed in a uniform as their attendant and doorman or footman. This state of affairs the law presumes continues to exist, until the contrary is shown (10 R. C. L., page 872). The burden of establishing the contrary, of course rests upon the defendant.

The Supreme Court assumed that the accident occurred while Battles was employed by Miss McClurg. There was evidence, however, to the contrary. It is true that the plaintiff in this case testified (after first being unable to distinctly remember), that he saw Battles come up from the cellar at the time he fell (Case, top of page 58).

In the salient features of this case, the plaintiff was amply corroborated by independent and disinterested witnesses. However, his testimony with regard to whether or not Battles came up from the cellar as he fell, is not in agreement with the testimony of several disinterested witnesses, who were in a position to see everything that transpired. There was evidence from which the jury might find that the plaintiff was suffering from a loss of memory, and consequently was confused or inaccurate in that regard.

There was considerable evidence offered by disinterested witnesses to the effect that Battles CAME OUT OF THE THEATRE WITH SOMEONE IN AUTHORITY SOMETIME AFTER THE ACCIDENT HAPPENED AND CLOSED THE CELLAR DOORS. In other words, there was evidence to show that Battles had left the cellar and returned to the theatre in his uniform, and that he

did not come upon the scene until after the plaintiff had fallen into the cellarway. This would indicate that the accident happened at a time when he was actually working for the defendant company, and not during that period of time when he was performing a service for Miss McClurg.

The testimony of Mrs. Bradley is very clear on that score. She testified that accompanied by her husband, she walked towards the theatre from Harrison Street between 7:00 and 7:30 P. M. (Case, page 94, l. 30). She observed that the cellar doors were open until she was right up to them (Case, page 94, l. 37). She testified that she and her husband were compelled to walk single file on the sidewalk in order to pass them (Case, page 95, l. 15). Her husband went to purchase the tickets and she stood waiting on the sidewalk at the entrance of the theatre while he did so (Case, page 95, l. 24). She saw Mr. Hackney come out of the theatre (Case, page 95). He walked only a short distance when she heard a scream and saw him fall into the open cellar way (Case, page 95). From where she was standing, she was unable to see whether the cellar doors were open or not (Case, page 95). When she saw Mr. Hackney drop into the cellarway, she approached a woman and her daughter, who were standing in the lobby (later identified as Mrs. Hackney and her daughter, and she spoke to them, and together they walked to the street, and as they did, Mr. Rogow approached, holding Mr. Hackney by the Arm (Case, page 96, l. 30).

It will be noted that there was no testimony that a colored man passed her or entered the theatre, from the street. She was then asked (Case, page 97, l. 10):

> Q. Did you see a colored man in the immediate vicinity of the doors at that time?

A. Yes, I did. *Some gentleman came out of the theatre with a colored man in a uniform and he told him, "For God's Sake"*——

Mr. Foley: I object to that.

The Court: Don't tell us the conversation.

Q. You saw a colored man?

A. Yes.

Q. And he had a uniform on?

A. Yes.

Q. What kind of a uniform?

A. One that the ushers wear at the Palace, with gold braid and dark color.

Q. Do you know who came out with him?

A. I don't remember.

Mr. Dreskin: Mr. Kridell, will you please stand up?

Q. Is that the gentleman?

A. I wouldn't really want to say definitely.

Q. *What did the colored man do after coming out of the theatre?*

A. *Closed the doors.*

Q. Prior to that time they were both open?

A. Yes.

Q. Was there any light at that time in the cellar?

A. No.

Q. Was there any guard at that time?

A. No.

This testimony was supported by Grover A. Dietrich, a police officer of the Orange Police Department, who testified that about 7:30 P. M. he went to the Palace Theatre Building, and when he got there, he found out that a man had fallen down the cellar. He saw an attendant of the theatre just closing the cellarway doors as he arrived there. He identified Mr. Battles as the man who was closing them, and said that at the time Battles was dressed in a uniform with a gold braid (Case, page 99, et seq.).

Mrs. Mary E. Hackney testified to the same effect (Case, page 76).

From this testimony it is clear the jury could have inferred that Battles, the doorman, footman and attendant was still on duty for the Ledirk Amusement Company, in and about its theatre, and that while he was so employed as its employee, he failed to close the cellar doors and thus make the "approaches" to the theatre entrance and exit safe for those who were invited to use them. It was this issue, inter alia, which the Trial Court submitted to the jury for its decision when it said in its charge (Case bottom page 138-139).

> "You take all the testimony in the case and find the facts. Then you apply that rule and see whether or not the defendant Ledirk Amusement Company is to be held responsible for the actions of Battles *with regard to these doors being left open.* Then you still apply the rules with regard to whether or not Battles was negligent in doing what he did, because if the defendant Ledirk Amusement Company is held responsible for his negligence, still the negligence must be proved under the rules I have laid down."

Let us assume for the argument that someone other than Battles had opened the doors and left them open. We submit that the jury under those circumstances could have inferred from evidence in this case that it was the duty of Battles upon being made aware of that fact, to close those doors in order to render safe the "approaches" to the entrance and exits of the theatre, and thus protect patrons invited to use those "approaches" from falling into the cellarway.

It is common knowledge that at the close of a theatrical performance many people emerge from the theatre at the same time. It is common knowledge that many people enter the theatre at a certain fixed and appointed time. It is also common knowledge that persons witnessing a moving

picture performance remain in the dark for several hours, and when they leave the darkened area and enter into a lighted one, they are for a short time temporarily blinded. These are matters of common knowledge which the proprietors of the defendant company were bound to anticipate and consider when they used and managed the theatre premises.

It is, therefore, clear that it was within the contemplation of the minds of the defendant company when they undertook to save the Mutual Theatre Company harmless from liability, that they were under a duty to render safe not only the immediate area within the theatre building itself, but those contiguous areas which were described as "approaches" to the entrance and exits.

One cannot reasonably escape this conviction. The Supreme Court failed to take all of these factors, circumstances, and testimony and inferences into consideration when it decided as a matter of law that Battles was not at the time of the accident acting within the scope of his employment by the defendant. In failing so to do, the Supreme Court erred.

POINT TWO.

The Supreme Court erroneously found as a matter of law that battles was the servant pro hac vice of Miss McClurg, and that his negligent act, which was the proximate cause of the injury arose out of his employment by her.

There is no dispute that plaintiff's injuries were occasioned by the negligent acts of Battles, an employee of the defendant, Ledirk Amusement Co.

The sole issue is whether his act arose out of the scope of his employment and duties with Ledirk Amusement Co.

The Supreme Court found as a matter of law that the negligent act which was the proximate cause of the injuries to the plaintiff arose out of an employment by Miss McClurg pro hac vice. In so doing it was in error.

It is submitted that the facts and inferences were in dispute. The Supreme Court therefore could not apply to these disputed questions of fact, abstract principles of law, which while accurately enunciated were innapplicable to the record as it stood at the time the motions for a non-suit and direction of verdict were decided.

It is an elementary principle of law, that if the injuries were occasioned through the acts of Battles done in the course of his employment, the defendant is liable.

In determining whether a particular act is done in the course of the servant's employment, it is proper, first to inquire whether the servant was at the time engaged in serving his master.

If the act is done while the servant is at liberty from service and pursuing his own ends exclusively, there can be no question but that the master is free of all responsibility.

On the other hand, where a servant is allowed by his master to combine his own business with that of the master, or even to attend to both at substantially the same time, the master will be held responsible, and no nice inquiry will be made as to which business the servant was actually engaged, if it appears that the third person was injured by his negligence.

This rule will obtain unless it clearly appears that the servant could not have in any wise directly or indirectly been serving his master in

the acts the negligent performance of which caused the injuries.

Thus, it appears first necessary to determine what act was the proximate cause of the injuries. As has been pointed out under Point One, in this brief, it was not his entering of the cellar and opening of the cellar doors which was responsible for the injuries, it was his failure to close the doors after he had completed his labors in connection with the furnace, which unquestionably caused the accident to the plaintiff herein.

At the time he committed the latter act, there can be no question than that he was engaged in serving his nominal master, the Ledirk Amusement Co.

It appeared from the evidence that the master had permitted him without objection to openly and notoriously during the hours of his employment, and for a period of eighteen months, to perform this service for Miss McClurg; in other words, they permitted him to combine his own business with that of his master; at least this inference on a motion for a non-suit or directed verdict may reasonably be drawn from the testimony.

It appears too, from Point One, that it could be reasonably inferred, that it was part of his general duty to care for the safety of those invited to the theatre as they approached it, and to keep that portion of the premises which approached the entrance and exits of the theatre, safe for patrons using them.

Indirectly at least, there was some evidence to show that he was engaged in his usual labors for his nominal master, the Ledirk Amusement Co.

Under such circumstances, the issue is not one for the court but one of disputed fact for the jury.

In *Tischler* vs. *Steinholtz,* 99 N. J. L. 149, the court (middle of page 152), says:

> "If, however the evidence is contradictory or reasonably subject to contradictory interpretation, the question of liability is for the jury", and cites Doran *v.* Thomson, 76 N. J. L. 754, Missell *v.* Hayes, 86 N. J. L. 348, Mahan *v.* Walker, 97 N. J. L. 304.

The Supreme Court, however, attempted to apply to the facts in question, the principle frequently enunciated in cases where the question of the fellow servant rule is involved, i. e., that Battles at the time of the committance of the wrongful act was pro hac vice the servant of Miss McClurg, and an excerpt from the case of *D. L. & W. Railroad Co.* v. *Hardy,* 59 N. J. L. 35, 34 Atl. 986, is cited as authority for that principle. That principle has no application to the facts presented in this case.

Where as here, the interests of a third person are involved, it is not a question of who is the master. The real question is, was Battles discharging his employment with the defendant and did the negligent act which occasioned the injury arise in the course of it.

The ultimate right to say whether or not Battles could or could not go to Miss McClurg's cellar, rested with the Ledirk Amusement Co. Obviously he was in their employ and subject to their control. There is no evidence here that by agreement, contract or any other express agreement, Battles was loaned to Miss McClurg, or that the Ledirk Amusement Co. transferred his services to her.

The fact that Battles came out of the theatre with someone in authority after the accident, and after conversing with said person, immediately

closed the cellar doors, precludes any such inference. Quite the contrary, it creates the reasonable inference, that he closed the cellar doors at the direction of someone in authority of the Ledirk Amusement Co., which creates the additional inference that it was an act reasonably contemplated to be within his employment.

It is not denied that a servant who is employed by one person may nevertheless be pro hac vice the servant of another in a particular transaction. That situation arises when the servant deserts the service of his lawful master and works for another. But in that instance the act must be under the complete control and dominance of such new master.

Before that principle of law could be applied to this case, the evidence must have unerringly pointed to the conclusion that the negligent act which was the proximate cause of the injuries, arose while the servant was performing an act over which the new master exercised complete dominion and control. Such is not the situation presented here and it is in this respect that the Supreme Court fell into error.

When Battles had completed banking the fire of Miss McClurg, his act for her was completed. At the time he emerged from the cellar and then failed to close the doors, he was of necessity on the sidewalk, the site of his post as doorman and attendant of the Ledirk Amusement Co. and no-one else.

At that time he was in duty bound as the servant of Ledirk Amusement Co. to close those doors, and not lay a trap for patrons who were invited to come to the theatre.

At least the jury were entitled to draw the inference that he was so engaged, and even though the facts in that connection may be uncontra-

dicted, it cannot be reasonably argued that opposite inferences may not be drawn therefrom. So that, as we have previously argued, the question is not what master he was serving, but was his failure to act such an act as might be reasonably inferred to be one which arose out of his employment with the Ledirk Amusement Co.?

The answer to this question was one to be made by the jury and not the Court.

That being true, the trial Court was not in error in denying the motions for non-suit and a directed verdict.

For the diverse reasons herein argued, it is respectfully submitted that the Supreme Court erred in reversing the judgment of the Trial Court, and its decision should therefore be reversed, and the judgment of the Circuit Court reinstated.

Respectfully submitted,

Samuel Dreskin,
Attorney for Appellant,
Herbert L. Hackney.

New Jersey Court of Errors and Appeals

HERBERT L. HACKNEY, *Plaintiff-Appellant,* *vs.* MUTUAL THEATRE COMPANY, a corporation, LEDIRK AMUSEMENT CO., INC., a corporation, and KATHERINE MCCLURG, individually, and trading as McClurg's Gift Shop, *Defendants,* LEDIRK AMUSEMENT CO., INC., a corporation, *Defendant-Respondent.*	**Action at Law.** **On Appeal from New Jersey Supreme Court.**

BRIEF OF DEFENDANT-RESPONDENT.

This is an appeal from a judgment entered in favor of the defendant-respondent (hereinafter referred to as defendant) in the New Jersey Supreme Court reversing the Essex County Circuit Court. The accident from which this cause of action arose occurred in the early evening April 17th, 1932, on a public sidewalk, adjacent to property located at No. 2 Main Street, Orange, New Jersey.

Statement of Facts.

For some years prior to the happening of this accident, the Mutual Theatre Company was the owner of a building known as the Palace Theatre Building which was located at Nos. 2, 4 and 6

Main Street, Orange, New Jersey. The building is subdivided into two stores and a theatre. One of the stores, which is designated as No. 6 on Exhibit P-5 is not involved in this proceeding. The store which is located at No. 2 Main Street was leased by the Mutual Theatre Company to Katherine McClurg (Exhibit P-2, S. C. p. 177), on March 1, 1930, and was occupied by her on the date of this accident. The theatre, which is located at No. 4 Main Street, was leased by the Mutual Theatre Company to the defendant Ledirk Amusement Co., Inc., on December 22, 1930 (Exhibit P-1, S. C. p. 154), and was occupied by it on the date of this occurrence. The McClurg store and the basement beneath it are completely shut off from the theatre and the basement beneath it by a brick wall (Exhibits D-L 1, D-L 2, D-L 3, S. C. pp. 185, 186 and 198; Exhibit D-L 5, S. C. p. 189). In each basement there was provided a separate heating plant for the parts of the building leased to each of the defendants. The cellar beneath the McClurg store might have been entered either by means of a stairway from the interior of the store which led to it, or by means of a stairway leading from the public sidewalk in front of the store to it. The dimensions of the opening created in the surface of the sidewalk by the construction of the latter stairway were 3′ 5″ in length by 5′ 1″ in width, the width of the sidewalk being 9′ 6″, Exhibit P-5. This stairway was covered by two folding iron doors equal in size. When closed, these doors lay approximately flush with the surface of the sidewalk and when open stood at right angles to it. This stairway was located directly in front of one of the two store windows of the McClurg store, Exhibit P-3.

One Frank Battles, who was called as a witness by the plaintiff, had been for some time prior to

the accident and was, on the day of the accident, in the employ of the defendant. His duties were those of janitor and porter in the theatre itself during the day; while at night, between the hours of 7:30 and 10:30, he was stationed in front of the theatre as a footman (S. C. p. 113, l. 20). In the performance of his services for the defendant, he at no time had occasion to enter the cellar of the McClurg store (S. C. p. 113, l. 29).

However, some time prior to the happening of this accident, Battles had made an agreement with McClurg to tend the McClurg furnace in consideration of the sum of $5.00 per month.

At about seven o'clock in the evening of April 17, 1932, Battles, in the course of his employment by McClurg, opened the doors covering the cellar entranceway and entered the McClurg cellar for the sole purpose of tending the McClurg furnace (S. C. p. 109. ll. 1-10; p. 110, l. 10). Shortly thereafter, presumably while Battles was still in the McClurg basement, the plaintiff, who had been a patron at the moving-picture performance in the Palace Theatre, left the theatre by means of the "main entrance" which is shown in Exhibit P-5, and, while walking past the McClurg store, fell over the open cellar door and was injured (S. C. p. 38, l. 37).

Upon this evidence, the defendant, Ledirk Amusement Co., Inc., moved for a nonsuit at the close of the plaintiff's case on the ground that the evidence failed to disclose that at the time of the happening Battles' act in opening the cellar doors of the McClurg store was within the scope of his employment by defendant and, further, that the evidence affirmatively demonstrated that at the time of the accident Battles was the servant *pro hac vice* of the defendant Katherine McClurg. The motion was denied and an exception allowed (S. C. p. 112). At the conclusion of the entire

case, the legal tenor of the evidence being unchanged insofar as the question of the responsibility of this defendant was concerned, a motion was made for a direction of a verdict on the same grounds. This motion was denied and an exception was allowed (S. C. p. 129). During the course of this motion, the following colloquy between counsel for defendant and the trial court took place:

> Mr. Foley: "Does your Honor feel that there is any evidence to show we had any control over the doors?"
>
> The Court: "No, I don't think so. It is not on that issue at all; it is because he was still your servant, acting for you * * *."

It was upon this theory that the case was sent to the jury and in the charge the trial court carefully removed from the consideration of the jury the question of control by the defendant of the doors:—

> "As to the question of the responsibility of the Ledirk Amusement Company, the tenant of the theatre, for Battles' actions in reference to these doors; the Ledirk Amusement Company, as a tenant, is not responsible as such for these doors or the areaway, from the gift shop to the cellar. In other words, it did not rent that part of the property; it did not, by reason of its being a tenant, have any responsibility with regard to these doors. It was not its sidewalk and it was not an entrance to any part of the building. So that it is not responsible for the upkeep of those doors."

The record will show that at the trial the plaintiff recognized that the court had limited his right to recovery against this defendant to proof by the greater weight of the evidence that at the time of the accident Battles was acting for this defendant,

since his counsel saw fit to take exception to that part of the court's charge wherein the court instructed the jury that it could not return a verdict against this defendant which was based upon the theory that the defendant had control of that part of the sidewalk in which the doors were located (S. C. pp. 146-147).

Judgment being entered upon a verdict against the defendant, an appeal was taken to the Supreme Court. There it was argued that the motions for nonsuit or direction should have been granted, first because there was no evidence that Battles was acting on behalf of the Ledirk Amusement Company, and, secondly, because the proof was uncontradicted that at the time of the accident Battles was *pro hac vice* the servant of McClurg. Counsel for the plaintiff argued the matter on these issues. The Supreme Court reversed the action of the trial court in denying the motions by an opinion which was in accordance with the argument of the defendant. Thereafter this appeal was taken.

Thirteen days prior to the opening of the term of this court, plaintiff served upon the defendant with its consent a typewritten copy of his brief, in which it was argued, first, that a factual question of whether or not Battles was acting in the course of his duties for McClurg existed, and, secondly, that a factual question was raised by the proof as to whether or not Battles was *pro hac vice* the servant of McClurg. The defendant prepared its brief in reply to these arguments. On the day prior to the opening of the present term, plaintiff served upon the defendant his printed brief. It bore no resemblance to the typewritten "copy" which he had previously served and it seems it is based in part upon a theory which was not argued in the Supreme Court nor passed upon by its opinion.

It is now argued, through the medium of Point One of plaintiff's brief, that a factual question was presented by which the jury may have determined that the defendant controlled the doorway over which the plaintiff fell.

POINT ONE.

The trial court removed from the consideration of the jury the question of whether or not the defendant was in control of the areaway the condition of which it is alleged proximately caused the plaintiff's injury and, consequently, the verdict could not have been based upon this theory of responsibility.

As we have pointed out in our statement of facts, the trial court submitted the question of the defendant's negligence upon the sole theory that since this accident occurred during the hours of the employment of Battles by the defendant, it was for the jury to determine whether or not he was in fact acting for the defendant, although the uncontradicted proof led to the opposite conclusion. It was contended by the plaintiff below that, by reason of its lease from the owner of the building, defendant had undertaken to maintain the McClurg sidewalk. This lease, which is in the usual form, describes the premises demised as follows:

> "The Palace Theatre in the Palace Theatre Building, at No. 2 Main Street, in the City of Orange, County of Essex and State of New Jersey, together with the lobbies, halls, entrances, exits, rights of way, and of ingress and egress * * *" (S. C. p. 154).

The lease between the Mutual Theatre Company and Katherine McClurg describes the premises let

to her as those "known as No. 2 Main Street in the City of Orange." By Exhibit D-L1 (S. C. p. 185), the sidewalk adjacent to each of the premises is shown. The areaway at which this accident occurred is clearly shown by Exhibits P-3, P-4 and P-5 to have been located in the sidewalk directly in front of the McClurg store at a point approximately sixteen feet from the nearest point of the sidewalk abutting the entrance to the theatre. Under these circumstances, the trial court found as a matter of law that the entranceway was not located in the "lobbies, halls, entrances, exits, rights of way of egress and ingress" of the premises let to the defendant and, consequently, it could exercise no control over them. This conclusion necessarily obliged the court to remove the question of "control" from the jury. The court is now asked, in effect, to hold that the trial court erred in failing to submit to the jury the question of the defendant's control over the areaway, and, secondly, to affirm the judgment in favor of the plaintiff below because the jury might have found for the plaintiff, had the question been submitted. This position is untenable for many reasons. First, to so hold would be to preclude the defendant from its day in court, for it would be bound by a judgment on an issue upon which a jury never passed. Second, it would be to hold that a jury is not bound by the law of the case as made by the trial judge. Third, this court would be obliged to reverse the Supreme Court on a matter which was not decided by it and which, consequently, cannot be deemed to be within the purview of its decision.

Aside from the insurmountable difficulty that the issue which is now raised was never submitted to the jury, the contention in support of it is obviously specious. As we understand it, the plaintiff now says there was evidence that the defend-

ant was in control of the areaway by reason of a provision in the lease by which the defendant undertook to indemnify the owner for damages resulting from its liability for injuries sustained by the general public in the use of "approaches" to the theatre. The plaintiff assumes without argument in support of the assumption that the entranceway to the McClurg cellar, which admittedly is shut off entirely from the cellar beneath the theatre constituted an "approach" to the theatre. Apparently, the basis for this is that persons walking to or from the theatre might pass over the areaway. What the plaintiff neglects to recognize is that this entranceway was not located in any part of the sidewalk abutting the premises leased to the defendant but, on the contrary, it was leased to McClurg and formed a necessary part of the premises demised to her. This being true, any act of dominion which this defendant would have exercised over the entranceway would have been a trespass upon the property of McClurg for which the defendant would have been legally liable. It had no greater right to lay a hand upon the doors in question than a passerby would have had. It was as much a stranger to the premises demised to McClurg as any other member of the public. As we have said, the plaintiff rests a contention that this was an "approach" to the theatre upon the fact that persons intending to visit the theare might walk over it. If that were the test, then a person who left his home a mile from the theatre and walked toward it, intending to attend a performance, would, in the same sense, be traversing an approach to the theatre. The word "approach" must necessarily be viewed in connection with the limits of the property demised. Under no circumstances does it seem conceivable that it can be deemed to include a part of premises, the right

to the exclusive use of which resided in a third person. We repeat, however, that this question seems academic at this time.

The only way in which the plaintiff may have the legal propriety of his theory decided is to assert it upon a retrial of this matter at the circuit, and, in the event that the trial court holds, as a matter of law, that the defendant was not in control of the areaway, to except to such ruling and appeal either to this court or to the Supreme Court.

POINT TWO.

The judgment of the New Jersey Supreme Court should be affirmed.

The uncontradicted evidence was that Battles entered the basement pursuant to a contract of employment with McClurg; that he at no time had occasion to use the McClurg basement in the course of his employment by the defendant; and that Battles was in fact rendering a service to the defendant McClurg which was in no way connected with the business of the defendant. The testimony of Battles, with regard to the identity of his master at the time of the accident was the following:

> "Q. Did you open the cellar doors on April 17, 1932? A. Is that the date of the accident?
> Q. Yes. A. I did.
> Q. Why did you open those cellar doors? A. To bank the fire in the furnace.
> Q. For whom? A. Miss McClurg.
> Q. Did she instruct you to bank the fire in the furnace? A. She asked me if I would, and I done it as a favor for her.
> Q. But it was done with her knowledge and consent, wasn't it? A. Yes.
>
> * * * * * * *

Q. You had been doing this taking care of this furnace for Miss McClurg for some time, hadn't you? A. Yes.

Q. She paid you a stated sum for it, didn't she? A. Yes.

Q. $5. a month? A. Yes.

Q. And that money you got independent of any money you got from the Ledirk Amusement Company? A. Yes.

Q. On that night you went down to take care of the furnace pursuant to the arrangements you had with Miss McClurg? A. Yes.

Q. Was the sole purpose of your going into the cellar to bank the fire? A. Yes, sir.

Q. Did you ever go in there for any other purpose? A. No, sir.

Jerome L. Kridell, Secretary and Treasurer of the Ledirk Amusement Co., testified as follows:

Q. At the time of the accident he was employed by you? A. Yes, sir.

Q. What were his duties? A. In the morning he was janitor and porter and did the cleaning in the Palace Theatre itself, and any general maintenance work that had to be done he did in the afternoon; at night he acted as a footman out front between the hours of 7:30 and 10:30.

Q. Did he at any time in the course of any of his duties for you have any occasion to go into the cellar beneath the McClurg store? A. Never.

Q. Was there anything down there that you exercised any control over? A. Nothing.

Q. How was the basement of the McClurg store separated from the cellar of the Palace Theatre? A. By a brick foundation wall.

Q. Is there any door in that wall? A. Nothing. It runs the length of the two cellars.

Q. Is there a separate heating plant in each of them? A. Yes, sir. There are four separate heating plants in the building.

Q. How many does the theatre use? A. One.

Q. And McClurg's uses one? A. Yes, sir.

By the Court:

Q. And your plant is not connected with this cellar? A. In no way whatsoever.

* * * * * *

Q. Did you have any knowledge that Battles had entered into some arrangement with McClurg's to take care of their furnace for a consideration? A. None at all.

Q. Did you ever instruct him to go into that cellar for any purpose whatsoever? A. Never.

Q. Did you ever go into that cellar yourself? A. Never.

Q. I think you have already stated that none of his duties would have taken him in there. A. None at all.

The defendant, Katherine McClurg, testified as follows:—

Q. Did Battles work for you? A. He did take care of my furnace, yes.

* * * * * *

Q. What were the arrangements that you had with Mr. Battles? A. Why, I paid him $5 a month for taking care of the furnace for me.

* * * * * *

Q. Did he usually bank the fires about that time? A. Right after I left.

Q. He usually banked the fire at about the time that this accident occurred on that particular night? A. I should say so, yes; about that time.

Q. This cellar door marked "cellar door" on the map, leads directly down into your cellar, doesn't it? A. That's right.

Q. Your cellar is entirely shut off from every other cellar? A. Yes.

Q. And the cellar to which this door leads is entirely yours? A. That's right.

Cross-examination by Dr. Dreskin:

Q. You say your instructions to him were to take care of your furnace several times a day? A. Yes, sir.

Q. And those instructions included Sunday as well? A. Those fires have to be kept going over Sunday.

Q. Did you have any conversation with Mr. Kridell about taking care of the furnace? A. No.

Battles, Kridell and Miss McClurg were the only witnesses who testified concerning Battles' employment and it is clear that the only inference to be drawn from this testimony is that at the time of this accident a relationship of master and servant between the defendant and Battles did not exist. As a matter of fact the trial court in charging the jury expressly stated that at the time of the accident Battles was the employee of McClurg. We quote from the charge (S. C. 132);

> "At any rate, he opened these doors and went down to fix the furnace for Miss McClurg, her furnace being in the cellar of the gift shop, and while these doors were up—and I am under the impression that it was while he was down there, but that is still another matter for your determination—this accident happened. He went down there for the purpose of fixing the furnace, and he was down there performing work for Miss McClurg, by whom he was employed for that work of looking after the furnace. In so far as his going down there and doing that work is concerned, he was an employee of hers, and she was responsible for his actions in the way that an employer is responsible for the employee or the servant."

The trial court predicated the responsibility of the appellee upon the question of whether or not the fact that the accident occurred during the hours of Battles' employment by Ledirk was sufficient to render Ledirk chargeable with Battles' acts. It is conceivable that a presumption of agency would arise from the mere showing that a

servant of A, clothed with apparent authority, committed a given act during the hours of his employment by A, but in such case the presumption would be rebutted if the uncontroverted evidence gave rise to no inference other than that the servant was not performing an act which was reasonably connected with the scope of his employment by A. The plaintiff here affirmatively proved that the negligent act upon which his cause of action was based arose from the contract of employment between Battles and McClurg and occurred in the course of that employment. It is fundamental that a servant cannot serve two masters whose interests are not identical. There is no suggestion that the interests of the defendant and those of McClurg were in any way related. In fact, the record clearly indicates the contrary to have been true. Each of these defendants leased a part of a building and each had exclusive control of the respective leased parts. The stationery store of Miss McClurg and the business therein conducted was as completely unrelated to the theatre occupied by the defendant as if the two were in separate parts of the city. When Battles left the premises of the Ledirk Amusement Co., and took up his business with McClurg, from a legal standpoint the dominion of the defendant over him was lost. From that very moment, the relationship of master and servant between him and the defendant was terminated and it could not again exist until such time as Battles saw fit to resume the duties which were attendant to his employment by the defendant.

It is well established that a general servant of one may *pro hac vice* become the servant of another so as to relieve the general master from liability for acts performed by the servant while in the furtherance of the business of the person exercising temporary dominion over him. Such

a situation arises when the services together with the right to direct the manner in which such services are performed are transferred from the master to a third person. The leading case on that subject in this state is that of

D. L. & W. R. R. Co. v. *Hardy,* 59 N. J. L. 35; 34 Atl. 986.

The question in the *Hardy* case was whether at the time when Hardy suffered injury he had transferred his services from his general employer, the Passaic Rolling Mill Company, to the appellant. The circumstances in which a general servant of one may *pro hac vice* become the servant of another were ably discussed by Justice Magie who said:

> "A general servant of one may, for a particular work or a particular occasion, become *pro hac vice* the servant of another person. What will suffice to prove the assumption of the dual service gives rise to question. I think the applicable rule is admirably expressed by Lord Watson thus: 'I can well conceive that the general servant of A might, by working toward a common end, along with the servants of B, and submitting himself to the control and orders of B, become *pro hac vice* B's servant in such sense as not only to disable him from recovering from B for injuries sustained through the fault of B's proper servants, but to exclude the liability of A for injury occasioned by his fault to B's own workmen. In order to produce that result, the circumstances must be such as to show conclusively that the servant submitted himself to the control of another person than his proper master and either expressly or impliedly consented to accept that other person as his master for the purposes of the common employment'."

In the case of

Errickson v. *Schwiers, Jr. Co.*, 108 L. 481; 158 Atl. 482

the converse of this proposition is expressed by Justice Trenchard who said:

> "The relation of Master and servant exists whenever the master retains the right to direct the manner in which the business shall be done, as well as the result to be accomplished. Or, in other words, not only what shall be done, but how it shall be done."

In the present case, the circumstances are such as "to show conclusively that" Battles "submitted himself to the control of another person than his proper master and" * * * "expressly" * * * "consented to accept that other person as his master." The fact of his acceptance of a stated remuneration for his services to McClurg is uncontrovertible evidence of this. Furthermore, during the pendency of Battles' service to McClurg, the defendant retained neither the right to direct what Battles was to do nor the manner in which it should be done.

Our contention was clearly expressed in the Supreme Court opinion. There, Mr. Justice Parker, speaking for the court, said:

> "But giving the plaintiff the benefit of all relevant matters of fact in dispute, we are unable to sustain a submission of the case to the jury. As we read the evidence, no inference is possible other than that Battles, perhaps with the consent of his general employers, perhaps without their knowledge, became, by agreement with Miss McClurg, her servant to the extent of looking after her furnace and entering and leaving her premises for that purpose. He himself testified, as plaintiff's witness, that she requested his services and agreed with him on the compen-

> sation to be paid. What he did for her was of no benefit, but rather a detriment, to the appellant, who received nothing for this outside service performed by him.
>
> "The evidence meets without contradiction the test laid down in *Delaware, Lackawanna and Western Railroad Co.* v. *Hardy,* 59 N. J. L. 562, 565, of a servant having expressly transferred his services *pro hac vice* to a new master by agreement with the latter, and it lacks any scintilla of proof that Battles was accountable to the appellant as general employer for anything that he did for Miss McClurg. There should have been a nonsuit or a direction."

It will be observed that appellant through his brief makes no effort to distinguish the present case from the principle involved in the *Hardy* case, supra, beyond the bare statement that it is inapplicable, although we relied upon it below and the opinion in the Supreme Court was unequivocally rested upon it. The general rule upon which the *Hardy* case is founded is laid down in 18 R. C. L. 784 where it is said that

> "the general test is whether the act is done in the business of which the person is in *control* as proprietor so that he can at any time stop or continue it and determine the way in which it should be done, not merely in reference to the method of reaching the result. The mere fact that the general employer continues to pay the wages of a servant lent by him will not make him liable for the servant's acts, where the person to whom he is lent controls him entirely in regard to the work to be done."

In the present case, it was undisputed that Battles by arrangement with McClurg had undertaken services for McClurg which were unrelated to those of the defendant. While performing those services, he was under the exclusive control of

McClurg. The defendant, during the period of such service, reserved no right to himself to direct the manner in which Battles should perform his duties to McClurg, and, as a matter of fact, everything done by Battles in furtherance of his private arrangement with McClurg was repugnant to the terms of his contract of employment with the defendant. The case of *Standard Oil Co.* v. *Anderson,* 212 U. S. 215, is in accord with the decision in *Hardy* v. *D. L. & W.,* supra. In that case, the plaintiff, a longshoreman employed by a master stevedore whose contract with the defendant to load a vessel required him to pay the latter an agreed compensation for hoisting, was injured through the negligence of a winchman in the general employ of the defendant. He obtained a judgment against the defendant upon the theory that the accident occurred in the course of the winchman's employment by the defendant. The defendant contended that since the stevedore was paying it for the services rendered to him by the winchman, the latter was, *pro hac vice,* his servant. The court held:

> "The winchman was undoubtedly in the general employ of the defendant who selected him, paid his wages and had the right to discharge him for incompetence, misconduct or any other reason. In order to relieve the defendant from the results of the legal relation of master and servant, it must appear that that relation for the time had been suspended and a new like relation between the winchman and the stevedore had been created. The evidence in this case does not warrant a conclusion that his changed relation had come into existence. For reasons satisfactory to it, the defendant preferred to do the work of hoisting itself and received an agreed compensation for it. The power, the winch, the drum and the winchman were its own. It did not furnish them but furnished

> the work they did to the stevedore. That work was done by the defendant for a price as its own work by and through its own instrumentalties and servant, under its own control."

In the present case, the defendant received no benefit from the work done by Battles. It did not direct Battles to do the work, let alone direct how the work should be done. On the contrary, he was the exclusive servant of McClurg during the pendency of the time he was employed by her. She alone benefited by his acts, she alone directed them, and only she could control him. In the cited case, if it had appeared that the stevedore had paid the defendant for the servant, instead of for the work accomplished by the servant, the defendant could not have been held, for in such circumstances the stevedore would have controlled the actions of the servant and would have obtained the right to direct the manner in which the temporary service was to be rendered.

The case of

> *C. R. R. Co. of N. J.* vs. *DeBusley,* 261 Fed. 561

follows the authority of *Standard Oil Co.* v. *Anderson, supra.* It too stands for the principle laid down in the *Hardy* case. It appeared that an employee of the Baltimore & Ohio Railroad Co., in the performance of his duties as a freight train conductor of that railroad, was injured by a negligently operated engine of the defendant. It appeared that at the time of the accident the defendant's engine was being operated upon the tracks of the Baltimore & Ohio Railroad Co. and that while it was being operated there the employees who manned it were subject to the track rules, signals and directions of the timetables

issued by the latter company. It further appeared that the defendant was paid by the Philadelphia & Reading Railroad for the services which were being rendered by the engine and crew at the time of the accident. Under these circumstances it was contended that at the time of the accident the crew of the engine were employees of the Philadelphia & Reading R. R. Co., and further that they were subject to the directions of the Baltimore & Ohio Railroad Co. The court, reviewing the *Anderson* case at length, held that the defendant retained control over its servants and that neither the hire of the engine and crew by the Philadelphia & Reading Railroad Co., nor the fact that the crew was subject to the directions prescribed by the Baltimore & Ohio Railroad Co. while the engine was being operated on its tracks was evidence of the establishment of a relationship of master and servant between either of the companies and the crew in question. This decision is entirely in conformity with the law as laid down by the Supreme Court in the present case.

The case of

Doran v. *Thomsen,* 76 L. 584,

is based upon a different principle from those contained in these cases and in this quotation from Ruling Case Law, but is nevertheless excellent authority for the defendant's position in the instant case. In *Doran* v. *Thomsen,* it was held that where the defendant permitted his daughter to use his automobile exclusively for her pleasure, it was error to submit to the jury the question of whether or not while operating the automobile she was acting as the servant of her father. The court said:

> "This proposition ignores an essential element in the creation of that status as to third

> persons, that such use must be in furtherance of and not apart from the master's service and control, and fails to distinguish between a mere permission to use and a use subject to the control of the master and connected with his affairs. The reason for liability is founded upon the idea of control which a master has over his servant."

The cases of *Tischler* v. *Steinholtz,* 99 N. J. L. 149, and *Crowell* vs. *Podolski,* 98 N. J. L. 552, lay down the rule that proof of defendant's ownership of an automobile driven on a public highway raises a presumption of fact that the automobile was either in the possession of the defendant or in his control. This is true but, of course, the presumption may be rebutted by uncontradicted proof that the automobile was not in fact operated either by the defendant or by his duly authorized servant, agent or employee. It is elementary that, when the latter proof is uncontradicted, the question of control becomes one for the court. In the present case, the fact that an accident was caused by the negligence of a general servant of the defendant during his regular hours of employment raised a presumption that he was acting in behalf of the defendant. This presumption was overcome by the uncontradicted proof that at the time of the occurrence he had temporarily severed his connection with the defendant and was engaged in an enterprise for McClurg pursuant to an arrangement between McClurg and him to which his general employer was not a party and from which he received no benefit.

In the final analysis, the plaintiff's contention on this point may be stated to be that a master is responsible for all of the acts of his servants during the hours of their employment, whether or not the acts are done in the scope of the authority, whether or not they are done in the course of the

employment, and, even though they may be committed at a time during which the servant has submitted himself wholly to the control of a third person who is entirely unconnected with and independent of the general master. If this rule were adopted, it would destroy all of the authority cited in the plaintiff's own brief. The effect of it would be to wipe out the doctrine of *respondeat superior* and to place every master in the position where he might be held by a jury for the errant acts of a servant if the servant could contrive to commit them during his regular hours of employment.

It is, therefore, respectfully submitted that the judgment of the New Jersey Supreme Court should be affirmed.

Respectfully submitted,

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New Jersey Court of Errors and Appeals.

HERBERT L. HACKNEY,
Plaintiff-Appellant,

vs.

MUTUAL THEATRE COMPANY, a corporation, LEDIRK AMUSEMENT CO. INC., a corporation, and KATHERINE MCCLURG, individually and trading as MCCLURG'S GIFT SHOP,
Defendants,

and

LEDIRK AMUSEMENT CO. INC., a corporation,
Defendant-Respondent.

Action at Law

On Appeal From New Jersey Supreme Court.

(Italics ours except where otherwise noted.)

REPLY BRIEF ON BEHALF OF APPELLANT.

POINT ONE.

In its brief defendant-respondent argued that the Trial Court removed from the consideration of the jury, the question of whether or not the defendant was in control of the sidewalk in which were located the iron doors over which the plaintiff fell and was injured. Counsel argue that the

matter argued under Point I of our main brief cannot be urged before this Court as the question was never passed upon by the jury.

It is respectfully submitted that this contention is unsound and results from a misconception of the real tenor of appellant's argument under Point I of the main brief.

It is not contended that this defendant was in control as a tenant, of the areaway or the doors. It is admitted that Miss McClurg by her lease, Exhibit P-2, had rented the premises known as #2 Main Street in the City of Orange, and State of New Jersey, in front of which these doors were located. It is contended, however, that the owner of the realty, the Mutual Theatre Company, had leased said premises to Miss McClurg, and collected rents from her, and to facilitate the use of the said premises, had built a cellarway into a public street, as is shown on the diagram Exhibit P-5 (Case, page 184), which was prima facie a nuisance, and as such *might* render the owner responsible, if, as a result of its negligent maintenance, a person using said highway or sidewalk was injured.

In the case of *Durant* vs. *Palmer,* 29 N. J. L. 544, 548, where a similar areaway was the cause of the injuries, the Court said:

> "The defendant testified that areas are made for steps to the basement, and to protect the building from dampness, and that this area was intended for steps down the entire way. If so, it surely belonged to the house, and both the owner and occupant are required to render it safe to the public. The defendant, as the owner of the building, had caused or permitted the area to be made. If he continued in possession of that part of the premises, he was liable both as occupier and owner. *If he had leased it with the store, he was still liable as the owner, continuing the*

nuisance and receiving rent as the consideration for it.''

Compare *Kelley* vs. *Lembeck & Betz Brewing Co.,* 86 N. J. L. 471; *McKeown et al.* vs. *King, et al.,* 99 N. J. L. 251; 122 A. 753.

When the Mutual Theatre Company drew its lease with the Ledirk Amusement Company, it contemplated that the use of its premises as a theatre would undoubtedly bring to the theatre premises, and to the surrounding areas owned by it, an unusually large number of people, who at the time that the performance would commence or close, would undoubtedly crowd the entrance, exits of the theatre, and the adjacent sidewalks. They realized that the cellar doors in question were within the adjacent area and were within a public street, and that they might become liable to the patrons invited to the theatre, if the doors were improperly maintained.

Therefore they demanded from the Ledirk Amusement Company indemnification, and in accordance with their demand, the Ledirk Amusement Company agreed to indemnify them and save them harmless from any and all liability, suits, etc. which might arise due to the use of the premises as a theatre. But in making this demand for indemnification, they did not confine it solely to the premises leased to the Ledirk Amusement Company. They demanded and secured indemnification with respect to areas *owned by it;* but *not leased* to the Ledirk Amusement Company, but which, because of the use of the leased premises as a theatre, might in the normal course be used by the patrons of the theatre. Accordingly, they included within the terms of the indemnification agreement, certain contiguous areas owned by them, which they designated in said agreement as ''approaches''. And it is con-

tended that by that term they meant to include that portion of the sidewalk in front of the building owned by them, which might be used by the patrons of the theatre as an access to or from the entrance or exits of the theatre.

It will be noted that they did not demand, nor did they receive from Miss McClurg, in her lease, any such indemnification.

It is not contended that by this indemnification agreement, the Ledirk Amusement Company thereby became a tenant of the area wherein the iron doors were located, nor did it assume to control the area in question. This is not the theory upon which the main argument rests. We do contend, however, that the question submitted to the jury was: What were the duties of Battles as a doorman for the Ledirk Amusement Company? In this regard, the Court said (Case, page 137, line 18):

> "At or about the time this accident happened, he was to be stationed in the front of the theatre building as a doorman. It is not for me to say to you just the limits of his duties as a doorman. It is for you to say what the term 'doorman' means as applied to him under the situation as you find it in this case. It is for you to take these facts and apply these particular rules as to what renders an employer responsible for his servant's actions."

We insist that it was proper for the jury, in order to determine what his duties were as a doorman, to take into consideration the fact that the Ledirk Amusement Company had undertaken to indemnify the Mutual Theatre Company against any liability which might arise against the Mutual Theatre Company by reason of its ownership, or its maintenance, of the iron doors

within the area designated in the indemnification agreement as the "approaches" to the entrance and exits of the theatre. And this becomes more patent when the diagram Exhibit P-5 (Case, page 184) is examined.

We contend that the jury might well have found that Battles was stationed in front of the theatre building as a doorman, because the respondent desired to avoid the possibility of an action arising in favor of patrons entering or leaving the theatre, not only against themselves but against the owner of the premises as well, resulting from a failure to properly maintain the iron doors in question.

If the respondent directed Battles to see to it that the iron doors were not left open, unguarded and unlighted, thus protecting the owner of the property from liability to patrons using the "approaches" to the entrance and exits of the theatre, can it be argued that if Battles failed in his duty in that regard, as a result of which a patron using the "approaches" became injured, that his employer would not thereupon be liable for the injuries so sustained?

It is submitted that the answer to this question comes within the rationale of the case of *Warner* vs. *Davis*, 10 N. J. (Misc.) 539, 159 Atlantic 817, wherein the Court said:

> "There is, perhaps, no rule of law more firmly settled than that a master is ordinarily liable to answer, in a civil suit, for tortious act of his servant, if the act be done in the course of his employment in his master's service. This is on the principle of the maxim respondeat superior, and also of the maxim 'qui facit per alium facit per se'. *The master is liable, although he did not authorize or even know of the servant's act or negligence, and although he disapproved*

> *of or forbade it, if the act was done in the course of the servant's employment, or, as it is sometimes expressed, within the scope of his authority". Ayrrigg's Ex'rs* v. *New York & Erie R. R.,* 30 N. J. Law, 462.
>
> "To rebut the presumption of liability of a master for damage consequent upon the negligent act of a servant, done within the apparent scope of the latter's employment, it must be shown, either that the act was purely wanton, or that it was not performed in furtherance of any duty within the actual scope of the servant's authority. Rhinesmith *v. Erie Railroad Co.,* 76 N. J. Law 783, 72 A. 15. In cases where the scope of authority of a servant or agent depends upon disputed matters of fact, the extent of such authority is ordinarily a question for the jury. Dierkes *v.* Hauxhurst Land Co., 80 N. J. Law 369; 79 A. 361; 34 L. R. A. (N. S.) 693; Klitch *v.* Betts, 89 N. J. Law, 352; 98 A. 427, 429."

Compare also *Pederson et al* vs. *Edward Shoe Corporation, et als,* 104 N. J. L. 566.

If Battles, while acting as a footman or doorman, had opened the door of an automobile of a patron, and in closing the door, had negligently closed it upon the finger of one of the occupants of the automobile, could it be argued that the Ledirk Amusement Company would not be liable for the act of Battles in negligently closing the door of the automobile?

If the jury found it was within the scope of Battle's employment by the Ledirk Amusement Company to see to it that the iron doors in question were properly maintained so that his employer would escape any liability under the indemnification agreement, then, even though a stranger had opened the iron doors, if Battles, after seeing them opened failed to close them, thus permitting a dangerous trap to exist, in the path

of patrons entering and leaving the theatre, it is submitted his employer would be liable to one who was injured as the result of his failure to close the doors.

The mere fact that the Trial Court non-suited the plaintiff in his action against the Mutual Theatre Company does not mitigate against the contention of appellant. If the employment of Battles as a doorman, by the Ledirk Amusement Company, was motivated by their desire to avoid the barest possibility of an action against the landlord, the jury could infer that his failure to close the doors arose within the scope of his employment with the respondent.

The respondent argues that it had no greater right to lay a hand upon the doors in question than a passerby would have. In other words, that it was a stranger to the doors in question.

But this is not the test. Assume Battles as a doorman opened the door of an automobile of a stranger who approached the entrance of the theatre to discharge patrons, and assume further that Battles left the door of the automobile open and that while it was opened directed the driver to proceed, and that while proceeding the open door struck a pedestrian; under such circumstances would the mere fact that respondent was a stranger to the owner of the car in question, and without right to open the door in the first instance, prevent a recovery against the respondent by the pedestrian who was struck by the open door of the automobile?

Although in the case *sub judice* and in the example just recited the opening of the doors by Battles might be perfectly proper yet, it was the failure to close the door in each instance which

was the proximate cause of the injury, and created liability against the employer.

Negligence may arise as the result of an act of omission as well as an act of commission. If the tortious act, which is the proximate cause of the injury, occurred while the employee was performing his duties for his master, no matter how imperfectly, the master is still liable for the tortious act.

It is submitted that the jury might well have found that it was wholly within the scope of Battles' employment by the Ledirk Amusement Company to see to it that no action be brought against his employer by the Mutual Theatre Co. under the indemnification agreement, or, putting it in another way, it was part of the job of Battles to see to it that no cause of action arose against the Mutual Theatre Co. by reason of its improper maintenance of the cellar doors in question, which were within a public highway.

When the issue was submitted to the jury as to whether or not the tortious act of Battles arose out of his employment by the Ledirk Amusement Co., the jury could have arrived at the conclusion that it did, without any regard whatsoever to whether they were in control of the premises as a tenant or not.

POINT II.

The respondent at great length argues that as a matter of law the Court was justified in finding that the tortious act of Battles arose out of the employment by Miss McClurg *pro hac vice.* We insist that this question was one for the jury and not for the Court.

Throughout, the respondent denied it had any knowledge whatsoever of the acts performed by Battles for Miss McClurg. Before there can be a transfer or change of status the evidence must reasonably lead to the inference that the change of status was within the contemplation of both parties to the undertaking. In the case of *Pederson, et al.* v. *Edwards Shoe Corp.*, 104 N. J. L. 566, 142 A. 13, at p. 14, the court said:

> "The doctrine of respondeat superior, upon which this contention must be predicated, results from the contractual relationship of agency, or of master and servant, expressly or impliedly created, in which legally inheres the essential element of consent to the change of status, express or implied, upon the part of both parties; and, while this dominant legal characteristic may be implied from acts and circumstances, *the evidence must be such as would reasonably lead to the inference that the change of status was within the contemplation of both parties to the undertaking;* for as was observed by this court in Courtinard *v.* Gray Burial Co., 98 N. J. Law, 497, 121 A. 146:
>
> > 'As a sentient being capable of choosing his own employment, his services could not be transferred to another without his consent, expressly or impliedly given; and whether such transfer was, in fact, effectuated would inevitably become a jury question, whenever, from the testimony, that inquiry would assume the form of a debatable question.' "

It was a jury question, for the further reason, as we pointed out in Point II of the main brief, that if there was any evidence (and there was) which tended to show that the tortious act of Battles arose out of his employment by the Ledirk

Amusement Co., the mere fact that Battles had previously performed some act for Miss McClurg was of no importance, nor in any wise controlling of the issue.

It is respectfully submitted that the judgment of the Supreme Court should be reversed.

SAMUEL DRESKIN,
of Counsel with Plaintiff-Appellant.

New Jersey Court of Errors and Appeals

HERBERT L. HACKNEY,
Plaintiff-Appellant,

vs.

MUTUAL THEATRE COMPANY, a corporation, LEDIRK AMUSEMENT CO., INC., a corporation, and KATHERINE MCCLURG, individually, and trading as McClurg's Gift Shop,
Defendants,

LEDIRK AMUSEMENT CO., INC., a corporation,
Defendant-Respondent.

Action at Law

On Appeal from New Jersey Supreme Court.

REPLY BRIEF OF DEFENDANT-RESPONDENT.

The liability of the LeDirk Amusement Co., Inc., hereinafter called the defendant, could be predicated only upon two theories; first, that the tortious act of Battles occurred within the scope of his employment by the defendant, and, second, that the defendant was in control of the areaway leading to the McClurg cellar and, consequently, was responsible for any defect in such doors of which it had either actual or implied notice. The first of these two propositions was submitted to the jury. The Supreme Court held that the submission of such issue was erroneous since the uncontradicted proof showed that, at the time of the allegedly tortious act, Battles was in the employ of McClurg and under her exclusive control. This we have argued under Point Two of our brief.

The second of the theories of responsibility, as we pointed out in our main brief, was not submitted to the jury. It was argued in the main brief of the appellant that there was evidence that the defendant was in control of the portion of the McClurg premises at which the accident occurred by reason of a contract of indemnification with the owner of the premises by which it undertook to save the owner harmless from damages occasioned by injuries to persons using the "approaches" to the theatre. This argument was based upon the premises, first, that the sidewalk abutting the McClurg store was an "approach" to the theatre within the terms of the lease and, second, that, by reason of the contract of indemnification, the defendant retained control over it, although it was a part of premises leased to McClurg. We argued in response, first, that neither the jury nor the Supreme Court was permitted to pass upon the propriety of this proposition, and, second, that since the premises upon which the accident occurred were leased to McClurg, the defendant, as a matter of law, had no right of control over them.

In reply to this argument, the plaintiff, through the medium of his reply brief, now says, first, it is admitted that the premises upon which the accident occurred were demised to McClurg and, consequently, the defendant had no control over them, and, second, it is urged that a jury question arose as to whether or not Battles' duties included the proper maintenance of the McClurg sidewalk by reason of the contract of indemnification between the defendant and the owner, Mutual Theatre Company. Therefore, as we now see it, the plaintiff has shifted back to the argument that the accident occurred within the scope of Battles' duties to defendant. Tacitly, it is admitted by the plaintiff that, were it not for the lease, there would be

no evidence that at the time of the accident Battles was acting on behalf of the defendant. If that be true, then the judgment of the Supreme Court should be affirmed because the trial court submitted the question of LeDirk's responsibility to the jury upon the sole question of whether or not it should be held by reason of the fact that the accident occurred during the hours of Battles' employment by the defendant (S. C., pp. 136-137). To affirm upon the theory now offered by the plaintiff in support of the verdict would be to affirm upon a question which the jury was not permitted to determine. Regardless of this, may we point out: (1) It has been held by this court that a contract such as the lease between the defendant and the Mutual Theatre Company is not one for the benefit of third parties (*Fielders* v. *North Jersey Street Railway Company,* 68 N. J. L. 243). (2) Such a contract could be evidential for the purpose of showing control only if the trial court determined that the place in question was in fact an "approach" within the meaning of the lease. It is admitted by the plaintiff by his reply brief that it is not maintained that the defendant was in control of the premises upon which the accident occurred. (3) That even if this contract could be distinguished from that in *Fielders* v. *North Jersey Street Railway Company, supra,* the fact remains that the indemnitee, Mutual Theatre Company, for whose act the defendant is now sought to be held as indemnitor, was exonerated by the trial court when that court granted its motion for a nonsuit.

Respectfully submitted,

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