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SUMMONS.

THE STATE OF NEW JERSEY to STAN-
LEY KOHL.

(SEAL) YOU ARE SUMMONED to answer the
annexed complaint of Elsie Malzer and
Harold Malzer in an action at law in 10
the Hudson County Circuit Court. And take
notice that unless you file your answer to said
complaint with the Clerk of the said Hudson
County Circuit Court, at Jersey City, within
twenty days after service upon you of this writ
and the annexed complaint, the plaintiffs may
proceed in the suit and judgment may be entered
against you.

WITNESS, FRANK L. CLEARY, Judge of the said
Court, at Jersey City, this 24th day of April, 20
nineteen hundred and twenty-eight.

JOHN J. MCGOVERN,
Clerk.

MARK TOWNSEND, JR.,
Attorney.

30

40

COMPLAINT.

Filed April 28, 1928.

Hudson County Circuit Court

10

 ELSIE MALZER and HAROLD
MALZER,

Plaintiffs,
vs.

STANLEY KOHL,

Defendant.

*Action
at Law.*
Complaint.

20 The plaintiff, Elsie Malzer, residing in the City of Jersey City, County of Hudson, State of New Jersey, complaining of the defendant, states as follows:

1. That at all times hereinafter mentioned defendant was and still is the owner of a certain Bergen avenue bus of the City of Jersey City, State of New Jersey, which runs on Bergen avenue in a northerly and southerly direction from Journal Square, and having for its terminal, Journal Square, in the aforesaid city.

30 2. Upon information and belief, that at all of the times hereinafter mentioned the defendant, his servants, agents and employees had possession and operated the said automobile bus.

3. That at all times hereinafter mentioned the defendant, his servants, agents and employees had control of the said automobile bus.

40 4. That on or about March 26, 1928, plaintiff was a passenger on said bus and on said day and at the times herein mentioned the automobile

Complaint.

bus aforesaid which was in possession and control and operated by the defendant, his agents, servants and employees, came to a stop at the north-westerly corner of Bergen and Woodlawn avenues in the City of Jersey City, for the purpose of permitting passengers to leave said bus.

5. That the said automobile bus, owned by the defendant and in his possession and control, was stopped at a dangerous and unsafe place and that plaintiff, while leaving the aforesaid bus suddenly and without any warning and by reason of the unsafe and dangerous place where said automobile bus stopped, fell into a certain depression in the highway.

10

6. That through the carelessness, negligence and unskillfulness of the defendant, his agents, servants and employees, in the manner in which said bus was operated and brought to a stop, plaintiff was caused to sustain serious and permanent injuries; that by reason of the said premises, the plaintiff was made sick, sore, lame and disabled, and so remained and for a long period of time was confined to her bed and will be confined thereto for a long period of time to come; that said injuries are permanent in character and plaintiff was unable and will be unable to attend to her usual occupations and duties; that she suffered contusions and abrasions of the head, face, body and limbs.

20

30

WHEREFORE, plaintiff demands damages in the sum of Fifteen Thousand Dollars (\$15,000.00).

SECOND COUNT.

The plaintiff, Harold Malzer, residing in the City of Jersey City, County of Hudson, State of

40

Complaint.

New Jersey, for his complaint against the defendant states as follows:

1. He repeats and reiterates each and every paragraph of the first count as though the same were more fully set forth herein.

10 2. That as a result of the aforesaid he is compelled to expend various sums of money for medical aid and attention in an effort to cure said Elsie Malzer of her said injuries; that he has been deprived of the company and society of his said wife and will in the future be deprived of the company and society of his said wife.

WHEREFORE, plaintiff demands damages in the sum of Five Thousand Dollars (\$5,000.00).

20

MARK TOWNSEND, JR.,
Attorney for Plaintiffs.

I hereby deputize John Convery to serve the within writ. Witness my hand and seal this 26 day of April, 1928.

JOHN J. COPPINGER,
Sheriff.

30

By THOS. MADIGAN,
Under Sheriff.

Served the within summons and complaint April 26, 1928, personally on the defendant Stanley Kohl, at 24 Winfield avenue, Jersey City.

JOHN J. COPPINGER,
Sheriff.

40

By JOHN CONVERY,
S. D. S.

Answer.

Filed Clerk's Office, April 28, 1928, Hudson
County, N. J.

JOHN J. McGOVERN,
Clerk.

ANSWER.

10

Filed May 1, 1928.

HUDSON COUNTY CIRCUIT COURT.

ELSIE MALZER and HAROLD
MALZER,

Plaintiffs,

vs.

STANLEY KOHL,

Defendant.

*Action
at Law.*

Answer.

20

Defendant, residing in the City of Jersey City,
County of Hudson, State of New Jersey, answer-
ing the complaint of the plaintiffs, says that:

FIRST COUNT.

1. Defendant denies paragraphs 1, 2, 3, 4, 5 30
and 6 of the first count.

SECOND COUNT.

1. Defendant denies paragraphs 1 and 2 of the
second count.

FIRST SEPARATE DEFENSE.

Defendant says and will offer to prove at the
trial that the plaintiff Elsie Malzer was guilty of
contributory negligence, and the injuries, if any, 40

Answer.

sustained by her were the result of such contributory negligence.

SECOND SEPARATE DEFENSE.

10 Defendant gives notice that he will move at the trial to strike out the complaint on the ground that it fails to set out any cause of action against the defendant.

FRANK J. HIGGINS,
Attorney for Defendant.

Filed Clerk's Office, May 1, 1928, Hudson
County, N. J.

20 JOHN J. McGOVERN,
Clerk.

30

40

NOTICE OF TRIAL.

Filed June 29, 1928.

HUDSON COUNTY CIRCUIT COURT.

10	ELSIE MALZER and HAROLD MALZER, <i>vs.</i> STANLEY KOHL, 	<i>Plaintiffs,</i> <i>Defendant.</i>	} <i>Action at Law.</i> } <i>Notice of Trial.</i>
----	---	---	--

SIR:

20 PLEASE TO TAKE NOTICE, that the trial of the issue joined in this cause will be moved before said Court, in the presence of such Judge or Justice thereof, as shall then be holding said Court, on the third Tuesday of September, A. D. 1928, at the Court House, in Jersey City in and for the County of Hudson at ten o'clock in the forenoon, or as soon thereafter as the said Court can attend to the same.

Dated June 21, A. D. 1928.

30 Your obedient servant,
 MARK TOWNSEND, JR.,
 Attorney of Plaintiffs.

To Frank J. Higgins, Esq.,
 Attorney of Defendant,
 15 Exchange Place,
 Jersey City, N. J.

Amended Answer.

Service of the within notice of trial is hereby
acknowledged this 27th day of June, A. D. 1928.

FRANK J. HIGGINS,
Attorney for Defendant.

Filed Clerk's Office, June 29, 1928, Hudson 10
County, N. J.

JOHN J. McGOVERN,
Clerk.

AMENDED ANSWER.

Filed December 27, 1929.

HUDSON COUNTY CIRCUIT COURT.

20

ELSIE MALZER and HAROLD
MALZER, her husband,

Plaintiffs,

vs.

STANLEY KOHL,

Defendant.

*Action
at Law.*

*Amended
Answer.*

Defendant in answer to the complaint says:

30

1. He denies paragraphs 1, 2, 3, 4, 5 and 6
of the first count.

SECOND COUNT.

1. He makes the same answer to paragraph
one of this count as heretofore made to each and
every allegation contained in the first count and
makes the same a part hereof as though herein
repeated in full.

40

Amended Answer.

2. He has no knowledge or information sufficient to form a belief as to contents of paragraph two.

3. He denies paragraph three.

10

FIRST SEPARATE DEFENSE.

Defendant says and will offer to prove at the trial that the plaintiff Elsie Malzer was guilty of contributory negligence, and the injuries, if any, sustained by her were the result of such contributory negligence.

SECOND SEPARATE DEFENSE.

20 Defendant gives notice that he will move at the trial to strike out the complaint on the ground that it fails to set out any cause of action against the defendant.

FRANK J. HIGGINS,
Attorney for Defendant.

Filed Clerk's Office, Dec. 27, 1929, Hudson
County, N. J.

30

JOHN J. McGOVERN,
Clerk.

40

Amended Complaint.

Jersey City, for the purpose of permitting plaintiff to alight therefrom.

10 4. That the plaintiff, Elsie Malzer, while in the act of alighting from said bus was by reason of the negligence of the defendant, his agent, servant or employee permitted to alight at a dangerous and unsafe place and as a result therefrom was precipitated to the ground, sustaining the injuries hereinafter mentioned.

20 5. That the negligence of the defendant, his agent, servant or employee consisted in: (a) failing to exercise reasonable care to see that the place selected for the plaintiff, Elsie Malzer's discharge was a safe and proper one for that purpose; (b) in permitting said bus to be stopped at a dangerous and unsafe place knowing or having reasonable means of knowing that the place where the plaintiff alighted was uneven and sloped away from the other parts of the highway; and in permitting the plaintiff to alight from said bus without warning or notice of the sudden descent or slope in the roadway at the point of discharge; in permitting said plaintiff to alight from said bus without assistance, knowing or having reasonable means of knowing that
30 the place of discharge was unsafe and dangerous, and in failing to warn plaintiff of the dangerous and unsafe condition existing at the point of discharge.

40 6. That by reason of the aforesaid negligence plaintiff sustained injuries, all of which are of a permanent nature in and about her head, arms, body and legs and sustained bruises, lacerations, contusions and scars of the head and face, fracture of left and right legs, as a result of which she was confined to her home for a long period

Amended Complaint.

of time, and has and will in the future be deprived of her earnings and has undergone great pain and suffering, all of which said injuries are permanent all to her great damage in the sum of Fifteen Thousand (\$15,000) Dollars.

WHEREFORE, plaintiff demands damages in the sum of Fifteen Thousand (\$15,000) Dollars. 10

SECOND COUNT.

Plaintiff, Harold Malzer, residing in the City of Jersey City, County of Hudson and State of New Jersey, for his complaint against the defendant says:

1. He repeats each and every allegation contained in the first count as though set forth herein. 20

2. That he is the husband of the plaintiff, Elsie Malzer, with whom he resides in the City of Jersey City, County of Hudson, State of New Jersey.

3. As a result of the said injuries the plaintiff has been and will in the future be deprived of the services of his said wife and has been and will in the future be forced to expend large and divers sums of money in endeavoring to effectuate a cure for said injuries all to his great damage in the sum of Five Thousand (\$5,000) Dollars. 30

WHEREFORE, plaintiff demands damages in the sum of Five Thousand (\$5,000) Dollars.

MARK TOWNSEND, JR.,
Attorney for Plaintiffs.

Supplemental Summons.

Service of the within hereby acknowledged this
26th day of December, 1929.

FRANK J. HIGGINS,
Attorney for Defendant.

10 Filed Clerk's Office, December 30, 1929, Hud-
son County, N. J.

JOHN J. McGOVERN,
Clerk.

SUPPLEMENTAL SUMMONS.

Filed February 26, 1930.

20 THE STATE OF NEW JERSEY to KOLL
TRANSPORTATION COMPANY.

(L. s.) YOU ARE SUMMONED to answer the
annexed complaint of Elsie Malzer
and Harold Malzer in an action at
law in the Hudson County Circuit Court, and take
notice that unless you file your answer to said
complaint with the Clerk of the said Hudson
County Circuit Court, at Jersey City within
30 twenty days after service upon you of this writ
and the annexed complaint, the plaintiff may
proceed in the suit and judgment may be entered
against you.

WITNESS, HENRY E. ACKERSON, Judge of the
Circuit Court, at Jersey City this 5th day
of February, nineteen hundred and thirty.

MARK TOWNSEND, JR.,
Attorney.

JOHN J. McGOVERN,
40 Clerk.

Supplemental Complaint.

4. That on or about March 26, 1928, plaintiff, Elsie Malzer, was a passenger in said automobile bus and on the said date and at the times herein mentioned the bus aforesaid, which was in possession and controlled and operated by the defendant, his agent, servant or employee came to a
10 stop at the northwesterly corner of Bergen and Woodlawn avenue in the City of Jersey City, for the purpose of permitting plaintiff to alight therefrom.

5. That the plaintiff, Elsie Malzer, while in the act of alighting from said bus was by reason of the negligence of the defendant, his agent, servant or employee permitted to alight at a dangerous and unsafe place and as a result therefrom was precipitated to the ground, sus-
20 taining the injuries hereinafter mentioned.

6. That the negligence of the defendant, his agent, servant or employee consisted in: (a) failing to exercise reasonable care to see that the place selected for the plaintiff, Elsie Malzer's discharge was a safe and proper one for that purpose; (b) in permitting said bus to be stopped at a dangerous and unsafe place knowing or having reasonable means of knowing that the
30 place where the plaintiff alighted was uneven and sloped away from the other parts of the highway; and in permitting the plaintiff to alight from said bus without warning or notice of the sudden descent or slope in the roadway at the point of discharge; in permitting said plaintiff to alight from said bus without assistance, knowing or having reasonable means of knowing that the place of discharge was unsafe and dangerous; and in failing to warn plaintiff of the dangerous and unsafe condition existing at the point of
40 discharge.

Supplemental Complaint.

7. That by reason of the aforesaid negligence plaintiff sustained injuries, all of which are of a permanent nature in and about her head, arms, body and legs and sustained bruises, lacerations, contusions and scars of the head and face, fracture of left and right legs; as a result of which she was confined to her home for a long period of time, and has and will in the future be deprived of her earning and has undergone great pain and suffering, all of which said injuries are permanent all to her great damage in the sum of Fifteen Thousand (\$15,000) Dollars. 10

WHEREFORE, plaintiff demands damages in the sum of Fifteen Thousand (\$15,000) Dollars.

SECOND COUNT. 20

Plaintiff, Harold Malzer, residing in the City of Jersey City, County of Hudson and State of New Jersey for his complaint against the defendant, says:

1. He repeats each and every allegation contained in the first count as though set forth herein.

2. That he is the husband of the plaintiff, Elsie Malzer, with whom he resides in the City of Jersey City, County of Hudson and State of New Jersey. 30

3. As a result of the said injuries the plaintiff has been and will in the future be deprived of the services of his said wife and has been and will in the future be forced to expend large and divers sums of money in endeavoring to effectuate a cure for said injuries all to his great damage in the sum of Five Thousand (\$5,000) Dollars. 40

Supplemental Complaint.

WHEREFORE, plaintiff demands damages in the sum of Five Thousand (\$5,000) Dollars.

MARK TOWNSEND, JR.,
Attorney for Plaintiffs.

10 I hereby deputize James Magnier to serve the within writ. Witness my hand and seal this 7th day of February 1930.

WILLIAM V. O'DRISCOLL,
Sheriff.

By JOSEPH COLFORD,
Under Sheriff.

20 Served within summons and complaint February 14, 1930, on the defendant Koll Transportation Company, by leaving a true copy thereof at 28 Winfield avenue, Jersey City, the usual place of abode of Stanley Koll, President of said Company, with a member of his family above the age of fourteen years whom I informed of the contents thereof.

WILLIAM V. O'DRISCOLL,
Sheriff.

30 By JAMES MAGNIER,
S. D. S.

Filed Clerk's Office, February 26, 10:04 A. M.,
Hudson County, N. J.

JOHN J. McGOVERN.

ANSWER.

Filed March 6, 1930.

HUDSON COUNTY CIRCUIT COURT.

ELSIE MALZER and HAROLD
MALZER, her husband,

*Plaintiffs,**vs.*

KOLL TRANSPORTATION COMPANY,
Defendant.

10

*Action
at Law.**Answer.*

Defendant in answer to the complaint says:

1. It admits paragraphs 1, 2 and 3.
2. It denies paragraphs 4, 5, 6 and 7.

20

SECOND COUNT.

1. It makes the same answer to paragraph one of this count as heretofore made to each and every allegation contained in the first count, and makes the same a part hereof as though herein repeated in full.

2. It has no knowledge or information sufficient to form a belief as to contents of paragraph two.

30

3. It denies paragraph 3.

**FIRST SEPARATE DEFENSE TO BOTH
COUNTS.**

Defendant says and will offer to prove at the trial that the alleged injuries received by the plaintiff, Elsie Malzer, if any, were contributed to by her own negligence, in that:

40

Answer.

(a) In divers ways she was so careless and negligent she became the heedless instrument of her own injuries.

F. HOBART HIGGINS,
Attorney for Defendant.

10

Filed Clerk's Office, March 6, 1930, Hudson
County, N. J.

JOHN J. McGOVERN,
Clerk.

20

30

40

REPLY.

Filed March 10, 1930.

HUDSON COUNTY CIRCUIT COURT.

<p>ELSIE MALZER and HAROLD MALZER, her husband, <i>Plaintiffs,</i></p> <p style="text-align: center;"><i>vs.</i></p> <p>KOLL TRANSPORTATION COMPANY, <i>Defendant.</i></p>	}	<p><i>Action at Law.</i></p> <p><i>Reply.</i></p>	<p>10</p>
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Plaintiffs, for their reply to the answer of the defendant, Koll Transportation Company, say:

1. Plaintiffs join issue with defendant on paragraphs 1 and 2 of the answer. 20
2. Plaintiffs join issue with defendant on paragraphs 1, 2 and 3 of the second count.
3. Plaintiffs deny the first separate defense to both counts.

MARK TOWNSEND, JR.,
Attorney for Plaintiffs.

30

Filed Clerk's Office, March 10, 1930, Hudson County, N. J.

JOHN J. McGOVERN,
Clerk.

SUBSTITUTION OF ATTORNEYS.

Filed June 13, 1930.

HUDSON COUNTY CIRCUIT COURT.

10	ELSIE MALZER and HAROLD MALZER, her husband, <div style="text-align: right;"><i>Plaintiffs,</i></div>	}	<i>Action at Law.</i>
	<i>vs.</i>		<i>Substitution of Attorneys.</i>
	KOLL TRANSPORTATION COMPANY, <div style="text-align: right;"><i>Defendant.</i></div>		

I hereby consent to the substitution of Messrs.
 Harley, Cox & Walburg, in my place and stead
 20 as attorneys for the defendant in the above-
 entitled matter.

F. HOBART HIGGINS,
 Attorney of Defendant.

We hereby consent to the above.

HARLEY, COX & WALBURG,
 Attorneys.

30

Filed Clerk's Office June 13, 1930, Hudson
 County, N. J.

GUSTAV BACH,
 Clerk.

40

RULE FOR JUDGMENT.

Filed May 14, 1930.

HUDSON COUNTY CIRCUIT COURT.

<p>ELSIE MALZER and HAROLD MALZER, her husband, <i>Plaintiffs,</i></p> <p style="text-align: center;"><i>vs.</i></p> <p>KOHL TRANSPORTATION COM- PANY, <i>Defendant.</i></p>	}	<p><i>Action at Law.</i></p> <p><i>Rule for Judgment.</i></p>	<p>10</p>
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The above-entitled cause duly came to issue and was tried before the Hon. Frank L. Cleary and a jury. Mark Townsend, Jr., appearing for the plaintiffs and Harley, Cox & Walburg for the defendant. The evidence was offered in behalf of the plaintiffs and also on behalf of the defendant and the Court having charged the jury and the jury having retired and deliberated and announced as their verdict that the plaintiff Elsie Malzer recover of defendant the sum of Fifteen Hundred (\$1500) Dollars and that the plaintiff Harold Malzer recover of the defendant the sum of One Thousand (\$1,000) Dollars.

WHEREUPON it is Ordered and Adjudged on this 14th day of May, 1930, that judgment final be entered in favor of the plaintiff Elsie Malzer and against the Kohl Transportation Company in the sum of Fifteen Hundred (\$1500) Dollars and in favor of the plaintiff Harold Malzer and against the Kohl Transportation Company in the

Rule for Judgment.

sum of One Thousand (\$1,000) Dollars with costs to be taxed in favor of both plaintiffs.

FRANK L. CLEARY,
Judge.

On motion of

10 MARK TOWNSEND, JR.,
Attorney for Plaintiffs.

Filed Clerk's Office, May 14, 1930, Hudson County, N. J.

GUSTAV BACH,
Clerk.

20

30

40

NOTICE OF APPEAL.

Filed June 5, 1930.

HUDSON COUNTY CIRCUIT COURT.

10	ELSIE MALZER and HAROLD MALZER, her husband, <div style="text-align: right;"><i>Plaintiffs,</i></div>	}	<i>Action at Law.</i>
	<i>vs.</i>		<i>Notice of Appeal.</i>
	KOLL TRANSPORTATION COMPANY, <div style="text-align: right;"><i>Defendant.</i></div>		

20 To Mark Townsend, Jr., Esq., attorney for the
 plaintiff, 921 Bergen avenue, Jersey City,
 New Jersey.

SIR:

TAKE NOTICE that the defendant appeals from
 the whole of the judgment entered in this cause
 to the New Jersey Court of Errors and Appeals
 in the last resort in all causes.

HARLEY, COX & WALBURG,
 Attorneys for the Defendant.

30 Dated, May 27, 1930.

Copy received. Mark Townsend, Jr., attorney
 for plaintiff. May 27, 1930.

Filed Clerk's Office, June 5, 1930, Hudson
 County, N. J. Gustav Bach, Clerk.

ORDER EXTENDING TIME.

Filed June 9, 1930.

HUDSON COUNTY CIRCUIT COURT.

ELSIE MALZER and HAROLD
MALZER, her husband,

Plaintiffs,

vs.

KOLL TRANSPORTATION Co.,

Defendant.

10

*Action
at Law.*

Order.

It appearing that the defendant on June 4, 1930, filed a notice of appeal from the within court to the New Jersey Court of Errors and Appeals, and application having been made for an extension of time for the defendant to file its appeal bond;

20

It is on this 9th day of June, 1930, ORDERED that the time for filing the defendant's appeal bond be and is hereby extended until June 10, 1930.

FRANK L. CLEARY,

C. C. J.

30

Filed Clerk's Office, June 9, 1930, Hudson County, N. J.

APPEAL BOND.

Filed June 9, 1930.

HUDSON COUNTY CIRCUIT COURT.

10	ELSIE MALZER and HAROLD MALZER, her husband, <div style="text-align: right;"><i>Plaintiffs,</i></div>	}	<i>Appeal Bond.</i>
	<i>vs.</i> KOLL TRANSPORTATION Co., <div style="text-align: right;"><i>Defendant.</i></div>		

KNOW ALL MEN BY THESE PRESENTS, That we,
 Koll Transportation Co. of New Jersey, as prin-
 20 cipal, and the National Surety Company, a cor-
 poration under the laws of the State of New
 York, authorized to transact business in the State
 of New Jersey, as surety, are held and firmly
 bound unto Elsie Malzer and Harold Malzer, her
 husband, in the sum of five thousand and 00/100
 (\$5,000.00) dollars lawful money of the United
 States, to be paid to the said Elsie Malzer and
 Harold Malzer, her husband, or to their certain
 30 attorney, heirs, executors, administrators or as-
 signs, to which payment well and truly to be
 made, we bind ourselves, our successors and
 assigns, jointly and severally, firmly by these
 presents.

Sealed with our seals and dated this 29th day
 of May, A. D. 1930.

The condition of this obligation is such that
 whereas the above-named Koll Transportation
 Co. have appealed from the judgment and de-
 termination of the Hudson County Circuit Court
 40 entered on the 6th day of May, 1930, in an

Appeal Bond.

action wherein the said Elsie Malzer and Harold Malzer, her husband, are plaintiffs and the said Koll Transportation Co. are defendants.

Now, THEREFORE, if the said Koll Transportation Co. shall appear and prosecute the said appeal in the Court of Errors and Appeals and shall pay the amount of the judgment rendered against it in the Hudson County Circuit Court if the appeal be not prosecuted by the appellant or shall be dismissed and shall pay the costs of the appeal whatever may be the result thereof, then this obligation to be void; otherwise to remain in full force and virtue. 10

KOLL TRANSPORTATION CO.,

By STANLEY KOLL,
President.

(SEAL) 20

Signed, sealed and delivered
in the presence of

LILLIAN WADDILOVE,
Notary Public.

Hudson County, No. 12936.

Commission expires Nov. 5, 1933.

NATIONAL SURETY COMPANY,

RALPH H. CHAPMAN,
Resident Vice-President.

(SEAL) 30

Countersigned at Jersey City, N. J.

By RALPH H. CHAPMAN,
Agent.

(SEAL) (SEAL)

Attest:

VIRGINIA STRABETTI,
Resident Assistant Secretary.

40

Certificate of Clerk.

Approved as to form and sufficiency.

FRANK L. CLEARY,
Judge.

Filed Clerk's Office, June 9, 1930, Hudson
County, N. J.

10

GUSTAV BACH,
Clerk.

STATE OF NEW JERSEY.

HUDSON COUNTY, ss.

I, GUSTAV BACH, Clerk of the County of Hudson
aforesaid and also Clerk of the Circuit Court
and Court of Common Pleas, holden therein

Do HEREBY CERTIFY, That the foregoing is a
20 true and correct copy of summons and complaint,
answer, reply, notice of trial, amended answer,
amended complaint, supplemental summons and
complaint, answer, reply, order of substitution
of attorney, rule for judgment, judgment record,
notice of appeal, order extending time to file
bond, and bond on appeal, in the case of Elsie
Malzer and Harold Malzer, her husband, plain-
tiffs *v.* Koll Transportation Company, defendant,
at the same is taken from and compared with the
original as filed and recorded in my office. This
30 certificate is issued so that the said cause may
be removed to the Court of Errors and Appeals
of the last resort of all causes at Trenton, N. J.,
for adjudicature according to law.

IN TESTIMONY WHEREOF, I have
hereunto set my hand and affixed the
(SEAL) seal of said Courts and County, at
Jersey City this thirteenth day of
June, 1930.

40

GUSTAV BACH,
Clerk.

GROUND OF APPEAL.

NEW JERSEY COURT OF ERRORS
AND APPEALS.

<p>ELSIE MALZER and HAROLD MALZER, her husband, <i>Plaintiffs,</i></p> <p style="text-align: center;"><i>vs.</i></p> <p>KOLL TRANSPORTATION COMPANY, <i>Defendant.</i></p>	}	<p><i>Action at Law.</i></p> <p><i>Grounds of Appeal.</i></p>	10
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To Mark Townsend, Esq., attorney of the plain-
tiffs:

SIR: 20

TAKE NOTICE that the defendant-appellant hereby assigns the following as the grounds of appeal, upon which the defendant-appellant will rely:

1. The Trial Judge of the court below erred in refusing to grant the defendant-appellant's motion for a non-suit.

2. The Trial Judge of the court below erred in refusing to grant the defendant-appellant's motion for a direction of verdict. 30

HARLEY, COX & WALBURG,
Attorneys for the Defendant-Appellant.

Dated June 2, 1930.

Dr. Peter Marais, direct.

TESTIMONY.

HUDSON COUNTY CIRCUIT COURT.

10 ELSIE MALZER and HAROLD
 MALZER,

vs.

KOLL TRANSPORTATION Co.

Before Hon. Frank L. Cleary, *J.*, and a jury.

Jersey City, N. J., May 6, 1930.

Appearances:

20 Mark Townsend, Jr., Esq., for the plaintiffs, by
 Thomas Doyle, Esq.

 Frank Higgins, Esq., for the defendant, by
 William Cox, Esq.

 A jury was duly empanelled; being found
 satisfactory, they were sworn.

 Counsel opened to the jury.

30 DR. PETER MARAIS, sworn.

Direct examination by Mr. Doyle.

 Q You are a practicing physician in New
 Jersey? A Yes, sir.

 Mr. Cox: I will admit the doctor's qualifi-
 cations.

40 Q Do you know the plaintiff Elsie Malzer in
 this case? A Yes, sir.

Dr. Peter Marais, direct.

Q Did you treat her in the month of March 1928? A Yes, sir.

Q Do you recall the first day you saw her? A Yes, sir.

Q What date was that? A That was on March 26, 1928.

Q Where was she at that time? A At her home, 313 Armstrong avenue. 10

Q When you got there, was she walking or in bed? A She was in bed.

Q What did you do when you got there? A I proceeded to examine her, according to her complaints of the right leg, and found that she had two fractures in the right leg; that is, technically, a comminuted fracture of the right tibia at the junction of the middle and lower third, with a forward and inward displacement of the upper fragments; a fracture of the right fibula at the upper third, with an inner displacement of the lower fragments. 20

Q When you got there, what did she complain of? A She complained of pain in the leg and unable to stand upon it. In fact, she told me that she had been taken to the Greenville Hospital and the leg was put in splints and then she was sent home.

Q Did she complain of any other injuries other than the fracture of her right leg? A I don't recollect other injuries. 30

Q Can you show us, doctor, where the fibula is located on the right leg, so that the jury might understand the meaning of the word? A There are two bones in the leg; the inner, commonly known as the shin bone, is the tibia; the outer is the fibula. The tibia was fractured at the junction of the middle and lower third. The fibula was fractured at the junction of the middle and upper third on the opposite side. 40

Dr. Peter Marais, direct.

Q Now, what did you do when you went there, the first day? A I proceeded to reduce as well as is possible under the circumstances and placed the leg in a fracture box.

10 Q What is that fracture box like? A Well, it is constructed like a truss, three-sided, and a foot board to keep the foot upward, to keep it upright, keep the toes upright and retain the foot at right angles to the leg. It extends from the sole of the foot to a short distance above the knee, and that is packed in with cotton and whatever other means is necessary to treat the wound, gauze and medication upon it.

20 Q At the time you examined the foot, was there any swelling of any kind? A Considerable; considerable swelling from the toes to the knee.

Q Was there any expression of pain on the part of the plaintiff? A Absolutely; plenty of pain.

Q When was the next visit to the home of the plaintiff? A Daily; I visited her daily.

30 Q For how long a period of time? A Well, at home she was visited daily for the first week; then after that at various intervals of three, four and five days and my last visit at her home was June 14th.

Q During that period of time, had you been taking care of this fracture? A Yes, sir.

Q After June 14th, did you go to her home at any time, or did she come to your office? A After that she came to the office; on the 26th, came to the office.

Q When did your treatment of her condition stop? A She was last treated by me on July 19th.

40 Q And at that time, what would you say was the condition of her foot insofar as cure of the

Dr. Peter Marais, direct.

fracture is concerned? A Well, the fracture was united, with some displacement. There is considerable swelling of the entire leg from the knee down, due to disturbances of the lymph circulation, lymph edema, which is of a permanent character, I believe. There is some impairment in the use of the leg. 10

Q Has there been complete recovery of the leg? A Not at all; the fractures have united, that is true. They have united as well as they ever will under the circumstances, but the leg is still in a state of edema.

Q And edema means what? A Swelling.

Q For how long a period of time will that swelling continue? A That may be permanent with her, very likely is.

Q You say there is permanent disability? A 20 I say there is.

Q Can you tell us to what degree of permanency? A I would judge about 25 per cent. disability of that leg.

Q And when did you last make your examination? A April first, 1930.

Q About a month ago? A Yes, sir.

Q At that time, what was the condition of the leg? A The condition at that time; the calf of the leg measured fifteen and three-eighths inches on the left leg; on the right leg, it measured fifteen and seven-eighths inches. 30

Q Would you say, doctor, that the swelling is limited to the seat of the fracture? A Yes, sir; now, at the ankle joint, the left leg measured ten and seven-eighths inches; the right leg eleven and three-eighths inches. Now, just above the ankle joint, at the thin part of the shin, the left leg was $10\frac{1}{2}$ inches and the right leg $11\frac{1}{4}$ inches. The arch of the left leg measured $9\frac{1}{2}$ 40

Dr. Peter Marais, direct.

inches; the arch of the right leg measured nine and seven-eighths inches. There was noted at this time a lymph edema extending from the knee to the toes.

10 Q What is the meaning of "lymph"? A Swelling, commonly called swelling. Of course, we interpret swelling in different ways. There is limitation in the motions at the ankle joint in all directions, due to the impairment of the swelling.

Q Now, doctor, those measurements were made as a result of your examination in April, 1930? A Yes, sir.

Q That is about a month ago? A Yes, sir.

20 Q Did you take care of the plaintiff, doctor, at the time of the birth of her child? A No, I did not.

Q Assuming that the plaintiff was a passenger in a bus and that while alighting from the bus at a street intersection, she was caused to fall and that as a result of that fall, she sustained the injuries which you have just stated; could you say, in your opinion whether or not the injuries could have been brought about as a result of that fall?

30 Mr. Cox: I don't like to be technical; I think the record ought to be clear. As I understand Mr. Doyle's question, his question is: "If she had a fall and sustained the injuries you described as a result of the fall." It seems to me the question answers itself.

Mr. Doyle: I will reframe the question.

40 (Question read as follows: Assuming that the plaintiff was a passenger in a bus and that while alighting from the bus at a street

Dr. Peter Marais, cross.

intersection, she was caused to fall and that as a result of that fall, she sustained the injuries which you have just stated; could you say, in your opinion whether or not the injuries could have been brought about as a result of that fall?)

The Witness: Yes, sir.

10

The Court: What he meant: Assuming she had such a fall, could the injuries which you found there be the result of the fall?

The Witness: Yes, sir. We assume that the particular type of fracture is quite constant under certain conditions, namely, direct application of force on the longitudinal axis of these bones with a turning of the leg when the foot is fixed.

20

Q Have you rendered a bill for your services in this matter? A Yes, sir; I did.

Q Has that bill been paid? A Yes, it has.

Q What is the amount of the bill? A \$103.

Q Would you say that that bill is reasonable for the services? A Yes, I would say it is very reasonable.

Cross examination by Mr. Cox.

30

Q At the time that she called at your office in June, 1928, you had removed the fracture box from her leg, had you not? A Yes, sir; long since.

Q What treatment did you give her after she started calling at your office in June, 1928? A First, diathermic, baking and sine wave, massage to the leg.

Q I understand she called first at your office on June 26th? A Yes, sir.

40

Dr. Peter Marais, cross.

Q The last time you had seen her before that was on June 14th? A Yes, sir.

Q You didn't give her this baking treatment until she called at your office? A Yes, sir; that is right.

10 Q How many times did she call at your office between June 26th and July 19th? A Nine times.

Q And the reason that you gave her these baking treatments was to reduce the edema? A Yes, sir.

Q Did it reduce the edema? A Not all; to some extent, but not appreciable.

Q Was it reducing the edema on or about July 19th? A I didn't hear that.

20 Q This treatment, was it reducing the swelling on or about July 19th? A Not to much appreciable extent.

Q At the time that you started to treat her, she was pregnant, was she not? A Yes, sir.

Q She was pregnant about four months at the time, was she not? A I am not certain on this, but I believe about five months.

Q And the reduction of the swelling in the leg of a woman that is pregnant is apt to be slower than of a woman that is not pregnant?

30 A Not from the pregnancy.

Q Isn't it a fact that a woman's circulation is impaired generally during the time she is pregnant? A That is true. But that is not the circulation alone; this is the lymph circulation.

Q Did you not think, from your experience, that you could have perhaps gotten better results from this swelling if you had gone on with the baking treatment after the birth of her child?

40 A I could not state; I could not say that.

Dr. Peter Marais, cross.

Q You didn't tell her to come back after the birth of her child? A I told her to continue her treatment and why she stopped, I don't know. I presume on account of her pregnancy.

Q You told her to continue the treatment with the idea of further reducing that swelling, did you not? A Yes, sir. 10

Q You have given us measurements which would indicate that the right leg is larger than the left leg; now, isn't that often true, that the right leg of a person is somewhat more fully developed than the left leg? A No more so than the opposite side. The condition may exist similarly on the opposite side.

Q I will put it this way. Isn't it true that it is very seldom that a person will have the same measurement around the left leg as around the right leg; the right leg may be smaller or larger than the left leg; that the two legs do not coincide in their measurements? A That is true. 20

Q So that, in order to know the exact amount of swelling, I mean, the exact amount of increase in size due to swelling, you would have to have the measurements of this woman prior to the time of this accident and compare them with the measurements now? A Yes; but you are speaking of normal conditions, and here is a pathological state. 30

Q See if we don't understand each other, doctor. My question to you was: in order to know the exact amount of the increase in size of the right leg over the left leg which is due to swelling, and swelling alone, you would have had to know the measurements of both legs before this accident, or at least of the right leg 40

Dr. Peter Marais, cross.

before this accident? A But you are obscuring the chief point of view.

Q Isn't that so, doctor? A Yes, truly. But they don't have this edema state. This is not what you consider a swelling.

10 Q The only thing I am asking in this question is for you to indicate that perhaps the measurements you have given of the difference, is not due to swelling. I don't say there is not some swelling there. Is it not so, that even at the present time, if this girl should take further baking and massage treatments, she might further reduce the swelling, even at this date? A Perhaps she may, but that is rather indefinite.

Q Oh, yes. And she had what you doctors call a good strong union of the leg, did she not? A I don't know what to say about it. It is 20 united; it is not dependable.

Q Haven't the bones formed a strong union? A No, there is an overlapping of the fibula, which, of course, does not mean strong by any means.

Q Isn't it true that where there is an overlapping such as you have described that in healing, nature throws out callus to form a strong union? A Between the bones; not the 30 complete circumference of the bone.

Q And doesn't that form a strong union? A No, it does not; not always.

Q You mean it never does? A I won't say it never does; but ordinarily it does not.

Q You don't think it does? A I won't say it never does, but ordinarily it does not.

Q Never? A In overlapping, it is not strong, and they may fracture repeatedly at that same 40 place.

Dr. Peter Marais, re-direct.

Q Did you reduce the fracture before you put this fracture box on? A Yes, sir.

Q By reducing I mean getting the bones in line? A Yes, sir.

Q That is what is meant by reducing the fracture? A Yes, sir.

Q As I understood, you say that this injury, as you understood it, was probably caused by the leg turning while it was in a fixed position? A Right.

Q In other words, while the leg was standing on something, the ankle turned; is that right? A Yes, sir.

Re-direct examination by Mr. Doyle.

Q I show you an X-ray and ask you if you can tell us what that discloses? By the way, were these taken at your request? A Not at my request. They were taken before I saw her, when she was removed to the hospital.

Mr. Cox: I have no objection to their going in evidence just to show what has been described.

Q I show you an X-ray and ask you whether or not you can tell us what that discloses? A It discloses the fracture of the shin bone at the junction of the lower and middle third with considerable displacement there, and likewise a fracture of the fibula at the junction of the upper and middle third with similar displacement.

Q Will you point out to the jurors where that is? A Also the comminution. This is the shin bone; this is the lower end, the lower third

Dr. Peter Marais, re-direct.

and this is the fragmentation. This upper part of the shin bone is displaced forward. This lower is overlapping. The same condition occurs on the fibula, the bone at the back, and the upper bone is similar. This fragmentation creates a destruction of the soft flesh which is not discernable in the X-rays.

10

Q Will you again point out to the jurors where that is? A This is the shin bone, this lower portion. This bone; the upper end is displaced forward. It is protruding from the shin in this picture. The lower bone is sliding upwards behind it. At this point it is fragmented, cracked up into smaller pieces. That is what creates the disturbances, because these fragments destroy, or produce destruction in the soft flesh, the vessels and nerves and muscles of the leg, which is not visible on the X-ray, only by feeling of it and watching results and the circulation, and so forth. Now, the same condition has occurred at the upper end. Now, here we have the picture taken from the opposite side. One picture is taken one way and the other is from another angle, to check up, and we find here the overlapping of about two inches in the fibula, and we find a similar overlapping on the shin bone, and you can see the contour where it is displaced.

20

30

Mr. Cox: It is agreed that these X-rays were taken at the hospital before the doctor started to treat the case.

X-rays marked Exhibits P. 1 and P. 2.

Dr. Peter Marais, re-cross.

Re-cross examination by Mr. Cox.

Q Taking this Plaintiff's Exhibit P. 2; the fracture of the tibia, of the shin bone, is that an oblique fracture? Is it not? A Yes, sir.

Q And it is very much similar to the situation which would occur on taking a stick and cutting it on a slant; isn't that so? A Yes, sir. 10

Q The idea of a fracture box and as you call it, reducing the fracture, was to force this protruding part of bone in as nearly in line with that part as possible? A Yes, sir.

Q So that the result obtained by you, if it were X-rayed, would show that this bone more nearly met this one that this X-ray shows. From your treatment of this woman, wouldn't that be what the X-ray taken at the present time, would show? A I doubt it. 20

Q You don't mean to tell me you did not reduce this fracture at all? A We reduced to the best of our ability, but considering the character of the ends of the bones. They are not as a stick, cut straight across. They are fragmented. They have sharp protruding bones which will prevent the ends of the bones from being properly proximated. Then, again, the musculature is so thick at that portion of the leg, the traction due to spasm of the muscles will get in between these fragments and nothing but an open operation will properly reduce the fragments of that character. 30

The Court: Was this X-ray, doctor, taken before any reduction was made?

The Witness: Before reduction. 40

Mrs. Elsie Malzer, direct.

The Court: Now, what counsel is asking is whether the reduction did not, at least to some degree, no matter how slight, remedy the condition as shown there?

10 The Witness: Undoubtedly it did from the outward appearance of the leg. At least it is straight.

Q This X-ray does not show it as being straight? A Not on there.

Q In other words, it shows— A Angulation. But that shows there the natural contour of the back of her leg, plus the swelling.

Q In other words, you have this leg straight now? A It is as straight as we can get it.

20 Q What more was done to the fibula up here? A Nothing was done to that. That is, I doubt if it can be replaced at the great risk of throwing the lower fracture farther out and making the condition far worse.

MRS. ELSIE MALZER, sworn for the plaintiffs.

30 *Direct examination* by Mr. Doyle.

Q You are the plaintiff in this action? A Yes, sir; I am.

Q How old are you? A I am twenty-one.

Q When were you twenty-one? A January 22, 1930.

Q Are you married? A Yes, I am.

Q What is the name of your husband? A Herman.

Q Have you any children? A Yes, one.

40 Q How old? A The child is twenty months.

Mrs. Elsie Malzer, direct.

Q In March, 1928, on March 26, 1928, were you a passenger in a bus owned by the defendant? A Yes, sir, I was.

Q Where did you get on that bus? A At Egé and Bergen avenues.

Q Going which direction? A Going towards Bayonne. 10

Q Was the bus crowded when you got in? A No, it was not so awfully crowded; all the seats were taken.

Q Where were you going to? A I was going down to my mother's.

Q Who was with you at the time? A My mother.

Q Now, when you approached Woodlawn avenue, what did you do? A Well, just before, the driver of the bus had started the bus at Fulton avenue I pressed the buzzer to let him know I wanted to get off at Woodlawn avenue. Just about we were near the corner I got up and attempted to hold the strap, about to get hold of the strap when he stopped the bus so suddenly that I fell on to the floor, on to somebody's lap. Then I got off the platform step. Then there was another step near the pavement. Well, just before I got to the step, I got a grip on the hand bar with my left hand, put my right foot down to reach the pavement. When I put my right foot down, I had to go down from the floor. I didn't realize it, I had let go the left-hand bar, it was so high that I had to go down and I could not help myself. I tried to reach it, but I could not. 20 30

Q Fulton avenue is one block north of Woodlawn avenue? A It is the block before.

Q You were going to get off at Woodlawn avenue, were you? A Yes, sir. 40

Mrs. Elsie Malzer, direct.

Q You say you signalled the driver of the bus? A Yes, sir.

Q Where were you when you got off? A I was in the bus just before he started from Fulton avenue.

10 Q Then what did you do after you signalled the driver? A Well, I waited until he neared the corner.

Q What did you do then? A I tried to get hold of the strap, so that I could get off the bus.

Q Who got off the bus first, you or your mother? A I did.

Q Had the bus come to a stop at the time? A Yes, but it came to a sudden stop.

20 Q Do you know where the bus was at the time? A Well, I noticed that he had passed the corner; the bus had passed the corner, a little ways.

Q Was the door of the bus open at the time you started to get off? A When he came to a sudden stop, he slammed it back quickly.

Q And then he opened the door? A Yes, sir.

Q Then you proceeded to get off? A Yes, sir.

30 Q In getting off, will you tell the jury just what happened? A Well, as I was getting off the bus, I went off the platform step. Then there was another step to get down to the pavement. Well, there was a hand bar. I put my left hand out to grab it. I put my right foot to reach the pavement. As I put my right foot down, I was down upon the floor and I didn't realize the step was so deep, I had to let go the left-hand bar. All I remember was I was in pain when I got to the hospital. I know I had to go down.

40

Mrs. Elsie Malzer, direct.

Q Were you unconscious when you struck the ground? A Well, I don't remember nothing.

Q Do you know where your right foot went to after you fell on the ground? A All I know it went underneath me.

Q Was there anything the matter with the street at that point that you know of? A No, I didn't notice. 10

Q Did you notice afterwards whether or not there was anything wrong? A Well, I was in such pain, I could not take notice.

Q Did the driver of the bus say anything to you as you were getting off? A No, he didn't.

Mr. Cox: I object to that; not the agent of the defendant; could not bind the defendant. 20

The Court: Sustained.

Q After you found yourself on the ground, can you tell us what happened? A Well, I don't remember nothing until I was in the hospital, on the table.

Q What hospital were you taken to? A Greenville Hospital.

Q How long were you at the hospital? A I was only there about two hours. 30

Q From there where did you? A I was taken to my mother's home.

Q Where was your mother's home? A 313, Armstrong avenue.

Q While you were at the hospital what did they do for you? A Well, Dr. Chapman (?) let me lay there on the table. I don't know what he was doing. Finally he came in. He said he could not do nothing for me, that I had to go home, because he didn't have any room in the 40

Mrs. Elsie Malzer, direct.

hospital to keep me there. My mother said the only thing we can do is to take me home.

Q Then you went to your mother's home? A Yes, we did.

Q And sent for the doctor? A Yes, sir.

10 Q What doctor did you get? A Dr. Marais.

Q What did Dr. Marais do? A He said he could not do anything until he went to the hospital to see the X-ray.

Mr. Cox: I object to what the doctor said.

The Court: Sustained.

20 Q Tell us what the doctor did at the time he came there that first day? A When he came there, asked what was the matter. I told him I had an accident, I had such pain in my right leg that I could not stand it. So he started to examine it, and all he said "Well, I can't do nothing."

Mr. Cox: Not what the doctor said.

Q Just tell us what he did, not what the doctor said, about the condition of your leg? A Well, he could not do nothing.

30 Q Well, did he come back to see you after the first day? A Yes, he came back later on.

Q When he came back later on, did he do anything for you? A Well, yes.

Q What did he do? A He put it in a box.

Q What else did he do? A He bandaged the leg, put cotton around so that the leg would not sway from side to side.

40 Q For how long a period of time was your leg in a box as you describe? A Until one week after.

Mrs. Elsie Malzer, direct.

Q Then after that time, what treatment did he give you? A Then he put it in a cast.

Q How long was your foot in a cast? A Well, I don't know how long the first cast was on, but he took that off and then he put it in another cast and I just can't say how long it was.

Q After he removed the cast, were you still compelled to remain at home? A Yes, sir. 10

Q How long would you say that you were compelled to stay in bed as a result of this accident? A Well, I had to stay there for two months in bed, but after that I was up about half an hour and then I had to go back to bed for the rest of the day.

Q When were you first able to leave the house? A Well, it was some time in October.

Q Of the same year? A Yes, sir. 20

Q Were you able to get about your house without the aid of anyone? A Well, in October just a little bit.

Q You were able to go out in the street in October? A Well, yes for a few yards.

Q Could you walk at that time; were you able to walk? A Not very well.

Q What was the matter with your foot at that time? A I had such pain.

Q Are you able to walk now on your foot? A Not so well. 30

Q How far would you say you are able to walk without the experience of pain? A Well, the most distance is ten or eleven blocks.

Q Do you experience any pain in inclement or rainy weather? A Very much.

Q In an ordinary condition of the weather do you experience any pain? A Yes, sir.

Q What is the condition of your right foot at the present time, as far as you know? A Well, I haven't got the use of it as I used to have. 40

Mrs. Elsie Malzer, direct.

Q What do you mean by that? A I can't go down steps right and I can't run when I have to and when I do my housework, I have to rest. When I have to scrub I have to get a rest for a while.

10 Q Do you have anyone come to assist you in the house? A My mother does.

Q During this period of time did you remain at your mother's home? A At what time?

Q During the time following the accident? A Yes, sir.

Q Until what time? A Until the end of July some time.

Q Then you went to your home? A Yes, sir.

20 Q Now, when was your child born? A September 4th.

Q What doctor did you have? A Dr. St. Angelo.

Q Where is he located? A He is located now on Montgomery street, I think, some place.

Q In getting off the bus at this particular point, can you describe once again the manner in which you got off (withdrawn).

30 Q Did you jump off the bus getting off? A No, I didn't.

Q Can you describe the height or distance from the lower step of the bus to the ground? A Well, I judge it must be a foot and a half or two feet.

Q Was it an ordinary step, would you say, the ordinary distance that you would have to step? A No.

Q What made the change in the distance; can you state? A Well, I didn't notice at the time when I got off, but there was a depression.

40

Mrs. Elsie Malzer, cross.

Mr. Cox: I object to any conclusion. She is asked what made the step higher, and she says she didn't notice at the time she got off, and is now describing something she concluded later.

Q When did you first notice the condition that existed there? A Well, I didn't notice it until after a while when I started to go out in the automobile a little bit. 10

Q When you saw it at that time, what condition was there?

Mr. Cox: I object to that, something that occurred months later.

Q Did you notice the condition immediately after you fell off the bus? A No, I didn't. 20

Q Did you notice the condition at any time before you left for the hospital immediately following the accident? A No, I didn't.

Q Did you sustain any other injuries other than the injury to your leg? A Well, a couple of bruises on my body.

Q Was the child born normally? A Yes, sir.

Q The child is living now? A Yes, sir. 30

Cross examination by Mr. Cox.

Q Mrs. Malzer, I just want to get this story and this picture clearly. As I understand it, you waited until the bus had come to a complete stop before you started to go down the stairs? A Yes, sir.

Q There was no one ahead of you, blocking your view as you went down the stairs, was there? A No. 40

Mrs. Elsie Malzer, cross.

Q And as you got to the last step of the bus, did you look down and see where the ground was? Before you stepped down? A Yes, sir; I did.

Q You misjudged the distance?

10 Mr. Doyle: I object to that.

Q Did you or did you not misjudge the distance? A What is that question?

Q Did you or did you not misjudge the distance of the step there, the last step down?

Mr. Doyle: I object to the question as misleading.

Mr. Cox: I withdraw it.

20 Q As you had a clear view of where the ground was, and from the view that you had of the ground or street, before this accident the step didn't seem to be too high for you to step from? A Well, it looked all right to me.

Q It looked all right to you at that time and there was nothing to block your view of the ground? A Only the step.

30 Q I mean when you stepped on the last step, there was nothing to block your view of the street at that time? A Nothing but the step.

Q And when you looked down to the street, you saw this asphalt of the street? A Yes, sir.

Q When you did step off into the street you fell, almost as soon as your foot touched the ground? A It did not touch the ground.

Q It did not touch the ground before you fell? A No.

Q Were you watching the ground the full time that you stepped down? A Yes, sir.

40 Q Watching the full time? A Yes, sir.

Mrs. Elsie Malzer, re-direct.

Q Yet you fell before your foot touched the ground? A Well, I could not reach the pavement.

Q At no time did you ask the driver to back the bus up and change the position of the bus before you fell? A No, I did not.

Q Your mother was right behind you there, was she not? A Yes, sir. 10

Q You didn't ask her to assist you from the bus? A No, it was more natural for me to assist her.

Q Did you or did you not ask her to assist you from the bus? A No.

Re-direct examination by Mr. Doyle.

Q Could you at the time you were getting off the bus see any depression of any kind under the step of the bus? 20

Mr. Cox: I object to that as improper re-direct; and as being leading.

The Court: It is leading.

Q As you were getting off the bus, could you see anything under the step? A No, I could not. 30

Q Why not? A Well, the step partly covered it.

Q And was that the reason why you could not see anything that might be under it? A Yes, sir.

Q Well, now, when this bus pulled in to the corner there, how close to the curb did it come, can you say? A Well, there was about near to a foot away from the curb. 40

Mrs. Elsie Malzer, re-cross.

Q Can you tell us where the front of the bus was? A Well, the front of the bus is pointed in towards Woodlawn avenue, past the corner.

Q Past which corner? A Woodlawn.

Q Is that the northwest corner of Woodlawn?

A Well, I don't—

10

Mr. Doyle: The nearest corner.

Mr. Cox: It is stipulated it is the northwest corner.

Re-cross examination by Mr. Cox.

Q I understood that you looked at the street when you stood on the last step? A Yes, sir.

20 Q And at that time, at the time that you stood on the last step and looked at the street, you had perfect vision of the spot upon which you intended to step?

Mr. Doyle: I think counsel's question is misleading. Counsel, I imagine, is not distinguishing the street from the pavement. I think the witness understands the street to be the sidewalk.

30 Mr. Cox: All right. I withdraw it. I will put it this way:

Q You had a complete view of the asphalt pavement of the street, the spot on the asphalt pavement of the street upon which you intended to step when you stood on the last step and before you stepped out? A I can't quite understand that.

40 Q As you stood on the last step, you say you looked out and saw the asphalt pavement of the street?

Mrs. Elsie Malzer, re-cross.

Mr. Doyle: The witness didn't say that.

Q Did you say it, that you looked at the pavement of the street? On what step were you when last you looked at the pavement of the street? A Just as I was getting to the last step. 10

Q On the last step? A Yes, sir; I was getting to the last step.

Q And you looked when you were on the last step? A Well, I looked before I got to the last step.

Q Did you look while you were on the last step? A Well, I only waited until I got to the last step.

Q Did you look this time when you were on the last step to see where you were going to step next? A I was looking as I was going down. 20

Q That does not answer the question. It is a simple question. When you were on the last step, did you look then to see where you were going to step next on the street? A Yes, sir.

Q And at that time, when you were standing on the last step and looking down at the pavement, that is, the asphalt pavement of the street, did you then see the spot upon which you intended to step with your right foot? Do you understand the question? A No, I don't. 30

Mr. Cox: Don't answer if you don't.

Q As you were standing on this last step intending to step down to the floor of the court room, which we will say is the asphalt pavement of the street, and you were on the last step, about to step off with your right foot; 40

Mrs. Elsie Malzer, re-cross.

as you looked down to the pavement of the street as you were standing in this position, did you see the spot on the asphalt street, the asphalt pavement of the street, where you intended to put your foot and where you were going to step? A Yes, I did look.

10 Q And it was farther down than you thought?

A Yes, sir.

Q And that is what made you fall? A Yes, sir.

Q At the time that you got on the bus, did you pay any particular attention to the exact height that the bottom step was above the pavement of the street?

Mr. Doyle: I object, if your Honor please.

20 Q At any time before this accident, did you pay any particular attention to the exact height that the step, the bottom step itself, was above the street level?

Mr. Doyle: I object to that as immaterial.

The Court: I will permit it. At the time you were getting on, did you notice how high the step was from the part of the street on which you were standing; at the time you boarded or got on this bus?

30

The Witness: When I got on the bus?

The Court: Yes.

The Witness: Well, I didn't take notice.

Mrs. Freida Kovelak, direct.

MRS. FREIDA KOVELAK, sworn for the plaintiffs.

Direct examination by Mr. Doyle.

Q Where do you live, Mrs. Kovelak? A 10
313, Armstrong avenue.

Q Were you with your daughter on March 26, 1928? A Yes, sir.

Q Did you board the same bus that your daughter got at that time? A Yes, sir.

Q Did you get off at Woodlawn avenue? A Yes, sir.

Q And who got off first, you or your daughter? A My daughter.

Q Did you follow after her? A Yes, sir. 20

Q When you got off the bus, did you get off after she had gotten off? A Yes, after she had gotten off and fell down.

Q Can you describe for the jurors the manner in which your daughter got off the bus, as far as you know? A Yes; when we got to Fulton avenue we rang the buzzer to get off. Then we came to the end, it was kind of quick, he turned the bus towards Woodlawn avenue and then she fell right back; she grabbed the handle when she got off in front. All I know, as soon as she went down, she slipped her hand down and went to the bottom. 30

Q How far behind your daughter were you when she was getting off the bus? A I was right behind her.

Q Can you tell us just about where, with respect to the northwest corner it was that the bus came to a stop? A It was right around the corner. 40

Mrs. Freida Kovelak, direct.

Q What do you mean by around the corner?

A Right near the sewer place.

Q Where is the sewer plate, on the corner?

A On the corner.

Q With respect to the sewer plate, where was the step of the bus? A The step of the bus
10 was a couple of inches off the sewer.

Q You say off the sewer; do you mean away from it, or over it? A Away from the sewer.

Q Where was the front of the bus? A Facing towards Woodlawn.

Q So that when the bus came to a stop, it was stopped at the time that your daughter fell, when it came to a stop, where would you say the steps of the bus were with respect to the sewer? A Was over—away from the sewer.

Q Did you see your daughter getting down
20 off the steps of the bus? A Yes, sir.

Q Did you watch her as she got down? A Yes, sir.

Q Now, tell the jurors just what happened as your daughter got to the bottom step of the bus and when she was about to step down on to the highway? A She was down when the bus stopped, to take her foot down. She went down, or slipped down when she fell from the
30 bus. That is all I noticed at the back.

Q Did you look to see where she fell to after this happened? A And they picked her on the sidewalk; before the car came to take her, I see there was a hole.

Q What kind of hole? A It looked down into the sewer.

Q It sloped down into the sewer? A Yes, sir.

Q Do you know where with respect to that
40 hole it was that your daughter fell? A What do you mean?

Mrs. Freida Kovelak, direct.

Q Did you pick your daughter up afterwards?

A Yes, sir.

Q Where was she when you picked her up? A
In the hole there.

Q Did you help pick her out of the hole? A
Yes, sir.

Q Can you describe for the jurors just what
that hole looked like? A Yes, sir; the front of
the sewer, it was all sloped down like, deep; it
was deeper, the hole, than some other sewers.

Q Where was that hole with respect to the
steps, immediately below? A Below it.

Q And that was the hole you found your
daughter in when you got off the bus? A
Yes, sir.

Q And then, what did you do after that? A
We took her to the hospital.

Q What hospital? A Greenville.

Q From there you took her where, to your
home? A My home.

Q Did you take care of her while she was
at your home? A Yes, sir.

Q Did she have anyone else taking care of
her? A No, I and my other daughter.

Q Do you know of your own knowledge
whether or not she experienced any pain? A
Yes, she was in terrible pain. I was many nights
up with her.

Q Immediately following the accident, when
she got out of the bus, did she experience any
pain of any kind? A Yes, terrible pain.

Q How did she act? A At that time I think
she was unconscious.

Q Did you go to the hospital with her? A
Sure.

Q What sort of stop did this bus make at
the time? A A kind of jerky, quick stop.

10

20

30

40

Mrs. Frieda Kovelak, cross.

Q A sudden stop? A Quick stop.

Q Were your daughter's legs all right before this accident occurred? A Yes, sir.

Q Was she able to walk around? A Yes, sir.

Q Do her housework? A Yes, sir.

10 Q Did she give birth to a child? A No, in the hospital.

Q Was your daughter living with you at that time? A She is living with me, she lived with me a couple of months when she got on her feet, was able a little to walk; then she went home.

Q Do you know of your own knowledge whether she is able to do her housework? A Not so good, I think. I go up many days to help out.

20 Q You have to go around to her home to help her do the work? A Yes, sir.

Cross examination by Mr. Cox.

Q Her little child keeps her pretty busy now, doesn't he? A Pardon me?

Q The baby keeps her pretty busy? A Of course; all babies do.

30 Q I don't believe I quite understood how this accident happened. I understand that you followed your daughter from the bus? A Yes, sir.

Q And she got down on the steps; was she on the steps before you got to the head of the steps or not? A She went in front. I went after. As soon as she stepped down, she fell right down.

Q Where were you when she fell? A Right back of her.

40 Q And the first thing you noticed was that she got off and then she fell; is that right? A Yes, she fell right down.

Mrs. Frieda Kovelak, cross.

Q The very next thing you did, you slipped right off the bus to help her and see what you could do? A Yes, sir.

Q By the way, when she fell, she came down somewhat in this position? (Indicating.) A Yes, sir.

Q Isn't it a fact that she came down on the right foot, with her right hand on the pavement? A Yes, sir.

Q You got her over to the curb, did you not? A Yes, sir; on the curb.

Q You were interested in seeing how badly she was hurt, were you not? A Yes, sir.

Q How long was it after the time of this accident before she was taken to the hospital? A It only took a few minutes. There was a car standing there, put her in the car.

Q You went to the hospital with her, did you not? A Yes, sir.

Q Before she went to the hospital, you were interested in seeing just what was the matter and you didn't have much time to see where that bus was, or where the steps of the bus were? A Oh, yes, I looked back.

Q When was it you looked back? A I see what was happened and she fell down.

Q How long was it after she fell off the bus you looked back to see where the step of the bus was? A As soon as they lift her up on the sidewalk, I looked back.

Q You looked back then? A Yes, sir.

Q Were you familiar with the sewer basin that was there at the time? A No, I was not so familiar.

Q Would you know what the sewer basin looked like if I showed you a picture of it? A Yes, sir.

Mrs. Frieda Kovelak, cross.

Q I show you this picture and ask you if that is not the sewer basin that you are talking about?

Mr. Doyle: I would like to know when it was taken.

10 Mr. Cox: Taken six days after this accident.

The Witness: Yes, I suppose.

Q That looks just the way this sewer basin did at the time? A Yes, it was right near the deep hole.

Q Suppose you put a cross where your daughter's right foot was as you remember it, when you got out and picked her up; just put
20 a cross there on the picture? A Fell right there; she stepped right down there.

Q This mark that you have made indicates where her right foot was, right in between these two marks? A Right about like that.

Mr. Cox: Have you any objection to this going in evidence?

Mr. Doyle: If you will connect it up.

30 Mr. Cox: I will mark it for identification. Marked D. 1 for identification.

Q The point you have indicated by an ink mark is the point where you think your daughter's foot was at the time you saw her first when you got off the bus; is that right? A Yes, sir.

Q But of course, Mrs. Kovelak, when you first got off the bus, your first thought was to get
40 your daughter to the curb rather than to see

Harold Malzer, direct.

just where her foot was? A Sure, when she got hurt.

Q At the time she went forward, her knee went forward this way; her knee was right near the curb? A No, it was like in here.

Q Her hip extended out from the curb? A I guess it was. I am not sure. I was excited. 10

Q How far away from the curb would you say that her knee was at the time that you got off the bus? A About that far (indicating).

Mr. Cox: Indicating about a foot, would you say?

Mr. Doyle: Not quite—yes, about a foot.

Q Of course, Mrs. Kovelak, you don't know whether that bus had moved forward or not from the time your daughter fell until you looked around to see where the bus was? A Yes, sir. 20

Q Did you or did you not know? A I didn't notice it.

Re-direct examination by Mr. Doyle.

Q Did the bus move at all from the time you got off the bus until you looked at the position on the highway? A No, I didn't notice it. 30

HAROLD MALZER, sworn for the plaintiffs.

Direct examination by Mr. Doyle.

Q Are you the husband of the plaintiff, Elsie Malzer? A Yes, sir.

Q When were you married? A June 4, 1926. 40

Harold Malzer, direct.

Q Do you recall the date of this accident? A I do.

Q Where were you at the time? A Working.

10 Q When did you first see your wife after that? A Immediately after I came home, she was home in her mother's house, 313 Armstrong avenue.

Q Can you describe the condition she was in at the time? A Why she was in, seemed dazed like when I seen her. Her foot was all fixed up. She was in such pain.

20 Q Can you describe the condition of pain; how did she act? A Why, didn't want anybody around her. You could not do nothing with her, the pain was so terrific that she could not do anything with her.

Q What was the condition of her right leg previous to the date of this accident? A Why, normal, as anybody else's looked.

Q Was she able to walk? A Walked all right, do anything, roller skating, ice skating, anything.

30 Q Can you tell us how soon after it was that she was able to go out on the highway? A Just what do you mean on the highway, walking?

Q Walking out doors? A As far as that is concerned, she can't go yet proper the way she could.

Mr. Cox: I think that this question calls for an answer how she walks, not the conclusion of the witness.

40 Q How does she walk now? A She walks with a limp, can't walk two or three blocks but she has got to stop. You can't do any distance,

Harold Malzer, direct.

can't go out for a walk with her unless she is complaining. You have got to stop in people's houses to give her a rest.

Q Did you pay the doctor's bills? A Yes, sir.

Q Did you have any other bills outside of the bill of Dr. Marais? A Yes, bill for the ambulance; as far as Dr. Marais, it is not complete yet. 10

Q Dr. Marais testified that he had been paid \$103. Are there any further sums of money due to Dr. Marais? A Not to Dr. Marais.

Q Has the X-ray bill been paid? A Yes, sir.

Q I show you a bill of the Greenville Hospital in the amount of \$20. Was that \$20 paid by you?

Mr. Cox: No objection. 20

A Yes, sir.

Q Were there any other bills that you had to pay for medicine and things of that kind? A Medicines and bandages and cast and ether when they reset her leg. I had to pay another doctor.

Q Who was the other doctor? A Dr. St. Angelo.

Q Did you have another doctor? A Dr. Marais had him to give the ether, or whatever they did when he put her to sleep so that they could set up the leg. 30

Q In addition to Dr. Marais' bill, and the bill of the hospital, how much money have you had to pay as a result of this accident? A In addition, without the doctor's bill?

Q Yes. A That I could not say sure. I didn't keep track of it.

Q Your total expenses in connection with medical bills has been how much? A How much? 40

Harold Malzer, direct.

Q As a result of this accident? A Any-
wheres from four to five hundred dollars, with
what I have to pay my mother-in-law for helping
me.

Q Did you have to pay your mother-in-law for
the services? A I haven't paid her yet, but
10 I have to.

Q Has she indicated she is going to charge
anything for the services? A Yes, sir.

Q How much has she been asking? A Well,
she is asking me board for the times she was
there, for board, and she has not said what she
is going to charge for taking care of her.

Q In addition to that, what other bills have
you? A That is all the bills I have so far.

Q Is your wife able to do her housework?
20 A Not yet, not the way she should.

Mr. Cox: I ask that the last part be
stricken out.

The Court: Yes, that may be stricken out.

Q Has this highway at that particular point
been altered since the accident? A It has.

Q Can you say how soon after the accident
30 it was changed? A Well, that same night that
the accident happened, I went up to look at it. I
looked at the sewer, that particular sewer. I went
along Bergen avenue and took note of the others,
and every one I found that was the most treacher-
ous.

Q Did you make an examination of this par-
ticular sewer? A Yes, sir.

Q Can you describe what it looked like? A
Well, it was a deep slope and ran into the side
40 of the curbing.

Harold Malzer, cross.

Q Did you then make an examination of any other sewers in the neighborhood? A I did. I went up three or four blocks and looked them over.

Q Where were the others? A On Bergen avenue.

Q On the street? A Well, I could not name the streets. I went and walked along Bergen avenue. 10

Q What can you say was the difference between the sewer on the northwest corner of Bergen and Woodlawn avenues and the other sewers?

Mr. Cox: I don't see how this is material in this case.

The Court: Sustained. 20

Q Did you notice any depression of any kind at the point at the northwest corner of Woodlawn and Bergen avenues? A I did; I noticed it was the most treacherous.

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

The Court: That may be stricken out.

Cross examination by Mr. Cox. 30

Q I show you this photograph Exhibit D. 1 for identification and ask you if that is a picture of the sewer basin as it was on the day that this accident occurred? A Well, I could not say if that was before or after it was altered. I could not tell you that.

Q You don't know the difference; you can't tell the difference between that sewer basin? A Not on the photograph. 40

Alexander Macglashan, direct—cross.

Q Would you say that that looks familiar, that it looks like the sewer basin before the accident? A I would not say it looks like it before the accident.

10

ALEXANDER MACGLASHAN, sworn for the plaintiffs.

Direct examination by Mr. Doyle.

Q You are an engineer by profession? A Yes, sir.

Q Practising where? A Jersey City.

20 Q You made a sketch of the northwest corner of Woodlawn avenue and Bergen avenue for me? A I did.

Q Is the map I show you a sketch drawn to scale? A Yes, sir.

Q I ask you to look at this sketch?

Mr. Cox: When was it made?

Mr. Doyle: April 5, 1930.

30 *Cross examination by Mr. Cox.*

Q Do you know whether or not any change was made in this particular sewer basin between the date of March 26, 1928, and April 5, 1930? A Not of my own knowledge. I didn't do the work.

Q Do you know from any records that you have seen whether or not a change was made? A Yes, sir; there was a change made.

40

James H. Cassell, direct.

Mr. Cox: It seems to me it is immaterial because it does not show the condition as it was at the time the accident occurred.

Mr. Doyle: I will connect it up.

10

JAMES H. CASSELL, sworn for the plaintiffs.

Direct examination by Mr. Doyle.

Q Mr. Cassell, are you an engineer? A No, sir; I am an inspector.

Q By whom are you employed? A Department of Streets and Public Improvements.

Q And have been employed by them for how long a period of time? A Thirteen years. 20

Q Are you familiar with the northwest corner of Bergen avenue and Woodlawn avenue? A I repaired that.

Q When did you repair it? A June 1, 1928. I am pretty sure; just a minute.

Q Can you tell us with respect to the northwest corner, the exact portion of the highway that was repaired by you? A I raised the receiving basin. 30

Mr. Cox: It seems to me it is immaterial whether this was repaired or not. What we are trying to get is the condition as of March 26, 1928.

The Court: I don't think it makes a particle of difference what the conditions were afterwards. They are not suing anybody that was responsible for keeping it in repair. 40

James H. Cassell, direct.

Q Are you familiar with the condition of the highway on the northwest corner of Bergen avenue on or about March, 1928? A Well, I won't say in March. I would say before May 1st, when we started out, or in April I know.

10 Q Before April, 1928, were there any repairs made to that particular portion of the highway? A No.

Q And can you tell us the condition of the highway at or about the sewer basin there as it existed previous to the repairs? A Yes, sir; I could say that I built that particular corner up there anywheres from say three and a half inches to five inches, which means that there was a depression there at that depth.

20 Q Well, starting out at the center of the highway, at or about the point north of the sewer basin and extending from the center over to the sewer basin, can you tell us what degree of depression there was; are you familiar with that? A Well, I could not very well tell you. You mean the outside of say a quarter of the street?

30 Q Yes. In other words, let us assume a point ten feet back from the sewer basin, and can you tell us what degree of depression was between that point ten feet north of the sewer basin and the point immediately adjacent to it? A Well, the condition at that particular corner was very bad, in fact I practically took out that entire intersection running from forty some odd feet there. There is a house there on the corner. I took in the first house and then right around into the receiving basin. I had to do that in order to change the grade at the intersection.

40 Q Was the depression at this particular point, on the northwest corner any different from that at other corners? A Yes, in fact I didn't touch

James H. Cassell, cross.

the other three corners. It was just that particular one.

Q What was the difference between the depression at this corner and the other corner?

Mr. Cox: The question is what was the depression at this corner. All the other corners it seems to me are immaterial. 10

Mr. Doyle: I withdraw it.

Q Did you receive any complaints of any kind from the people in the neighborhood as to the condition of the depression? A Yes, sir.

Mr. Cox: I object to that.

The Court: Sustained.

20

Cross examination by Mr. Cox.

Q Can you tell us how far out from the northwest corner this street starts to slope in to form the sewer basin? A I would say roughly about 6 feet.

Q I show you a picture that has been marked D. 1 for identification and ask you if that in your opinion, or according to your recollection, shows that particular sewer basin as it was at the time that you started to make the repairs? A Yes, that looks just exactly like it. In fact it is. 30

Q From a point six feet up into the street where you say that street starts to slope down to form the sewer basin, how much lower is the street level at the sewer basin, how much lower from the street level that it was six feet out from the sewer basin? A I am afraid you will have to ask the engineer on that. I could not state that. 40

Motion for a Non-suit.

Q According to your recollection? A Now you say ten feet?

Q No: six feet out where it starts to slope down? A Well, it would be about half, in other words, if it was three out there, it would be six at the basin.

10 Q What you say is perfectly clear, but I don't believe it is clear as to how many inches lower the surface of the street would be up at the sewer basin there? A It is six feet out from it?

Q Yes? A Well, I still say that I would say that it probably has a drop maybe of six inches there, six feet out to into the mouth of the sewer.

Q Have you a foot rule with you? A No.

20 Q So that you would say that the slope at the sewer basin we are talking about, from a point six feet out down to the basin is about at the angle which is indicated by the bottom lines I have drawn on the blackboard, this line being a foot and this line being an inch? A Yes, sir.

Mr. Doyle: Plaintiff rests.

30 Mr. Cox: I would like to make a motion for a non-suit on behalf of the defendant.

The evidence as given by the plaintiff seems to me to be the only definite evidence of how this accident happened.

40 Her testimony, as I understand, is that after the bus came to a stop, be it sudden or otherwise, she started to descend the steps of the bus. She says that while descending the steps, and at the time that she stepped on the bottom step of the bus, she had a clear vision of the street below her, and

Felix Delitizia, direct.

had vision, clear vision, of the spot upon which she intended to step.

She says also that most of this depression was underneath. There is no evidence that she stepped underneath the step.

The Court: The motion will be denied.

Mr. Cox: Exception.

10

FELIX DELITIZIA, sworn for the defendant.

Direct examination by Mr. Cox.

Q On March 26, 1928, you were the driver of the bus for the Koll Transportation Co.? A Yes, sir.

20

Q And that bus was what is commonly known as a Bergen avenue bus? A Yes, sir.

Q You were running on Bergen avenue? A Yes, sir.

Q At the time that Mrs. Malzer was a passenger on your bus, you were running toward Bayonne, or on Bergen avenue in a southerly direction, were you not? A Yes, sir.

Q As you approached the corner of Woodlawn and Bergen avenues, you got a signal to stop, did you not? A Yes, sir.

30

Q Will you tell the Court and jury how you brought that bus to a stop with reference as to whether or not you made a quick stop or a gradual stop? A I picked this man up at Ege avenue and Bergen avenue and came to Woodlawn, right after Fulton avenue, which is a block away, she got up to get off. So, when I pulled up to the corner, there was a car parked there.

40

Felix Delitizia, direct.

Q I don't think you understood the question. The question is, at the time you brought your bus to a stop, did you bring it to a sudden stop or a gradual stop? A I made a slow stop.

10 Q At the time that you came to the northwest corner of Woodlawn avenue and Bergen avenue, were there any automobiles or other vehicles parked on Bergen avenue? A There was.

Q Where was the nearest car parked with reference to the northwest corner of Woodlawn avenue and Bergen avenue? A About fifteen or eighteen feet.

Q Is there any object near the corner or any object on the street which you recall this car being parked near? A I don't get you.

20 Q Was there anything that you noticed on the street, that is in the way of a house or fence or tree or anything else? A There was a pole.

Q You mean a telephone pole? A Telephone pole.

Q How long was this bus you were driving from the radiator to the rear of the bus? A About thirty feet.

Q Was or was not this automobile parked a bus length from the corner? A That was less than a bus length.

30 Q Now, how many steps are there going from the floor of your bus down to the last step? A Three steps.

Q Do you or do you not know how high the last step is above the ground? A I should say about—

Mr. Doyle: Above the ground; ordinary ground or this place.

40 Q When the bus stands on level ground? A About a foot.

Felix Delitizia, direct.

Q As you brought your bus to a stop at the northwest corner of Woodlawn avenue and Bergen avenue, how was your bus facing with reference to the northwest, or north and south, that is up and down Bergen avenue, or east and west, the direction Woodlawn avenue runs? A My front radiator was about the crossing.

10

Q Was about where? A The crosswalk.

Q I will put it another way; which end of your bus, front or rear, was nearer the curb, or were both ends the same distance? A It was on an angle.

Q About how far was portion of the bus, or the steps and door away from the curb then? A About three and a half foot or so.

Q And the door and steps are right alongside of the driver's seat, right back of the windshield of your bus, are they not? A What is that?

20

Q I say, the steps going out of the bus are right alongside of where you sit, right back of the windshield of the bus? A Yes, sir.

Q Now, on the day that this accident happened, how many people got off on that corner? A Three.

Q And did you see Mrs. Malzer fall? A I did.

30

Q Was she or was she not the first person to get off the bus? A She was the third.

Q Did you notice the type of shoe or type of heel on the shoe that Mrs. Malzer was wearing at the time? A High heels.

Q Can you tell us the width of the heel at the ground? A That I could not say; about an inch; an inch or so.

Q Can you tell us the position of Mrs. Malzer after she had fallen after she had got off the bus? A She was on the side.

40

Felix Delitizia, direct.

Q Which side right or left side? A I think she was on her right.

Q When you stopped this bus, was the door of your bus opposite the sewer basin? A No.

10 Q How far back was the door of this bus from the sewer basin? A About two feet.

Q Do you know where Mr. Koll was? A Was waiting for me in front of the bus at one side, on Woodlawn avenue.

Q Was there anyone with him? A Another man; two of them.

Q What did they have? A A tire.

Q Was that a tire for your bus? A Yes, sir.

20 Q That was to replace a flat tire which you had gotten that day? A Yes, sir.

Q Can you tell us how Mrs. Malzer, the woman who fell, got off the bus, the manner in which she stepped off the last step? A She got off the two steps, on the last one she got hold of the door, she tried to get off there and I guess—

30 Q Not what you guess, what did you see? A She went on one side, that is the last I know, and I got off to help her up and Mr. Koll and another man there happened to be there with the tire, gave a hand to put her in the car and she was taken to the hospital.

Q Where was Mr. Koll and this man with the tire standing with reference to your bus after it had stopped to let Mrs. Malzer off? A About five or six feet off Woodlawn avenue, in Bergen.

Q Five or six feet away? A From the front of the bumper.

40 Mr. Cox: Cross examine.

Felix Delitizia, cross.

Cross examination by Mr. Doyle.

Q Who was the first person to get off the bus?

A That I don't know.

Q Who was second? A Mrs. Malzer's mother.

Q In other words, Mrs. Malzer's mother got off before Mrs. Malzer did? A Yes, sir. 10

Q Now, what kind of shoes did Mrs. Malzer's mother have on her? A I don't know.

Mr. Cox: I object to it.

Mr. Doyle: I withdraw it.

Q What kind of shoes did the person who got off first have? A I don't know.

Q Was it a man or woman? A No, it was a woman. 20

Q What kind of coat did she have on? A I don't know what kind.

Q What kind of coat did Mrs. Malzer's mother have on? A I don't know.

Q You want the jury to understand you can describe the width of the heels of the shoes Mrs. Malzer had on? A When I got off.

Mr. Cox: I object to that question as being argumentative. 30

The Court: Sustained.

Q What kind of coat did Mrs. Malzer wear that morning? A I don't know.

Q What kind of shoes did she have, black or white? A Well, I don't know what color they were.

Q What kind of stockings did she wear? A I don't know. 40

Felix Delitizia, cross.

Q Yet you can describe the height of the heel of the shoe; is that what you want the jury to believe? A I noticed when I got off the bus, to help her up. I didn't look at the shoes she had, the color; high heels, and shoes and stockings.

10 Q You didn't take particular notice to anything else she wore except the height of the heels; is that so? A No.

Q Where was she lying when you saw her? A On the street, alongside of the curb.

Q Did you immediately get off the bus after she got off? A Yes, sir.

Q Did you start your bus up in the meantime? A No, sir.

20 Q Did any other passengers get off? A Two.

Q I mean after she fell did anyone else get off? A Somebody else got off before.

Q After she got off? A I think a man got off.

Q You don't know? A I don't remember that.

Q You don't know who got off before she got off and after, outside of the fact there was a third person? A I said she was the third one

30 to get off.

Q Where with respect to the northwest corner do you say the other car was parked; how far back? A I don't get you.

Q How far back from the northwest corner was this parked car you speak of? A About fifteen feet.

Q What kind of car was it? A I don't know.

40 Q Was it a touring car or a truck? A I don't remember. It was an automobile.

Felix Delitizia, cross.

Q That is all you know, it was an automobile. Was it a Buick? A That I could not say.

Q Did you stop alongside of this other car? A No, sir.

Q What did you do? A I pulled in on an angle.

Q Pulled in on an angle? A Yes, sir. 10

Q Towards the corner? A Towards the curb.

Q So that your car, at the time you stopped was part of the way behind the front of this parked car, wasn't it? A No.

Q It was not? A I don't get you.

Q I say, when your car came to a stop, part of your car extended back beyond this other car? A Yes, sir.

Q And the front of your car was on an angle nearer to the curb? A To the curb. 20

Q And that was where you stopped when these passengers got off? A Yes, sir.

Q Now, did you see Mrs. Malzer getting off the bus? A I did.

Q Watched her going down the steps? A Yes, sir.

Q Did you have any particular reason for watching her as she went down there? A When I see everybody get off, I have to watch to see the last one off the step and I am going on. 30

Q You watch them all get off? A Yes, sir.

Q You saw her get off the step? A Yes, fall off.

Q You saw the people ahead of her get off the step? A Yes, sir.

Q You saw her mother go ahead of her going down the steps? A Yes, sir.

Q When she got down to the bottom step what did she do? A She got hold of the 40

Felix Delitizia, cross.

handle to get off, and then the last I seen, she was on one side lying out on the street.

Q In other words, the next thing you saw after she grabbed the handle was, she was on one side going down? A Yes, sir.

10 Q You don't know how it was that she was getting off to one side, do you? A No.

Q Then, how soon after she went down did you get off the bus or get out? A Right after.

Q Did you help her up? A Yes, sir.

Q What did you do? A Helped her up.

Q What did you do after that? A She was put in the car and taken to the Greenville Hospital.

Q And what did you do after that? A I went to my business.

20 Q Where did you go to? A Kept on going on with my passengers in the bus.

Q Where were you going to? A To Bayonne.

Q How many passengers were in the bus after you left Woodlawn avenue? A I could not say; maybe ten or 11 or so.

Q You have been on that line very long? A Yes, sir.

Q How long? A About six years.

30 Q Been operating a Bergen avenue bus back and forth along Bergen avenue that period of time? A Yes, sir.

Q Did you say anything to Mrs. Malzer as she was getting off the bus? A No.

Q Now, how far away would you say you were from the sewer basin when you came to a stop? A About two feet.

Q And is that at the house line? A No.

40 Q That is beyond the house line, nearer to the sidewalk; the house line is about ten feet back from the sewer basin? A Yes, about that.

Stanley Koll, direct.

Q You stopped about two feet back from the sewer basin? A Yes, sir.

Q About how far away from the curb side?
A About 3½ feet or so.

Q How old was that bus; was it very old?
A About four years old at that time, it was.

10

STANLEY KOLL, sworn for the defendant.

Direct examination by Mr. Cox.

Q Mr. Koll, you are an officer of the Koll Transportation Company? A I am.

Q What officer are you? A President.

Q You held that office in March, 1928? A I did. 20

Q The Koll Transportation Co. was the owner of the bus known as No. 16 that ran on the Bergen avenue line, did they not? A Yes, sir.

Q What make of car was that? A My own make. I designed it and built it.

Q Can you tell us how high the bottom step of the bus was above the ground as the bus stood on level ground? A Eleven inches.

Q On the 26th day of March, 1928, where were you about 11:30 o'clock of that morning? A I was going with my carpenter north, carrying a spare tire for the bus. 30

Q Which bus is that? A Bus 16. We came to the intersection of Bergen and Woodlawn, I saw bus 16 going south towards Bayonne, the opposite direction. I told the man that was with me to roll the tire and he rolled the tire across the street to Woodlawn avenue, that is the northwest corner of Woodlawn avenue. 40

Stanley Koll, direct.

Q Now, did you see this bus come to a stop at that corner? A I did. I was standing there before.

10 Q Can you tell us whether the stop was a sudden or a gradual stop? A It was gradual all the way through.

Q Did you see any passengers get off that bus on that corner? A Two women got off the bus first. What drawn my particular attention was their laughing, and the short women getting off there holds the left hand by the handle and instead of putting her foot down, she has one foot loose and she jumped. When she jumped, she seems to me she has her foot went right under. She went like this (indicating). I was standing three or four feet away. I jumped; I lift her up and the driver and some other man was passing in his car and we carried her to the car. While taking her up there, we tried to sit her on the curb, but she was hollering pain. We got her out to the car. Some man pulled right to Woodlawn avenue, it was the northwest corner of Woodlawn. Before we started her, to carry her to the car, she started hollering to me: "Will you take the number and the driver's name. I am going to get something out of it."

20

30

Q Now, Mr. Koll, did you notice at any time while you were with Mrs. Malzer, the kind of heel that she had on her shoe? A Yes, she had what I call spike heels, because I was trying to take off her shoe. She was hollering, "My foot."

Q Was the heel a high one? A High spike heel, what they call, the height of this (indicating).

40

Stanley Koll, cross.

Q Can you tell us where the bus was, where the door of the bus was when the passengers got out of it with respect to the sewer basin on the northwest corner of Woodlawn avenue and Bergen avenue? A The front of the bumper was about two feet away from the sewer. From the front of the bumper to the door, where the door begins is seven feet. It was about nine feet from the curb of Woodlawn avenue was the door, or the corner, that was a little before the sidewalk, because I was standing right on I would call the sewer basin side of the corner there, facing down. 10

Q I show you this picture that has been marked Exhibit D. 1 for identification and I ask you if that shows the condition of that sewer basin at the time that this accident occurred? A Yes, it does. 20

Mr. Cox: I would like to offer the picture in evidence.

Mr. Doyle: No objection.

(D. 1 for identification now marked in evidence.)

Q What is the name of the man who was with you at the time? A I can't exactly pronounce his name, Paul Kovalsky; something like that. 30

Q That is the man that was with you at the time of the accident? A Yes, sir.

Cross examination by Mr. Doyle.

Q What time did you reach the northwest corner? A About a quarter to twelve; something like that. 40

Stanley Koll, cross.

Q How long had you been there before this bus came up to that corner? A Not long. I seen my bus a block before, otherwise, see bus 16 at Fulton avenue when I was at Woodlawn.

10 Q Why were you standing on that corner? A I have a tire.

Q For whom? A For the bus.

Q Which bus? A Bus 16.

Q Why did you have to have a tire? A Because there was a flat. We fixed the flat and carried a spare tire to the bus.

Q You had waited to fix a flat? A Yes, sir.

Q And the bus continued on its journey afterwards? A Yes, sir.

20 Q You were going to fix the flat at that particular time? A No, that is a spare tire.

Q Where did you meet this other man that you were with? A He was working on the house as a carpenter.

Q What house? A 24 Winfield avenue where I was living.

Q Is he employed by you? A He was employed by my wife at that time.

30 Q How did he happen to be with you at the time? A He was going for some lumber and I asked him to take the tire in his car.

Q You were riding in his car at the time? A Yes, sir.

Q Did you go to the hospital some time after this accident? A I did go right after.

Q How soon afterwards did you go? A Well, within two minutes. We put Mrs. Malzer in the car and I followed in another car right to the hospital.

40 Q Did you talk to Mrs. Malzer at the hospital? A I did.

Stanley Koll, cross.

Q Did you talk to her husband at the hospital? A I didn't see him.

Q Did you talk to anybody? A To her mother.

Q Did you tell her mother that you would give her your name as a witness to the accident and that you would testify for her? A Yes, sir. 10

Q You did that, didn't you? A Yes, sir.

Q Then you left the hospital? A I was quite a long time there.

Q But this all took place the morning of the accident? A Yes, sir.

Q Now, with respect to the sewer basin, where would you say the steps of the bus were at the time Mrs. Malzer got off? A I explained about seven feet from the front; seven feet and two is nine feet. 20

Q In other words, you say the step of the bus was about nine feet away from the sewer basin when the car came to a stop? A Right.

Q That was the point at which Mrs. Malzer alighted from the bus? A Right.

Q Was there any other passenger? A Before her?

Q Did you see Mrs. Malzer's mother? A Two women got off first. 30

Q Do you know who they were? A This lady down there. The first woman got off, this lady got off second and the young lady third.

Q Where was Mrs. Malzer's mother standing when she got off the bus? A Well, she was on the curb already.

Q Where were you at the time? A Right on the sewer basin.

Q On the northwest corner? A Yes, sir. 40

Stanley Koll, cross.

Q With the tire in your hand and this other man with you? A No, he was standing alongside of me, right in the sewer basin was the tire.

Q When you first came to a stop, you were facing Journal Square? A Right.

10 Q Then when you saw the bus come along Bergen avenue, what did you do? A I faced the same way.

Q Where did you go to? A Where did I go to? I didn't go anywheres; standing there.

Q In other words, your car came to a stop at the southeast corner of Bergen avenue and Woodlawn avenue? A Southeast?

Q You were going towards Journal Square? A Northwest corner it was stopped.

20 Q Where did your car stop? A My car stopped on the southeast corner, right.

Q That is where you were standing when the bus came? A No, I walked across the street.

Q You walked across the street? A Right. He stopped the car and rolled the tire across before the bus came to Woodlawn.

Q Was that before the bus had gotten to the corner? A Right.

30 Q How many minutes then transpired before the bus reached the corner? A Not much, because I saw it a block and a half in the opposite direction. The car stopped at Woodlawn avenue to discharge some people and I walked only across the street and waited a minute or half a minute.

Q What kind of shoes did this plaintiff have on? A Firestone.

Q What kind of shoes? A Firestone.

40 The Court: Not the shoes of the bus; the lady's shoes?

Paul Kowalsky, direct.

Q What kind of shoes did the plaintiff have on at the time? A White shoes.

Q Did you go to the hospital with her? A I did.

(Recess to 2 P. M.)

10

AFTER RECESS, 2 P. M.

PAUL KOWALSKY, sworn for the defendant.

Direct examination by Mr. Cox. (Through the Polish interpreter.)

Q Mr. Kowalsky, what is your business? A Carpenter.

20

Q What was your business in March, 1928? A I worked for Mrs. Koll.

Q During the day of March 26, 1928, did you have occasion to drive your automobile at any time with Mr. Koll in it? A I was going for molding for that building there and Mr. Koll says, "Take a flat tire to old Bergen Road and take a jitney," which was a block away.

Mr. Doyle: That is immaterial.

30

Mr. Cox: May I just ask one leading question?

Q On March 26, 1928, Mr. Koll asked you to take a tire in your car over to Bergen avenue so that he could put it on a bus, did he not? A Yes, Bergen Road, to meet the jitney; that was what I was to do.

Q Did you stop your automobile anywhere on Bergen avenue in order to meet this bus? A On Bergen avenue.

40

Paul Kowalsky, direct.

Q Whereabouts on Bergen avenue? A And Woodlawn avenue.

Q Did you take the tire to the bus? A I took the tire right to the curbstone there, where is the sewer.

10 Q Which way was the bus coming or going, towards Bayonne or towards the Tubes? A He was coming from Summit Station to Bayonne.

Q Did you see the bus come to a stop at the corner of Woodlawn avenue and Bergen avenue?

A Yes, and I was standing there with the tire.

Q Did the bus come to a sudden stop or come to a gradual stop? A He came to a gradual stop. He wasn't going fast because a block away he stopped there.

20 Q As the bus came to a stop, how far was the right side of the bus away from the curb? A It was over three feet.

Q Where was the door of the bus with relation to the sewer basin at the corner or the hole at the corner? A The door was right by the corner there. No, the front of the jitney was on the corner and the door was about three feet.

30 Q Who had the tire at the time that the bus came to a stop; did you take it or did Mr. Koll take it? A I was holding it.

Q Where were you standing? A Right by the sewer there.

Q Did you see any people get off the bus after the bus stopped? A I did.

Q How many people got off the bus? A There was two ladies came one, two; then the third lady.

40 Q Did you see anything happen to any of those ladies? A I seen the same lady here like twisted and she started to holler.

Paul Kowalsky, cross.

Q When this lady twisted her leg as you have indicated and started to holler, was she or was she not in that sewer basin? A No, because my tire was right at that sewer.

Q Can you tell us whether the front of the bus or the rear of the bus was nearest to the curb, or whether both the front and rear were equal distant from the curb at the time the bus stopped? A The front of the automobile was closer. 10

Q Did you see any other automobile other than the bus, or any other vehicle other than the bus standing anywhere near the corner of Bergen avenue? A There was an automobile in the back, towards Summit station.

Q How far back from the corner was that automobile? A I am not sure, but over seventy-five feet. 20

Q How wide was that bus? A You mean that automobile?

Q No, the bus? A You mean the jitney; I guess more than five feet.

Cross examination by Mr. Doyle.

Q You are a carpenter by trade, are you? A Yes, sir. 30

Q How long have you been a carpenter? A From the time I came to America. I was even a carpenter in Europe.

Q How long were you employed by Mrs. Koll? A Four days I guess.

Q What kind of work were you doing for her? A I was repairing, putting molding there and fixing, well, outside and inside.

Q In other words, you were working on her home at the time? A Yes, sir. 40

Paul Kowalsky, cross.

Q And about what time of the day was it that Mr. Koll asked you to drive him over along Bergen avenue? A About half-past ten.

Q And how long did it take you to get from Mrs. Koll's house to Woodlawn and Bergen avenue? A About fifteen minutes.

10 Q From that time until the time this bus came into view, were you standing at the corner? A I was standing there because Mr. Koll said something about a bus coming and he said about the third bus going; he said this would be the one.

Q Where was the bus when you first saw it, how far away? A About a block and a half.

Q Did you see the bus a block and a half away? A Yes, sir.

20 Q And how did you know that was the bus that was owned by the Koll Transportation Company? A I know the number, and I know the bumper. You could see it was the same one; the boss himself recognized it.

Q Could you see the number of the bus a block and a half away? A No; I seen the jitney. I know that jitney all right.

30 Q What was different in this particular bus that wasn't on some other bus? A It made no difference, but I waited until this bus came and I kept the tire until that bus came.

Q How long have you been wearing glasses? A A couple of years.

Q Can you see a block away? A With that looking glass I see more than a block and a half.

Q You can see a block away? A Yes, sure.

Q How long have you been driving cars? A Seven or eight years.

40 Q Have you got a license to drive? A Yes, sir.

Paul Kowalsky, cross.

Q What kind of car were you driving that day? A Studebaker.

Q Did you have to take a written examination when you got your license to drive a car?

Mr. Cox: I object to that because I don't see how that is material at all. 10

Mr. Doyle: Withdraw it.

Q Where were you standing when the bus came to a stop at the corner? A I was standing in Woodlawn avenue, where that sewer is.

Q How soon before the bus came to the corner did you go from one side of the street over to the other? A About a minute or two.

Q When you saw the bus a block away, was that the time you started to cross the street? A Yes, sir. Then I see the bus about at the other block yet. 20

Q Then it was a block away when you started to cross the street? A Yes, sir.

Q Was there anything peculiar about the bumper of this bus that led you to believe it was the one that you were after? A The boss himself said "There comes my bus; go on the other side."

Q Where were you when the boss said this to you? A The car was standing. We took the tire off the car. 30

Q Was your car standing at the corner when he said that to you? A It was on the other side of Bergen, right-hand side.

Q When Mr. Koll said to you "There is the bus," where were you with respect to that corner? A About thirty feet from the corner.

Q And where was the bus? A The bus was standing about the next block. 40

Paul Kowalsky, cross.

Q In other words, the bus was a block away from where you were? A Yes, sir.

Q And that was the first time Koll said to you "That is the bus I want. Let us stop here"?

A We stopped before.

10 Q In other words, you stopped thirty feet from the corner to wait for that bus to come up; is that so? A Yes, sir.

Q How far away from the corner, or the intersection of Bergen and Woodlawn avenues had the bus gotten when you got out of the car to take the tire across the street? A He was already started from the other block; it wasn't going fast.

Q That does not answer my question.

20 (Previous question repeated by the interpreter.)

A Would I reached the corner, the bus was about in the middle of the block.

Q Had you gotten out of your car at the time? A No, I was already standing at the corner. I had the tire and was holding it.

Q You had gotten out of the car then, and you were standing on the corner? A Yes, sir.

30 Q And at that time the bus was half a block away; is that so? A Yes, sir.

Q And then did you start across the street? A With the boss?

Q You? A Yes, sir.

Q When you got to the center of the highway, where was the bus at that time? A It was then starting out from the other corner.

40 Q Didn't you just tell us that when you were standing at the corner with the tire in your hand, the bus was then half a block away? A

Paul Kowalsky, cross.

When the jitney was on the other corner, I was then rolling the tire to the corner.

Q Didn't you just testify that you had gotten out of the car and you had taken the tire and you were standing on the corner when you saw the bus half a block away coming towards you?

A No.

10

Mr. Cox: That is not his testimony. Mr. Doyle has got it wrong, according to my recollection.

Mr. Doyle: That is his testimony, if your Honor please.

Mr. Cox: He said he was standing over at the sewer basin when the bus was half a block away.

20

Q Where, with respect to the intersection, did you bring your car to a stop. Can you come around here and point out on this map.

Mr. Cox: That map is not in evidence. I think if you ask him where with relation to where the bus stopped, where his car was.

The Court: Do you know where the bus stopped?

30

The Witness: On the left-hand side, the bus stops as you go to Summit Station.

The Court: How far away from that point was it that your car was stopped?

The Witness: Not very far. It is across the street.

Q Well, now, when you stopped your car and got out, you took the tire out, and then you

40

Paul Kowalsky, cross.

started to cross the street; is that so? A Yes, sir.

Q Well, now, when you started across the street to cross, when you got off the sidewalk to go across the street, where was the bus? A He started from the other block.

10

Mr. Cox: I object to that question.

Mr. Doyle: I think the witness understands the question.

The Court: What are you trying to find out?

Mr. Doyle: I just want to find out what time he got on the corner; what time the bus got there, whether he got there first or the bus got there first.

20

The Court: Go ahead.

Q When you were half-way across the street going over to where the bus was going to come to a stop, do you know how far away from you the bus was at that time? A At that time the bus would have been about half a block. I was then near the curb when he was coming up.

Q How fast was the bus going when you saw it? A Maybe ten miles an hour.

30

Q Who got to the corner first, you or the bus? A I first.

Q And then where did the bus come to a stop? A The bus stopped a little past the corner.

Q A little past the corner? A No, right before the corner.

Q Had any part of the bus gotten past the corner? A The front was about even with the corner.

40

Q Which way were you facing when the bus came to a stop? A I was holding the tire by

Dr. Leo Koppel, direct.

the sewer when the jitney came to a stop; then I threw it right on.

Q You were waiting for the bus to come to a stop and put the tire in the bus? A Yes, sir.

Q Where was Mr. Koll? A Mr. Koll stay on the sidewalk.

Q What was it that drew your attention to the particular point where the bus came to a stop? A I never drink or anything, but I seen where the bus stopped. 10

DR. LEO KOPPEL, sworn for the defendant.

Direct examination by Mr. Cox.

Q Dr. Koppel, you are a practicing physician of the State of New Jersey? A I am. 20

Q How long have you been practicing? A Twenty years.

Q What school are you a graduate of? A Bellevue College.

Mr. Doyle: I will admit the doctor's qualifications.

Q Did you make an examination of the leg of Mrs. Malzer after the cast was removed? A Yes, sir. 30

Q What was the date of that examination? A On April 20th.

Q What year? A 1930.

Q This year? A Yes, sir.

Q What have you to say as to the union that has been made of these fractured bones, as to whether it is strong or not? A There is firm union of the fracture. 40

Dr. Leo Koppel, direct.

Q In your opinion, is there any more danger of the leg being fractured in the future at the site of these fractures that occurred in this accident than there is at any other point in the leg?

10 Mr. Doyle: I object to that question. I think it is improper. I don't think there is any foundation for it.

The Court: Your doctor said it would fracture much more easily.

Mr. Doyle: All right; I withdraw the objection.

A That is not the usual history of these cases.

20 Q What is the usual effect of the healing of a fracture of the leg, as to whether or not the fracture becomes stronger or weaker than the surrounding bones? A The callus formation, the cement substance that is thrown out to heal the bones at the point of fracture—

Q Is the site of the fracture after healed stronger or weaker than the bones adjoining?

A I was just going to answer. The callus thrown out at the point of fracture is usually stronger than the surrounding bone.

30 Q I show you Exhibits P. 1 and P. 2, and ask you to look at them, if you will. (Handing witness.) During your course of practice, your years of practice, have you had occasion to read X-rays? A Not very many; I usually have my X-rays read by experts.

Q Are you able to read these X-rays? A Oh, yes, sir.

40 Q Is there any reason that you can see from examining those X-rays why there should not be strong union of the bones at the sites of the fractures? A I see no reason, no.

Dr. Leo Koppel, cross.

Q What have you to say as to the position of those bones, as shown by that X-ray, so far as producing a good strong union is concerned?

A Usually, a picture like this produces a very strong union.

Q What have you to say as to the position as shown in the picture itself? A Very good. 10

Q Doctor, in your opinion, would it be possible to reduce the fracture, and by reducing the fracture, I mean get these bones in even better alignment than they are, as shown in this picture? A Well, this alignment is pretty good. I don't think you can get very much better alignment by any more reduction.

Cross examination by Mr. Doyle.

Q When did you make this examination, doctor? A April 20th, this year. 20

Q You made the examination for the purpose of testifying? A I suppose so.

Q Made at the request of the defendant? A At the request of Judge Higgins; yes, sir.

Q Did you make any other examination than the one on April 20th? A Yes, I made an examination some time after the alleged accident.

Q Would you say, doctor, that there was any overlapping as a result of this fracture? A Why, you can't see any overlapping without an X-ray, without a subsequent X-ray. There is no overlapping here. 30

Q Can you tell from a reading of that X-ray whether or not there was overlapping at this time? A No, I could not tell you very much about that.

Q You didn't make any measurements to determine whether or not the right leg was any different from the left? A No, I didn't. 40

Dr. Harry J. Perlberg, direct.

Q Your examination took how long? A I was there about half an hour.

Q Where was the examination made? A On Lexington avenue, I believe.

Q At the home of the plaintiff? A Yes, sir.

10

DR. HARRY J. PERLBERG, sworn for the defendant.

Direct examination by Mr. Cox.

Mr. Doyle: Qualifications admitted.

Mr. Cox: I would just like to bring out his being an X-ray expert.

20

Q You are a practicing physician of the State of New Jersey? A Yes, sir.

Q Specializing in X-ray work? A Yes, sir.

Q I show you the X-rays P. 1 and P. 2, showing a fractured fibula and tibia of the plaintiff? A Yes, sir.

30

Q What have you to say as to the position, that is the position of these bones as shown in this X-ray? A I find that there was a fracture of the fibula, which is the small bone on the side of the leg, and of the tibia, which is the main bone, and that the fragments are in excellent position and alignment.

Q Doctor, in your opinion, what would be the usual result—you have not made a physical examination of Mrs. Malzer? A No, sir.

40

Q What in your opinion would be the usual result from a fracture such as is shown in that X-ray, with regard to a strong or a weak union following? A There is absolutely no reason

Dr. Harry J. Perlberg, cross.

why the result of this union should not be one hundred per cent. perfect.

Q That is as to strength? A Yes, sir.

Q And in your opinion, doctor, would it be possible to reduce the fracture still further than is shown on these X-rays by the application of a fracture box or the application of a cast? A 10
Well, in my judgment there is practically no reduction necessary, because the alignment is so good that nothing need be done except immobilize it and let it heal.

Q From your experience as a physician, can you tell us whether or not swelling or edema follows a fracture of the leg such as this? A
It always follows.

Q Doctor, is or is not that edema or swelling a permanent condition? A It usually subsides 20
and after a period it disappears.

Q Does it always take the same length of time to subside in each person? A No.

Q And what are some of the factors or some of the methods which may be used in causing the swelling to subside? A Why, nature really is one of the best methods. To aid nature, we use massage and electric treatment, electric therapy, to cause absorption of the swelling.

Q Would or would not use of the leg have 30
any effect upon the swelling? A It would cause the free circulation of blood in the leg and thereby hasten the absorption of the swelling.

Cross examination by Mr. Doyle.

Q The purpose of baking is to increase the circulation of the blood? A That is right.

Q And that is the usual procedure to follow after a fracture? A Yes, sir. 40

Dr. Harry J. Perlberg, cross.

Q You did not make an examination of the plaintiff? A No.

Q You don't know what her condition is today? A No.

Q Your opinion is gathered solely from the examination of the X-rays, is that so? A Yes, sir.

Q Can you, doctor, account for the fact that she has swelling of that leg today? A This is how long after the injury?

Q This accident occurred March 26, 1928, about two and a half years ago. Can you account for the fact that there is still swelling in that leg? A Why, very frequently swelling will persist for a considerable time after an injury, depending upon the type of the patient to a great extent and what they do. If that were not fragmented, and she had used that leg gradually, the chances are that swelling would be all gone by now.

Q That is not an unusual condition following fracture, to have swelling, pain, loss of motion of the leg two years after the accident? A You have asked me three things at one time. Swelling is a thing that will subside more or less gradually, sometimes longer than others, depending upon the various factors, such as the physical condition of the patient, occupation and what not. Pain: I see no reason why this lady should have any pain at this time, two years after the accident. Loss of motion; I see no reason why this should affect the motion at all, unless some joint were involved, and then here she has nothing but the bones themselves.

Q Assuming, doctor, that it is testified and shown that the plaintiff at the present time, two years following the accident, complains of pain,

Dr. Harry J. Perlberg, cross.

and loss of motion, and swelling of the right leg; would you say that that condition would be a permanent one? A To complain of pain?

Q The question calls for yes or no? A I can't answer it yes or no.

Q Assuming, doctor, that at the present time, two years following the accident, that the plaintiff limps as a result of said accident, would you say that that condition, or that limp would be a permanent one? A Would be a permanent one?

10

Q Yes? A No.

Q It would not? A Not necessarily.

Q When in your opinion would that limp clear up? A Well, I haven't enough factors. You are simply assuming that the patient tells you this. In other words, the patient says she has pain. Now, perhaps she has a little, assume she has, it is the truth that she has pain. We won't question that; that is simply what the patient tells us. The limp; unless there is an involvement of the joint, there is no reason why she should not be without limp. There is no shortening in that leg. There is an overlapping of an eighth of an inch of the little bone, which means nothing. So I don't know why the patient should limp.

20

30

Q If I told you, doctor, that it has been testified by medical testimony that there is a limp, and that there is swelling of the right leg, would you deny that there is a permanent disability there at this time? A I do not see any reason for a permanent disability.

Q You didn't make any examination? A I don't even know the patient.

40

Dr. Harry J. Perlberg, re-direct—re-cross.

Re-direct examination by Mr. Cox.

Q Would the cause of the limp in this case, from your examination of the X-ray, be a subjective cause or an objective cause? A As I stated before, I see nothing in these X-rays to
10 account for a limp.

Q In other words, the cause, if anything, could not be disclosed by anything you see there? A As far as I can see.

Re-cross examination by Mr. Doyle.

Q You would not deny, doctor, that if there was a limp, and if it has been so testified there was a limp two years following the accident that the limp will be permanent? A I would deny.
20

Re-direct examination by Mr. Cox.

Q Would favoring a foot cause a limp? A Yes, surely.

Re-cross examination by Mr. Doyle.

Q From your testimony, you don't mean to indicate that this plaintiff is a malingerer or faker? A No, you are questioning me on the permanency of this thing. In other words, will this patient have this pain and disability for life?
30

Q How long do you suppose it will last, in your opinion, assuming that condition to have existed there for a period of two years? A That would be purely guesswork. I don't want to guess.

Mr. Cox: That is the defendant's case.

Mrs. Elsie Malzer, in rebuttal, direct—cross.

MRS. ELSIE MALZER, recalled in rebuttal.

Direct examination by Mr. Doyle.

Q On the day of this accident, what kind of shoes did you have on? A I wore black buttoned leather; had a black vamp, but inside the vamp was tan. 10

Q Was that a low shoe or a high shoe? A Low shoe.

Q I show you a pair of shoes and ask you whether or not you can identify these shoes as being the ones you wore on the day of the accident? A Yes, they are.

Q Where have these shoes been up to the present time? A In my closet.

Q Have they ever been worn since that day? A No, sir. 20

Cross examination by Mr. Cox.

Q Where did you buy these shoes? A On Jackson avenue.

Q What store, do you know? A It is between Orient avenue and Claremont.

Q Do you happen to know the maker of the shoe? A It is right near A. S. Beck, right next. I think it is Haas, if I am not mistaken. 30

Q I call your attention to the fact that a rubber heel is on the left shoe and there is one missing from the right shoe; was that missing before this accident, or did you lose it in this accident? A It was missing before the accident.

Q So that the heel of this shoe was of a different height than the heel on the other shoe? A Well, it was just that way. 40

Motion for Direction of a Verdict.

10 Mr. Cox: I would like to put on the record that the heel of the shoe is just a little over an inch high, and that its breadth across the part of the shoe toward the instep is an inch and a quarter across, above the heel toward the instep, and that the heel runs from the front back a distance of about just a little less than an inch and that the heel is rounded.

Mr. Doyle: Do you want to measure the other?

Mr. Cox: The other is about an inch and a quarter high; the width of the other is an inch and a quarter.

BOTH SIDES REST.

20 Mr. Cox: I move for a direction of verdict on the ground there has been no negligence shown upon the part of the defendant in this case that was the proximate cause.

And because it has been shown that the plaintiff herself was guilty of contributory negligence as a matter of law.

The Court: Denied.

Mr. Cox: May I ask an exception?

30 The Court: Yes, you may have an exception.
(Counsel summed up to the jury.)

CHARGE TO JURY.

The Court then charged the jury as follows:

The Court: Gentlemen of the Jury: This is an action brought by these two plaintiffs against this defendant Company to recover for damages which the woman plaintiff claims she sustained on March 26, 1928, on the northwest corner of Bergen and Woodlawn avenues here in Jersey City. 10

I say plaintiff, because there are two plaintiffs. First the one who was injured by having this leg broken, and second, her husband.

I will dispose of the husband's case at this time, in just a few words, so as not to make it necessary for me to discuss it with you later on. 20

The husband's right to recover is dependent entirely upon the wife's right to recover. A husband is entitled to recover in cases of this kind, if the wife is, because under the law the husband is responsible for his wife's expenses in being cured of any injury she might sustain, and he is entitled to his wife's services and society during all the time of their married life, and if anything happens, or by anyone's negligence he is deprived of those services and society, or if through anyone's negligence he is forced to expend money for having his wife cured of any injury she might sustain, then under the law, the husband would be entitled to be compensated for that loss. 30

And so, if the wife is entitled to recover, the husband is, and if the husband is entitled to recover, he would be entitled to be compensated in so much as you think would fairly compensate 40

Charge to Jury.

him for the moneys that he has been actually forced to expend and for such sum as you think would compensate him for the loss of society of his wife during the time that she was incapacitated.

10 Now, so much for the husband's claim, because, as I said a moment ago, it is dependent entirely upon the wife's right. You can readily see, if she cannot recover, he can't, and by the same token, if she can recover, he can.

So it will not be necessary for me to discuss with you again the husband feature of the case.

20 The main case, of course, is the wife's case, the woman plaintiff, who seeks to recover for the injuries that she sustained, and she seeks to recover because she claims that she was injured on the day in question by the negligence, the negligent manner in which this bus was stopped at this dangerous place in the street which she claims.

30 Now, before I go any further in my charge let me say to you that any motions that were made, such as a motion for a non-suit and a motion for a direction of verdict, both motions being refused by the Court, you are not to take that as any indication that the Court had any notion or any idea of who was really entitled to your verdict. Those motions are merely directed to legal questions which the Court has to pass upon, and it merely means whether or not such a set of facts has been raised as would justify a jury in arriving at one or the other conclusion based upon those facts, and the Court's refusal to grant the motions merely meant that in its opinion, such a conflicting set of facts had been raised as to make it a jury
40 question, a fact question for a jury to determine

Charge to Jury.

as to just how this accident happened and under what circumstances it happened. It meant that and nothing more. You are not going to give it any more credence except that. It merely is that, instead of being a question for the Court to decide, that in the Court's judgment it was a question for the jury to decide and hence the motions to non-suit and direct a verdict were refused and the case submitted to you. 10

So, going back to the case itself, the plaintiff being the moving party and who seeks to recover here, has a certain duty to perform, because, as you can readily understand, the mere happening of an accident does not mean anything of itself. The mere fact that this woman was hurt on the day in question, standing alone, does not mean anything as far as this case is concerned. 20

It may be a regrettable circumstance, that people are injured, but when they seek to recover damages from someone else because of the injury, they have got something else to prove other than merely the fact that they had an accident.

The plaintiff alleges that she received these injuries because of what? Because of something that this defendant negligently did which caused this accident. Now, the plaintiff has got to prove that. There is no dispute but what an accident happened. There is no dispute but what this woman was injured. The extent of her injuries, of course, is in dispute; but the fact that there was an accident, out of which she sustained injury, is not disputed. The defendant does not even deny that. 30

But, as I said a moment ago, that is not enough unless the plaintiff has shown you that which she alleges, namely, that the injury was the 40

Charge to Jury.

result of some negligence on behalf of this defendant.

10 Negligence has been defined to be the doing of something which a person should not do, or the failure to do something which a person should do, and measuring the actions of this bus driver on the day in question by that test, it is for you to say whether or not he did something which he should not have done on that day, which resulted in the happening of this accident, or whether he failed to do some duty which he owed, and as a result of that failure this accident happened. The burden of proving that is upon the plaintiff and the plaintiff has to satisfy you by a fair preponderance of the evidence, that is, by the greater weight of the evidence, not necessarily the greater number of witnesses, but by 20 the greater weight of the evidence; and unless the plaintiff has sustained that burden and has proved to your satisfaction by this greater weight of the evidence that this accident was caused by the negligent act of this driver of the bus, then there can be no recovery in this case.

30 Now, the negligence alleged here is not a sudden stop. You must not get confused with that feature which you often hear of in cases of this kind, a sudden stop. There is nothing in this case tending to prove that, and there is not anything in this case that alleges that the accident occurred because of any jerk, or any sudden stop, or any sudden starting of the car while a person was about to alight, or about to board the car. The negligence as claimed in this case is that this bus was stopped at a point where it was dangerous, where a dangerous condition existed on the highway at that point, and that therefore 40 the duty which was placed upon defendant of

Charge to Jury.

using reasonable care to see that its passengers had a safe place to alight was not complied with. Now, that is the sole measure, the sole element of negligence that has been alleged and is claimed in this case.

In order to understand whether or not that was done, you have got of course to determine from the evidence in the case, first, the facts and circumstances under which the accident happened, because you see there is conflict as to that. The plaintiff alleges that at the point where this bus was stopped that there was a depression in the street, caused by this sewer in the highway. The extent of that depression you have heard testified to here, and I think a picture of the conditions as they existed at that time has been offered in evidence and can be taken by you into the jury room. There is an absolute denial of that fact by the defendant. The defendant says that the bus did not stop at the point where the plaintiff says it did, that it did not stop at this sewer at all. That illustrates again what I said to you at the opening of my remarks as to what it meant when the Court refused to direct a verdict. You can understand that fact questions are jury questions rather than Court questions, and you have right there a fact question, whether or not it did stop at this place, or whether it did not.

If it did not stop there, if you believe that to be so, then there can be no right of recovery in this case, because the plaintiffs' whole case is dependent upon your finding that there was a dangerous condition in this street at that point, and secondly that this bus stopped there at that point where this dangerous condition existed. You can readily understand if there wasn't any

Charge to Jury.

dangerous condition there, then it would not make any difference where it stopped, and by the same token, you can readily understand that even though there was a condition there, regardless of how dangerous that might be, that unless the bus stopped at that point, it could not
10 make any difference. You can readily understand, there might have been a hole into which this bus might even have dropped, but if the bus did not stop at that spot in order to let passengers alight, it could not have any materiality as far as this case is concerned.

So you have to decide this question, this issue of fact, and determine from all of the evidence in the case, first, what the condition of the street was, or, first of all where the bus was, it
20 seems to me, and secondly what the condition of the street was at the point where the bus did stop.

Now, in order to determine just what duty the driver owed this plaintiff, you would be interested in finding out what the duty of the driver of this bus was on the day in question. The cases have held, that it was the duty of the defendant Company, through its driver, to exercise reasonable care to see that the place selected for the
30 plaintiff's discharge, was a safe one for that purpose.

Now again, it becomes important, you see, for you to determine just what the facts were there, and to determine whether or not, assuming that there was a depression, whether or not it was of such character that even if the bus did stop at it, with that condition existing was what a reasonably prudent person would do under the circumstances. Because the only duty that the
40 driver owed was not as an insurer, not to get

Charge to Jury.

out and lift this passenger off the bus, but to use reasonable care, the care that a reasonably prudent person would use, in seeing that the place at which it stopped to discharge its passengers was reasonably safe for people to alight. It is for you to say, under the circumstances, whether that is so.

10

Now, the defense in this case, as I say, is an absolute denial that the point at which this bus stopped had any depression in the street at all, or indeed that it was at the place where the plaintiff alleges it was. That defense would be sufficient, if you find the facts would justify it.

As a second defense, the defendant says that this plaintiff, in alighting from the bus at the point where she did alight was guilty of contributory negligence. It was the duty of this passenger to use reasonable care, too, the care that a reasonably prudent person would in alighting from the bus at the point where she attempted to alight, and if she used that reasonable care, that is all the law required of her. But if she did not use the care that a reasonably prudent person would use under the circumstances, then she would be guilty of negligence. As a second defense here, the defendant says that the plaintiff herself was guilty of contributory negligence, of negligence which proximately contributed to the happening of the accident, of negligence which helped to cause the accident, assuming that the defendant himself was guilty of negligence. And if you find that to be so, that would defeat the plaintiff's right to recover, even if you should find that this defendant was negligent in the manner and place at which he stopped this bus, nevertheless, **if you find that the manner in which** this plaintiff attempted to alight from the bus,

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Charge to Jury.

she also was negligent and that the negligence of herself proximately contributed to the happening of the accident, it would defeat her recovery entirely, because in this State, contributory negligence is an absolute bar to recovery in cases of this kind, and that regardless of the
10 degree of contributory negligence.

To illustrate: you can't say that you believe that one party was ninety per cent. negligent, that this defendant was ninety per cent. negligent, but you think also that the plaintiff was guilty of ten per cent. negligence, and therefore you will give eighty per cent. of what you would have given if the plaintiff was not guilty of any negligence at all. You can't do that. There are
20 no comparative degrees of contributory negligence in this State, no matter how small that degree may be, if it proximately contributes to the happening of the accident, that is an absolute bar to recovery. So you must take that question up in your determination when you go into the jury room.

If the plaintiff, as I told you a while ago, alleges that this accident happened through the negligence of the defendant, the plaintiff has the burden of proving that by a fair preponderance of the evidence. Upon this question of
30 contributory negligence, being an affirmative defense, the burden of proving that contributory negligence is upon the defendant, and it must prove to your satisfaction by a fair preponderance of the evidence, that is, by the greater weight of the evidence, that there was contributory negligence if the defendant is to prevail upon that.

So the first thing that you must determine when
40 you go into the jury room, is the question of

Charge to Jury.

whether or not there is liability, because if there is no liability, that ends the case, and your verdict would be in favor of the defendant, and against the plaintiff of "no cause for action."

If there is liability, you go to the next step in the case, which is the question of the measure of damages. If this plaintiff is entitled to recover, she would be entitled to be compensated for the pain and suffering which she has already sustained and suffered because of this accident. She would be entitled to be compensated for any pain and suffering which she will probably suffer in the future if you find there is any evidence that would justify you in finding that she will probably suffer. She would be entitled to be compensated for any permanent injury, if you find from the evidence in the case that there is any permanent injury. Such sum, in other words, as would fairly compensate her for all the losses she has been put to because of and as a result of this accident, would be the amount of damages that the plaintiff would be entitled to, if at all.

The husband's case I have discussed with you at the opening of my charge.

And so, gentlemen, you will take this case into the jury room, and remembering the law as I have tried to give it to you, then make application of it to the fact that you find from the evidence.

You will recall what that evidence is, probably better than I can attempt to detail it. You know just where the burden of proof lies. And it is for you to say whether, under all the circumstances of the case, which party did bear that burden which the law placed upon it, in order to determine the case, and the cause of this accident.

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Charge to Jury.

I have been requested by the defendant to charge a number of requests. I think I have pretty well covered them, but if not, I will go over them.

10 1. While it was the duty of the defendant, through its driver, in the within case, to use reasonable care to select, for the discharge of the passenger, a place which was reasonably safe for that purpose, the mere fact that the plaintiff fell while alighting from the bus would not, standing alone, indicate that the place where the plaintiff was discharged was not a reasonably safe place.

I so charge you.

20 2. In order to find that the defendant did not use reasonable care in selecting a place reasonably safe for the plaintiff to alight from the bus, it must appear to you that there existed a condition on the public highway at or near that portion of the bus, from which the plaintiff was discharged, which would disclose to a person using reasonable care for the safety of passengers leaving the bus that a passenger using reasonable care might be injured because of that condition.

30 I think I have already substantially charged that. If not, I so charge you.

40 3. There is a duty cast by the law upon a passenger leaving a bus or other public conveyance, which is an absolute duty which must be exercised by the passenger in leaving, namely, the duty to use reasonable care in disembarking therefrom. If, therefore, the plaintiff, through the use of reasonable care, could have safely alighted from the bus without injury to herself, but because of her failure to use that degree of

Charge to Jury.

care which a reasonably prudent person would use in alighting from the bus, this accident occurred and she suffered the consequential injury therefrom, she cannot recover against the defendant in this case.

I think I have substantially charged you that, but if not, I so charge you.

10

4. There was no duty upon the part of this defendant to pull over to and discharge its passengers at the curb of the street unless it appears from the evidence that a reasonable observation upon the part of the driver would have disclosed to him that passengers using reasonable care could not have alighted with safety from its bus at any other point.

I so charge you.

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You may take the case.

(The jury retired.)

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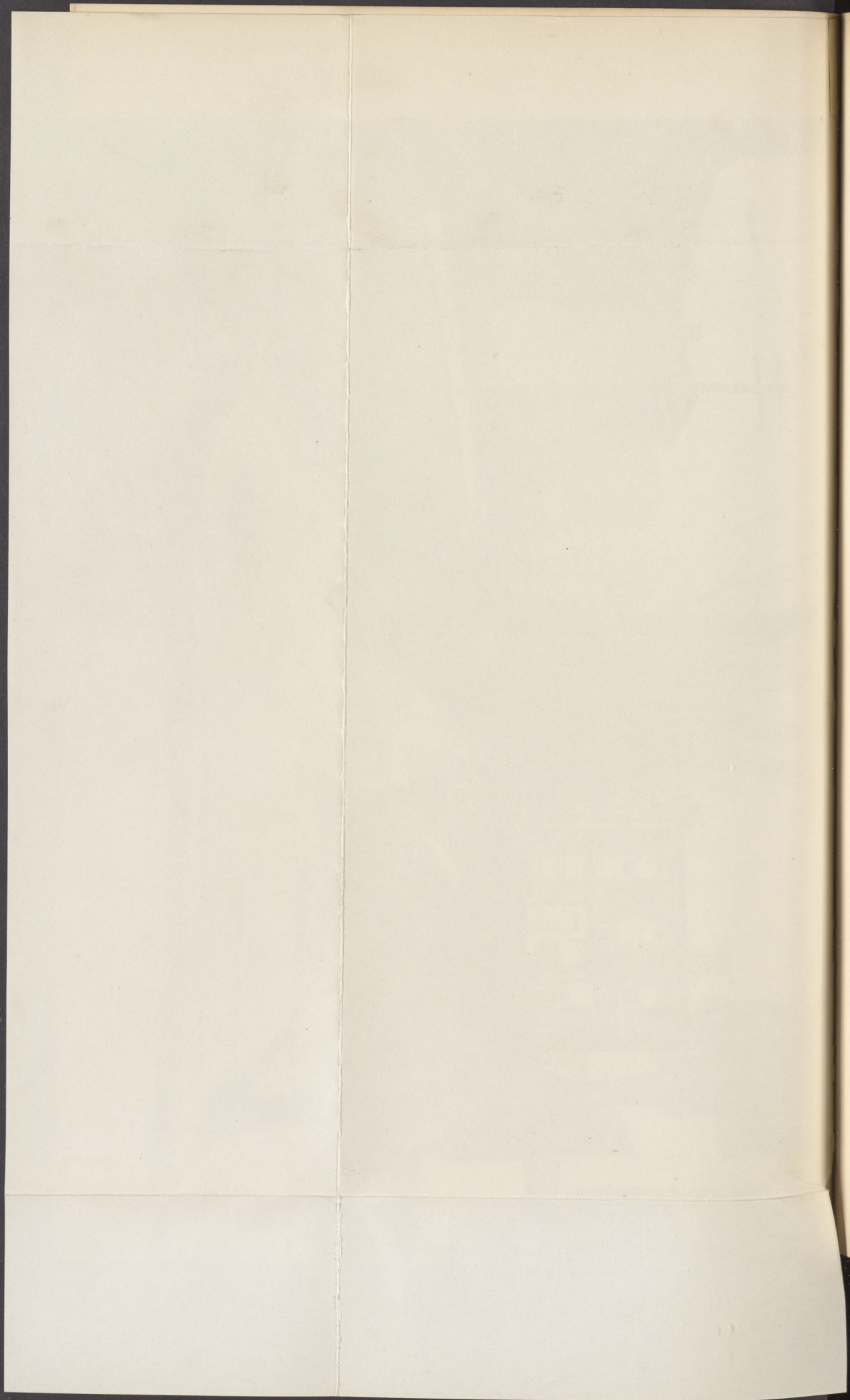
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EXHIBIT D. 1.



3 MAY. 7 1931

New Jersey Court of Errors and Appeals

<p>ELSIE MALZER and HAROLD MALZER, her husband, <i>Plaintiffs-Appellees,</i> <i>v.</i> KOHL TRANSPORTATION COMPANY, <i>Defendant-Appellant.</i></p>	}	<p>On Appeal from the Hudson County Circuit Court.</p>
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BRIEF OF PLAINTIFFS-APPELLEES.

This was an action brought by Elsie Malzer for personal injuries, and by Harold Malzer for loss of services, against the Kohl Transportation Company, and was tried before Hon. FRANK C. CLEARY and a jury in the Hudson County Circuit Court and resulted in a verdict in favor of plaintiff, Elsie Malzer, in the sum of One Thousand Five Hundred (\$1,500) Dollars and in favor of plaintiff, Harold Malzer, in the sum of One Thousand (\$1,000) Dollars.

The case now comes before this Court on defendant's appeal based upon the following grounds:

1. The trial judge erred in refusing to grant motion for nonsuit.
2. The trial judge erred in refusing to grant motion for a direction of verdict.

Statement of Facts.

Plaintiff, Elsie Malzer, alleges in substance, that on March 26th, 1928, she was a passenger on the

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automobile bus of the defendant on her way to her mother's home on Woodlawn Avenue, Jersey City; that about a city block away from the intersection of Bergen Avenue and Woodlawn Avenue in Jersey City, aforesaid, she signalled the operator to stop the bus so that she might alight at Bergen Avenue and Woodlawn Avenue. The bus stopped at the northwest corner of Woodlawn Avenue and Bergen Avenue, directly at a point where the highway sloped under and out from the step of the bus into a sewer basin located at the northwest corner.

Plaintiff proceeded to leave the bus by taking hold of the hand bar with her left hand and, having gotten to the bottom step of the bus, then placed her right foot as near the ground as she could possibly get it and said foot not touching the ground, the plaintiff, because of her inability to touch the ground, was thrown to the street.

The negligence of the defendant, plaintiff contends, consisted in defendant's stopping its bus at a dangerous and unsafe place knowing or having reasonable means of knowing that the place where the plaintiff alighted was uneven and sloped away from the other parts of the highway; in failing to exercise reasonable care to see that the place selected for the plaintiff's discharge was a safe and proper one for that purpose; in permitting the plaintiff to alight from said bus without warning or notice of the sudden descent or slope in the highway at the point of discharge and in permitting said plaintiff to alight from the bus without assistance, knowing or having reasonable means of knowing that the place of discharge was unsafe and dangerous; and in failing to warn plaintiff of the dangerous and unsafe condition existing at the point of discharge.

As a result of the fall from the step of the bus to the ground, plaintiff sustained a comminuted

fracture of the right tibia at the junction of the middle and lower third with a forward and inward displacement of the upper fragments; a fracture of the right fibula at the upper third with an inner displacement of the lower fragments.

Immediately following the accident, plaintiff was taken to the Greenville Hospital and from there to her home where she was attended by a Dr. Maras. She was unable to leave her home until October of that year.

There is no dispute on this appeal as to the nature and extent of the injuries suffered by the plaintiff. Consequently, no mention will hereafter be made of the medical testimony in the case.

Testimony.

Elsie Malzer, plaintiff, testified (p. 45) that on March 26th, 1928, she and her mother were passengers in a bus owned by the Kohl Transportation Company, on her way to her mother's home. As the bus approached Fulton Avenue where the same intersects Bergen Avenue, she signalled to the operator that she wanted to alight at the next stop which was Woodlawn Avenue. The bus came to a stop at Woodlawn Avenue and plaintiff proceeded to alight by grasping the hand bar of the bus with her left hand and proceeded down the steps of the bus until she reached the bottom step and there she placed her right foot down towards the highway below and because of the distance between the bottom step of the bus and the highway, she was compelled to release her hold on the hand and fell to the ground. Her testimony is as follows (p. 45) :

“* * * Well, just before I got to the step, I got a grip on the hand bar with my left hand, put my right foot down to reach the pavement. When I put my right foot down, I had

to go down from the floor. I didn't realize it, I had let go the left hand bar, it was so high that I had to go down and I could not help myself. I tried to reach it, but I could not."

And again (p. 46):

"* * * As I put my right foot down, I was down upon the floor and I didn't realize the step was so deep, I had to let go the left hand bar. All I remember was I was in pain when I got to the hospital. I know I had to go down."

Plaintiff preceded her mother in getting off the bus (p. 46). At the time she alighted from the bus she noticed that it had passed a little way beyond the corner. She did not jump off the bus.

When she struck the ground her right foot went underneath her. She did not remember anything that occurred after that (p. 47).

Cross examination (p. 51):

No one preceded plaintiff in getting off the bus (p. 51), and as she got to the last step she looked down towards the ground. She testified that the step interfered with her view of the ground immediately below the point where she was about to alight.

"Q. It looked all right to you at that time and there was nothing to block your view of the ground? A. Well, it looked all right to me.

"Q. I mean when you stepped on the last step, there was nothing to block your view of the street at that time? A. Nothing but the step" (p. 52).

She was watching the ground during the time of her descent (p. 52), and the reason she fell was because she could not reach the pavement. She did not ask the driver to change the position of the

bus before she fell. Her mother followed her from the bus (p. 53).

Redirect examination (p. 53):

The step partly covered the highway and prevented her from seeing anything that might be under it (p. 53).

“Q. As you were getting off the bus could you see anything under it? A. No, I could not.

“Q. Why not? A. Well, the step partly covered it.

“Q. And was that the reason why you could not see anything that might be under it? A. Yes, sir.”

When the bus came to a stop it was about a foot away from the curb (p. 54).

Recross examination (p. 54):

She looked at the pavement of the street as she was getting to the last step, preparatory to leaving the bus (p. 55). At the time she boarded the bus she did not notice how high the step was from the part of the street on which she was standing (p. 56).

Frieda Kovelak, the mother of plaintiff, testified (p. 57) that she followed the plaintiff from the bus after the plaintiff had gotten off and fallen to the ground (p. 57). The bus came to a stop a couple of inches away from the sewer. She watched the plaintiff go down the steps of the bus; she noticed after she got out of the bus that plaintiff had fallen into what she described as a hole which sloped down into the sewer (p. 57). Her testimony is as follows (p. 59):

“Q. Did you pick your daughter up afterwards? A. Yes, sir.

“Q. Where was she when you picked her up? A. In the hole there.

"Q. Did you help pick her out of the hole?
A. Yes, sir.

"Q. Can you describe for the jurors just what that hole looked like? A. Yes, sir; the point of the sewer, it was all sloped down like, deep; it was deeper the hole than some other sewers.

"Q. Where was the hole with respect to the steps immediately below? A. Below it."

Cross examination (p. 60):

Plaintiff fell on the right foot with her right hand on the pavement. She saw where plaintiff fell immediately after it happened (p. 61).

"Q. How long was it after she fell off the bus you looked back to see where the step of the bus was? A. As soon as they lift her up on the sidewalk, I looked back."

She was not familiar with the sewer basin that was there at the time (p. 61). She identified Defendant's Exhibit D-1 as being a picture of the sewer basin at the time of the accident and she indicated on said photograph by her mark exactly where the plaintiff's right foot was after she fell to the highway (p. 62).

Redirect examination (p. 63):

She didn't notice the bus move from the time she got off the bus until she looked at the position of the plaintiff on the highway.

Harold Malzer (p. 63), the husband of the plaintiff, testified that he made an examination of the sewer basin the night of the accident. That he went along Bergen Avenue and took note of the others and his inspection disclosed that the sewer basin at the northwest corner of Bergen Avenue and Woodlawn Avenue was the most treacherous.

He describes it as being a deep slope which ran into the side of the curbing (p. 66).

Cross examination (p. 67):

He could not say that photograph, Exhibit D-1, showed the condition of the sewer basin as it was on the day of the accident.

James H. Cassell (p. 69) testified on behalf of the plaintiff that he is an inspector employed by the Department of Streets and Public Improvements and had been employed by them for a period of thirteen years. He was familiar with the northwest corner of Bergen Avenue and Woodlawn Avenue (p. 69). He was familiar with the condition of the highway at or about the sewer basin.

“Q. And could you tell us the condition of the highway at or about the sewer basin there as it existed previous to the repairs? A. Yes, sir. I could say that I built that particular corner up there, anywheres from say three and a half inches to five inches which means that there was a depression there at that depth.”

The condition of the sewer basin at the northwest corner was very bad (p. 70).

“Q. In other words, let us assume a point ten feet back from the sewer basin and can you tell us what degree of depression was between that point ten feet north of the sewer basin and the point immediately adjacent to it? A. Well, the condition of the particular corner was very bad, in fact, I practically took out that entire section running from forty some odd feet there. There is a house there on the corner; I took in the first house and then right around into the receiving basin. I had to do that in order to change the grade at the intersection.

“Q. Was the depression at this particular point at the northwest corner any different from that at other corners? A. Yes. In fact, I didn’t touch the other three corners. It was just that particular one” (p. 71).

Cross examination (p. 71):

The street at the northwest corner starts sloping in to form the sewer basin at a point about six feet out and has a drop of about six inches in to the sewer basin (p. 72).

Defendant’s Witnesses.

Felix Delitizia (p. 73), produced on behalf of the defendant, testified that on the day of the accident he was operating a bus in a southerly direction, along Bergen Avenue, Jersey City. As he approached the corner of Woodlawn and Bergen Avenue, he received a signal to stop (p. 73). When he approached the corner there was a car parked about 15 feet or 18 feet north of the northwest corner of Woodlawn Avenue and Bergen Avenue. His bus was 30 feet in length. There are three steps from the main floor of the bus to the bottom and the distance from the lower step to the ground on level ground is about a foot (p. 74). As he brought the bus to a stop at the corner the front radiator was about at the cross-walk, but on an angle, and the steps of the bus were about three and a half feet away from the curb. Three people got off the bus at that corner. He testified the plaintiff was the third person to get off the bus (p. 75). The door of the bus was not opposite the sewer basin, but was about two feet back of it. As to the manner in which the plaintiff got off the bus, he stated that she took hold of the door and as she tried to get off she went on one side. That is all he knows.

He got out of the bus to help her. In this he was assisted by a Mr. Kohl and some other man who were standing about five or six feet from the front of the bumper of the bus after it came to a stop (p. 76).

Cross examination (p. 77) :

Plaintiff's mother was the second person to get off the bus and plaintiff got off after her, but as to other passengers getting off after plaintiff, he was not certain.

He did not start the bus in motion between the time that plaintiff fell and the time when he left the bus to assist the plaintiff. When the bus came to a stop, part of it extended back beyond the parked car along the curb (p. 79).

When plaintiff got down to the bottom step of the bus, she got hold of the handle to get off and that was the last witness saw until he found her lying on her side out on the street. He did not know how it was that she was getting off to one side. There were ten or eleven passengers in the car. He had been operating buses along the Bergen Avenue line for a period of about six years prior to the accident. He said nothing to the plaintiff as she was getting off the bus. When the bus came to a stop it was about two feet away from the sewer basin and about three and a half feet away from the curb line of the street (pp. 80 and 81).

Stanley Kohl testified on behalf of the defendant (p. 81) that he was the president of the Kohl Transportation Company, the defendant in the within action. That on March 26th, 1928, at about 11:30 o'clock in the morning he and the witness Kowalsky, who was employed by his wife, were

carrying a spare tire to Bus #16, the one involved in the accident. The bottom step of the bus is about eleven inches above the highway on level ground (p. 81). The bus came to a gradual stop at the northwest corner on Woodlawn Avenue and Bergen Avenue. He saw two women get off the bus first and described one of them as being a short woman who he saw grasp the handle on the left side of the bus and as he states, instead of putting her foot down, she jumped, and her right foot went under her. He was then standing three or four feet away. He noticed that she wore shoes with high-spiked heels (p. 82). He estimated that the front of the bumper was about two feet away from the sewer and from the bumper to the door of the bus was about nine feet from the curb of Woodlawn Avenue (p. 83).

Cross examination (p. 83):

He reached the northwest corner of the intersection about a quarter to twelve, and was standing at the sewer basin at that corner when the bus came to a stop. Plaintiff's mother was already standing on the curb when plaintiff, whom the witness says was third person to get off, fell to the street (p. 85).

Paul Kowalsky (p. 87), a witness produced by the defendant, testified that he worked for Mrs. Kohl on the date of the accident and that he had been asked by Mr. Kohl to take a tire to Old Bergen Road to meet the bus (p. 87). He saw the bus come to a gradual stop at the corner of Woodlawn Avenue and Bergen Avenue where he was standing with the tire. When the bus stopped, the right side of it was about three feet from the curb. The front of the bus was on the corner and the door

was about three feet away. He was holding the tire and standing alongside of the sewer. Three people got off the bus, the last of whom was the plaintiff (p. 88). When she fell she was not in the sewer basin because the tire which he was holding was resting at that point. When the bus came to a stop, the forward part of the bus was closer to the curb than the rear because there was an automobile parked about 75 feet from the corner (p. 89).

Cross examination (p. 89) :

It was about half past ten when Mr. Kohl asked him to drive along Bergen Avenue. He saw the bus when it was about a block and a half away from Bergen Avenue and Woodlawn Avenue (p. 90). He crossed the highway to meet the bus at the intersection about a minute or two before the bus came to a stop (p. 91). He arrived at the northwest corner of the intersection before the bus. The front of the bus, at the time it came to a stop, was about even with the corner (p. 94).

Direct examination (Mrs. Elsie Malzer, p. 103) :

At the time of the accident she wore black buttoned leather low shoes.

Cross examination:

She testified that a rubber heel appeared on the left shoe whereas it was missing from the right shoe.

ARGUMENT.

POINT I.

The Court did not err in refusing to grant defendant's request for a nonsuit and for a direction of verdict.

We submit that the accident was caused solely by the negligence of the operator of the defendant's bus in stopping the bus at a dangerous and unsafe place and not through any contributory negligence on the part of the plaintiff. From the testimony, it was open to the jury to find from the evidence that the bus came to a stop at a place where the driver, if he had exercised that degree of care required, would have been cautioned to remove the bus to more level ground.

The testimony as to the material issues is most conflicting and raised an issue not only as to the facts involved but also as to the veracity of the witnesses who testified. There is a conflict of testimony as to where the bus actually stopped, the plaintiff contending that it stopped over and above the sloping highway about a foot away from the mouth of the sewer basin, and the defendant, on the other hand, contending that it stopped on level ground. There was conflicting testimony as to whether the plaintiff was the first or third person to leave the bus. As to all these facts, we say that the jury were at liberty to believe plaintiff and her witnesses in opposition to several by the defendant, if they found an air of veracity surrounding her testimony as to satisfy them that she told the truth.

Plaintiff's testimony as to what caused her to fall, though not in exact and concise terms, is clear and convincing. She testified that she grasped the

left hand bar of the bus and then placed her right foot down towards the ground and, in trying to reach the surface below, fell because she could not get her foot on the ground although she tried to reach it.

That the surface surrounding the mouth of the sewer basin was very bad was testified to by the witness, Frieda Kovelak, and the witness, Cassell, an inspector employed by the Department of Streets and Public Improvements, who testified that the condition of the highway at the northwest corner of Bergen Avenue and Woodlawn Avenue was in fact so bad that when he did work at the intersection of this street, the northwest corner was the only one of the four that had to be changed.

There is no testimony that the plaintiff had ever alighted from a bus at this corner. The operator of defendant's bus must have been aware of the condition that existed at that particular corner. He testified that he had been operating buses along the Bergen Avenue line for a period of about six years prior to the accident. Certainly, in view of his testimony, he should have been aware of the danger of stopping the bus at this point.

Counsel for defendant in his brief attempts to construe the testimony of the plaintiff as showing that it was not the distance between the step of the bus and the highway that caused the plaintiff to fall, but that it resulted solely from the plaintiff losing her balance in getting off the bus.

We submit that, from the plaintiff's testimony, this is an unwarranted assumption of fact.

Counsel for defendant in his brief attempts to argue that, because the plaintiff did not notice how high the step was from the part of the street upon which she was standing at the time she boarded the bus, she was guilty of contributory negli-

gence. Surely, there is no duty on the part of a passenger who boards a bus on level ground to assume that, when a bus comes to a stop for the purpose of permitting the passenger to alight, that he or she must necessarily know the distance between the step of the bus and the highway, or that it will be any greater than it was at the time she boarded the bus.

Plaintiff in this case had a right to assume that when the bus came to a stop, it would be on level ground. Consequently, she was under no duty to make any greater observation than she would have to make if she were getting off under ordinary circumstances.

There undoubtedly was some degree of care that the operator of the bus should have exercised to determine the condition of the highway at the stopping point, which degree of care should have cautioned him to remove the bus to more level ground, and whether such caution was exercised by the operator of the bus depended upon the reasonableness of the exercise and the question was solely for the jury.

The case is somewhat similar to that of *Gore v. D., L. & W. R. R. Co.*, 89 N. J. L. 224, where the plaintiff, in attempting to alight from the train, stepped out of the car in which she was riding and down the steps until she stood on the bottom step, and, taking hold of the rail with her right hand, reached down from the step with her left foot as far as as she could and then let go with her hand, her foot extending down a long distance before striking the rough surface of a Belgian block pavement, whereupon she lost her balance and fell. There the Court said that the duty to warn or assist a passenger, although in itself not a direct duty, may arise from the unusual conditions created by the place of stoppage and that in such a

situation there is presented by the plaintiff's testimony sufficient evidence from which a jury might infer an invitation to leave the train under conditions that placed upon the defendant the duty of using such care as arose out of such conditions and was commensurate with the danger to be reasonably apprehended therefrom.

The fact that the accident in the *Gore* case occurred a little after five o'clock P. M., and the accident in the principal case occurred about noon, does not alter the situation because in the principal case the plaintiff was not in a position to ascertain the condition of the highway immediately below the step nor was she under any greater duty than to exercise reasonable care in attempting to ascertain the condition existing at that point, and, further, she had the right to assume that the bus was stopped at a reasonably safe place for her to alight under the circumstances.

In the case of *Traphagen v. Erie Railroad Company*, 73 N. J. L. 759, the facts are not analogous to those in the principal case because there the testimony showed that the injury complained of resulted from the plaintiff's heel catching on the step before she touched the ground. There is no such factor present in the case at bar.

There was also testimony in the *Traphagen* case that two persons went down the same steps ahead of the plaintiff and while there is testimony in the principal case regarding this point, it is in dispute inasmuch as the plaintiff and her witness say that she was the first one to leave the bus, which testimony is denied by the defendant.

In the case of *Pabst v. Public Service Railway Co.*, 141 Atl. 773, 104 N. J. L. 537, the rule of law is laid down as follows:

"It was the duty of the defendant street car company to exercise reasonable care to see

that the place selected for the plaintiff's discharge was a safe one for that purpose. 'Foley v. Brunswick Traction Co., 66 N. J. L. 637.'

Under the circumstances, the jury may well have found that the defendant in the exercise of reasonable care would have noticed the condition of the highway at that point or have foreseen the danger of stopping there. The jury were in a position to see, hear and weigh the witnesses and their verdict, we contend, should not be disturbed.

POINT II.

The Court properly denied defendant's motion for a nonsuit on the ground that no legal reason was offered by the defendant's counsel for granting same.

At the close of plaintiff's case, counsel for defendant moved for a nonsuit on behalf of the defendant, as follows (State of Case, pp. 72, 73):

"Mr. Cox: I would like to make a motion for a nonsuit on behalf of the defendant.

"The evidence as given by the plaintiff seems to me to be the only definite evidence of how this accident happened.

"Her testimony, as I understand, is that after the bus came to a stop, be it sudden or otherwise, she started to descend the steps of the bus. She says that while descending the steps, and at the time that she stepped on the bottom step of the bus, she had a clear vision of the street below her, and had vision of the spot upon which she intended to step.

"She says also that most of this depression was underneath. There is no evidence that she stepped underneath the step.

"The Court: The motion will be denied.

"Mr. Cox: Exception."

Counsel, in moving for a nonsuit, did not, at any time, state specifically the grounds upon which a motion rested and consequently his failure to so state the reasons rendered the motion for a nonsuit invalid.

In the case of *Koch v. Costello*, 33 N. J. L. 367, the Court, at page 371, said:

“Saying to a trial judge that the plaintiff has failed to make out a case is not pointing out to him any absence of proof or any matter of law disintitling the plaintiff to go to the jury. Counsel cannot require the judge to run over in his mind all the evidence adduced by the plaintiff and conjure up objections of fact or law which might disintitle the plaintiff to recover and thus run the risk of making errors of his own motion, so to speak. It is the duty of counsel to point out the questions of law or fact, or both, upon which he relies for a nonsuit.

“It is pertinent here to remark that in moving for a nonsuit, counsel should state specifically the grounds upon which the motion is rested and then proceed to argue them. * * *”

This Court in the case of *Ippolito v. Borough of Ridgefield, Bergen County*, 109 Atl. 337, 94 N. J. L. 97, affirmed the doctrine as stated in the *Koch* case, *supra*.

It is therefore submitted that in view of defendant's failure to set forth the grounds upon which a motion for a nonsuit rested, the Court did not err in denying the motion.

Respectfully submitted,

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Mark Townsend Jr.
Thomas F. Doyle
of Counsel

New Jersey Court of Errors and Appeals.

ELSIE MALZER <i>and</i> HAROLD MALZER, her husband, <i>Plaintiffs-Appellees,</i>	} On Appeal from the Hudson County Circuit Court.	10
<i>v.</i>		
KOLL TRANSPORTATION COMPANY, <i>Defendant-Appellant.</i>		

BRIEF OF DEFENDANT-APPELLANT. 20

This is an appeal from a judgment entered in the Hudson County Circuit Court in favor of the plaintiffs.

Statement of Facts.

About noon on March 26, 1928, a clear day, the plaintiff, Elsie Malzer, in company with her mother, was a passenger for hire on an automobile bus owned and operated by the defendant corporation, which bus was being operated along Bergen Avenue, in Jersey City, New Jersey, a public highway, near the intersection of Bergen Avenue and Woodlawn Avenue. 30

The bus was of a type such as is commonly used for the transportation of passengers. It had a door in the right-hand front corner of the body of the bus and immediately inside of the door were two steps leading to the floor of the bus. The steps 40

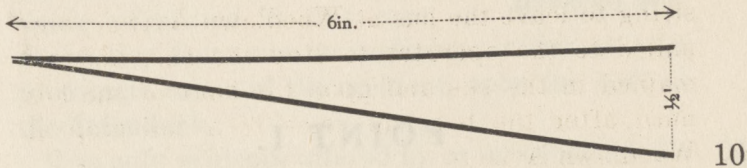
of the bus were located directly opposite the seat in which the operator of the bus sat.

The plaintiff, Elsie Malzer, and her mother, desiring to leave the bus at Woodlawn Avenue, signalled to the operator to stop the bus, and remained in the bus and upon the floor of the bus until after the bus had come to a full stop at
10 Woodlawn Avenue.

At the time that the bus stopped, the right side of the bus at the doorway was some three feet or more from the curb of Bergen Avenue. This was due to the fact that an automobile had been left parked at the curb of Bergen Avenue so near Woodlawn Avenue that the bus did not have an opportunity to pass this automobile and swing up against the curb to discharge its passengers. Some idea of the distance that the right side of
20 the bus was from the curbline of Bergen Avenue when it stopped may be gained from the evidence given by the plaintiff's mother. She testified that when her daughter's right foot finally reached the pavement, her knee bent, so that her thigh was parallel with the pavement of the street and that while she was in this position, her knee was still about a foot from the curbline of Bergen Avenue.

Located at the northwest corner of the intersection of these two streets at the time that the accident occurred was a sewer basin, a picture of which
30 was offered in evidence and appears in the back of the state of case. The depression forming the sewer basin was formed by an incline of the pavement of the street, which started about six feet from the curbing, the incline being one inch to each foot (S. C. 72—ls. 10 to 30). The angle of the

pavement forming the depression is shown by the lower line of the diagram drawn below.



The plaintiff then started to leave the bus, going down the two steps located at the right front corner of the bus. When she was on the last step, she looked at the asphalt pavement of the street upon which she was about to step, grasped the grab-iron, which was located at the left side of the doorway, with her left hand, stepped out from the bus, lost her balance before either foot reached the ground, lost her hold upon the grab-iron and fell (S. C. pg. 45—ls. 26 to 36, pg. 52—l. 31, pg. 53—l. 3).

The lower step of the bus, according to the testimony in this case, when the bus was standing on level ground, was eleven inches above the ground. The plaintiff described the step as being from eighteen inches to two feet above the pavement of the street directly beneath it at the point at which the plaintiff attempted to leave the bus, whereas, the defendant's witnesses insisted that the doorway of the bus stood over a portion of the pavement which was level, bringing the lower step of the bus within eleven inches of the paved portion of the street.

The plaintiff, Elsie Malzer, as a result of the accident, sustained certain injuries to her leg, for which this suit was brought. The plaintiff, Harold Malzer, is her husband and he joined in the suit for his damages as a result of the loss of her services and companionship, for the medical expense which he incurred in attempting to produce her

cure, and for the moneys which he was obliged to pay to those who came to help him while his wife was incapacitated as a result of the injuries which she received.

POINT I.

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The Trial Judge erred in refusing to grant the requests of the defendant for a non-suit and for a direction of verdict for the defendant.

The motions for a non-suit and for a direction of verdict were made upon two grounds:

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(a) That the defendant and its servant or agent were guilty of no negligence, which was the proximate cause of the accident, and

(b) That the plaintiff, herself, was guilty of negligence, which was the proximate cause of the accident.

In arguing these points we will consider these two grounds separately:

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(a) The plaintiff in her complaint charges that the defendant, through its servant or agent, was guilty of negligence in two respects, namely, that it failed to use reasonable care in selecting a safe place for the plaintiff to alight from the bus, and that it failed to give her assistance in alighting from the bus. The plaintiff, having alleged these grounds of negligence, was under the duty of proving her allegations, or either of them, by a fair preponderance of the evidence.

The mere fact that the accident happened, of course, would be no ground for presuming that the defendant's agent was negligent in the opera-

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tion of its bus. *McCombe v. Public Service Railway Company*, 95 N. J. L. 187. It is the contention of the defendant upon this point that the evidence submitted in this case, on the contrary, shows that there was no negligence, which was the proximate cause of the accident, upon the part of the defendant.

The only evidence offered by or on behalf of the plaintiff to show that the operator of the bus did not use reasonable care in selecting a reasonably safe spot for her to alight is that the operator stopped his bus in such a position that, because of the depression in the street, formed by the sewer basin, the step of the bus was about eighteen to twenty-four inches from the ground and farther from the ground than she thought it was as she went to get off (S. C. pg. 50—ls. 30 to 34). She does not claim, by her testimony, that there was any defect in the pavement of the street, upon which she stepped, which caused her to fall, nor that the incline of the sewer basin itself was such that she could not step upon it with safety, but merely that, although she looked at the street before she attempted to step and while she was stepping from the bus, the pavement was farther away than she thought. Her testimony shows that she lost her balance and fell before either of her feet touched the ground as she was alighting. We quote from her testimony upon this point:

“Q. In getting off, will you tell the jury just what happened? A. Well, as I was getting off the bus, I went off the platform step. Then there was another step to get down to the pavement. Well, there was a hand bar. I put my left hand out to grab it. I put my right foot to reach the pavement. As I put my right foot down, I was down upon the floor and I didn't realize the step was so deep, I

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had to let go the left-hand bar. * * *” pg. 46—ls. 29 to 38.

“Q. Was there anything the matter with the street at that point that you know off? A. No, I didn’t notice.” pg. 47—ls. 9 to 11.

10 “Q. As you had a clear view of where the ground was, and from the view that you had of the ground or street, before this accident, the step didn’t seem to be too high for you to step from? A. Well, it looked all right to me.

“Q. It looked all right to you at that time and there was nothing to block your view of the ground. A. Only the step.

“Q. I mean when you stepped on the last step, there was nothing to block your view of the street at that time? A. Nothing but the step.

“Q. And when you looked down to the street, you saw the asphalt of the street? A. Yes, sir.

20 “Q. When you did step off into the street, you fell, almost as soon as your foot touched the ground? A. It did not touch the ground.

“Q. It did not touch the ground before you fell? A. No.

“Q. Were you watching the ground the full time that you stepped down? A. Yes, sir.

“Q. Watching the full time? A. Yes, sir.

“Q. Yet you fell before your foot touched the ground? A. Well, I could not reach the pavement. * * *” (S. C. pg. 52—ls. 1 to 40, pg. 52—ls. 1 to 10).

30 The fact that her fall occurred before her foot reached the ground and was, apparently, caused even in her own mind, by the step being higher from the ground than she thought leaves, as the only question to be considered, the question of whether the operator should have considered, in the exercise of reasonable care, that the step was so far from the pavement that a person, in the exercise of reasonable care, would probably suffer
40 an accident while leaving the bus.

Assuming for the moment that the lower step of the bus was a foot and a half to two feet above the pavement, as the plaintiff testified, such fact would not show any want of care by the operator of the bus.

We have been impressed, in reading through the testimony given in this case, by its similarity to the case of *Traphagen v. Erie Railroad Company*, 73 N. J. L. 759. In that case, the plaintiff fell from a step which was actually twenty-four to twenty-six inches above the platform of the station; she fell because she lost her balance before her foot reached the platform, and her theory of negligence was that the step was too high to be used safely in alighting from the train. 10

The Trial Judge in that case non-suited the plaintiff, thereby holding, as a matter of law, that the mere fact that a step was twenty-four to twenty-six inches above the platform was no evidence of negligence upon the part of the railroad company, which provided that step. Upon appeal to this court, the ruling of the Trial Judge was upheld. 20

This court, in its decision, pointed out that the railroad company might have constructed a step so high that it would be in want of the exercise of reasonable care in providing such a step for the use of its passengers, but agreed with the Trial Judge that a step twenty-four or twenty-six inches high as a matter of law was not such a step. This court said: 30

“We do not mean to say that a railroad company can construct the steps of its cars as it pleases. It must, of course, afford reasonable means for alighting and must use careful judgment in the method of construction it adopts, but when it appears, as in this case, that the steps are similar to those in 40

common use, which must have proved sufficient for hundreds of passengers, and were actually sufficient for two passengers who alighted just before the plaintiff, and when, also, there is a failure to prove any departure from the usage of other railroads, we think there is no proof which would justify a jury in finding the defendant negligent."

10 In line with the decision of this court, there is no proof in this case that the step itself was other than standard construction, nor that it, in any way, differed from that used by other buses on the same line. There was also evidence in this case that the mother of the plaintiff, having seen her daughter fall, alighted from the same step, without having the bus moved, and alighted with safety.

20 It may be urged, however, that this case differs from the *Traphagen* case in that the step, while two feet above the ground at the time that the plaintiff attempted to alight, was not usually that high, and the plaintiff, therefore, had no warning of the exact height of the step from the ground. The answer to that argument is obvious. The plaintiff testified on S. C. pg. 56—l. 20:

30 "Q. At any time before the accident, did you pay any particular attention to the exact height that the step, the bottom step itself, was above the street level?

"The Court: At the time you were getting on, did you notice how high the step was from the part of the street on which you were standing; at the time you boarded or got on this bus?

"A. Well, I didn't take notice."

40 The plaintiff, having taken no notice of the height of the step above the street level at any time before she attempted to leave the bus, had

no knowledge of its height to assist her in getting off. She, therefore, had to rely upon such observations as she should make while descending the steps to assist her in getting off. The only recollection which she carried of the height of the step above the pavement at the time that she was injured was that given to her by an observation made almost immediately before she fell. In other words, she did not recall the step being but eleven or twelve inches above the street when she got on the bus and, relying upon that recollection, feel that the step was only that high above the pavement where she attempted to alight. In alighting, she made observations to assist her and relied entirely upon the observations which she made while alighting. Those observations disclosed the step to be, in her opinion, but two feet above the pavement. As we have pointed out, this court has held that to provide a step of such a height for a passenger to use is not negligence, as a matter of law.

Analyzing the testimony given by the plaintiff to explain what caused her to fall more fully, it appears that she nowhere testified that she considered the step too high to alight from with safety. A fair reading of her testimony, we believe, leads to but one conclusion, and that is that she misjudged the distance from the step to the ground. In fact, she says so in so many words on S. C. pg. 56—ls. 10 to 14:

“Q. And it was farther down than you thought? A. Yes, sir.

“Q. And that is what made you fall? A. Yes, sir.”

As was said by this court in *Traphagen v. Erie Railroad*:

“Whether the height of the step be high or low, accidents will happen that might be

avoided in each particular case if the height were different.”

So, in this case, if the height of the step had been nearly what the plaintiff thought it was, no accident would have happened. In all probability, if it had been less than she thought it was, another type of accident would have happened.

10 To hold that the defendant or the defendant’s servant or agent was negligent in this case would be to hold the defendant responsible for a misjudgment of the height of the step by a person using it.

The plaintiff, as we have stated above, charges that the defendant was negligent in failing to assist her from the bus. The *Traphagen* case deals directly with this point:

20 “The failure to provide a footstool and to assist the plaintiff in alighting was obvious to the plaintiff, and if she had desired such assistance she should have at least made her desire known to the conductor, who was close at hand. No liability attaches to the defendant by reason of these circumstances.”

30 So, in the present case, in leaving the bus, the plaintiff left by a stairway directly opposite the servant of the defendant company, but she chose to attempt to leave the bus without asking for assistance of any kind from the operator, nor did she ask for assistance from her mother.

40 We feel that her failure to ask assistance from either of these persons, although she, at the time, was four months’ pregnant, tends to shed a strong light upon the question as to whether or not she considered the step too high from the pavement. If there had been any doubt in her mind about the step being too high, she would certainly, at least, have called to her mother to assist her from the

bus. Nor can it be said, on behalf of the plaintiff, that there were any circumstances which prevented her from seeing the asphalt pavement upon which she intended to step. Her testimony is that while she was standing on the last step of the bus, she could see the pavement upon which she was going to step. On S. C. pg. 55—l. 35:

“Q. As you were on this last step about to step down to the floor of the court room, which we will say is the asphalt pavement of the street, and you were on the last step, about to step off with your right foot; as you looked down to the pavement of the street as you were standing in this position, did you see the spot on the asphalt street, where you intended to put your foot and where you were going to step? A. Yes, I did look.” 10

The day being clear and it being about noontime of that day, she had full opportunity to see what she was about. 20

It is not admitted, however, that the step of the bus was two feet above the pavement of the street at the place where Mrs. Malzer attempted to alight. The president of the defendant company, who, himself, built the bus, testified that the step was but eleven inches above level ground (S. C. pg. 81—ls. 26 to 29). In other words, if there were no depression in the pavement, the lower step, from which Mrs. Malzer stepped, would be but eleven inches from the pavement itself. 30

By taking into consideration the sewer basin opposite which the plaintiff's mother testified the bus stopped, the step still could not be twenty-four inches above the pavement itself. An engineer called by the plaintiff, who testified that he knew exactly the measurements of the sewer basin, testified that the pavement began to slope toward the sewer basin six feet out into the street from the 40

curb (S. C. pg. 72—ls. 15 to 18). The slope was at the rate of one inch to each foot. If, therefore, the plaintiff had stepped from the bus directly against the curb, the step could have been but eleven inches, plus six, or seventeen inches from the pavement. It is agreed, however, by all witnesses in the case that the bus did not stop at the curb, but stopped some two or three feet from the curb. Each foot that it stopped away from the curb would reduce by one inch the maximum of seventeen inches which the step was above the pavement of the street.

Some definite indication of the distance that the bus was away from the curblineline may be gained from the testimony of the plaintiff's mother that when her daughter's right foot finally did touch the pavement, it bent beneath her, so that her thigh was parallel with the pavement. That would cause her knee to be extended forward toward the curb from her body and from the spot where her foot touched the pavement. Even so, her knee was then about a foot from the curb. See S. C. pg. 63—ls. 3 to 19.

Great stress was laid upon the sewer basin and the fact that its slope was more than that of the surrounding street. Inasmuch as the plaintiff was not tripped by its slope and inasmuch as she was caused to fall before either foot reached the slope in the pavement, the only importance to be attached to the fact that the sewer basin sloped is that the slope made the step more than eleven inches above the pavement of the road itself.

We cannot speculate on whether the plaintiff would have been caused to fall by the slope of the pavement or by any condition of the pavement, had her foot reached it before she lost her balance, for such is not the plaintiff's theory of the case. Only such facts as are proximate to the falling of

the plaintiff can be considered when arriving at a decision as to whether the defendant's servant or agent was guilty of negligence which was the proximate cause of this accident. *Davenport v. McClelland*, 88 N. J. L. 653.

At the time of the trial of this case, much point was made by the plaintiffs of the decision of this court in the case of *Gore v. D. L. and W. Railroad Company*, 89 N. J. L. 224. That case and the present case are, in our opinion, entirely dissimilar. In the *Gore* case, the accident happened at night time and occurred because the plaintiff was permitted to get from a high step to a rough pavement under the step, her fall having been caused by the unevenness of the pavement. There was also evidence in that case that she had to make a hurried departure from the train, as she delayed stepping for quite some time while she was looking for an employee to assist her. In the present case, the accident occurred during the day at a time and under conditions which gave the plaintiff ample opportunity to make a clear and accurate observation as she was leaving the bus, and the fall itself occurred before the plaintiff reached the pavement. There was no evidence of the plaintiff being hurried from the bus.

This court, in writing the decision in the *Gore* case, said at the bottom of page 225:

“Such duties by a carrier are often in the alternative, so that while no one duty is specific, it does not follow that they may all be neglected with impunity. Thus, under ordinary conditions, there is no direct duty to assist passengers to alight, or to warn or instruct them, or to furnish additional light, so, also, there may be no direct duty to stop the train opposite the station platform or to avoid disembarking passengers on a paved roadway, but, notwithstanding the absence

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of direct duty as to each of these isolated elements, an alternate or conditional duty may arise from their fortuitous combination. Thus the duty to warn or assist, not in itself a direct duty, may arise from the unusual conditions created by the place of stoppage, not in itself the violation of a direct duty.”

- 10 As we understand this decision, this court laid down, as rules of law, that there is no direct duty to assist passengers in alighting or to warn or instruct the passengers in alighting and that such a duty may only arise where other circumstances intervene. No such circumstances intervened in this case. The only circumstance which was present in this case, which would not have been present at every other stop made by this bus along its
- 20 route, was that the depression of the street pavement made the step slightly higher than it otherwise would have been. The wrong judgment by the plaintiff of the height of the step caused her to fall. Certainly, if the defendant, as a matter of law, was not negligent in providing a step of that height for the plaintiff to alight from, it could not be held negligent for failing to warn the plaintiff of the exact height of the step. Nor, can it be held negligent for failing to advise the plaintiff that the step was slightly higher than usual, for she had
- 30 a clear vision of the height of the step as she attempted to get off, and she had no recollection of the height of the step which she was relying upon as she got off, other than that which the view of the street immediately before she fell gave to her. To call her attention to the step would merely serve as a request to her to make an observation as to its height. This she testifies she did without being requested to.

To hold that the defendant was negligent in this case would be tantamount to giving every passenger a cause of action against the carrier upon which she had been riding, provided she would testify that the ground or the pavement was slightly farther below or slightly nearer to the step than she thought, and, having misjudged the distance, lost here balance before she was able to reach that pavement. It would not be necessary for her to testify that with the use of ordinary care, she could not have stepped down to the pavement in safety, but merely that she formed an opinion of the height of the step from the pavement, was wrong in her opinion, and lost her balance as a result thereof.

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To lay down such a rule of law would expose carriers of passengers, as well as owners of property, upon which steps were located, to an endless number of suits founded upon mistaken judgment of the height of some step or platform, which, if the plaintiff had been correct about the height, would have caused no injury at all.

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(b) The plaintiff, Mrs. Malzer, in alighting from the bus, was under the duty to herself of exercising reasonable care for her own safety. If, by the exercise of reasonable care, she could have apprised herself of the height of the step of the bus from the ground and avoided the accident which happened, but did not do so, then her want of the exercise of reasonable care was the proximate cause of this accident and is a bar to her recovery in this case. *Pabst vs. Public Service Ry. Co.*, 104 N. J. L. 537.

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As we have pointed out heretofore in our brief, this accident occurred about noontime on a clear day (S. C. pg. 81—ls. 30 to 34). The plaintiff herself states that she could see the pavement of the street to which she was about to step, and nowhere

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in her testimony intimates that she was prevented from making a clear and accurate observation by darkness or any intervening object. She does say at one place in her testimony that the only obstacle which prevented her from seeing the pavement was the lower step of the bus and that this prevented her from seeing the pavement at the time that she was standing on the lower step of the bus. See S. C. pg. 52—ls. 25 to 30. But her testimony immediately prior thereto and immediately thereafter, as well as common sense, negatives the idea that the lower step had anything to do with preventing her from seeing the distance that the ground was from the step and forming an accurate estimate of its height, had she used any care in so doing. Her testimony is as follows:

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20 “Q. And as you got to the last step of the bus, did you look down and see where the ground was? Before you stepped down? A. Yes, sir; I did.

“Q. As you had a clear view of where the ground was, and from the view that you had of the ground or street, before this accident the step didn't seem to be too high for you to step from? A. Well, it looked all right to me.

“Q. It looked all right to you at that time and there was nothing to block your view of the ground? A. Only the step.

30 “Q. I mean when you stepped on the last step, there was nothing to block your view of the street at that time? A. Nothing but the step.

“Q. And when you looked down to the street you saw this asphalt of the street? A. Yes, sir.”

And again on S. C. pg. 55—l. 39:

40 “* * * And you were standing on this last step, about to step off with your right foot; as you looked down to the pavement of

the street as you were standing in this position, did you see the spot on the asphalt street, the asphalt pavement of the street, where you intended to put your foot and where you were going to step? A. Yes, I did look.

“Q. And it was farther down than you thought? A. Yes, sir.

“Q. And that is what made you fall? A. Yes, sir.” 10

It will be noted from this testimony, especially the last questions and last answers, that Mrs. Malzer states that she did have a view of the portion of the street upon which she intended to step and that the sole reason that she fell was that it was farther down than she thought.

And, as a matter of common sense, a person of the age of Mrs. Malzer, standing upon the last step of a bus and looking at the pavement, would not have that portion of the pavement, upon which she intended to step, blocked from her view by the step. The only portion of the roadway which would be blocked from her view would be that portion of the pavement directly beneath the step, and, of course, as a matter of every day experience, a person stepping down does not step beneath the step, but steps forward and away from the step some short distance. 20

Some idea of the carelessness with which Mrs. Malzer made her observation can be gained by the degree of error which she made in estimating the height of the step. Had her estimate been but slightly wrong: that is, had the step been but a few inches higher from the ground than she calculated, her injury would have been caused by her coming down upon her foot too hard and falling forward, but, in this case, she did not fall in this way, but rather lost her grasp upon the hand-rail 30

and lost her balance while in air and before her foot came to the pavement.

10 It, furthermore, appears from the evidence in this case that Mrs. Malzer, at the time that this accident occurred, had been pregnant about four or five months. See S. C. pg. 38—ls. 22 to 26. Such condition was known to her, but there is no evidence that it was known or should have been known to the operator of the defendant's bus. Under the circumstances, the plaintiff, in exercising reasonable care, should have exercised a higher degree of care than ordinary. We mention this fact simply because it serves to point out more clearly that she did not use that care which she should have used under the existing circumstances.

20 As we have pointed out heretofore in the brief, at no place does she claim that the step was so high that she could not, under any circumstances, alight in safety. Her sole contention is that it was higher than she judged it to be. This court has decided in the *Traphagen* case that the defendant would not be guilty of negligence, as a matter of law, even had the step been as high as the greatest height which she indicated in her testimony, namely, two feet.

30 In order for this court to find that the plaintiff was not guilty of contributory negligence as a matter of law, it would be necessary to subscribe to the theory that a person is not guilty of contributory negligence as a matter of law, where, under favorable circumstances, that person makes an observation of the height of a step, which observation is so incorrect as to cause that person, who has grasped a safety device to assist him or her in stepping down, to lose his or her hold and lose his or her balance before he or she touches the ground, the height of the step not being so

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great that he or she could not step down from it in safety. Such a theory would be justification for freeing a person from contributory negligence, no matter how much less than two feet the height of the step chanced to be. That a different view, however, is taken by this court is indicated by the quotation from the *Traphagen v. Erie Railroad Company* case, given above:

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“Whether the height of a step be high or low, accidents will happen that might be avoided in each particular case if the height were different.”

There is one other element, which, we feel, has a bearing upon the contributory negligence of the plaintiff in this case. Bearing in mind that, at the time that this accident occurred, she was between four and five months pregnant, she still saw fit to wear shoes with heels upon them which were over one inch high and which were but an inch and a quarter across the portion nearest the instep and less than an inch from the front to the back, and, further, that there was before this accident and at the time that the accident occurred a rubber heel was missing from the heel of the right shoe. See S. C. 103—ls. 32 to 40, pg. 104—ls. 1 to 19. Whether the height of the heel had any direct bearing upon her losing her balance or not, it, certainly, should have made her more cautious in gaging the distance which she had to step, for it is a matter of common knowledge that a high heel of such dimensions is not as stable a foundation for the foot as a low, flat heel.

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To recapitulate the argument of the defendant-appellant, this accident was caused by the plaintiff losing her balance and her grasp upon the hand-rail of the bus while stepping from a step and before she reached the pavement, which step

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was not so high and was not claimed to be so high that it could not be used with safety, but the height of which was misjudged by the plaintiff.

10 Under those facts the defendant-appellant submits that the defendant, as a matter of law, was guilty of no negligence, which was the proximate cause of the accident, and that the plaintiff, having had ample opportunity to make an accurate observation to assist her from the bus, was guilty of contributory negligence.

The defendant-appellant, therefore, respectfully requests that the judgment entered in the court below, be reversed.

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Attorneys for Defendant-Appellant.

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