

# INDEX

|                                  | PAGE |
|----------------------------------|------|
| Notice of Appeal .....           | 1    |
| Grounds of Appeal .....          | 2    |
| Summons .....                    | 6    |
| Complaint .....                  | 7    |
| Answer of Joseph Slobodien ..... | 10   |
| Reply .....                      | 12   |
| Postea .....                     | 13   |

## TESTIMONY.

### *For Plaintiff.*

|                         |    |
|-------------------------|----|
| Estelle Shortz,         |    |
| direct examination..... | 15 |
| cross " .....           | 23 |
| George W. Fithian,      |    |
| direct examination..... | 31 |
| cross " .....           | 35 |
| re-direct " .....       | 36 |
| Mary Resnick,           |    |
| direct examination..... | 38 |
| James Horton,           |    |
| direct examination..... | 39 |
| cross " .....           | 43 |
| re-direct " .....       | 53 |
| re-cross " .....        | 54 |
| Michael Trygar,         |    |
| direct examination..... | 56 |
| cross " .....           | 60 |

### *For Defendant.*

|                         |    |
|-------------------------|----|
| William E. Ramsay,      |    |
| direct examination..... | 61 |
| cross " .....           | 63 |
| Jacob Slobodien,        |    |
| direct examination..... | 64 |
| cross " .....           | 70 |

|                                       | PAGE |
|---------------------------------------|------|
| Eva Ohmer,                            |      |
| direct examination.....               | 77   |
| Motion for Non-suit .....             | 63   |
| Motion for Direction of Verdict ..... | 81   |
| Court's Charge to Jury .....          | 83   |
| Exceptions to Charge .....            | 89   |
| Stipulation .....                     | 91   |

EXHIBITS.

|                           | Off'd  | P't'd |
|---------------------------|--------|-------|
| P. 1. Photograph .....    | 17     | 92    |
| P. 2. Photograph .....    | 17     | 92    |
| P. 3. Piece of Wood ..... | 17, 56 |       |
| P. 4. Piece of Wood ..... | 17, 56 |       |
| P. 5. Hospital Bill ..... | 80     |       |

**NOTICE OF APPEAL.**

Filed June 19, 1930.

**New Jersey Supreme Court**

MIDDLESEX COUNTY.

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ESTELLE SHORTZ,

*Plaintiff,*

*Action  
at Law.*

*vs.*

JOSEPH SLOBODIEN,

*Defendant.*

*Notice  
of Appeal.*

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To Alfred Antonio, attorney of plaintiff, or to  
whom it may concern:

20

Please take notice that the defendant in the  
above-entitled cause appeals to the Court of Er-  
rors and Appeals in the last resort in all causes  
in New Jersey from the whole judgment entered  
in this cause.

GEORGE J. MILLER,  
Attorney for Defendant.

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**GROUNDS OF APPEAL.**

NEW JERSEY SUPREME COURT.

MIDDLESEX COUNTY.

|    |                                                                                                                                                                                            |   |                                                                |
|----|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|---|----------------------------------------------------------------|
| 10 | ESTELLE SHORTZ,<br><br><div style="text-align: center;"><i>Plaintiff,</i></div> <div style="text-align: center;"><i>vs.</i></div> <div style="text-align: center;"><i>Defendant.</i></div> | } | <i>Action<br/>at Law.</i><br><br><i>Grounds<br/>of Appeal.</i> |
|----|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|---|----------------------------------------------------------------|

To Alfred D. Antonio, attorney for plaintiff;

SIR:

20 Please take notice that the defendant hereby appeals to the Court of Errors and Appeals in the last resort in all causes in New Jersey from the whole of the judgment entered in this cause on the following grounds, to wit:

1. The trial court erred in refusing to non-suit the plaintiff on the ground that no duty by the defendant to the plaintiff was shown.

30 2. The trial court erred in refusing to non-suit the plaintiff because there was no proof of negligence on the defendant's part.

3. The trial court erred in refusing to non-suit the plaintiff on the ground that there was no proof that the defendant had knowledge of the condition of the bannister or railing.

40 4. The trial court erred in refusing to non-suit the plaintiff on the ground that there was no evidence the conditions existed for any length of time, as would constitute in law constructive notice.

*Grounds of Appeal.*

5. The court erred in refusing to grant the motion of the defendant for a non-suit of the plaintiff.

6. The court below erred in refusing to grant the motion of the defendant for a direction of a verdict for defendant on the ground that defendant's testimony is undisputed that the premises were frequently inspected and by reasonable inspection the defect could not be ascertained, was undisputed. 10

7. The court below erred in refusing to grant the motion of the defendant for a direction of the verdict for defendant on the ground that it was undisputed that defendant had actual or constructive knowledge of the defect. 20

8. The court below erred in refusing to grant the motion of the defendant for a direction of the verdict for defendant on the ground that plaintiff failed to show that defendant had exercised reasonable diligence in ascertaining what repairs were necessary or that a due inspection of the premises would have disclosed the condition of the guard rail. 20

9. The court below erred in refusing to direct a verdict for defendant on the ground that plaintiff failed to prove defendant had notice of the defect or that it existed for such length of time that such notice would have been presumed. 30

10. The court below erred in refusing to direct a verdict for defendant on the ground that plaintiff was guilty of contributory negligence.

11. The court below erred in refusing to direct a verdict for defendant on the ground that there was no contradiction or controversy as to 40

*Grounds of Appeal.*

the facts in relation to the condition of the rail as to inspection as to the reasonableness of the inspection as to the condition of the rail and it then became a question of the law for the court to determine and not a question of fact for the jury.

- 10 12. Because of errors in the charge of the Court as to the degree of care necessary to be exercised by a landlord toward his tenant, increased his burden, as provided by law when it charged:

20 “Had this condition, as you are able to determine it from the testimony of the witnesses, so far as the testimony will bear upon that aspect of the case, and from an examination of the exhibits, P. 3 and P. 4, particularly P. 3, which has been introduced here, whether or not this condition has been so slow and gradual and has continued over such a length of time as to have required the landlord by reasonable inspection to have repaired and made it proper? That is a jury question.”

- 30 13. Because of error in the charge of the Court as to what the jury was to determine when it charged:

40 “It is a question for you to determine under all the aspects of the case, and if you come to the conclusion that this condition has existed or that the landlord had notice of it from any other source and failed to make the repairs which he should have made, then he is liable. If, on the other hand, you find that this was not such a condition as has existed over such a period of time as to have charged the landlord with the duty

*Grounds of Appeal.*

of making an inspection and repair, and he had no notice of the defective condition of the railing, then he is not responsible"; and there was no evidence to substantiate it.

14. Because it was undisputed that the landlord used reasonable care to have such places reasonably fit for use. 10

15. Because the court below erred in charging:

"I charge you that, however, with this modification: that if the landlord knows of a hidden or latent defect, he is under the obligation to apprise his tenant of the same."

16. Because the court below erred in charging: 20

"I charge you with the modification of that which I have already charged you, concerning conditions which have extended over a long period of time, which charges the landlord with the duty of inspecting and repairing."

17. Because the questions of fact were undisputed and uncontroverted, and it became a question of law for the Judge to decide, and he committed error in permitting the jury to decide the case. 30

18. Because trial court failed to charge the plaintiff's burden of proof must be sustained by a preponderance of the evidence.

GEORGE J. MILLER,  
Attorney for Defendant.

**SUMMONS.**

Filed August 31, 1929.

State of New Jersey to Joseph  
Slobodien:

10 (SEAL) YOU ARE SUMMONED to answer the  
annexed complaint of Estelle Shortz  
in an action at law in the New Jersey  
Supreme Court. AND TAKE NOTICE that unless  
you file your answer to said complaint with the  
Clerk of the said New Jersey Supreme Court,  
at Trenton, within twenty days after service  
upon you of this writ and the annexed complaint,  
the plaintiff may proceed in the suit and judgment  
may be entered against you.

20 WITNESS, WILLIAM S. GUMMERE, Chief Justice  
of our New Jersey Supreme Court, at Trenton,  
this twelfth day of August, nineteen hundred and  
twenty-nine.

FRED L. BLOODGOOD,  
Clerk.

ALFRED D. ANTONIO,  
Attorney.

30

40

## COMPLAINT.

NEW JERSEY SUPREME COURT.

MIDDLESEX COUNTY.

|                                                                                                                                                                                                             |   |                                          |    |
|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|---|------------------------------------------|----|
| ESTELLE SHORTZ,<br><div style="text-align: center;"><i>Plaintiff,</i></div> <div style="text-align: center;"><i>vs.</i></div> JOSEPH SLOBODIEN,<br><div style="text-align: center;"><i>Defendant.</i></div> | } | <i>Action<br/>at Law.<br/>Complaint.</i> | 10 |
|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|---|------------------------------------------|----|

Plaintiff, Estelle Shortz, residing in the City of Perth Amboy, County of Middlesex and State of New Jersey, complaining of the defendant, Joseph Slobodien, says that: 20

1. On or about the 26th day of July, 1928, the defendant, Joseph Slobodien, was the owner and for a long period of time prior thereto was the owner of a certain three-story building known as No. 288 Hobart street, in the City of Perth Amboy, County of Middlesex and State of New Jersey.

2. On or about said date, the plaintiff, Estelle Shortz, was a month-to-month tenant of the said Joseph Slobodien, having possession under said tenancy of the second floor flat of said premises. 30

3. At the time aforesaid, said Joseph Slobodien, rented the third floor of said building and did retain in his possession, control and supervision, a common passageway for the use of the tenants in said building, to wit: the stairway and landing in the rear of said building, together with the guard rail on said landing. 40

*Complaint.*

4. At the time and place aforesaid, the plaintiff was lawfully upon said landing of the aforementioned common passageway at the invitation of the defendant, Joseph Slobodien.

10 5. It then and there became and was the duty of the defendant to maintain said stairway and landing in a safe and proper condition for the use of the tenants of said building, and to make inspection thereof and reasonable repairs thereto.

20 6. The defendant herein not regarding his duty as aforesaid, did neglect and fail to properly maintain, inspect and repair said common passageway and more particularly he did fail to maintain, inspect and repair the guardrail on the landing of said common stairway, although the defendant had notice of the defective condition of said guard rail for a long period of time preceding the aforementioned date.

30 7. As a direct and proximate result of the premises aforesaid, plaintiff, Estelle Shortz, fell from said landing and sustained serious and permanent injuries about the head, face, arms and other parts of her body, and she suffered great pain and anguish, both of body and mind, and will in the future suffer great pain and anguish  
40 both of body and mind, and she was confined to the hospital and to her bed for a long period of time, and will in the future be confined to the hospital and her bed for a long period of time, and she was prevented from following the usual course of her employment for a long period of time, and will in the future be prevented from following the usual course of her employment for a long period of time, and she was obliged to and did expend large sums of money for doctors' bills, medicines and care in an effort to

*Complaint.*

cure herself of her injuries, and she will in the future be obliged to expend large sums of money for doctors' bills, medicines and care, in an effort to be cured of her injuries, and she has been permanently disabled, disfigured and incapacitated to her damage in the sum of ten thousand (\$10,000.00) dollars. 10

Plaintiff, Estelle Shortz, demands of the defendant, Joseph Slobodien, the sum of ten thousand (\$10,000.00) dollars, besides costs of suit.

ALFRED D. ANTONIA,  
Attorney of Plaintiff.

20

30

40

**ANSWER.**

Filed September 12, 1929.

NEW JERSEY SUPREME COURT.

MIDDLESEX COUNTY.

10

ESTELLE SHORTZ,

*Plaintiff,**vs.*

JOSEPH SLOBODIEN,

*Defendant.**Answer.*

20

The defendant, Joseph Slobodien, residing in the City of Los Angeles and State of California answering the complaint of the plaintiff, says that:

**FIRST DEFENSE.**

1. He admits the truth of the allegations in paragraph one of the complaint.

30

2. Defendant has no knowledge or information sufficient to form a belief concerning the allegations of the complaint contained in paragraph two thereof and puts the plaintiff to her proof.

3. He denies the truth of the allegations in paragraphs three, four, five, six and seven of the complaint.

**SECOND DEFENSE.**

4. Defendant says that the plaintiff was, at the time and place set forth in the complaint, guilty of contributory negligence in that she was

40

*Answer.*

leaning over the guard rail without precaution,  
recklessly and unlawfully.

### THIRD DEFENSE.

5. Defendant says that he had no notice at  
any time or knowledge of the condition of the  
guard rail, landing or stairway, as set forth in  
the complaint. 10

### FOURTH DEFENSE.

6. The defendant further says that the plain-  
tiff did not notify nor inform the defendant of  
the condition of the guard rail, landing or stair-  
way.

GEORGE J. MILLER,  
Attorney for Defendant. 20

30

40

REPLY.

Filed September 10, 1929.

NEW JERSEY SUPREME COURT.

MIDDLESEX COUNTY.

10

ESTELLE SHORTZ,

*Plaintiff,*

*vs.*

JOSEPH SLOBODIEN,

*Defendant.*

*Action  
at Law.*

*Reply.*

20

Plaintiff replying to the answer of the defendant filed herein, says that:

1. She denies each and every allegation contained in the answer.

ALFRED D. ANTONIA,  
Attorney of Plaintiff.

30

40

**POSTEA.**

Filed April 30, 1930.

NEW JERSEY SUPREME COURT.

MIDDLESEX COUNTY.

ESTELLE SHORTZ,

*Plaintiff,**vs.*

JOSEPH SLOBODIEN,

*Defendant.**Postea.*

10

This case was tried before the Hon. John P. Kirkpatrick, Judge, and a jury in the Middlesex County Court House, in the City of New Brunswick, on April 23, 1930.

20

The jury rendered a general verdict against the defendant and in favor of the plaintiff, in the sum of one thousand eight hundred (\$1,800) dollars.

JOHN A. KIRKPATRICK,  
Judge.

30

40

## TESTIMONY.

NEW JERSEY SUPREME COURT.

MIDDLESEX COUNTY CIRCUIT.

April Term, 1930.

10

ESTELLE SHORTZ,

*Plaintiff,**vs.*

JOSEPH SLOBODIEN,

*Defendant.*

20

Transcript of stenographer's notes of evidence in the above-entitled cause, taken before Hon. John P. Kirkpatrick, Judge, and a jury, at the Middlesex County Court House, in the City of New Brunswick, New Jersey, on the twenty-third day of April, A. D. 1930.

## Appearances:

Alfred D. Antonia, Esq., attorney for the plaintiff.

George J. Miller, Esq., attorney for the defendant.

30

(A jury being empaneled and found satisfactory, they were sworn.)

(Mr. Antonia opened the case for the plaintiff.)

(Mr. Miller opened the case for the defendant.)

40

*Estelle Shortz, direct.*

ESTELLE SHORTZ, the plaintiff, being duly sworn according to law, on her oath saith:

*Direct examination by Mr. Antonia.*

Q Mrs. Shortz, you are the plaintiff in this case? A I am. 10

Q And you reside where at the present time?

A At 288 Hobart street in the City of Perth Amboy.

Q Is that the place where you were living when this accident happened? A It is.

Q Now, how long prior to July 26, 1928, the day on which the accident happened, had you been living on the premises at 288 Hobart street?

A I lived there since February 1.

Q February preceding the accident of the same year? A Yes. 20

Q On what floor of the premises did you live?

A On the second floor.

Q And from whom did you rent those premises? A From Mr. Slobodien at 200—203— I don't know.

Q What is it? Speak up, please. A He lives on Smith street, Slobodien shoe store.

Q Is the gentleman in court from whom you rented these premises? A He is. 30

Q Will you point him out to us? A Right there (indicating).

Mr. Antonia: It is agreed, if the Court please, that that is Mr. Jacob Slobodien.

*By Mr. Antonia.*

Q Now, then, how many entrances were there to your premises on the second floor at 288 Hobart street? A There are two entrances, the front entrance and the back entrance. 40

*Estelle Shortz, direct.*

Q Will you tell us with reference to the back entrance what it was you had to go through to get into the apartment? A In order to get in the back apartment you had to go to 288 Hobart street through an alleyway, then turn, then you had to go one flight of stairs, and up on top of  
10 the stairs there is a sort of little platform, and over the roof of this store downstairs and into my house.

Q Now, was there another floor to the premises? A There is. There is a third floor to the premises.

Q Can you tell us how it was that the tenants of the third floor were able to get to their apartments by the way of the back way? A  
20 The same way. They had to go through an alleyway, then turn, then they had to go one flight of stairs, and up on top of the stairs and over the roof of this store downstairs and up another flight of stairs.

Q Who was living on the third floor of these premises at the time the accident happened? A At the time Mr. James Horton was living there.

Q Now, in reference to this landing of the back entrance that you spoke of, do you know  
30 whether or not there was a guard rail protecting that landing? A Yes, there is two rails, and just one rail on the other.

Q In reference to these pictures that I now show you— Mrs. Shortz, I show you a picture—

Mr. Miller: I would like to have entered on the record that these photographs are admitted by the defendant as being taken three or four months ago.

40 Mr. Antonia: That is correct.

*Estelle Shortz, direct.*

(The pictures referred to were received in evidence and marked "Plaintiff's Exhibits 1 and 2," respectively.)

*By Mr. Antonia.*

Q I show you picture marked P. 1 in evidence, showing a flight of stairs with a landing at the top of it. Is that a fair representation of the first flight of stairs that you spoke about as the entrance to the back premises? A It is. 10

Q I show you a picture marked P. 2 in evidence, showing the top of the same flight of stairs in P. 1, showing the landing and the guard rail more particularly. Is that a fair representation of the way the premises were at the time that this accident happened? A It is, all except this piece of wood right here. At that time it did not have that (indicating). 20

Mr. Antonia: Indicating P. 1, the left top of the picture.

*By Mr. Antonia.*

Q You say that this piece of wood was not there? A That piece of wood was not there. It was put after the accident.

Q I show you a piece of wood and ask that it be marked for identification. 30

(The articles referred to were marked "Plaintiff's Exhibit 3 for identification," and "Plaintiff's Exhibit 4 for identification.")

*By Mr. Antonia.*

Q I show you this piece of wood marked "P. 3 for identification," and ask you whether or not 40

*Estelle Shortz, direct.*

that is the railing that you have reference to in your testimony? A Yes, that is the first railing.

Q That is the first railing, which was the guard rail on that landing which you spoke about? A It is.

10 Q It was there at that time? A It was there at that time.

Q Now, on July 26, 1928, you say you were in the premises at 288 Hobart street. Had you been home? A I was in the kitchen.

Q Were you on the landing that day, the landing on the back entrance of the premises? A I have not been there. I had not been out at all during that day.

Q Had you been on the landing that day? A Yes.

20 Q Just previous to the accident? A Yes.

Q What time of the day was that? A That was around three o'clock.

Q You say you were in the kitchen of your apartment? A I was.

30 Q Tell us just how the accident happened on that day? A I was in the kitchen when I wanted to go out and call my boy. I went from the kitchen over the roof of the stair downstairs onto the landing. I went to lean—I leaned on the bannister to call my boy, when the bannister goes in, and I fell all the way down to the bottom of the concrete pavement.

Q And then what happened to you? Do you remember? A I don't remember what happened.

Q What next do you remember after the accident? A The next I remember was Mr. James Horton from upstairs was carrying me from the bottom, the first flight of stairs, into my house.

40 Q Who was it that was carrying you? A Mr. James Horton.

*Estelle Shortz, direct.*

Q Where were you taken. A I was taken into the dining room on the couch, then they sent the nearest doctor, the nearest doctor was Dr. Urbansky. He wrapped a towel very tightly around my arm, and then they sent for the ambulance.

Q And where were you taken? A To the Perth Amboy City Hospital. 10

Q How long were you at the Perth Amboy City Hospital? A Two weeks.

Q And after you left the hospital, Mrs. Shortz, where did you go? A I went back to 288 Hobart street.

Q On July 26, 1928, were you in good health? A I was in perfect health.

Q In reference to the limbs of your body, was there anything wrong with them? A There was not. 20

Q Now, in this accident, what was it that happened to you? Do you recall? A I recall that the bannister goes in and I fell, and then when I—when they took me up to the dining room, the doctor said my arm was broken.

Mr. Miller: What was the last?

(The last answer was read by the stenographic reporter.) 30

*By Mr. Antonia.*

Q I show you this piece of wood marked "P. 4 for identification," and ask you whether that was at the landing at the time? A Yes, that was the second bannister.

Q Will you describe to us just the way these pieces of wood were situated there on the landing? A This wood is on top and this one is underneath it. 40

*Estelle Shortz, direct.*

Q Are there any other rails there at all? A Yes, there is a third rail very low to the platform.

Q Do you know what happened to those rails after the accident? A The only thing I remember was when that first one gave in, I grabbed  
10 for the second one, and that one gave in with me too.

Q You are a married woman, are you, Mrs. Shortz? A I am.

Q For how long previous to the accident had you been married? A Four years.

Q At the time of the accident were you living with your husband? A I was not.

Q And for how long previous to the accident had you not been living with your husband? A  
20 A year and a half.

Q Living separate, were you? A Yes, separate.

Q Now, were you working at the time that this accident happened? A I was working until a month before the accident.

Q Where were you working? A At Wolf and Company.

Q What were you making a week? A At  
30 that time I was making fourteen dollars a week.

Q And what was the character of your work? A I was operating an electric sewing machine.

Q Sewing? A Seamstress.

Q You say you were working up to about a month previous to the accident? A To a month.

Q Can you tell us why you had not worked for a month previous to the accident? A It was very slack at that time in the season so they had laid everybody off, and I was looking for  
40 work every day since I had been home, but then

*Estelle Shortz, direct.*

it was so slack they hardly employed anybody then.

Q After you got home from the hospital what was the condition of your left arm? A The condition of my left arm, I could not use that at all. I had it bandaged up.

Q Who was your doctor? A Dr. Fithian. 10

Q Was he treating you after you got home from the hospital? A Yes, he was.

Q Do you recall for how long it was that the doctor treated you after you got home from the hospital? A I should judge about three or four months.

Q And when was it that you were able to go to work after this accident occurred? A A year after.

Q Was it exactly a year after, do you recall? 20  
A No, not exactly, a little over a year.

Q When was it, do you remember, when you went back to work? A Yes, I went back to work July 1.

Q What year? A 1928—1929.

Q 1929? A 1929.

Q Then that is not quite a year after? A Not quite a year.

Q Were you able to work previous to July 1, 1929? A I was not. I was looking for work, but then they asked me if I could operate very well, once they looked at my arm, why they would not give me work. 30

Q What was the condition of your arm at that time? Was it visible that there was something the matter with it? A At that time I could not use it very well.

Q Will you take off your coat now and show the Court and jury your left arm? A (The witness removed the coat.) 40

*Estelle Shortz, direct.*

Q Will you indicate to the jury, if you can, just how you can bend your wrist, the left wrist of that hand? A I could indicate here. This arm I can bend all the way up like that (indicating); and this arm I can only bend this far (indicating).

10 Q You can't bend your wrist back any further? A I can't bend it back any further.

Q Now, will you indicate, Mrs. Shortz, please, the extent of the manner in which you can bend your elbow joint on the left arm? A My elbow, when I put my elbow down like that (indicating). I can get all the way down on the right arm; this one I can only get as far as that, my left one.

Q Has the doctor tried to get this arm further? A He has.

20 Q Did you receive treatment from anybody else after you got home from the hospital? A Yes.

Q What was it? A I had—I was going to massages.

Q You were having massages? A Yes.

Q Who was doing that, or doing that work? A Miss Mary Resnick on Smith street, Perth Amboy.

30 Q Do you recall what her bill was? A I think her bill is \$96 or \$98.

Q Do you know whether or not you had any X-ray pictures taken of your arm? A Yes, I had quite a few X-rays taken.

Q You had X-ray pictures taken at the hospital? A I had.

Q And you went to a doctor afterwards? A I have went to Dr. Klein on Market street. I have went twice to him.

Mr. Antonia: That is all.

*Estelle Shortz, cross.*

*Cross examination by Mr. Miller.*

Q When were you married, Mrs. Shortz? A I was married in May.

Q May? A Yes, the year 1924.

Q At the time of this accident your boy was six years old? A No, at the time of the accident my boy was only three. 10

Q Three years old? A Three years old.

Q And this gentleman sitting here is your husband? A That is my husband.

Q Now, on February 1 when you moved in the premises were you working at that time? A I was.

Q For the same people? A I was.

Q How many times would you go up and down this stairway a day? A How many times? I don't think I have used it so very often. 20

Q How often did you use it? A About three or four times a day.

Q Didn't you say in answer to interrogatories that you went up and down those stairs at least six times a day? A Six? I don't remember answering that.

Q What? A I don't remember saying six times.

Q When you signed this affidavit and these interrogatories did you know what you were signing? That is your signature? A Yes, that is. 30

Q As a matter of fact, you went up and down the stairs more than six times a day, didn't you? A No, I didn't.

Q You went up at least six times, didn't you? A Yes, I should judge about six.

Q Why did you say three or four times before? 40

*Estelle Shortz, cross.*

Mr. Antonia: I object to that.

*By Mr. Miller.*

Q Now, did you know that the condition of that rail was bad? A I did not.

10 Q Did you ever tell Mr. Slobodien about it?  
A I didn't.

Mr. Antonia: Will you designate which Mr. Slobodien you have in mind?

Mr. Miller: There is only one we have in mind, because the other one is in California.

Mr. Antonia: I understand he has two brothers who assist him in the store in Perth Amboy.

20 Mr. Miller: They are not in this case. They are not mentioned.

The Court: We assume the defendant, Joseph Slobodien.

Mr. Antonia: No, your Honor, I don't think he does. Mr. Slobodien was not in Perth Amboy at the time.

*By Mr. Miller.*

30 Q Your relationships between yourself and your landlord was with Mr. Slobodien, sitting on my left here? A It was.

Q Now, during your tenancy did you ever ask him to make any repairs to your house? A Well, such as the window panes.

Q Did you ask him to fix the window panes? A I did.

Q Did he fix it? A He did.

40 Q Did you ask him to fix anything else? A I did not.

*Estelle Shortz, cross.*

Q I call your attention to your kitchen door. That did not close. Did you ask him to fix— A No, I fix that myself.

Q And he sent a carpenter up there and fixed it? A It was not the kitchen door.

Q Was it another door? A No, at the time he sent the carpenter up it was for the windows. 10

Q Not the door? A Not the door.

Q Did you ever ask him to fix your water faucets? A Yes.

Q And did he do it? A He did.

Q Was there any request that you made that he should repair the apartment that he did not act on it promptly and repair it?

Mr. Antonia: I object to that, if your Honor please. 20

The Court: Well, I permit it. It is close, but I will permit it anyway.

Mr. Miller: Read the question, please.

(The last question was read by the reporter.)

A No.

*By Mr. Miller.*

Q Did you ever ask for paint to paint your kitchen? A I did. 30

Q Did he give it to you? A Yes.

Q Now what time of the day did this accident happen? A Three o'clock.

Q And where was your boy? A Downstairs.

Q Whereabouts? A In the alleyway.

Q On the side of the house or in the rear of the stairway? A On the side.

Q Have you any windows in your kitchen on that side of the house? A I have. 40

*Estelle Shortz, cross.*

Q Why did you have to go to the landing to call him? A The window leads to a small porch on the side of the house.

Q That small porch was on the same side where the boy was, isn't that true? A Yes.

10 Q Why did you have to walk to the rear of the landing to call the boy when he was on the side of the house? A Well, he was not exactly on the side of the house.

Q Didn't you say he was? A Well, where—there is an alleyway, and there is a rear entrance to that too. There is about pretty near the same length.

Q So you want us to believe now, when you said he was on the side of the house he was not there? Do you want to change that testimony? A He was not on the side of the house in the way you put it. The way you put it, he is exactly on the side. He was towards the end of the house, the rear end of the house.

Q So you want us to believe now that when you said he was on the side of the house he was on the rear of the house? A I am telling you he was on the side of the house. He was on the rear end of the house.

30 Q Now, on my previous question you said he was on the side, didn't you?

Mr. Antonia: I object to that. I think the witness has given a sufficient explanation of it.

The Court: Objection sustained.

*By Mr. Miller.*

40 Q Mrs. Shortz, the porch—was there a porch leading off the rear door of that apartment? A

*Estelle Shortz, cross.*

The rear door? There is a landing over the roof onto the platform.

Q Was there a covered porch that leads off of your rear door? A There is.

Q How big is that porch? A I should judge about three feet.

Q Does it extend around to the side of the house? A It does. 10

Q How many feet does it extend on the side? A About two.

Q And couldn't you see your boy in the yard from your porch? A I could.

Q And how many feet is it from the end of this porch to the nearest point of this landing? A About six feet.

Q And you walked over that six feet and beyond the landing? A I did. 20

Q To call the boy? A I did.

Q Now, when you got to the landing you leaned on this rail, is that right? A I did.

Q Now, can you tell us what was the top or the bottom of the rail? A The top was this.

Q This was the top? A That was the top.

Q And this board was underneath it? A That is underneath.

Q Is that the top? Is that the way it was? A I didn't take notice how that was. 30

Q Or was it this way? A All I know is that that is the second bannister.

Q The second railing underneath it? A Yes the second railing.

Q Where has this piece of wood been since the accident? A Since the accident it has been in the house.

Q Who took it in the house? A That I don't remember, who took it in. 40

*Estelle Shortz, cross.*

Q When was the first time you saw it after the accident? A The first time? The first time was the day I had brought it up to Mr. Antonia.

Q When was that? A About three weeks ago.

10 Q How long was it in Mr. Antonia's office?  
A Over three—from three weeks on until now.

Q Until now. Didn't you just say that it was in your house? A Yes, it was in my house until three weeks ago.

Q Didn't you say that three weeks ago you brought it up to Mr. Antonia's office? A I did not.

Q Now, Mrs. Shortz, were you eating watermelon that day? A I was not.

20 Q Anyone around there eating watermelon that day that you saw? A Nobody was eating watermelon.

Q When was the last time you walked up and down the stairs before the accident? A I think that very same day,

Q How many hours? A In the morning.

Q Were there any watermelon pits or watermelon rind in the alleyway at that time? A I don't remember seeing any.

30 Q Was the railing in good condition at that time you went down? A It is in the same condition that you see it now.

Q Did you know it was? A I did not.

Q Did you ever lean on it before? A No, I did not.

Q Now, as a matter of fact, you were sitting on this railing at the time? A I was not sitting onto it.

40 Q When you were leaning on it and it gave way what direction did the wood go? A Forward.

*Estelle Shortz, cross.*

Q How? A Out.

Q And are those nails on the side of that piece of board in the same condition they were all the time, to your knowledge?

Mr. Antonia: I object to that, if your Honor please. How can she testify as to the condition of the nails when she testified she could not testify as to the condition of the wood before the accident? 10

*By Mr. Miller.*

Q Since the accident?

Mr. Antonia: No objection to that.

*By Mr. Miller.*

20

Q Are those nails the same way? Have they been moved since the accident? A Not that I remember.

Q This seems to be the inside of the board and this, the outside? A That I don't know.

Q Where did this piece of wood come from? A Right from there.

Q From here, and is this the condition of this piece of board since the accident happened? 30

A It is.

Q And you say that you leaned against it and it went out this way (indicating)? A No, it didn't go out that way.

Q How did it go out? A As I leaned against it, it fell down.

Q Could you see your son without going to this rail at that time from the roof? A I could not. 40

*Estelle Shortz, cross.*

Q Since the accident, Mrs. Shortz, you have not been working from August 10 to July 1 this year?

Mr. Antonia: I object to that.

10 *By Mr. Miller.*

Q 1929. I withdraw the question? I will change it to July 1, 1929. A 1929?

Q Who were you working for? A For Wolf and Company.

Q And the premises you occupied are the same ones you occupied at the time of the accident? A Yes.

Q And you didn't move from the premises after it? A I did not.

20 Q Was there anyone living with you at the time you rented this apartment? A They were.

Q Who was?

Mr. Antonia: Just a moment, I object to that, if your Honor please. What has that got to do with this case?

30 Mr. Miller: If the Court please, it would show income, mitigation of the damages, if she collected rent from a boarder or tenant and supported herself.

The Court: She is still entitled to her earnings, if she was prevented from working by injury due to the fault of the defendant.

Mr. Miller: Also to test the credibility of the witness.

The Court: She says somebody was living there.

Mr. Miller: I take exception to that ruling.

40

*George W. Fithian, direct.*

*By Mr. Miller.*

Q Mrs. Shortz, who lived with you when this accident happened? A I had a roomer.

Q And he is still living with you? A He is.

Q And during the period of time you were not working you maintained yourself with the proceeds of the room rent he paid? 10

Mr. Antonia: Just a minute. I object to that.

The Court: Why the just a minute, Mr. Antonia?

Mr. Antonia: I didn't want the witness to answer the question.

The Court: Just make your objections to the Court. I will control the witness. Objection sustained. 20

Mr. Miller: Exception. That is all, Mrs. Shortz.

Mr. Antonia: That is all.

Mr. Antonia: If the Court please, I would like to call the doctor out of turn. He has been waiting here and is anxious to get away.

The Court: All right.

30

GEORGE W. FITHIAN, a witness produced on behalf of the plaintiff, being duly sworn according to law, on his oath, saith:

*Direct examination by Mr. Antonia.*

Q Doctor, you are a practicing physician in the City of Perth Amboy? 40

*George W. Fithian, direct.*

Mr. Miller: We will admit the doctor's qualifications.

*By Mr. Antonia.*

10 Q In connection with your work as a doctor, did you have occasion to treat Mrs. Estelle Shortz, the plaintiff in this case? A Yes, sir; I did.

Q Tell us, doctor, when it was you first saw her? A July 26, 1928, at the hospital, Perth Amboy City Hospital.

20 Q What did you find her suffering from at that time? A She had a dislocated elbow, and a dislocated wrist, the left elbow had what we call a compound dislocation. In other words, there was a hole from the outside that went into the joint and wound.

Q It was what? A A compound dislocation.

Q Yes, but you said something went from the outside?

The Court: The hole.

The Witness: The hole, the wound, the bone stuck out through the flesh.

*By Mr. Antonia.*

30 Q Was there anything else that she was suffering from at that time? A Yes, sir; compound dislocation of the elbow became infected. In other words, it resulted in infected joints. It had pus in it, which contributed to the poor condition of the elbow at this time.

40 Q Doctor, what treatment was it necessary for you to give this woman in an attempt to cure her injuries? A It was necessary to reduce both dislocations and treat the infection that took place in the elbow.

*George W. Fithian, direct.*

Q Doctor, can you describe the treatment that you gave? A First was, the dislocation was reduced, and then proper drainage of the elbow joint was established, and antiseptic solutions were used. We, of course—

Q When you say the dislocation was reduced, what do you mean by that, doctor? A Put back in place under an anaesthetic. 10

Q You had to give the patient an anaesthetic? A I had to give the patient an anaesthetic.

Q For what reason did you do that, doctor? A To reduce the dislocation which would hurt too much; almost impossible to reduce it without—

Q Doctor, what have you to say as to whether or not the injuries which this woman received and for which you treated her were painful? A Oh, yes; very painful. She had a lot of pain with her infected elbow. 20

Q For how long a period, doctor, would you say that pain existed and continued? A It existed practically all the time she was in the hospital and to a certain extent afterwards.

Q Doctor, is she entirely cured of her injuries now? A She is as well as she ever will be.

Q What I mean by that, are there any permanent conditions existing as the result of the injuries she sustained? A She has about a third loss of function of the elbow joint and also a third of the wrist. It is impossible for her to lift her wrist that way at all. She has this motion and some of the side motion. 30

Q Doctor, excuse me. The motions that you are indicating now are not being put down on the record. When you say this motion, you mean side or lateral motion of the wrist? A 40

*George W. Fithian, direct.*

Yes, you see there are three motions to the wrist, one what we call extension and the other one is inflexion, and the other is the side motion.

Q She has lost all of this motion, meaning the upward motion? A Yes, and there is some slight disability of the side motion and slight disability of the extension. She has lost at least a third of her motion of her wrist. I would say conservative, third.

Q Has she lost anything in the elbow? A She has lost one-third. The elbow has a radius of 135 degrees. It is a hinged joint. She has lost 45, that is one-third of that radius of that elbow joint.

Q Do you feel that condition is permanent, doctor? A It is absolutely as well as it ever will be, in my judgment. She has also lost some of the rotary motion of the arm.

Q Doctor, as a result of the permanent injuries which you say this woman has both to her wrist and to her elbow joint, what is the percentage of disability of the left arm, entire disability of the arm? Can you estimate that? A Well, we would say, take it in the three joints, we will say there is three hundred per cent. and you take a third of each three hundred—no, a third of two—that is, that would be seventy-five about, wouldn't it?

*By the Court.*

Q A third of two hundred is sixty-six and two-thirds. A Well, not sixty-six and two-thirds, sixty-six and three-one-hundredths is as near as I can give it to you in figures.

*George W. Fithian, cross.*

*By Mr. Antonia.*

Q Well, roughly, doctor, can you give us an idea? A Yes, sir. She has pretty good power of her fingers. I would say she has lost about a quarter of an arm.

Q And that is a permanent condition, is it, doctor? A That is a permanent condition. That is a permanent condition in my judgment. I don't think she will ever be improved any. 10

Q Doctor, over what period of time, for how long a period of time would you say it was reasonable for this woman to have been incapacitated and unable to go to work and do her work as a seamstress, an operator of a machine? A She was unable for at least a year to work.

Q What is your bill, doctor? A \$300.

Q Is that a reasonable charge for your services? A I considered it such, yes. 20

Mr. Antonia: That is all.

*Cross examination by Mr. Miller.*

Q Doctor, did you ever send Mrs. Shortz a bill? A I believe I did. I usually send my bills.

Q When do your records show you did that? A It has been very recent if I have. 30

Q How long ago? A Within the last week or so.

Q From the time of this accident until that time, you never asked her to pay? A No, I never did.

Q I understand she was a ward case in a hospital? A Yes, sir.

Q And you were the attending physician at the hospital at the time? A Yes, I was. 40

*George W. Fithian, re-direct.*

Q Does the payment of your bill depend upon the outcome of this litigation?

Mr. Antonia: Just a minute. I object to that, if your Honor please.

10 If your Honor please, it is not that I desire to use the word, "just a minute," but the character of the question brings it on.

The Court: I will permit it.

Mr. Miller: Read the question, please.

(The reporter read the last question.)

A Not that I know of, it doesn't, no.

Mr. Miller: That is all, doctor.

20 *By Mr. Antonia.*

Q Doctor, do you intend to hold this woman responsible for your bill in this case whether she wins or loses the case?

Mr. Miller: I object to that question.

The Court: Objection sustained.

Mr. Antonia: I withdraw it.

Mr. Miller: It is too late.

30 Mr. Antonia: We will leave that for the Court. Have you any objection to this hospital bill?

Mr. Miller: Yes, I object to it. I understand there is no charge on a ward case.

*By Mr. Antonia.*

Q Doctor, were you connected with the staff of the Perth Amboy City Hospital of Perth Amboy, New Jersey? A Yes, sir.

40

*George W. Fithian, re-direct.*

Q As such are you familiar with whether or not charges are made to ward patients who are there?

Mr. Miller: I object to that, if the Court please. That is not the proper way to prove that at all. The rules or regulations governing the hospital, by an attending physician. An attending physician cannot answer that question. 10

The Court: He is just the man who can.

*By Mr. Antonia.*

Q Can you answer the question, doctor? A Well—let the stenographer read the question.

Q (The stenographic reporter read as follows: "Question: As such are you familiar with whether or not charges are made to ward patients who are there?") A Yes, I am familiar with the rules. 20

Q Is a charge made? A Sure, there must be in a case of this kind.

Q And if a charge is made, that is in accordance with the rules of the institution? A Absolutely.

Mr. Miller: I object to this, if the Court please. 30

Mr. Antonia: That is all, doctor.

Mr. Miller: I move the answer be stricken out.

Mr. Antonia: That is all.

Mr. Miller: Just a moment, doctor.

*By Mr. Miller.*

Q What rule of the hospital is that, do you know? A Do you mean the number? 40

*Mary Resnick, direct.*

Q The number if it has got a number? A I don't know, but I know it is permissible.

Q It is not the general run of things on ward cases, is it? A I don't get your question.

10 Q Generally, the charge is made? A Generally there is no charge made for ward patients in the city hospital in Perth Amboy, and in a case of this kind it is permissible to send a bill.

The Court: The answer may be stricken out.

*By the Court.*

Q Please answer the question, doctor. A Ward cases—some ward cases are free.

20 Q Not all ward cases are free? A Not all ward cases are free.

Q As a general proposition? A Yes, outside of the compensation cases.

Mr. Antonia: Any further objection to the bill?

Mr. Miller: No.

30

MARY RESNICK, a witness produced on behalf of the plaintiff, being duly sworn according to law, on her oath saith:

*Direct examination by Mr. Antonia.*

Q Mrs. Resnick, were you a practicing masseuse in the City of Perth Amboy? A Yes, sir.

40 Q And you have been for how many years? A Three.

*James Horton, direct.*

Q And as a masseuse, what is the nature of that work? A Well, to give baking massage in cases some exercise, where there is no motion, to produce motion.

Q Did you have occasion to treat Mrs. Shortz, the plaintiff in this case?

10

Mr. Miller: I object to any further examination by him of this witness until she is properly qualified to practice as such and also whether she is qualified to administer treatment.

The Court: What is the purpose of calling this witness?

Mr. Antonia: To show she treated this plaintiff.

(Argument off the record.)

20

The Court: You don't need this witness to prove the bill if you have the bill.

Mr. Antonia: May I have an exception to your ruling?

The Court: Yes.

Mr. Antonia: That is all.

30

JAMES HORTON, a witness produced on behalf of the plaintiff, being duly sworn according to law, on his oath saith:

*Direct examination by Mr. Antonia.*

Q Where do you live, Mr. Horton? A 137 Washington street.

Q Perth Amboy, New Jersey? A Perth Amboy.

40

*James Horton, direct.*

Q On July 26, 1928, where were you living?

A 288 Hobart street.

Q Perth Amboy, too? A Perth Amboy.

Q At that time and on that day what part of the premises at 288 Hobart street were you living at? A The top floor.

10 Q Now, how many entrances were there to the top floor or the third floor? A The third floor.

Q (Continuing.) —of 288 Hobart street? A The top floor.

Q I say, how many entrances were there to the premises that you occupied? A Front and back.

20 Q In reference to the back entrance, will you kindly describe to the Court and jury how it was that you got to and from your premises by way of the back entrance?

The Court: Is there any dispute that this was the regular way of getting to and from the premises by way of the back entrance?

Mr. Antonia: It is denied in the pleadings, if your Honor please.

The Court: They admit it now.

30 Mr. Antonia: I would like to have you admit, Mr. Miller, if you will, that the landing and guardrail in this case were part of the common passageway in this case.

The Court: There is no dispute, I understand, on the part of the defendant that this was the way provided by the landlord to get in and out of this property, whether it was a common passageway or not makes no difference. There is no use of putting those words in. The jury can determine that.

*James Horton, direct.*

Mr. Antonia: Is it admitted also that the guard rail and this other piece of wood were part of that passageway, whether they be common or not?

The Court: Well, they are a part of the entire arrangement there. They were a part of the appliances supplied by the landlord. That is all you want. 10

Mr. Antonia: All right.

*By Mr. Antonia.*

Q Mr. Horton, now, on the day of July 26, 1928, where were you? I call your attention particularly to about three o'clock in the afternoon of that day. A With regards to Mrs. Shortz falling off the stoop, I was in the kitchen washing my hands and wiping them with the towel at the time. 20

Q In the kitchen of your premises? A Yes, sir.

Q You saw the accident that befell Mrs. Shortz? A I saw her fall off the porch.

Q Will you tell— A I stood washing my hands. I had been sick. I was washing my hands, and I was wiping them with a towel, and I heard Mrs. Shortz calling somebody. It seemed to be a child. I heard her scream and over she went. 30

Q Now, just before she went, what did you see her do, if anything? A She had her hands on the railing, that is all.

Mr. Miller: I object. It is not established, if the Court please, that this man saw this woman. His answer was, "I heard her scream."

The Court: He is finding out. 40

*James Horton, direct.*

*By Mr. Antonia.*

Q Did you see Mrs. Shortz fall from the landing there that day? A Yes, I saw her fall off.

Q Did you see her just before she fell? A Yes.

10 Q Tell us how it was that she fell? Describe it to us. A I stood looking out the window, and I could see where she was walking out from the roof. She walked out and put her hand as though partly leaning. I didn't pay particular attention, but I know her hands was on the railing. I heard her call somebody. She screamed and fell.

*By the Court.*

20 Q Did you see her fall over? A Yes.

Q What did she do? Go over head first? A She went over head first, and then turned, kind of.

Q Did the railing go with her? A The railing went over.

Q Did the post fall down or the railing come loose? A Well, I heard something crack, and then I figured the railing was broken.

30 Q You could tell, couldn't you, whether or not the post was pushed over or whether the rail came loose from the post? A Just the railing came loose from the post. The post was good.

*By Mr. Antonia.*

40 Q Mr. Horton, I show you Exhibit P. 3 for identification and ask you whether or not that is the railing you have reference to when you say Mrs. Shortz leaned upon a railing? A That is the railing that I picked up, and I was going

*James Horton, cross.*

to nail that back there, and I saw it was rotten, so I brought it upstairs and stood it in my kitchen.

Q I show you Exhibit P. 4 and ask you whether or not you saw that before? A They were both upstairs. I picked them both up.

Q After you picked them both up, where was it you took them? A I was going to nail them on. I saw they was no good, so I took them up and stood them in the kitchen. 10

Q In your premises? A Yes, on the top floor.

Q After you stood them in your kitchen, did you give them to anybody else? A Why, I told the woman that lives downstairs to come up and get them.

Q That is the way you gave them to her? A I don't know whether I gave them to her or I gave them to her. I know she came up after them. Whether my wife handed them to her— 20

Mr. Antonia: That is all.

*Cross examination by Mr. Miller.*

Q Mr. Horton, how long were you a tenant in that building? A About four months. I think it was about four months. I am not sure. 30

Q Four months at the time this accident happened? A Oh, no. I only lived there a short time when that accident happened.

Q You lived there how long? A I imagine about four months. I could not exactly say.

Q At the time of the accident? A Oh, at the time of the accident only a short time. I think it was close to three months, because I was sick in bed at the time with pneumonia. 40

*James Horton, cross.*

Q You lived there in the flat two months, you say?

Mr. Antonia: Three months.

10 A I lived there about three and a half or four months. I don't remember just exactly how long I lived there. I didn't live there very long.

*By Mr. Miller.*

Q You lived there how long after the accident happened? A Oh, I could not tell now just when. I didn't figure that out. I didn't look it up, for how long.

20 Q When did you move out? A I could not tell you that. I know I lived there about four months, and we moved out. That is all I know.

Q Now, Mr. Horton, when you moved out, how much rent did you owe?

Mr. Antonia: Just a minute. I object to that.

Mr. Miller: If the Court please, I can show bias and prejudice by the question. I desire to show the Court that this man is still a tenant.

30 The Court: I don't hardly believe that that is pertinent, Mr. Miller.

Mr. Miller: And also to further test his credibility.

The Court: Supposing he did owe money. Supposing he did owe two months' rent or three months' or four months' or five months'.

Mr. Miller: I am going to show that he is not telling the truth; that he paid me

*James Horton, cross.*

some rent, and that he lived there for so long afterwards, and that when he testified he is living there for four months, he is not telling the truth.

The Court: He says he is not certain.

Mr. Miller: He says three or four months.

10

The Court: I don't see how that has any bearing on the case.

*By the Court.*

Q How long after this accident did you live in this place? Now, give us as close as you can the time? A About six weeks, I imagine. I never kept no track of it. I am not sure.

*By Mr. Miller.*

20

Q Could it be more than six weeks, Mr. Horton? A After the accident?

Q Yes. A I think it was.

Q Now, I am showing you a letter that you wrote on November 28th. A That I wrote?

Q Yes, or that Mrs. Horton wrote, showing that you were still a tenant in there, and you paid rent. Does that refresh your memory—that you were still a tenant in there, as late as November you were a tenant?

30

Mr. Antonia: I object to that.

The Court: Objection sustained.

Mr. Miller: I take exception, if the Court please.

*By Mr. Miller.*

Q Now, were you a tenant at the time that letter was written?

40

*James Horton, cross.*

Mr. Antonia: I object to that.

The Court: I really don't see that this has any bearing on the case, Mr. Miller. Objection sustained.

Mr. Miller: Just to test his credibility.

10 *By Mr. Miller.*

Q Mr. Horton, you say at the time this happened you were at the sink washing yourself?

A I was wiping my hands after washing them.

Q How far away from your sink were you?

A How far away? Why, it was probably a foot.

Q A foot away? Now I want you to draw a diagram of the position of the window compared to the sink. What part of the room was the sink in? A The kitchen.

Q What part of the kitchen was the sink in? A In the corner towards the side, yes, towards the hotel.

Q How wide about is that room? A How wide about is that room? It is about fourteen feet, I imagine.

Q How far is it from the sink to the window?

A To the window about a foot.

Q Now, your window is in the middle of the back of the house, isn't it? A No, sir.

Q Will you please draw a diagram, showing the position of your kitchen as related to that window and as related to the entrance door to your apartment.

Mr. Antonia: I object to that, if your Honor pleases. I believe that this man is an automobile mechanic, and he is not here to draw diagrams.

40 The Court: Oh, objection overruled.

*James Horton, cross.*

A (The witness drew.)

*By Mr. Miller.*

Q Have you completed the diagram, Mr. Horton? A Yes.

Q Now, then, how far is it from your door to your window? A From the door? I should imagine about six feet. I never measured it. 10

Q And the door is—this photograph here shows the door entrance, doesn't it? Is that right? This is the door of the apartment that you occupied? A Yes, upstairs that is it, up here (indicating).

Q Indicating the upper right-hand corner of the photograph, P. 2. Now, Mr. Horton, your window is six feet to the left of the door? A Why, that is a frame door. The door is away over here in the corner that goes in the kitchen. 20

Q How many feet from this opening is it to that door? A Three feet.

Q And the frame door going in the kitchen is immediately behind this opening? A That is correct.

Q And the window is how many feet over to the left from the door? A From the inside door or this door? 30

Q From the inside door. A About six feet.

Q And the window is how wide? A About a yard wide. I never measured it.

Q And the distance from the window to the sink then is about five feet? A From the window to the sink?

Q Yes. A No, it is about a foot.

Q Didn't you testify that the kitchen was fourteen feet wide? A Surely. 40

*James Horton, cross.*

The Court: The sink has some width to it, Mr. Miller.

*By Mr. Miller.*

10 Q How wide is the sink? A I never measured it. I don't know how wide the sink is. Probably a foot, sixteen inches, something like that.

Q From the left side of the window, Mr. Horton, to the edge of the sink is about how many feet? A The left side? What do you mean, this corner or the other corner?

Q I don't know what you mean.

*By the Court.*

20 Q From the point of the window nearest to the sink.

*By Mr. Miller.*

Q To the nearest side of the sink. A To the nearest side of the sink is towards the hotel.

30 Q Yes. Is how many feet? A From the edge of it, well, it stands right near that. I never measured it, but probably a foot, sixteen inches. The sink is in the corner and the window is right near.

Q You are certain about that? A Unless it has been moved.

Q At the time this accident happened you were sick? A I had been sick. I had just got up about three or four days from having pneumonia. I was in bed for about a month.

40 Q How far down did you see Mrs. Shortz fall? A How far down? Well, she disappeared when she was falling.

*James Horton, cross.*

Q What caused you to look out the window?

A I was standing looking out the window wiping my hands.

Q What were you looking at? Where? A Down to the people in back.

Q What caused you to do that? A It was a nice day. 10

Q What was she doing? A I don't know what she was doing. She walked out there. She put her hands on the rail and called somebody; then she fell, and screamed.

Q Did you see all of that from the position you were in? A Right where I was standing? Yes.

Q How many boys have you got in your family? A I got three boys.

Q How old were they at the time of the accident? A That is very near two years, isn't it? The oldest one was thirteen. The other fellow is eleven going on twelve, and the other lad is seven. 20

Q Did they run up and down the stairs? A They always used them stairs.

Q Did you know that this rail was in bad condition? A I did not.

Q Did you ever ask your landlord for any repairs? A No, sir, I did not. 30

Q Did you see him around there very often? A I never saw him but once.

Q When was that? A Well, I couldn't tell you when it was. I know I came in the alley, and he was down there cleaning up or something. I don't know. He was talking to a colored fellow in the alley and I passed him in the alley and came up the back stairs.

Q Were the arrangements about your flat with Slobodien conducted by you? A They 40

*James Horton, cross.*

were conducted by my wife. I was with my wife. She went in and got the key, and we went over and looked at it.

Q Who paid the rent? A She paid the rent.

Q And she had all the arrangements— A Only what I paid you.

10 Q You didn't pay me all, did you? A I gave you \$75, and you told me to move out.

Q That \$75 did not pay all your rent? A I don't know.

Q Now, you know whether it did or not? A I don't know.

Q You still owe some rent there, don't you?

The Court: Objection sustained.

20 A I couldn't tell you. I have never received no bill for it.

Mr. Miller: Exception.

*By Mr. Miller.*

Q Now, how long was Mrs. Shortz standing on that platform before she fell? A Second or two.

30 Q Do you know anything about the watermelon pits and rind that were in the alleyway on that day?

Mr. Antonia: I object. There is no testimony that there was watermelon pits and rind there that day.

Mr. Miller: I withdraw the question.

*By Mr. Miller.*

40 Q Did you see any watermelon pits or rind when you went down that day? A There was

*James Horton, cross.*

seed around the steps and down the alleyway watermelon rind.

Q Did you see who was eating the watermelon? A I didn't see who was eating the watermelon? I know my boys had a piece.

Q Who gave it to them? A I couldn't tell you that. 10

Q Did Mrs. Shortz give it to them? A I couldn't swear to that.

Q How do you know that your boys had a piece? A I seen them with it.

Q You didn't give it to them? A No.

Q And you didn't have watermelon in your apartment that day? A I couldn't tell you that. There might have been.

Q You didn't get any? A I didn't have any, no. 20

Q How long did she have her hand on the rail before she fell? A It only looked to me to be a second. That is a distance down there. You have got to look down. You could just about see about two feet of the roof where you walk out to the railing.

Q How long after you heard her call, did she fall? A She fell—I heard her call. She was calling somebody—I don't know—I imagine a child. 30

Q How many times did you hear that call? A I think I heard it twice. She called more than once.

Q And where was she when she called? A Right standing by the rail.

Q She called twice? A She called more than once.

Q And she was there only a second, you say? A Just a second or so. 40

*James Horton, cross.*

Q Did you ever call your own children that way? A Yes.

Mr. Antonia: I object.

The Court: Objection sustained.

10 *By Mr. Miller.*

Q Did you ever go on this landing and call your children? A Yes, sir.

Mr. Antonia: I object.

The Court: Objection sustained.

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

20 *By Mr. Miller.*

Q How many times did you use this landing prior to the accident?

Mr. Antonia: I object.

A When I—

Mr. Antonia: Just a minute, Mr. Horton, please.

30 The Court: I suppose he can answer that question.

Mr. Antonia: May I have an exception?

A How many times did I use the back stairs?

*By Mr. Miller.*

Q A day. A Before I was taken sick I went up and down two or three times a day. I always used the back way to go in and out.

40

*James Horton, re-direct.*

Q Did you go up and down the day of the accident? A No, on that—a day after Mrs. Shortz fell I went down the stairs. No, I was not down before because I was only out of bed a few days.

Mr. Miller: That is all. 10

*Re-direct examination by Mr. Antonia.*

Q One further question, Mr. Horton. Can you give us the approximate distance from the landing to the yard below? A I imagine about twenty feet; something like that.

Q And that is the landing you have been talking about in this case? A That Mrs. Shortz fell from.

20

*By Mr. Miller.*

Q It is twenty feet? A Somewheres around that.

Mr. Antonia: Just a minute, Mr. Miller.

Mr. Miller: I beg your pardon.

A Maybe eighteen. Eighteen or twenty feet, something like that. I never measured it. I am only giving a rough guess. 30

*By Mr. Antonia.*

Q What is the surface of the yard composed of? A Downstairs in the alley the alley is about four foot wide.

Q What is the surface composed of? A Brick, I believe.

The Court: What has that got to do— 40

*James Horton, re-cross.*

Mr. Antonia: To show this woman fell onto the concrete pavement.

The Court: It doesn't make any difference. She got the injury she testified to here. She might have gotten them if she fell on soft sand.

10

Mr. Antonia: That is all.

*Re-cross examination by Mr. Miller.*

Q How high is each step of that stairway? A Each step?

Q Yes. A They generally run about eight inches.

Q Count the number of steps in this photograph to the top of that landing. A There are sixteen steps there.

20

Q Sixteen steps at eight inches makes how many feet?

Mr. Antonia: There is no dispute that the steps are eight inches high.

Mr. Miller: If the Court please—

The Court: The question is allowed.

A What did you say?

30

*By Mr. Miller.*

Q How many feet do you now say the distance is from the landing to the bottom? A I don't say no exact feet, because I never measured it. You asked me to guess. I said twenty or eighteen feet.

Q Didn't you answer Mr. Antonia eighteen or twenty feet? A Yes.

Q What is your estimate now? A I say about the same thing.

40

*James Horton, re-cross.*

Q You say each step is about eight inches?

A I don't know. They generally run about—

Q There is sixteen of them. That is 144 inches, isn't it? A Something like that.

Q That is twelve feet? A It looked to me to be about eighteen or twenty feet.

Q So you are mistaken when you say that? 10

Mr. Antonia: I object to that.

The Court: I don't see what difference it makes whether she fell eighteen or twenty feet or twelve feet. The injuries which she received are just the same. She might have fallen a foot and sustained the same injury, and she would be entitled to the same compensation, if any, that she would get if she fell twenty feet. 20

Mr. Miller: I know, but this witness is stretching twelve into eighteen.

The Court: I don't see it makes any difference.

Mr. Miller: In an effort to attack his credibility?

Mr. Antonia: I offer the exhibits marked P. 3 and P. 4 for identification, in evidence.

Mr. Miller: Before they are admitted, I would like to ask Mr. Horton a few questions in reference to the location of the piece of wood. 30

*By Mr. Miller.*

Q Mr. Horton, weren't these pieces of wood removed from the premises by Mr. Antonia immediately after the accident? A No, they were in my house until this woman came home from the hospital. 40

*Michael Trygar, direct.*

Q Who took them from your house? A I was not home at the time. My wife gave them to somebody after the lady came home from the hospital.

Q You testified a man came and took them.  
A I don't think I did. Somebody took them.

10

The Court: He said somebody came from downstairs and got them.

Mr. Antonia: I offer the exhibits.

The Court: They may be admitted.

(Plaintiff's Exhibits P. 3 and P. 4 for identification were received in evidence and marked "Plaintiff's Exhibits P. 3 and P. 4," respectively.)

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MICHAEL TRYGAR, a witness produced on behalf of the plaintiff, being duly sworn according to law, on his oath saith:

*Direct examination by Mr. Antonia.*

Q Mr. Trygar, you are a resident of Perth Amboy? A That is right.

Q And you have been for how many years?

30 A Thirty-eight years.

Q What business are you in? A Lumber business.

Q For how many years have you been in the lumber business? A Twenty-two.

Q And what is your experience then in that lumber business? In what capacity were you connected with it? A That is hard to answer. What do you mean?

40 Q Are you in the lumber business now? A Sure.

*Michael Trygar, direct.*

Q Do you sell lumber? A Yes, I sell lumber, yes.

Q How do you sell it, Mr. Trygar? A Well, I sell it retail and wholesale.

Q And how many years have you been in the lumber business? A Twenty-two years.

Q Have you ever had any experience with the manufacture of lumber? A Yes.

10

The Court: What is the purpose of this, Mr. Antonia?

Mr. Antonia: I am calling this witness as an expert to testify as to the condition of the lumber.

The Court: You mean those pieces there?

Mr. Antonia: Yes.

20

(Argument off the record.)

The Court: I think the defendant will admit that the condition of the wood would indicate that it had been, at least so far as one thing is concerned, rotted for a long time. Is that right, the Exhibit P. 3?

Mr. Miller: If the Court please, I am sorry but I don't think I can concede that point, because we don't know whether it was that way or not.

30

The Court: Well, the condition of the wood itself—do you want the witness to testify?

Mr. Miller: No, no. I will object to his testimony and qualifications.

The Court: Go ahead.

40

*Michael Trygar, direct.*

*By Mr. Antonia.*

Q Mr. Trygar, assuming that on the twenty-sixth day of July, 1928, this piece of wood which I show you—

10 The Court: Don't ask him anything about assuming on July 26, 1928. Just show him the piece of wood and call his attention to the condition on the two ends and ask him if that is of long standing or short standing.

Mr. Antonia: If the Court please, then I will ask the stenographer to read your question.

*By the Court.*

20 Q Mr. Trygar, directing your attention to the condition of Exhibit P. 3, and calling your attention particularly to the condition of the two ends, can you tell anything about the length of time which that condition has been present in the wood?

30 Mr. Miller: I would like to note my objection on the record to that question, if the Court please, that this witness is incompetent to answer such a question and that the question is immaterial.

The Court: All right.

A Why, Judge, your Honor, it is pretty hard to answer how long that has rotted. No man living can tell how long it has been rotting. You can take any piece of wood with a couple of coats of paint on the outside and it will hold together because of the paint. It can be rotten on the inside and still the coat of paint will hold

40

*Michael Trygar, direct.*

it together. This piece here, the looks of it is rotten.

*By the Court.*

Q Can you say anything about the length of time that that condition has been present? A The length of time it is hard— 10

Mr. Miller: The same objection may be noted.

The Court: Yes, I understand.

A That is hard to answer. There ain't anyone that can answer that question.

The Court: Anything further? 20

*By Mr. Antonia.*

Q Mr. Trygar, in your opinion as a lumber expert, can you answer the question as to how long, in your opinion, that condition of rottenness has existed in that wood?

Mr. Miller: I object to that question for the same reasons stated before.

The Court: I can't see it is any different from the question I asked him, that the witness said he could not answer. 30

Mr. Miller: I take an exception.

Mr. Antonia: Judge, I would not have produced him if I thought he could not answer it.

The Court: He has twice said he could not answer it. I will let him answer it the third time. If he says no this time you will have to be satisfied with it. 40

*Michael Trygar, cross.*

*By the Court.*

Q Can you answer Mr. Antonia's question?  
 A No. You see, a piece of wood—there is no one  
 can answer just how long a piece of wood—as  
 I say, a piece of wood can be put down there and  
 10 be getting rotten from one to ten years before  
 you notice, but we know this piece of wood here,  
 we can't tell, might be one year or over. It  
 might be rotten in one year or ten years.

Q In other words, you can't tell anything  
 about it there? A No.

The Court: That is three strikes and you  
 are out.

Mr. Antonia: That is all.

20

*By Mr. Miller.*

Q Mr. Trygar, when you have a lumber that  
 is set on a rail—

Mr. Miller: Mr. Golenbock will continue  
 the cross examination from now on.

30

Mr. Antonia: I object to it because Mr.  
 Miller has already cross examined and only  
 one counsel can cross examine.

The Court: Objection overruled.

Mr. Antonia: I pray an exception.

*By Mr. Golenbock.*

40

Q Mr. Trygar, assuming that you took this  
 piece and visualizing that it is in the frame of  
 the posts, there is no way of telling what the  
 inside of it is from the outside appearance, is  
 there? A No.

*William E. Ramsay, direct.*

Mr. Golenbock: That is all.

The Court: We will take a recess until 2:00 o'clock.

(A recess was taken until 2:00 P. M.)

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AFTERNOON SESSION.

Mr. Golenbock: May I call Dr. Ramsey, if your Honor please, reserving the right for a motion for a non-suit?

The Court: Yes.

WILLIAM E. RAMSAY, a witness produced on behalf of the defendant, being duly sworn according to law, on his oath saith:

20

*Direct examination* by Mr. Golenbock.

Q Doctor, you are a duly licensed and practicing physician in the City of Perth Amboy?

The Court: I take it the doctor's qualifications are admitted?

Mr. Antonia: Yes, sir.

30

*By Mr. Golenbock.*

Q Did you ever, at the request of the defendant, examine Mrs. Shortz? A I have.

Q What is the date of the examination? A About a week ago.

Q Will you please state, doctor, what you found upon examination? A Based upon the history given by the patient, she had fallen from an elevation and had dislocated the elbow and had a fracture of the rib. She had two small

40

*William E. Ramsay, direct.*

scars on the inner side of the elbow. On motion I found that she had full flexion, that is, the elbow joint I am speaking now—she had full flexion, but the extension was not complete. The full extension of the arm is out straight of the elbow, and the full flexion is as far as it comes, just as I am showing now (indicating). There was an impairment of motion onto about that angle. With the wrist there was complete flexion, lateral motion was all right, and rotation was complete, but the extension was fixed at the straight position. The extension was lost above. That would be about the full extension (indicating), but from a straight—but from a parallel line with the arm there was that deficiency.

10 Q What would you say, doctor, as to the percentage of the loss of the use of that arm, the wrist? A There was no loss in motion and flexion at all. That was complete. The lateral motion was complete, but it was lost from here up, and that would amount to from an angle of that kind to there is what she had and there would be a loss of extension of the hand of from ten to fifteen per cent. In the elbow the motion from this complete flexion to what should be complete extension there was a loss of approximately ten per cent.

20 Q Now, taking the arm and bearing in mind the loss of it in reference to the extension of the wrist and the loss of the percentage as you have indicated in the elbow, what would you say was the loss of use of the arm as the result of that? A You mean—am I to understand that you mean including the elbow and the wrist?

30 Q Yes, sir. A Fifteen to twenty per cent. would be the total.

40

*Motion for Non-suit.*

Q That is all? A That is, I am including now, the combination of the joints. The elbow, there is a loss there of about ten per cent.

*Cross examination by Mr. Antonia.*

Q Doctor, you examined this woman especially for the purpose of coming here and testifying, is that correct? A I did. 10

Mr. Antonia: That is all.

Mr. Antonia: I have called somebody from the Perth Amboy City Hospital, for the purpose of proving the hospital bill, which counsel will not consent to paying for it, and I ask therefore for permission to put the witness on the stand. She is not here and she has not arrived yet. 20

That is our case.

## MOTION FOR NON-SUIT.

Mr. Golenbock: May it please your Honor, I desire to move for a non-suit at this time on the ground that the plaintiff has failed to make out a cause of action; has failed to prove that the defendant has been guilty of negligence; failed to show in particular that the defendant had either knowledge of the condition of the stairway or bannister or railing, or that the condition existed for such a length of time as would constitute, under the law, constructive notice. Your Honor will recall that the only witness by whom they attempted to show the existing condition of the rail was this Mr. Trygar, the expert, and your Honor will recall that 40 30

*Jacob Slobodien, direct.*

10 he thrice stated that he could not tell how long a time the wood was in that condition. It seems to me, if your Honor please, that the mere happening of the event does not, in itself, create a liability on the defendant, but they have got to go beyond that and show either one of the two conditions; either that the defendant had notice and knowledge of the condition or that it existed for such a long time that he should have had knowledge or taken precaution to repair. This case is absolutely lacking of either one of the two conditions, and I therefore move for a non-suit.

The Court: I will deny your motion. You may have an exception.

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JACOB SLOBODIEN, a witness produced on behalf of the defendant, being duly sworn according to law, on his oath saith:

*Direct examination by Mr. Golenbock.*

Q You are the son of Joseph Slobodien, the defendant? A Yes, sir.

30 Q And you live in Perth Amboy? A Yes, sir.

Q How long have you had charge of this building? A Only since this past summer, that is, direct charge.

Q Did you have charge of the building at the time this accident happened? A No, my sister.

Q Well, when you say your sister had charge, your sister lives where? A Brooklyn.

40 Q And Julia is the sister who took care of the building? A Yes.

*Jacob Slobodien, direct.*

Q Your store, or, at least you are connected with the Slobodien Shoe Store, are you not? A Yes, sir.

Q That store is situated just around the corner from where this building is located? A Yes, sir.

Q Your store is on Smith street while this building is around the corner? A It is on the same grounds. 10

Q This building is really a continuation of the "L" shape and the building which you occupy has a shoe store? A Yes, sir.

Q Did you have occasion to visit the premises before this accident happened? A Yes, sir.

Q And how often? A At no stated intervals, but at least two or three times a month. Even more than that. 20

Q Your sister never came down? A Once in a while just to help out in case there was any trouble with the rent or anything.

Q So that in the absence of your sister, you had charge of the premises? A Yes, sir.

Q Your sister is married? A Yes, sir.

Q And has a family? A Yes, sir.

Q Living in Brooklyn for how long? A Oh, for twenty years. 30

Q Now, how long before this date of the accident had you occasion to be in the premises and pass this particular railing or post or stairway? A Within a week, possibly less than a week, even.

Q How many tenants are there in that building or were there at that time? A There were two, the middle and top floor. I don't remember who the other—

Q There is a store downstairs? A Yes, sir. 40

*Jacob Slobodien, direct.*

Q And two tenants upstairs? A Yes, sir, that is right.

Q One on the second story and the other on the third? A Yes, sir.

10 Q Now, was there a platform or porch over the rear portion on the store? A You will have to speak—

Q Is the store the length of the building? A The store is the length of the building but the—

Q Are the apartments as long or as deep as the store? A No, they are not.

Q Therefore, the rear portion of the store extends beyond the main building? A Yes, sir.

Q On top of this or on the roof of the store is a part of this porch? A Right.

20 Q Which the tenants, in order to use the rear entrance must pass over? A That is right.

Q Is there any extension or any portion of the building or covering reaching from the third floor to the second floor? A Yes, sir, the entire stairway from the third down is covered over with the roof.

30 Q Now, calling your attention to the top floor, which was, at the time of the accident, occupied by Mr. Horton, how many rooms has that apartment? A The top one?

Q Yes. A It has a small room, a living room, a side room—five.

Q The kitchen is situated where? A Directly in the rear.

Q And in what portion of the kitchen is the sink located? A The sink is in the southeast corner facing the south.

40 Q And how close or how far from the sink is this window or is there a window facing east in the kitchen? A There is.

*Jacob Slobodien, direct.*

Q How far from the sink is this particular window? A Well, it is about—it is fairly close, I would say.

Q Have you ever tested the visibility of the yard or the porch below from the sink through this particular window? A Yes, sure, I must have in being up there a lot of times. 10

Mr. Antonia: I move that the answer be stricken from the record.

*By Mr. Golenbock.*

Q Did you or did you not? A Yes, sir.

Q Can you see the porch below standing at the sink in the kitchen through that window? A Pretty hard. I doubt it. You can under certain circumstances only. 20

Q Now, under what circumstances can you see from the window in that position? A Well, if you are about seven feet tall or if you stood on something.

Q Did anyone ever call your attention to the fact that the stairway or the railing was in a defective condition? A No, sir.

Q Have you ever been asked to repair either the stairway or the railing along the stairway? A No, sir. 30

Q Did you know on the day of the accident or shortly thereabout that the railing was in a defective condition? A No, sir.

Q If you had known, would you have repaired it? A Oh, certainly.

Q Now, calling your attention to the photograph marked Exhibit P. 1, can you see the particular place where both of these rails were on the day of the accident? A Yes, sir. 40

*Jacob Slobodien, direct.*

Q Now, will you indicate that, please, by marking there "X" or some other letter right on the photograph? A Where these two railings were?

Q Yes. First mark the top piece and then the lower piece.

10

(The witness marked the photograph.)

Q Will you mark the top piece one and the lower piece two?

(The witness marked the photograph.)

20

Q Now, looking at the photograph marked "Exhibit P. 1," which you have marked, is it a fact that these pieces of wood were so nailed that both of the ends were covered by some other piece of wood or framework? A Absolutely were covered.

Q The ends were not visible? A Absolutely not.

Q Neither on this top rail nor on the lower rail? A Neither one.

Q And therefore the condition of the inside wood was not visible to the naked eye? A That is correct.

30

Q Nor could it have been by inspection? A Absolutely not.

Q Unless you removed the wood? A Only that way.

Q Now, I show you Exhibit P. 2 and will you please mark on that as well numbers one and two, showing the top rail and the lower rail, the same way as you have marked on Exhibit P. 1? A (The witness marked the photograph.)

40

Q Now, looking at Exhibit P. 2, I call your attention to the shed, which is constructed at the

*Jacob Slobodien, direct.*

south end of the building. Can you tell us, with reference to the shed or covering where the window was located on the floor above? A The window near the sink is just about here (indicating).

Q Now, will you please show, with reference to the shed, by making an "X"— A The picture is not big enough. 10

Q Well, assuming that is above, will you make an imaginary point indicating that it is about that point, higher up?

Mr. Antonia: I object to that, if your Honor please.

The Court: Objection sustained.

*By Mr. Golenbock.*

20

Q Well, now, is it or is it not somewhere in the position where the shed is on the floor below?

Mr. Antonia: I object to that.

The Court: Objection sustained.

*By Mr. Golenbock.*

Q In reference to the covering or shed as shown on this photograph, where is that window? A It is directly above at the uppermost part of the shed, directly above on the westerly end, which is a higher part of the shed. 30

Q Is there a gate on that porch which leads from the porch to the stairway? A Directly over the roof extension?

Q Yes. A There is a gate that locks off the porch.

Q Can you look below on the inside of the gate or standing on the porch inside of the gate?

A And look below in the yard? 40

*Jacob Slobodien, cross.*

Q Yes. A In what direction do you mean?  
In the direction of the accident?

Q Back part of the house. A No, it is impossible.

Q Could you see the side part of the house?  
A Do you mean the south side?

10 Q The south side. A You can here—you can't really see anybody walking down unless you sort of lean over.

Q You know Mr. Horton, don't you? A Who?

Q Mr. Horton. A Yes, sir, I do.

Q How long had he lived in the apartment on the third floor? A I don't exactly, but not very much. He moved in not very long before the accident. He was not in there very long.

20 Q Does he owe you any rent?

Mr. Antonia: I object.

The Court: Objection sustained.

Mr. Golenbock: I take an exception.

Cross examine.

*Cross examination by Mr. Antonia.*

30 Q How tall did you tell us a man would have to be to look out of that window and see the spot where this accident happened? A Taller than the average person by far.

Q What did you say on direct examination? Seven feet? A Seven feet, that is right.

Mr. Antonia: Stand up, Mr. Horton.

(Mr. Horton stood up.)

40 Q Are you prepared to tell this Court and jury that a man of Mr. Horton's height and

*Jacob Slobodien, cross.*

stature could not see this accident from the spot where he was standing?

Mr. Golenbock: I object to that.

The Court: I will permit that.

A Now, I might—I don't want to make a fabricator out of anybody—as he says he was standing? 10

Q That is correct. A You could not. It could hardly be seen.

Q Could hardly be seen? A That is it.

Q You say that about a week previous to the time of this accident you were in the premises?

A About the premises.

Q About the premises? A Up and down, that is right. 20

Q What do you mean by about? A About what?

Q About the premises. A It will be a little longer than you want to hear. One of the first things my father told me—

Mr. Antonia: I object to that.

Q Just answer the question. What do you mean when you say you were about the premises? A Up and down the stairway watching the children that they don't make leaking in the tin roof above, and all those things my father and sister told me. 30

Q How long before the accident was that? A Within a week.

Q Do you remember the time? A No.

Q But you know it was within a week? A Yes.

Q How many times previous to that had you done the same thing? A Monthly or weekly. 40

*Jacob Slobodien, cross.*

Q How many times previous to it? A At least two or three times a month. I have been out at times to—

Q And for how long a period of time? A For years and years.

Q For how long? A Over five years.

10 Q And when you went up and down the stairway inspecting the premises, what did you do? A I naturally grabbed hold of the railing in order to swing in. You see it is a sharp turn as you go up the stairway. It is almost a right angle turn, so I grabbed hold of both of the railings to go over.

Q Now I show you picture marked "P. 1," and ask you what it was you grabbed as you say, when you went around the doorway? A Up  
20 along here. It is a habit of mine.

Q Will you indicate to the jury, please, just what you are showing? A Whenever I would go up the stairway, I being left-handed, I would naturally grab hold of it going up along there and up along there and up along there. I naturally grabbed hold of the railing because it is a stairway and naturally I would do that on any stairway.

Q Finish your answer. A And if I get to  
30 the other part where it is level, I don't need to hold.

Q I show you a picture marked in evidence "P. 2," and ask you whether or not it represents this railing that you have marked with a Roman numeral I, you grabbed that railing as you swung in around there? A Every time.

Q How much of it did you grab? A I would saw towards the center of it.

Q You always grabbed it every time you walked up and down? A It is a sharp turn, and  
40 I would have to swing up that way.

*Jacob Slobodien, cross.*

Q You swung to the right, but yet you grabbed the railing to your left, is that correct? A That is correct, only on the left.

Q That is the only way that you had any contact with this railing? A Just by inspection also.

Q Well, how did you inspect it? A When-  
ever I would go up to watch the roof, that is  
what I wanted to tell you before, if you permit  
me. 10

Q Go right ahead now. A One of the first  
things, the chief admonitions that my father gave  
us, both my sister and I, was to always watch—

Q Now, please don't tell us about that. Tell  
us what you did. A I would run up there very,  
very often to watch the house, because there is  
slats on the roof, and we always had leaks in  
the store, and in running up I would have to grab  
hold of that railing to swing into the place there. 20

Q What other inspection did you ever make  
of this rail? A What other inspection was I  
to make?

Q Will you please answer the question? What  
other inspection, if any, did you make of this  
rail? A Just by looking at this thing as I was  
going up and down; just by sight.

Q As you were running by it? A And I  
walked it up. 30

Q Did you stop and hesitate there any time?  
A No.

Q You are sure of that? A Fairly sure of  
that—no, I will take that back, if I am permitted,  
because many times I would look over on the  
roof, to see if there was no dirt on there.

Q At that time what would you do? A I  
would keep after the tenants there to see that  
they were fixed. 40

*Jacob Slobodien, cross.*

Q But in reference to this rail what did you do? A Lean against it.

Q You did? A Lean against it, held on it, everything but sit on it.

Q You actually leaned against this railing? A Many a time.

10 Q Did you lean against it the time when you inspected it a week before the accident? A I would not make that statement. I don't remember that.

Q Did you or did you not? A I don't know. I would not want to lie. I don't know.

Q When was the last time before this accident that you leaned on it? A That is impossible to know right. I will say in the course of visits I did that many a time, but I won't sit here and say a certain time.

20 Q Then you don't know before the accident when you leaned on this railing? A That is correct.

Q When you did lean on it, whenever that was, you say you don't remember, it held you up or you would have fallen down through? A That is right.

Q When you leaned on it what did you do? A Moved on.

30 Q Put your whole weight on it? A Sometimes, yes.

Q But yet you don't remember how long before this accident that was? A No.

Q Now, did you ever stand up close to this and inspect it minutely, closely? A When it was—

Q When it was on there? A Yes.

Q You did? A Absolutely.

Q Did you ever see these holes that appear to be rotten around where the nail holes were?

40 A No, nor anybody else.

*Jacob Slobodien, cross.*

Q I am asking you. A No.

Q You never noticed these holes there? A No, there were nails there.

Q Did you notice the condition of the nails there? A All the nails on the outside are rusted on.

Q Will you tell the Court and jury a whole nail head took up this hole here (indicating)? 10

Mr. Antonia: I call the jury's attention to this which I am indicating.

Q Are you prepared to tell the Court and jury that the nail head which must have been there took up the entire space of that hole? A It is very possible; that is a knot.

Q Please answer the question? A Repeat it. 20

Mr. Antonia: Read the question, please.

Q (The stenographic reporter read as follows: "Question: Are you prepared to tell the Court and jury that the nail head which must have been there took up the entire space of that hole?") A As far as I could see it did.

Q You looked closely at it, didn't you? A As I went up and down. I didn't stand to look at that spot or any other spot. 30

Q Then you never got down and examined the ends of that, did you? A Please repeat that.

Q Then you never got down and examined the ends of that, did you? A Not the one spot or any spot, but the whole thing in general.

Q What I am asking you is this: Did you ever get down and examine the ends of that particularly? A Not particular reference to this one spot. 40

*Jacob Slobodien, cross.*

Q In reference to this rail, this end and that end (indicating)? A The whole thing in general.

Q Answer my question.

10 Mr. Golenbock: I object to it, if your Honor please. This witness has repeatedly answered the question, and I submit, if your Honor please, that the answer has been fully completed.

The Court: Objection sustained.

*By Mr. Antonia.*

20 Q Well, then, it was—Mr. Slobodien, you say you only examined this wood in whole? A The entire spot.

The Court: That is what he said, Mr. Antonia, a half a dozen times. If you keep on pressing him, he might say that he examined this with his penknife.

Mr. Antonia: If your Honor please, maybe he was obliged to. I don't know.

The Court: I say, he might say that he did.

30 Mr. Antonia: That is just what I would like to have him say.

Mr. Golenbock: I object to that, if your Honor please, what counsel would like to have him say.

The Court: Well, I am merely pointing out to Mr. Antonia—

Mr. Golenbock: I understand that, Judge, and I appreciate that.

*Eva Ohmer, direct.*

*By Mr. Antonia.*

Q How much do you weigh, Mr. Slobodien? Have you any idea? A 140.

Q And when was it that you leaned on this rail that you say you did?

Mr. Golenbeck: I object to that, if your Honor please. He said he could not give any idea of the time.

10

The Court: Objection sustained.

Mr. Antonia: That is all.

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EVA OHMER, a witness produced on behalf of the defendant, being duly sworn according to law, on her oath saith:

20

*Direct examination* by Mr. Golenbeck.

Q Mrs. Ohmer, where do you live? A I live in 298 Smith street now.

Q Please speak up a little louder? A Live in 298 Smith street now.

Q You are not related to Mr. Slobodien? A No, sir.

30

Q You did live in the house on Hobart street where this accident happened? A Yes.

Q How long did you live there? A I lived there for five years about, then I moved out about five or six months; then I moved back again. I lived there a little over two years.

Q That is the second time, over two years. A This was— I would not move out before, I got a janitor job, so I moved out and took the janitor job.

40

*Eva Ohmer, direct.*

Q So that you lived in that house for a period of, a total of about seven years or more?

A Yes, sir.

Q What floor did you live on? A Third floor.

Q The third floor? A Yes, sir.

10 Q That is the top floor, is it not? A Yes, sir.

Q Now, when were you there last? A Well, I was last month I was going to rent it again and then I found another place near my husband's work. I moved there and had it rented and I called Mr. Slobodien up, because I would not take it.

Q When you say last November, do you mean November, 1929? A Yes, sir.

20 Q What was the condition of the kitchen insofar as the sink and windows are concerned, the same as when you lived there? A The same.

Q You know where the sink is situated in the kitchen? A Yes, sir.

Q And how far from the sink is there a window facing the yard? A The sink is right by the window, see?

30 Q Now, you could see— A The sink is in that corner and the window lays this way.

Q The sink is in the corner? A Yes, sir.

Q Is it in the corner towards where the hotel is? A No, towards Mr. Slobodien's store, out in the back.

Q Now, if you stood by this sink, could you see through the window? A I could look through if I had to stretch or stand on something, then I could look over it from the house.

40 Q There is a little roof leading from your floor down below? A Yes, sir.

*Eva Ohmer, direct.*

Q During the time that you lived in that house did you ever have occasion to ask Mr. Slobodien to make any repairs?

Mr. Antonia: I object.

A Yes, sir.

10

The Court: Objection sustained.

Mr. Antonia: I move that the answer be stricken from the record.

The Court: It may be.

Mr. Golenbeck: I pray an exception, if your Honor please.

That is all.

Mr. Antonia: No questions.

20

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Mr. Antonia: If the Court please, I have doctor here at this time and a young lady from the hospital. I wish to use them for the only purpose of showing that the hospital bill is reasonable, fifty dollars.

Mr. Golenbeck: I will have to leave that to Mr. Miller.

The Court: Are you through, Mr. Miller?

Mr. Miller: I have another witness who corroborates the testimony along the line of Mr. Slobodien.

30

The Court: I don't think that is in dispute, that the repairs were made when they were asked for.

Mr. Miller: Yes, and that we made inspections.

The Court: I had not understood that it was.

Mr. Miller: That is our case.

40

*Dr. Klein.*

Mr. Antonia: Judge, I would like to get on the record that Dr. Klein's bill is fifty dollars, which is a reasonable charge, and the hospital bill, \$106.50.

10 Dr. Klein: There are three bills for X-ray and services done—five dollars—that is twenty-five dollars, our bill, fifty dollars, my bill, which is really the hospital bill which is included in \$106.50.

*By Mr. Antonia.*

Q Is there any other charge of yours, doctor?

A Yes, there were two sets of X-rays taken.

*By the Court.*

20 Q Then you have got a bill of twenty-five dollars in addition to what is included in the hospital bill? A Yes.

The Court: In addition to that.

Mr. Golenbock: No objection, your Honor.

Mr. Antonia: Hospital bill admitted?

30 Mr. Golenback: We will admit it was a reasonable charge. We will admit they have the bill.

Mr. Antonia: I will have to call the witness, Judge.

Mr. Golenbock: Oh, let it go, your Honor.

(The bill referred to was received in evidence and marked "Plaintiff's Exhibit 5.")

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*Motion for Direction of Verdict.*

## MOTION FOR DIRECTION OF VERDICT.

Mr. Golenbock: May it please your Honor, I desire to move for a direction of a verdict on the ground that from the evidence that now appears in the entire case, there is no testimony which establishes or proves any liability on the part of the defendant. 10

The plaintiff has not shown that the injury or at the time any defect which the defendant had actual or constructive knowledge or had negligently failed to repair it after having knowledge of such defect or failed to keep the same in reasonable condition. I further move that on the further ground that the plaintiff has failed to show that the defendant has not exercised reasonable diligence in ascertaining what repairs were necessary or that a due inspection would have disclosed the condition of the guard rail. The plaintiff has further failed to show that the defendant had notice of the defect, and I say as to that such notice cannot be presumed. I further move on the ground that the plaintiff admitted in her testimony that she had leaned over the railing and that by reason of that that she has contributed to the cause of the action, in other words, guilty of contributory negligence. While that may be a jury question, that, together with the other facts, should move the Court for a direction of a verdict. There is no other ground, that is, no ground nor any evidence to show that the condition of the railing even if defective existed for such a length of time as would put the defendant upon notice as to its condition. 20 30 40

*Motion for Direction of Verdict.*

10 In other words, there is no evidence in the case to show even as we term constructive notice, and I submit, if your Honor please, that upon the law in this State as the relationship between landlord and tenant, that a direction of a verdict is proper in this case under the facts shown. Further-  
more, if your Honor please, that there is no contradiction or controversy as to the facts in relation to the condition of the rail as to inspection, as to reasonableness of the inspection or as to reasonableness as to the condition of these rails; that then it becomes a question purely of law for the Court to determine and not a question of fact, and upon all of these facts, if your Honor please,  
20 I move for a direction of a verdict.

The Court: The motion will be denied. You may have an exception noted on the record.

Mr. Golenbock: May the Court instruct the jury on behalf of the defendant—

(Mr. Antonia made a closing address to the jury on behalf of the plaintiff.)

30 (Mr. Golenbock made a closing address to the jury on behalf of the defendant.)

*Court's Charge to Jury.***COURT'S CHARGE TO JURY.**

Court's charge to the jury by Honorable John P. Kirkpatrick, Judge, as follows:

Members of the Jury: The injuries sustained by the plaintiff in this case consisted of loss of wages, according to the testimony, for about one year, at fourteen dollars per week or something in the neighborhood of \$700, bills which she has incurred for treatment in the hospital, and Dr. Fithian, and the woman who administered the massage treatments, and for some X-rays taken by Dr. Klein. As I recall the testimony upon that aspect of the case, \$300 was Dr. Fithian's bill; \$106 was the hospital bill, and the \$96 the bill of the woman who administered these massages; and there was, in addition to that a further bill of \$25 for Dr. Klein. There has been no direct testimony that these charges were reasonable, except the testimony of Dr. Fithian, so far as his own charges are concerned, but they are apparently, so far as the others are concerned, the regular charges that are customarily made for these services rendered.

In addition to those items, the plaintiff is entitled to be compensated for the pain that she suffered as a result of the injuries sustained in this fall, and to be further compensated by such an amount as will represent, in your opinion, any permanent loss of earnings that she may sustain, I mean, any future loss of earnings that she may sustain as the result of the more or less slight and restricted motion of the arm from which she is now suffering and will in the future continue to suffer. Also she is entitled to any pain which she may in the future suffer as the result of the condition which Dr. Fithian testifies is

*Court's Charge to Jury.*

permanent, if any, and any loss of the ability to enjoy the ordinary enjoyments of life which she may sustain as a result of this apparently slight deformity. Those are the rules of damages that you will apply in determining the amount of your verdict, if you come to the conclusion that the plaintiff is entitled to recover from the defendant; but before you consider that aspect of the case, you must first find that the plaintiff has borne the burden which the law imposes upon the plaintiff, and that is the obligation of proving the plaintiff's right to recover from the defendant, by bearing a fair preponderance of the evidence, that is, in other words, the plaintiff is required to bear the burden of proof by proving his or her right to recover against the defendant by a fair preponderance of the evidence, that means, by a greater weight of the testimony.

So that, when there are two contradictory statements made, the plaintiff must and is required by law to sustain his side of the case by testimony which is of greater weight and more convincing than that which the defendant brings against it.

Now, it is the duty of all landlords who have buildings occupied by more than one family and where there is a common portion of the building retained under the control of the landlord and for the use of the tenants generally, to use reasonable care to maintain that portion of the demised premises in reasonably safe condition, and where a person is injured because of a defect in the common portion, that is, the portion that the tenants use in common, and over which the landlord retains control and custody, and where a person is injured due to a defect

*Court's Charge to Jury.*

in that portion of the property, that person is entitled to recover from the landlord if the injured person shows that the defect from which he received his injury was known to the landlord or had existed for such a length of time and under such circumstances that the landlord should have known it. In other words, if a defect happens suddenly and the tenant is injured, the tenant may not recover unless the landlord knew of the defective condition; but there are certain classes of disrepair and deterioration which cause injury, which from their very nature and character cannot come into existence coincident with the happening, that is, they can't from the very nature of the condition of the appliance, the condition could not have resulted just at the time when the injury happened, but must be more or less a slow and gradual process covering appreciable periods of time, having turned from a condition of reasonable safety to one not safe, yet measured by the rule of reasonable care such cases would present a question for the jury to determine as to whether or not the condition had existed for such a period of time as to give to the party charged with the care and maintenance reasonable time and opportunity to inspect and repair, if necessary.

That, I take it, is the situation that you have to consider in this case.

Had this condition, as you are able to determine it from the testimony of the witnesses, so far as the testimony will bear upon that aspect of the case, and from an examination of the exhibits, P. 3 and P. 4, particularly P. 3, which has been introduced here, whether or not this condition has been so slow and gradual and

*Court's Charge to Jury.*

has continued over such a length of time as to have required the landlord by reasonable inspection to have repaired and made it proper? That is a jury question. It is a question for you to determine under all the aspects of the case, and if you come to the conclusion that this condition has existed or that the landlord had notice of it from any other source and failed to make the repairs which he should have made, then he is liable. If, on the other hand, you find that this was not such a condition as has existed over such a period of time as to have charged the landlord with the duty of making an inspection and repair, and he had no notice of the defective condition of the railing, then he is not responsible.

10  
20 I am asked by the defendant to charge you as follows:

“No claim is made that the defendant landlord undertook at the time of the letting of the portion occupied by plaintiff, to keep the demised premises in repair.”

There is no testimony here that the landlord assumed any obligation to repair so far as this tenant is concerned, and gentlemen, under the law he is under no obligation to make repairs so far as the tenant is concerned.

30  
40 In the absence of an express agreement by the landlord to make repairs, the landlord is not liable to the tenant for damages caused by defects in the building existing at the time the tenancy began, there being no implied contract or condition that the premises shall be fit or suitable for the use of the tenant. I charge you that, however, with this modification: that if the landlord knows of a hidden or latent defect, he

*Court's Charge to Jury.*

is under the obligation to apprise his tenant of the same.

The defendant further asks me to charge: "The defendant is not liable to plaintiff for damages caused by defects in the building, unless the defendant had knowledge thereof or unless the defect was so apparent that he is presumed to have had knowledge thereof. That I charge you with the modification of that which I have already charged you, concerning conditions which have extended over a long period of time, which charges the landlord with the duty of inspecting and repairing."

10

If a stairway is fit for use in ascending and descending, the responsibility of safely using it is upon the person using it. Of course, that is obvious, and I so charge you.

20

This action is based upon the alleged negligence of the defendant, which must be proved, and the burden of proving it rests upon the plaintiff. Negligence is defined as the failure to observe, for the protection of the interests of another person that degree of care, precaution, and vigilance which the circumstances justly demand, whereby such other person suffers injury. There is no presumption of negligence on the part of the defendant from the mere fact that injury resulted to the plaintiff. Whether her injuries resulted from the negligence of the defendant as alleged, you must determine from all the facts and circumstances of this case as disclosed by the evidence, and that I so charge you.

30

"The landlord is bound to take reasonable care only to have halls and stairways reasonably fit for use."

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*Court's Charge to Jury.*

That I so charge you with the further statement, and other portions of the demised premises retained under his control.

If the landlord used due care under the facts to keep the stairways and halls reasonably safe, your judgment should be for the defendant.  
 10 That I charge you as my prior charge may have modified it.

The plaintiff admits that she did not know the condition of the railing at the time she says she leaned against it. That, I understand, is her testimony.

I am requested to charge you, that if you believe the plaintiff sat upon the railing and caused the injuries in that manner, she is guilty of contributory negligence and your judgment  
 20 should be for the defendant. That I charge you with this modification; that this railing apparently was not put there for the use of the tenants in sitting upon it and using it as a means of rest. You are to determine whether under all the circumstances of the case if the plaintiff sat upon the railing, if that was contributory negligence on her part. If you find that she was guilty of contributory negligence, that is, if she failed to use reasonable  
 30 care for her own safety under all the circumstances in the case, and that that failure on her part contributed in any manner to the injuries that she received, then she may not recover from the defendant.

If you come to the conclusion that the plaintiff is entitled to recover, you may award her damage as you think is proper under the rules which I have already given you; and if you come to the conclusion that she is not entitled

*Exceptions to Charge.*

to recover, then your verdict will be, no cause for action.

That is all, members of the jury. You may retire.

Mr. Miller: I desire to except to that portion of the charge where his Honor said, "If you find that the condition has been slow and gradual and continued for such a length of time that by reasonable inspection he could have ascertained it;" the objection being that there is nothing in the evidence to show that we could have ascertained the gradual and slow process of deterioration by any inspection in view of the fact that the evidence shows that that portion of the railing which is indicated as having become defective, was not visible to the eye, as there were posts on that side of the defective portion of the railing; and I also desire to take exception to his Honor's charge wherein he said, "If the landlord had any notice from any other source."

There is no evidence of any kind that he had notice as to the defective condition of the said railing.

I except to your Honor's modification, wherein the Court stated that, "If the defendant knew of the latent defect and did not so inform the tenants," as there is no evidence in the case that the defendant did know of any defect, either latent or hidden.

I take exception to his Honor's modifications, in which he added to the request of the defendant.

I except to that portion of his Honor's charge wherein he stated as the law of this state to be,

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30

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*Exceptions to Charge.*

that where the condition of the wood or that portion of the premises could become deteriorated either by slow or gradual process, where the condition had become by reason of a slow and gradual or natural process, and continued for such a length of time that by reason of an inspection the landlord could have ascertained it.

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30

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## STIPULATION.

## COURT OF ERRORS AND APPEALS.

|                                                                                                                                                                                                           |   |                                          |    |
|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|---|------------------------------------------|----|
| ESTELLE SHORTZ,<br><div style="text-align: right;"><i>Plaintiff,</i></div> <div style="text-align: center;"><i>vs.</i></div> JOSEPH SLOBODIEN,<br><div style="text-align: right;"><i>Defendant.</i></div> | } | <i>On Appeal.</i><br><i>Stipulation.</i> | 10 |
|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|---|------------------------------------------|----|

It is hereby stipulated and agreed by and between the parties hereto that the hospital bill of \$106.50 was entered by the plaintiff and marked "Plaintiff's Exhibit 5."

August 26, 1930. 20

ALFRED D. ANTONIA,  
Attorney for Estelle Shortz.

GEORGE J. MILLER,  
Attorney for Joseph Slobodien.

30

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COPIES OF REPORTS AND ANSWERS

15

On 1st April  
1881

Received of the  
Hon. Secy of State  
the sum of £1000  
for the purpose of  
purchasing the  
rights of the  
London & North  
Western Railway  
Company

16

ALFRED W. ARTHUR,  
Solicitor at Law,  
15, Abchurch Lane,  
London, E.C. 4.

17



EXHIBIT P. 1.



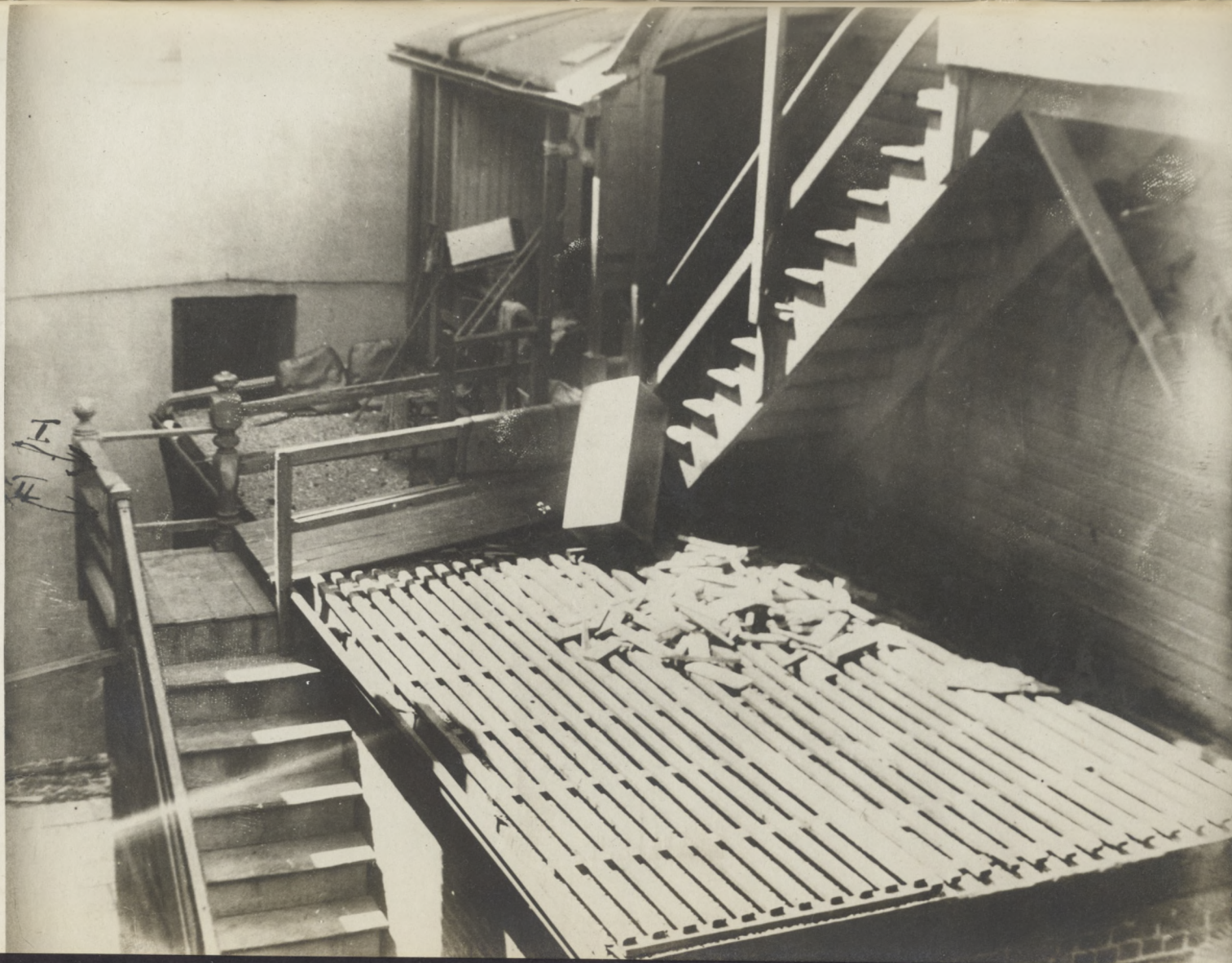


EXHIBIT P. 2



## New Jersey Court of Errors and Appeals

ESTELLE SHORTZ,  
Plaintiff-Appellee,

*vs.*

JOSEPH SLOBODIEN,  
Defendant-Appellant.

Action at Law.  
On Appeal from  
Supreme Court.

### BRIEF OF PLAINTIFF-APPELLEE.

#### Statement of Facts.

This action was brought by the plaintiff-appellee against the defendant-appellant to recover for injuries sustained by the plaintiff on July 26, 1928, when she, as tenant of the defendant-appellant, fell from a common landing of the defendant-appellant's premises because of a defective and rotten guard-rail on said landing. The plaintiff had leaned on the rail to call her infant son in the yard below (S. C., p. 18, ll. 21 to 30). The plaintiff's witness James Horton saw her fall, and he immediately ran to her and picked her up, and also picked up the railing which had given way (p. 42, ll. 36 to 40; p. 43, ll. 1 to 13). The witness James Horton further stated that he observed the rail to be rotten (p. 43, l. 1). The rail was introduced in evidence and marked "P-3" (p. 46, ll. 15 to 18). It was shown to and examined by the jury. There were introduced in evidence pictures of the common landing from which the plaintiff fell. The position of the guard-rail which gave way can be seen on said pictures opposite the

Roman numeral No. I (see pictures annexed to State of Case). The trial resulted in a verdict for the plaintiff-appellee in the sum of \$1,800. The defendant-appellant appeals from this verdict, and lists 18 reasons for reversal, three of said reasons being abandoned, to wit, 15, 17 and 18 (p. 5 of defendant's brief). In the defendant's brief the reasons urged for reversal are grouped under three issues. For the sake of convenience and brevity, the plaintiff-appellee will answer these grouped reasons in the same order they appear in defendant-appellant's brief.

## ISSUE ONE.

### **The plaintiff-appellee established a *prima facie* case.**

The plaintiff in this case introduced in evidence the rotten guard-rail and rested her case squarely upon the theory of having given constructive notice to the landlord as enunciated in the case of *Buda vs. Dzuretzko*, 87 N. J. L. 34, and *Stark vs. Great Atlantic and Pacific Tea Co.*, 102 N. J. L. 694.

In the case of *Buda*, the Court said, at page 35, in reference to what would justify a finding of want of reasonable care on the part of the landlord in maintaining a stairway:

“The defect \* \* \* (1) had in fact been brought to the previous attention of the landlord or (2) had existed for such a space of time before the accident as would have afforded the landlord sufficient opportunity to make proper inspection of the stairway and to repair its defects.”

In the case of *Stark vs. Great Atlantic and Pacific Tea Co.*, the Court said, at page 696, in speaking of what constitutes constructive notice:

“But it is equally certain that there are conditions of disrepair and deterioration causing injury which from their very nature and character cannot come into existence coincident with the happening, but must, by more or less slow and gradual processes covering appreciable periods of time have grown from a condition of reasonable safety to one not safe as measured by the rule of reasonable care. *Such cases would present a question for jury determination as to whether or not the condition had existed for such period of time as to give the party chargeable with the care and maintenance reasonable time and opportunity to inspect and repair if necessary.*”

The defendant, in his brief, speaks of the condition of disrepair, but excuses the legal implication of notice of said condition by saying that it was a latent one and invisible to the naked eye, and cites page 68 of the State of Case to substantiate that statement. An examination of that testimony shows it to be the testimony of the defendant's agent who was in charge of the premises (p. 65, l. 25); and the plaintiff respectfully submits that that witness was one with a deep interest in the case. On cross-examination this same witness was questioned concerning the holes on the outside of said guard-rail and which were rotten around where the rusted heads of the nails had been (p. 74, ll. 38 to 40; p. 75, ll. 1 to 19). He answered that the outside holes were *possibly* filled by the rusted heads of the nails (p. 74, ll. 38 to 40; p. 75, ll. 1 to 19).

The jury had the advantage of seeing the guard-rail and of examining it carefully. In view of the fact that the guard-rail is not before this Court, the plaintiff takes the liberty of informing this Honorable Court that the word “rotten” aptly fits the condition of the rail and that the rotten

outside holes as mentioned in the testimony vary in diameter from one-half to three-quarters of an inch by actual measurement, made as this brief is written. In addition to that fact there was testimony concerning the condition of the wood from the plaintiff's witness, James Horton, who picked the rail up immediately after the plaintiff fell, and described it as being rotten (p. 43, l. 1).

The plaintiff's case is therefore clearly within the rule as stated in the case of *Stark vs. Great Atlantic & Pacific Tea Co.*; a clear *prima facie* case being made out, and the Trial Court did not err in failing to grant a non-suit.

## ISSUE TWO.

The defendant, in arguing this point and the reasons for reversal grouped thereunder, practically repeats his argument under Issue One and makes many unwarranted and incorrect statements in the first paragraph under Issue Two; citing no testimony to substantiate these statements. The plaintiff respectfully submits that these statements are entirely untrue and misleading, and refers again to the physical condition of the guard-rail introduced in evidence and the testimony of the plaintiff's witness James Horton concerning that condition; together with the reference to the rotten condition of the outside holes of said guard-rail on the cross-examination of the defendant's agent.

The present case is very similar to the case of *Charney vs. Cohen*, 94 N. J. L. 381, affirmed by the Court of Errors and Appeals in 95 N. J. L. 538. In that case the Court said at page 382:

“An examination of the rail after the accident in question disclosed that the nails holding the rail were rusted and that the rail

itself had rotted at the point where it parted from the post."

It was inferable from the entire testimony that the rail was, in the language of an inspecting police officer, "In a very weak condition."

The plaintiff, therefore, produced a *prima facie* case and the defendant was called upon to answer. His defense consisted of testimony by the defendant's agent that reasonable inspection was made and failed to disclose any condition which called for repair. There was therefore presented a clear cut question of fact for the jury to pass upon, and the Court, therefore, did not err in refusing to direct a verdict for the defendant.

### ISSUE THREE.

The plaintiff will consider the alleged errors in the charge of the Trial Court in the same order as they are set forth in defendant's brief, and will refer to them by number as set forth in the defendant's brief.

1. The statement made herein is a clear exposition of the law as stated in the case of *Buda vs. Dzuretzko* and *Stark vs. Great Atlantic and Pacific Tea Co.*, above cited.

2. The portion of the charge here complained of cannot be separated from the paragraph from which it is taken (p. 85, ll. 33 to 44; p. 86, ll. 1 to 19). The Court merely restated in this entire paragraph the law as he charged it in the preceding paragraph wherein the Court actually quoted the language of the case of *Stark vs. Great Atlantic and Pacific Tea Co.* The defendant complains, however, that this portion of the charge is prejudicial to the defendant because there was no evidence to warrant this statement. The plaintiff

respectfully submits that the Trial Court expressly charged the jury to determine the case only upon the testimony adduced (p. 84, ll. 22 to 28).

3. The statement of the Trial Court alleged under this point to be error was made in response to a request of the defendant that the Court charge the law as stated in the paragraph on page 86, lines 31 to 38. The Court then added the modification which the defendant complains of as prejudicial. The defendant does not contend that this is a misstatement of law and the plaintiff therefore respectfully submits that the statement complained of should be taken into consideration with the whole charge, and respectfully adds that the defendant was not prejudiced by this particular portion of the charge, since it was made as stated concerning defects existing at the time of the leasing. The whole rule with its modification had no application here, as a tenant does not take, subject to defects in a portion of the premises over which the defendant maintains control, such as common passageways (*Hussey vs. Long Dock Railroad Co.*, 100 N. J. L. 380, p. 383).

It was undisputed that the defective guard-rail in this case was part of a common passageway. The plaintiff-appellee therefore respectfully urges that the appeal be dismissed and that the judgment entered in favor of the plaintiff-appellee be affirmed.

Respectfully submitted,

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## New Jersey Court of Errors and Appeals

ESTELLE SHORTZ,

*Appellee,*

*vs.*

*No. 80.*

JOSEPH SLOBODIEN,

*Appellant.*

### BRIEF OF APPELLANT.

#### Facts.

The plaintiff, a tenant renting the second floor of premises owned by defendant, while bending over or leaning against a guard rail on a stair landing which she used in common with other tenants over which the landlord defendant retained control, fell to a yard below as a result of the breaking of the guard rail, due to its weakened condition, which she had been unable to notice during her tenancy. It was not visible to the eye. Not having knowledge herself, it was not alleged that any notice of the condition had been conveyed to the landlord-defendant. Inspection by the defendant was testified to and undenied testimony to the effect that the disrepair was latent and not discernable upon visual inspection was uncontroverted. Upon this state of facts, a non-suit and direction of a verdict in favor of the defendant had been requested at the trial and refused. The jury brought in a verdict for the plaintiff in the sum of \$1,800.00 and costs from which the defendant appeals.

### Specification of Errors.

1. The trial court erred in refusing to non-suit the plaintiff on the ground that no duty by the defendant to the plaintiff was shown.

2. The trial court erred in refusing to non-suit the plaintiff because there was no proof of negligence on the defendant's part.

3. The trial court erred in refusing to non-suit the plaintiff on the ground that there was no proof that the defendant had knowledge of the condition of the banister or railing.

4. The trial court erred in refusing to non-suit the plaintiff on the ground that there was no evidence the conditions existed for any length of time, as would constitute in law constructive notice.

5. The court erred in refusing to grant the motion of the defendant for a non-suit of the plaintiff.

6. The court below erred in refusing to grant the motion of the defendant for a direction of a verdict for defendant on the ground that defendant's testimony is undisputed that the premises were frequently inspected and by reasonable inspection the defect could not be ascertained, was undisputed.

7. The court below erred in refusing to grant the motion of the defendant for a direction of the verdict for defendant on the ground that it was undisputed that defendant had no actual or constructive knowledge of the defect.

8. The court below erred in refusing to grant the motion of the defendant for a direction of the verdict for defendant on the ground that plaintiff failed to show that defendant had not exercised

reasonable diligence in ascertaining what repairs were necessary or that a due inspection of the premises would have disclosed the condition of the guard rail.

9. The court below erred in refusing to direct a verdict for defendant on the ground that plaintiff failed to prove defendant had notice of the defect or that it existed for such length of time that such notice would have been presumed.

10. The court below erred in refusing to direct a verdict for defendant on the ground that there was no contradiction or controversy as to the facts in relation to the condition of the rail as to inspection as to the reasonableness of the inspection as to the condition of the rail and it then became a question of the law for the Court to determine and not a question of fact for the jury.

11. The court below erred in refusing to direct a verdict for defendant on the ground that there was no contradiction or controversy as to the facts in relation to the condition of the rail as to inspection as to the reasonableness of the inspection as to the condition of the rail and it then became a question of the law for the Court to determine and not a question of fact for the jury.

12. Because of errors in the charge of the Court as to the degree of care necessary to be exercised by a landlord toward his tenant, increased his burden, as provided by law when it charged:

“Had this condition, as you are able to determine it from the testimony of the witnesses, so far as the testimony will bear upon that aspect of the case, and from an examination of the exhibits, P. 3 and P. 4, particularly P. 3, which has been introduced

here, whether or not this condition has been so slow and gradual and has continued over such a length of time as to have required the landlord by reasonable inspection to have repaired and made it proper? That is a jury question."

13. Because of error in the charge of the Court as to what the jury was to determine when it charged:

"It is a question for you to determine under all the aspects of the case, and if you come to the conclusion that this condition has existed or that the landlord had notice of it from any other source and failed to make the repairs which he should have made, then he is liable. If, on the other hand, you find that this was not such a condition as has existed over such a period of time as to have charged the landlord with the duty of making an inspection and repair, and he had no notice of the defective condition of the railing, then he is not responsible;" and there was no evidence to substantiate it.

14. Because it was undisputed that the landlord used reasonable care to have such places reasonably fit for use.

15. Because the court below erred in charging:

"I charge you that, however, with this modification: that if the landlord knows of a hidden or latent defect, he is under the obligation to appraise his tenant of the same."

16. Because the Court below erred in charging:

"I charge you with the modification of that which I have already charged you, concerning conditions which have extended over a long period of time, which charge the landlord with the duty of inspecting and repairing."

17. Because the questions of fact were undisputed and uncontroverted, and it became a question of law for the judge to decide the case.

18. Because trial court failed to charge the plaintiff's burden of proof must be sustained by a preponderance of the evidence.

#### DERIVATION OF ISSUES.

Errors, 1, 2, 3, 4 & 5 become Issue I. Was proof of knowledge on the part of the defendant of the defect in the guard rail essential to the establishment by the plaintiff of a prima facie case?

Errors, 6, 7, 8, 9, 10 & 11 constitute Issue II. There being no disputed question of fact, it was the duty of the Court to direct a verdict for the defendant.

Issue III. The Court erred in his charge as to the duty of the landlord defendant, charging 12, 13, 14 and 16.

#### ISSUE I.

Was proof of knowledge on the part of defendant of the defect in the guard rail essential to the establishment by the plaintiff of a prima facie case?

We submit that this question can only be answered in the affirmative.

“This is not a case where each of the parties have equal facilities of information. The rule is that notice to perform is necessary whenever the fact, on the occurrence of which the right to claim performance depends, lies more peculiarly within the knowledge of one of the parties than the other.”

The testimony adduced was to the effect that the landlord defendant inspected the premises two or three times a month (p. 65, State of Case).

“In reference to the state of these demised premises, the tenant possessed the advantage of position, and he was, consequently bound, if he wished them repaired, to request performance. \* \* \*” *Gerzebek et ux. v. Lord & Redmond*, 33 N. J. L. 246.

Notice to the landlord is an essential element in establishing the plaintiff's case and in paragraph 6 of the complaint (p. 8, State of Case), such notice is alleged but a close perusal of the record will fail to disclose anything in the nature of such notice in the case at bar, nor can such notice be inferred.

“The negligence of the landlord cannot be inferred and must not be left to mere conjecture and a bare possibility that the damage was caused in consequence of the negligence or unskillfulness of the defendant. Surmise will not do; it cannot take the place of proof.” 25 A. L. R. 1292.

In the New Jersey case of *Buda v. Dzuretzko*, 87 N. J. L. 34 the Court held that the landlord can only be held negligent for failure to use ordinary care to keep the premises in a reasonably safe condition after he has had notice or knowledge.

It has long been the rule based upon sound justice, upheld by the courts of this and other jurisdictions that a land owner, even as to that portion of the premises over which he retains control, is not liable for injuries resulting from disrepair unless it is shown that notice of the condition had been given him or that it existed for such a length of time that he is presumed to have had such notice. A search of the records

in this case will not disclose any testimony that would indicate that either by notice, elapse of time, inspection, or in any other manner the landlord had been charged with knowledge of the existence of the condition. Further than that, it had been expressly testified and uncontradicted that the portion of the premises in disrepair was concealed, latent and invisible to the naked eye (p. 68, State of Case). How then, by what process of mental gymnastics can it be inferred that the landlord had knowledge of the condition. And if knowledge had not been established and could not be inferred and is essential to the establishment of a prima facie case, as we respectfully submit it is, the plaintiff should have been non-suited.

#### ISSUE II.

**There being no disputed question of fact, it was the duty of the Court to direct a verdict for the defendant.**

It was established and undenied that this defendant received no notice of the condition from the plaintiff. It was proved and undenied that regular inspection was made by the defendant and by reason of such inspection, condition could not be disclosed. It was further established and undenied that the defect was a latent one and could not be discovered without dismantling the guard rail and posts. And finally plaintiff did not prove and there was no testimony that the condition has been of such long standing that knowledge of it in the defendant could be presumed.

In the absence of conflict in the evidence or dispute as to the facts the only questions are of law, to be determined by the court, 18 A. L. R. *Mason v. Sault*, 108 Atl. 267. If there is no conflict in the evidence or any

dispute as to the facts there is nothing for the jury. *ibid.*

In the case at bar there is no contest on the score of facts and therefore as the Court said, in the last cited case.

“It was the plain duty of the court on motion to direct a verdict. \* \* \* *Mason v. Sault, supra.* It is a settled rule that where the witness is unimpeached, the facts sworn to by him uncontradicted, either directly or indirectly, by other witnesses, and there is no intrinsic improbability in the relation given by him, neither a court nor jury can, in the exercise of a sound discretion, disregard his testimony.” *Cooley v. Barcroft*, 43 N. J. L. 363 also *Tracy v. Tracy*, 62 N. J. Equity, 807.

The rule as stated in the case of *Hull v. Littauer*, 162 N. Y. 569 where the Court in affirming a judgment for the defendants entered upon a directed verdict, said:

“Generally, the credibility of a witness, who is a party to the action, and therefore interested in its result, is for the jury; but this rule, being founded in reason is not an absolute and inflexible one. If the evidence is possible of contradiction in the circumstances—if its truthfulness or accuracy is open to a reasonable doubt upon the facts of the case, and the interest of the witness furnish a proper ground for hesitating to accept his statements—it is a necessary and just rule that the jury should pass upon it. Where, however, the evidence of a party to the action is not contradicted by direct evidence, nor by any legitimate inferences from the evidence, and it is not opposed to the probabilities, nor, its nature, surprising or suspicious, there is no reason for denying to its conclusiveness.”

We seriously urge the foregoing ground and are willing to rest the meritoriousness of this

appeal upon it for we feel with the Court who in the above-cited case stated in defending the rule:

“If this position were not true, then the rule might be reduced to an obvious absurdity in its consequences and verdicts might be rendered only to be set aside as against evidence.”

### ISSUE III.

**1. The Court erred in charging as to the duty of the landlord-defendant, in charging as follows:**

“Had the condition, as you are able to determine it from the testimony of the witnesses, so far as the testimony will bear upon that aspect of the case, and from an examination of the exhibits, P. 3 and P. 4, particularly P. 3, which has been introduced here, whether or not this condition has been so slow and gradual and has continued over such a length of time as to have required the landlord by reasonable inspection to have repaired and made it proper? That is a jury question.”

Because there was no testimony adduced as to the length of time the condition existed and the testimony was clear, (p. 68, State of Case) that inspection did not and could not disclose the condition because it was a latent one.

**2. The Court erred in charging as follows:**

“It is a question for you to determine under all the aspects of the case, and if you come to the conclusion that this condition has existed or that the landlord had notice of it from any other source and failed to make the repairs which he should have made, then he is liable. If, on the other hand, you find that this was not such a condition as has existed over such a period of time as to have

charged the landlord with the duty of making an inspection and repair, and he had no notice of the defective condition of the railing, then he is not responsible; and there was no evidence to substantiate it."

Because the record is bare of any evidence indicating that the landlord had notice of the condition from any other source, and the Court in saying that the landlord "failed to make the repairs which he should have made," in effect convicted the defendant of negligence and it was prejudicial to the defendant.

**3. The Court erred in charging as follows:**

"I charge you that, however, with this modification: that if the landlord knows of a hidden or latent defect, he is under the obligation of apprising his tenant of the same."

Because there was no evidence that the landlord had knowledge of a hidden or latent defect and the Court's charge in this respect was prejudicial to the defendant in that it suggested that there had been such evidence.

In conclusion we respectfully urge that the judgment below be reversed for the reasons that the Court erred in refusing to grant our motion for non-suit, that the Court erred further in refusing to direct a verdict for the defendant and finally because the Court's charge to the jury as hereinabove specifically set forth was prejudicial to the defendant-appellant.

Respectfully submitted,

GEORGE J. MILLER,  
Solicitor for and of Counsel  
with Plaintiff.

