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STIPULATION.

New Jersey Supreme Court

OSCAR GUENSCH, *Plaintiff,* *vs.* THE TRUSTEES OF THE THIRD PRESBYTERIAN CONGREGATION IN NEWARK, and P. DENICHOLAS, INC., *Defendants.*	*Action at Law.* *Stipulation.*

WHEREAS, the defendant, The Trustees of the Third Presbyterian Congregation in Newark, in the above cause, has taken an appeal from the judgment of the Supreme Court in said cause, and

WHEREAS, the defendant, P. DeNicholas, Inc., has also taken an appeal from said judgment,

NOW, THEREFORE, it is stipulated and agreed by and between the respective attorneys of the parties hereto, that the above-mentioned appellants may join in printing, serving and filing one State of the Case covering both of said appeals.

HARLEY, COX & WALBURG,
Attorneys of Plaintiff.

CHARLES S. GRAY,
Attorney of Defendant, The Trustees of the Third Presbyterian Congregation.

COHEN & KLEIN,
Attorneys of Defendant,
P. DeNicholas, Inc.

NOTICE OF APPEAL.

NEW JERSEY SUPREME COURT.

ESSEX COUNTY.

OSCAR GUENSCH, *Plaintiff,* *vs.* THE TRUSTEES OF THE THIRD PRESBYTERIAN CONGREGATION IN NEWARK, and P. DENICHOLAS, INC., *Defendants.*	*Action at Law.* *Notice of Appeal.*

To Harley, Cox and Walburg, Esqs., attorneys of plaintiff, or To Whom It May Concern:

PLEASE TAKE NOTICE that the defendant The Trustees of the Third Presbyterian Congregation in Newark, in the above-entitled cause of action, 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.

Respectfully yours,

CHARLES STOCKDELL GRAY,
Attorney for Defendant, The Trustees of the Third Presbyterian Congregation in Newark.

Service of the within Notice of Appeal is hereby acknowledged this 11th day of June, 1931.

HARLEY, COX & WALBURG,
Attys. for Plaintiff.

GROUNDS OF APPEAL.

New Jersey Court of Errors and Appeals

OSCAR GUENSCH, *Plaintiff,* *vs.* THE TRUSTEES OF THE THIRD PRESBYTERIAN CONGREGATION IN NEWARK, and P. DENICHOLAS, INC., *Defendants.*	*Action at Law.* *Grounds of Appeal.*

The defendant, The Trustees of the Third Presbyterian Congregation in Newark, states the following grounds of appeal:

1. The trial court erroneously refused to grant a non-suit, or direct a verdict in favor of this defendant when thereunto moved, whereas said motions should have been granted on one or more of the following grounds urged in support thereof:

(a) There was no evidence showing negligence upon the part of this defendant.

(b) There was no evidence that this defendant was in control or operation of the elevator.

(c) There was no evidence that this defendant had failed to make a reasonable inspection of the elevator.

(d) There was no evidence as to when the elevator became defective.

(e) There was no evidence that there had elapsed a reasonable time for this defendant to

make an inspection of the elevator between the time it became defective and the time of the accident.

(f) There was no evidence that this defendant had notice, either actual or constructive, of the defective condition of the elevator.

(g) There was no evidence that this defendant was under any duty to maintain or keep the elevator in repair.

(h) There was no evidence that any repairs which this defendant has assumed to make to the elevator, were done in a careless or negligent manner.

(i) There was no evidence that the negligence of this defendant was the proximate cause of the accident.

(j) The plaintiff was guilty of contributory negligence as a matter of law.

2. The trial court erroneously admitted the evidence of Albert Pfaff as to the condition of the mechanism of the elevator, and the repairs made to it after the accident, at the request of this defendant.

3. The trial court erroneously admitted the evidence of Albert Pfaff as to the causes of the elevator's becoming out of repair, based upon improper hypothetical questions.

4. The trial court erroneously admitted the evidence of one Rhoen as to requests for repairs.

5. The trial court erroneously refused to charge the jury this defendant's requests to charge, Nos. 1, 2, 3, 4, 5, 6 and 7.

6. The trial court erroneously charged the jury that there was no presumption of negli-

gence and that there was a presumption against negligence.

7. The trial court erroneously charged the jury that "if the jury found a defect of which the defendants had notice, or that existed for such a period of time that they necessarily should have discovered it" without adding that the defendants must have notice or sufficient knowledge of the defective conditions, and without adding the exception of contributory negligence.

8. The trial court erroneously charged the jury "that when a landlord reserves to himself any portion of the premises, for himself and several tenants, he is under the duty to use reasonable care.

CHARLES STOCKDELL GRAY,
Attorney for Defendant, The Trustees of the Third Presbyterian Congregation in Newark.

Service of a copy of within grounds of appeal is hereby acknowledged this day of August, 1931.

HARLEY, COX & WALBURG.

NOTICE OF APPEAL.

NEW JERSEY SUPREME COURT.

ESSEX COUNTY.

OSCAR GUENSCH, *Plaintiff,* *vs.* THE TRUSTEES OF THE THIRD PRESBYTERIAN CONGREGATION IN NEWARK, and P. DENICHOLAS, INC., *Defendants.*	*Action at Law.* *Notice of Appeal.*

To Harley, Cox & Walburg, Esqs., attorneys of plaintiff, or To Whom It May Concern:

PLEASE TAKE NOTICE that the defendant P. DeNicholas, Inc., in the above-entitled cause of action, 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.

Respectfully yours.

COHEN & KLEIN,
Attorneys for Defendant,
P. DeNicholas, Inc.

Dated May 27, 1931.

Service of the within Notice of Appeal is hereby acknowledged this 28th day of May, 1931.

HARLEY, COX & WALBURG,
Attorneys for Plaintiff.

GROUNDS OF APPEAL.

NEW JERSEY COURT OF ERRORS AND APPEALS.

OSCAR GUENSCH, *Plaintiff-Appellee,* *vs.* THE TRUSTEES OF THE THIRD PRESBYTERIAN CONGREGATION IN NEWARK, and P. DENICHOLAS, INC., *Defendants-Appellants.*	*Action at Law.* *Grounds of Appeal.*

To Messrs. Harley, Cox & Walburg, No. 60 Park Place, Newark, N. J.:

The appellant, P. DeNicholas, Inc., hereby states the following grounds of appeal in the above-entitled cause:

1. The trial court erred in permitting plaintiff's witness Albert Pfaff to testify over objection on his direct examination, in answer to the following question:

"Q When you arrived there, did you look at the elevator, examine the elevator? In what condition did you find it?"

2. The trial court erred in permitting the witness Albert Pfaff to testify over objection on his direct examination, in answer to the following question:

"Q In what condition did you find it?"

3. The trial court erred in permitting the witness Charles William Roehm, Jr., to testify

over objection in answer to the following question:

"Q Assume that in this particular case the plaintiff went into this restaurant, transacted his business, was told to go outside and the elevator would be sent up to him, he went outside, raised one of the doors, saw the elevator up, stepped in on the platform. At that time he weighed 165 or 160 pounds, that he stepped in on the platform with both feet, started to raise the other door up, the elevator went down with him. Afterward when they went to take him off, the platform was between half and two-thirds of the way down the shaft, testified at a 45-degree angle, and one of the cables was off, what would you say was the cause of that condition, of those three possibilities that you mentioned?"

4. The trial court erred in permitting the witness Charles William Roehm, Jr. to testify over objection in answer to the following question, put to said witness on his direct examination:

"Q Assume that on this day, the plaintiff went to the Rialto Restaurant, transacted his business, was instructed to go outside, that the elevator would be sent up to him, assuming that at that time he weighed between 160 and 165 pounds, assuming further that on going outside he raised one of the doors so the elevator platform was up, stepped on the elevator platform with both feet, started to raise the other door, when said platform went down with him. Assume further that while his body was

up on the platform or after it had been taken off or left the platform it was between one-half and two-thirds of the way down the shaft and the platform was tipped at a 45-degree angle to one side, and assume further that Mr. Pfaff, a repairman, or a service man from your establishment made an inspection of the elevator and found one cable off, or found two cables off, which in your opinion— Assume, further, Mr. Pfaff, your service man, made an inspection of this elevator and found the cable on one side considerably off and slightly off on the other side, which of these three possibilities which you have mentioned would you say was the cause that this elevator dropped?

The Court: Amend the question to that effect. After the other hypothetical question. That he not only raised the door, but then got in on the platform and was raising the second door and got it up about a foot, when the elevator dropped, the platform dropped. With that amendment, what is your answer?''

5. The trial court erred in its refusal to grant motion for a non-suit made by defendant P. DeNicholas, Inc.

6. The trial court erred in its refusal to grant the motion of defendant P. DeNicholas, Inc., for a direction of verdict.

7. The trial court erred in charging the jury as follows:

''There is no question here that the owner of these premises had any actual notice of the fact that the elevator was not in proper

condition, that it was not in proper repair, that it was in a dangerous condition or a condition that was out of repair, that I can recall. And so in the absence of having actual notice the owner can only be held responsible if a sufficient interval of time elapsed from the time when it became out of repair that the landlord by the use of that degree of reasonable care that it was under a duty to exercise should have discovered it."

8. The trial court erred in charging the jury as follows:

"What I mean by that is: If for instance there was a part of the premises that became broken, if in a hall in an apartment house, where the landlord had reserved to himself the care and custody of the hall that was used in common by the various tenants, a banister or a rail had become broken or destroyed and someone was hurt by reason of that defect, the landlord would be responsible if he had notice of that defect and then had neglected to correct it, or if it had existed for some length of time that he should have discovered it by the exercise of reasonable inspection."

9. The trial court erred in charging the jury as follows:

"If he jumped into this elevator without looking, if the elevator was not there but halfway down the shaft as they say, you may infer from the testimony that there was negligence on the part of the plaintiff."

10. The trial court erred in charging the jury as follows:

"He is responsible because the same rule applies to him that I have just enunciated as applying to the landlord, either of actual notice or constructive notice."

11. The trial court erred in charging the jury as follows:

"That means that even though the tenant did not know that the elevator was not in proper condition, if a reasonable inspection of it would have disclosed that and he failed to make that inspection or made it negligently, then he is responsible because that would be his negligent act."

12. The trial court erred in charging the jury as follows:

"But, if he has established it as against both defendants, your verdict will be against both of them without your attempting to say how much each will pay."

13. The trial court erred in refusing to charge the jury the defendant's third request to charge, which request to charge is as follows:

"If you find as a fact that the accident was unavoidable, then I charge you that your verdict must be for the defendants."

14. The trial court erred in refusing to charge the jury the defendant's fourth request to charge, which request to charge is as follows:

"When the plaintiff's evidence is equally consistent with the absence as with the existence of negligence on the part of the defendants, the plaintiff must fail—because

there is always a presumption against negligence and in favor of innocence."

15. The trial court erred in refusing to charge the jury the defendant's seventh request to charge, which request to charge is as follows:

"If the defendant P. DeNicholas, Inc., or its agent, inspected, or caused to be inspected, the elevator, and this inspection was carefully and properly made, and at reasonable intervals, and such inspection did not disclose the danger, the verdict must be for the defendant, P. DeNicholas, Inc."

16. The trial court erred in refusing to charge the jury the defendant's eighth request to charge, which request to charge is as follows:

"If you find as a fact that it was the landlord who had the duty to repair this elevator, and that the defendant P. DeNicholas, Inc. reported to the landlord whenever the elevator needed repair, then there must be a verdict in favor of the defendant P. DeNicholas, Inc."

17. The trial court erred in refusing to charge the jury the defendant's tenth request to charge, which request to charge is as follows:

"If the plaintiff exceeded the bounds of his invitation, and in so doing was injured, he cannot recover any damages for the injuries so sustained."

18. The trial court erred in refusing to charge the jury the defendant's eleventh request to charge, which request to charge is as follows:

"I charge you that if you find that the plaintiff knew that this was not a passenger,

but a freight elevator, he assumed all the risks incident to carriage upon it."

19. The trial court erred in refusing to charge the jury the defendant's twelfth request to charge, which request to charge is as follows:

"If you find as a fact that the elevator was partly under the control of a third party not connected with the defendant, P. DeNicholas, Inc., then you must find a verdict in favor of the defendant, P. DeNicholas, Inc."

20. The trial court erred in refusing to charge the jury the defendant's fourteenth request to charge, which request to charge is as follows:

"If you do find that the plaintiff was an invitee, then in order for the plaintiff to recover he must further show that the defective condition, if any there was, was brought to the notice of the defendant P. DeNicholas, Inc., or failing in proof of such actual notice, the plaintiff must prove that the defect, if any there was, had existed for such a space of time before the occurrence of January 10, 1929, as would have afforded the defendant P. DeNicholas, Inc., sufficient opportunity to make proper inspection of the elevator and elevator shaft to ascertain their condition as to safety, and repair their defects."

21. The trial court erred in refusing to charge the jury the defendant's fifteenth request to charge, which request to charge is as follows:

"I charge you that in the absence of proof of either actual notice of a defective condition or of proof of its existence for such

space of time before the occurrence that the defendant P. DeNicholas, Inc. should have inspected and repaired the defect, you are to presume that the defendant P. DeNicholas, Inc. used reasonable care under the circumstances."

22. The trial court erred in refusing to charge the jury the defendant's sixteenth request to charge, which request to charge is as follows:

"If you find that the witness knowingly told an untruth in any particular, you are, in your judgment, justified in not believing any of such witness' testimony."

23. The trial court erred in permitting plaintiff's witness, Albert Pfaff, to testify over objection with reference to the condition of the elevator as he found it.

24. The trial court erred in permitting plaintiff's witness, Albert Pfaff, to testify over objection with reference to any opinions based upon his inspection of the elevator.

COHEN & KLEIN,
Attorneys of Defendant-Appellant,
P. DeNicholas, Inc.

Service of a copy of the within Grounds of Appeal is hereby acknowledged this 18th day of August, 1931.

HARLEY, COX & WALBURG,
Attorneys of Plaintiff-Appellee.

JUDGMENT RECORD.

NEW JERSEY SUPREME COURT.

ESSEX COUNTY.

OSCAR GUENSCH, *Plaintiff,* *vs.* THE TRUSTEES OF THE THIRD PRESBYTERIAN CONGREGATION IN NEWARK, and P. DENICHOLAS, INC., *Defendants.*	*Action at Law.* *Judgment Record.* *Action at Law.* *On Postea.*

Harley, Cox & Walburg, attorneys.

The Trustees of the Third Presbyterian Congregation in Newark, and P. DeNicholas, Inc., the defendants in this cause, were summoned to answer unto Oscar Guensch, the plaintiff therein, in an action at law upon the following complaint:

(Summons issued December 6, 1929.)

Complaint.

Plaintiff, residing in the City of Newark, County of Essex and State of New Jersey, complaining of the defendants, says that:

FIRST COUNT.

1. On or about January 10, 1929, and for a long time prior thereto, the defendant, The Trustees of the Third Presbyterian Congregation in Newark, was the owner of the premises known

as No. 913 Broad street, in the City of Newark, County of Essex and State of New Jersey.

2. At the aforesaid time, the defendant, P. DeNicholas, Inc., was a lessee of the aforesaid premises, and operated a restaurant therein.

3. The defendants, and each of them, maintained and controlled a certain elevator on the aforesaid premises, which was operated in an elevator shaft leading from the basement of the aforesaid premises to the sidewalk.

4. At the aforesaid time, the plaintiff herein was lawfully invited by the defendants to make use of the aforesaid elevator, and was using the aforesaid elevator for the purpose of delivering certain merchandise to the defendant, P. DeNicholas, Inc.

5. The defendants, and each of them, so negligently, carelessly and recklessly maintained and operated the aforesaid elevator, so as to permit it to fall while the plaintiff was preparing to place certain merchandise upon it. As a result thereof, plaintiff was precipitated into the basement of the aforesaid premises.

6. As a result of the negligence of the defendants, and each of them, plaintiff was severely and permanently injured, and sustained a fractured vertebra, sacro-iliac sprain, and he was otherwise injured in and about the head, body and limbs. He was confined to the hospital for a long period of time, undergoing great pain and suffering, and was confined to his home for a long period of time, and he will be confined to his home for a long period of time in the future, undergoing great pain and suffering. He has

been permanently disabled from carrying on his occupation and will be permanently disabled from carrying on his occupation in the future. He has lost large sums of money which he otherwise would have earned, and will lose large sums of money in the future. His nervous system has been greatly disturbed and he has been otherwise permanently injured. He will be compelled to pay large sums of money for medical and surgical attention, and certain appliances necessary to support his back.

Plaintiff demands damages in the sum of fifty thousand dollars ($50,000).

SECOND COUNT.

1. He repeats paragraphs one and two of the first count and makes them a part hereof.

2. At the aforesaid time, the defendant, P. DeNicholas, Inc., maintained and controlled a certain elevator on the aforesaid premises, which was operated in an elevator shaft from the basement of the said premises to the sidewalk.

3. At the aforesaid time, the plaintiff herein was lawfully invited by the defendant, P. DeNicholas, Inc., to make use of the aforesaid elevator, and was using the aforesaid elevator for the purpose of delivering certain merchandise to the defendant, P. DeNicholas, Inc.

4. The defendant, P. DeNicholas, Inc., so negligently, carelessly and recklessly maintained and operated the aforesaid elevator, so as to permit it to fall while the plaintiff was preparing to place certain merchandise upon it. As a result thereof, plaintiff was precipitated into the basement of the aforesaid premises.

5. As a result of the negligence of the defendant, P. DeNicholas, Inc., plaintiff was severely and permanently injured, and sustained a fractured vertebra, sacro-iliac sprain, and he was otherwise injured in and about the head, body and limbs. He was confined to the hospital for a long period of time, undergoing great pain and suffering, and was confined to his home for a long period of time, and he will be confined to his home for a long period of time in the future, undergoing great pain and suffering. He has been permanently disabled from carrying on his occupation and will be permanently disabled from carrying on his occupation in the future. He has lost large sums of money which he otherwise would have earned, and will lose large sums of money in the future. His nervous system has been greatly disturbed and he has been otherwise permanently injured. He will be compelled to pay large sums of money for medical and surgical attention, and certain appliances necessary to support his back.

Plaintiff demands damages in the sum of fifty thousand dollars ($50,000) against the defendant, P. DeNicholas, Inc.

THIRD COUNT.

1. He repeats paragraphs one and two of the first count and makes them a part hereof.

2. At the aforesaid time, the defendant, The Trustees of the Third Presbyterian Congregation in Newark, maintained and controlled a certain elevator on the aforesaid premises, which was operated in an elevator shaft from the basement of the said premises to the sidewalk.

3. At the aforesaid time, the plaintiff herein was lawfully invited by the defendant, The Trustees of the Third Presbyterian Congregation in Newark, to make use of the aforesaid elevator, and was using the aforesaid elevator for the purpose of delivering certain merchandise to the defendant, P. DeNicholas, Inc.

4. The defendant, The Trustees of the Third Presbyterian Congregation in Newark, so negligently, carelessly and recklessly maintained and operated the aforesaid elevator, so as to permit it to fall while the plaintiff was preparing to place certain merchandise upon it. As a result thereof, plaintiff was precipitated into the basement of the aforesaid premises.

5. As a result of the negligence of the defendant, The Trustees of the Third Presbyterian Congregation in Newark, plaintiff was severely and permanently injured, and sustained a fractured vertebra, sacro-iliac sprain, and he was otherwise injured in and about his head, body and limbs. He was confined to the hospital for a long period of time, undergoing great pain and suffering, and was confined to his home for a long period of time, and he will be confined to his home for a long period of time in the future, undergoing great pain and suffering. He has been permanently disabled from carrying on his occupation and will be permanently disabled from carrying on his occupation in the future. He has lost large sums of money which he otherwise would have earned, and will lose large sums of money in the future. His nervous system has been greatly disturbed and he has been otherwise permanently injured. He will be compelled to pay large sums of money for medical and sur-

gical attention, and certain appliances necessary to support his back.

Plaintiff demands damages in the sum of fifty thousand dollars ($50,000) against the defendant, The Trustees of the Third Presbysterian Congregation in Newark.

HARLEY, COX & WALBURG,
Attorneys for Plaintiff.

Filed Dec. 13, 1929.

Answer of the Trustees of the Third Presbyterian Congregation in Newark.

The defendants, The Trustees of the Third Presbyterian Congregation in Newark, located at the corner of Abington avenue and Ridge street, Newark, New Jersey, in answer to the complaint filed by the plaintiff in the above-entitled action, says that:

FIRST COUNT.

1. The defendants deny each and every allegation contained in paragraphs 3 and 4 and 5 of the first count.

2. The defendants deny each and every allegation contained in paragraph 6 of the first count, alleging negligence on the part of the defendants, and as to the remainder they have not sufficient knowledge or information to form an opinion as to the same and leave the plaintiff to his proof, but aver if the same were true it was not the fault of the defendants.

3. The defendants deny that the plaintiff is entitled to any damages.

SECOND COUNT.

The allegations contained in the second count do not pertain to the defendant, The Trustees of the Third Presbyterian Congregation in Newark.

THIRD COUNT.

1. The defendants deny each and every allegation contained in paragraphs 2, 3 and 4 of the third count.

2. The defendants deny each and every allegation contained in paragraph 5 of the third count, alleging negligence on the part of the defendant, and as to the remainder they have not sufficient knowledge or information to form an opinion as to the same and leave the plaintiff to his proof, but aver if the same were true it was not the fault of the defendants.

3. The defendants deny that the plaintiff is entitled to any damages.

Defenses:

FIRST SEPARATE DEFENSE.

The defendant, The Trustees of the Third Presbyterian Congregation in Newark, did not invite the plaintiff on their premises and owed him no duty of reasonable care.

SECOND SEPARATE DEFENSE.

The alleged accident and injuries was caused by the sole negligence of an independent agency, over whom the defendant herein had no control.

Reply.

THIRD SEPARATE DEFENSE.

The defendant, The Trustees of the Third Presbyterian Congregation in Newark, were not in possession and control of the premises where the accident is alleged to have taken place.

FOURTH SEPARATE DEFENSE.

The defendant, The Trustees of the Third Presbyterian Congregation in Newark, were free from any and all negligence.

FIFTH SEPARATE DEFENSE.

The plaintiff was guilty of contributory negligence.

CHAS. S. GRAY,
Attorney for Defendant, The Trustees of the Third Presbyterian Congregation in Newark.

Filed Jan. 27, 1930.

Reply.

The plaintiff, replying to the answer of The Trustees of the Third Presbyterian Congregation in Newark, says that:

1. He denies the first, second, third, fourth and fifth separate defenses.

HARLEY, COX & WALBURG,
Attorneys for Plaintiff.

Filed Jan. 28, 1930.

Answer of P. DeNicholas, Inc.

The defendant, P. DeNicholas, Inc., a corporation of the State of New Jersey, by its amended answer, says that:

ANSWER TO FIRST COUNT.

1. It admits the allegations contained in paragraph 1.

2. It denies the allegations contained in paragraph 2.

3. It denies the allegations contained in paragraph 3, insofar as they apply to this defendant.

4. It denies the allegations contained in paragraph 4.

5. It denies the allegations contained in paragraph 5, insofar as they apply to this defendant.

6. It denies the allegations contained in paragraph 6.

ANSWER TO SECOND COUNT.

1. It denies the allegations contained in paragraph 1.

2. It denies the allegations contained in paragraphs 2, 3, 4 and 5.

ANSWER TO THIRD COUNT.

1. It denies the allegations contained in paragraph 1.

2. It admits the allegations contained in paragraph 2.

3. It has not sufficient knowledge to form a belief concerning that part of said paragraph 3,

which alleges that the plaintiff was lawfully invited by the defendant, the Trustees of the Third Presbyterian Congregation in Newark, but denies that part of said paragraph which refers to this defendant.

4. This defendant has no knowledge sufficient to form a belief concerning the facts set forth in paragraph 4, and therefore, leaves the plaintiff to his strict proof thereof.

5. This defendant has not sufficient knowledge to form a belief concerning the allegations set forth in paragraph 5 and therefore, leaves the plaintiff to his strict proof thereof.

FIRST SEPARATE DEFENSE.

Whatever injuries were sustained by the plaintiff at the time and place of the accident alleged in his complaint, were caused and contributed to by the negligence of the plaintiff, in that he conducted himself in a careless and reckless manner, and negligently exposed himself to the risk of such an accident, and neglected to take precaution and exercise care to guard and protect himself against such an accident, and the injuries which he may have sustained by reason thereof.

SECOND SEPARATE DEFENSE.

That at various times after the defendant, P. DeNicholas, Inc., entered into possession of the premises mentioned in the complaint herein, the defendant, The Trustees of the Third Presbyterian Congregation in Newark, exercised dominion of the premises, and more particularly the said elevator shaft, by repairing and maintain-

ing the same, and that said owner of said premises, the defendant, The Trustees of the Third Presbyterian Congregation in Newark, had reserved to itself the right of inspection of the said premises, and had exercised that right exclusively as aforesaid.

THIRD SEPARATE DEFENSE.

The alleged accident set forth in the complaint herein was due solely to the negligence of the defendant, The Trustees of the Third Presbyterian Congregation in Newark.

FOURTH SEPARATE DEFENSE.

The plaintiff used the elevator mentioned and described in the bill of complaint, contrary to the instructions given to him by the defendant, P. DeNicholas, Inc., and thereby assumed the risk incident to the said unlawful use thereof.

COHEN & KLEIN,
Attorneys of Defendant, P. DeNicholas, Inc.

Filed Jan. 9, 1931.

Reply.

The plaintiff, replying to the amended answer of the defendant, P. DeNicholas, Inc., a corporation, says that:

1. He denies the first, second, third and fourth separate defenses.

HARLEY, COX & WALBURG,
Attorneys for Plaintiff.

Filed Jan. 12, 1931.

Postea.

The above-entitled cause, which was referred to the Honorable Newton H. Porter, Judge of the Essex County Circuit Court, for trial, was tried before the said Judge and a jury on the fourth, fifth and sixth days of May, 1931.

After all the evidence had been submitted, the jury returned a verdict in favor of the plaintiff, Oscar Guensch, and against the defendants, The Trustees of the Third Presbyterian Congregation in Newark and P. DeNicholas, Inc., in the amount of Seventeen Thousand Dollars ($17,000).

Whereupon it is adjudged that the plaintiff Oscar Guensch do recover of the said defendants The Trustees of the Third Presbyterian Congregation in Newark, and P. DeNicholas, Inc., the sum of Seventeen thousand dollars damages together with his costs which have been taxed at the sum of Seventy dollars and ninety-four cents, making in the whole the sum of Seventeen thousand seventy dollars and ninety-four cents.

Damages	$17,000.00
Costs....	70.94
	$17,070.94

Judgment signed and entered May 9, 1931.

WM. S. GUMMERE,
C. J.

Judgment.

Judgment.

NEW JERSEY SUPREME COURT.

OSCAR GUENSCH, *Plaintiff,* *vs.* THE TRUSTEES OF THE THIRD PRESBYTERIAN CONGREGATION IN NEWARK, and P. DENICHOLAS, INC., *Defendants.*	*Action at Law.* *On Postea.* *Judgment.*

It is ordered that judgment be and hereby is entered in favor of plaintiff and against the defendants for the sum of Seventeen Thousand Dollars, besides costs to be taxed nisi.

Entered May 9, 1931.

On motion of
HARLEY, COX & WALBURG,
Attorneys.

Recorded Judgments,
Vol. 26, page 11.

Clerk's Certificate.

I, FRED L. BLOODGOOD, Clerk of the Supreme Court of the State of New Jersey, do certify that the foregoing is a true copy of the judgment entered in the above-stated cause as the same remains of record in my office.

In testimony whereof I have set my hand and the seal of said Court at Trenton, this thirteenth day of July, A. D. nineteen hundred and thirty-one.

(SEAL)

FRED L. BLOODGOOD,
Clerk.

TESTIMONY.

NEW JERSEY SUPREME COURT.

ESSEX COUNTY.

May 4, 1931.

OSCAR GUENSCH *vs.* THE TRUSTEES OF THE THIRD PRESBYTERIAN CONGREGATION IN NEWARK, and P. DI NICHOLAS, INC.	*Action at Law.*

Before Hon. Newton H. Porter, *J.*, and a jury.

For plaintiff appear Harley, Cox & Walburg (by John Francis).

For defendant Trustees of the Third Presbyterian Congregation in Newark appears Charles Stockdell Gray.

For the defendant P. DiNicholas, Inc., appear Cohen & Klein (by Louis J. Cohen).

Mr. Francis opens for plaintiff.

Mr. Gray opens for Third Presbyterian Congregation.

Mr. Cohen opens for P. DiNicholas, Inc.

Mr. Francis: I offer in evidence interrogatories directed to the Trustees of the Third Presbyterian Congregation in Newark.

(Same received in evidence and marked P. 1.)

Mr. Francis: I offer in evidence interrogatories directed to defendant P. DiNicholas, Inc., and answers thereto.

(Same received in evidence and marked P. 2.)

(Mr. Francis reads Exhibits P. 1 and P. 2 to the jury as follows):

"NEW JERSEY SUPREME COURT.

ESSEX COUNTY.

OSCAR GUENSCH, *Plaintiff,* *vs.* THE TRUSTEES OF THE THIRD PRESBYTERIAN CONGREGATION IN NEWARK, and P. DENICHOLAS, INC., *Defendants.*	*Action at Law.* *Interrogatories.*

To Chas. Stockdell Gray, Esq., 20 Washington Place, Newark, N. J., attorney for defendant, The Trustees of the Third Presbyterian Congregation in Newark.

SIR:

PLEASE TAKE NOTICE that the plaintiff demands of the defendant, The Trustees of the Third Presbyterian Congregation in Newark, answers under oath to the following interrogatories within the time prescribed by law:

1. Was this defendant the owner of the premises known as No. 913 Broad street, in the City of Newark, County of Essex and State of New Jersey, on January 10, 1929, and for a long time prior thereto? A Yes.

2. Was this defendant the owner of the premises known as No. 913 Broad street, in the City

of Newark, County of Essex and State of New Jersey, on January 10, 1929? A Yes.

3. Was this defendant the owner of the premises occupied by P. DeNicholas, Inc., operator of the Rialto Restaurant, No. 913 Broad street, in the City of Newark, County of Essex and State of New Jersey, on January 10, 1929? A Yes.

4. Did this defendant lease the premises known as No. 913 Broad street, in the City of Newark, County of Essex and State of New Jersey, to any person, partnership or corporation? A Yes.

5. If the answer to interrogatory No. 4 is 'yes' state the name of the person, partnership or corporation who was the lessee of the premises known as No. 913 Broad street, in the City of Newark, County of Essex and State of New Jersey. A Southern Candy Company.

6. What was the date of the lease executed by this defendant to the lessee of the premises known as No. 913 Broad street, in the City of Newark, County of Essex and State of New Jersey? A May 1, 1925.

7. On January 10, 1929, was there an elevator located in the premises known as No. 913 Broad street, in the City of Newark, County of Essex and State of New Jersey, which operated from the cellar of said premises to the sidewalk level? A Yes.

8. For how long a time prior to January 10, 1929, had said elevator been in use at the premises known as No. 913 Broad street, in the City of Newark, County of Essex and State of New Jersey? A About ten years.

9. What tenants, lessees or occupants of the premises known as No. 913 Broad street, in the City of Newark, County of Essex and State of New Jersey, at the time of the accident set forth in the complaint herein, used the aforesaid elevator? A All.

10. On or about January 10, 1929, was P. DeNicholas, Inc., operating as Rialto Restaurant, one of the occupants of the premises known as No. 913 Broad street, in the City of Newark, County of Essex and State of New Jersey? A We think so.

11. Was said P. DeNicholas, Inc., a lessee of this defendant, of premises known as No. 913 Broad street, in the City of Newark, County of Essex and State of New Jersey? A Not directly.

12. Was the said P. DeNicholas, Inc., a sublessee of a tenant of this defendant, of the premises known as No. 913 Broad street, in the City of Newark, County of Essex and State of New Jersey? A Yes.

13. For how long a time prior to January 10, 1929, had P. DeNicholas, Inc., been an occupant of the premises known as No. 913 Broad street, in the City of Newark, County of Essex and State of New Jersey? A May 1st, 1928.

14. Did occupants of the premises known as No. 913 Broad street, in the City of Newark, County of Essex and State of New Jersey, other than the P. DeNicholas, Inc., use the elevator hereinbefore mentioned? A Yes.

15. Did this defendant, prior to January 10, 1929, have any repairs made to the elevator located in the premises known as No. 913 Broad street, in the City of Newark, County of Essex and State of New Jersey? A Improper.

16. Did this defendant, on January 10, 1929, or subsequent thereto, have repairs made to the elevator located on premises known as No. 913 Broad street, in the City of Newark, County of Essex and State of New Jersey? A Improper.

17. Did this defendant, on January 10, 1929, engage any person, firm or corporation to make repairs to the elevator located in the premises known as No. 913 Broad street, in the City of Newark, County of Essex and State of New Jersey? A Improper.

18. On January 10, 1929, was one Morton C. Noble employed by this defendant? A Yes.

19. If the answer to interrogatory No. 18 is 'yes' state in what capacity. A Collector.

Respectfully,

HARLEY, COX & WALBURG."

"NEW JERSEY SUPREME COURT.

ESSEX COUNTY.

OSCAR GUENSCH, *Plaintiff,* *vs.* THE TRUSTEES OF THE THIRD PRESBYTERIAN CONGREGATION IN NEWARK, and P. DINICHOLAS, INC., *Defendants.*	*Action at Law.* *Answers to Interrogatories.*

To Harley, Cox & Walburg, attorneys for plaintiff, Military Park Building, Newark, New Jersey.

1. On January 10, 1929, was this defendant one of the tenants in the premises known as No. 913 Broad street, in the City of Newark, County of Essex and State of New Jersey? A Yes.

2. Was this defendant, on January 10, 1929, one of the occupants of the premises known as No. 913 Broad street, in the City of Newark, County of Essex and State of New Jersey? A Yes.

3. Did this defendant, on January 10, 1929, operate a restaurant known as Rialto Restaurant in the premises known as No. 913 Broad street, in the City of Newark, County of Essex and State of New Jersey? A Yes.

4. Did this defendant, on January 10, 1929, operate a restaurant in the premises known as No. 913 Broad street, in the City of Newark, County of Essex and State of New Jersey? A Yes.

5. Did this defendant occupy the premises known as No. 913 Broad street, in the City of Newark, County of Essex and State of New Jersey, or a part thereof, by virtue of a lease? A Yes.

6. If the answer to interrogatory No. 5 is 'yes' state whether said lease was written or oral. A Written.

7. If the answer to interrogatory No. 5 is 'yes' state by whom said lease was executed. A Southern Candy Company, Inc.

8. If the answer to interrogatory No. 5 is 'yes' state when said lease was executed. A On or about January 9, 1928.

9. For how long prior to January 10, 1929, was this defendant an occupant of the premises known as No. 913 Broad street, in the City of Newark, County of Essex and State of New Jersey? A One year.

10. For how long a time prior to January 10, 1929, did this defendant operate a restaurant at the premises known as No. 913 Broad street, in the City of Newark, County of Essex and State of New Jersey? A One year.

11. For how long a time prior to January 10, 1929, had this defendant been a tenant in the premises known as No. 913 Broad street, in the City of Newark, County of Essex and State of New Jersey? A One year.

12. Did any persons, firms or corporations other than this defendant occupy part of the premises known as No. 913 Broad street, in the City of Newark, County of Essex and State of New Jersey? A Yes.

13. If the answer to interrogatory No. 12 is 'yes' state the names of said persons, firms or

corporations. A Do not know the names of those who hold leases to said premises.

14. Did this defendant, on January 10, 1929, use and occupy the cellar or part thereof, located at the premises known as No. 913 Broad street, in the City of Newark, County of Essex and State of New Jersey? A Yes.

15. Did this defendant, on January 10, 1929, and for some time prior thereto occupy the cellar or a part thereof located at the premises known as No. 913 Broad street, in the City of Newark, County of Essex and State of New Jersey? A Yes.

16. For how long a time prior to January 10, 1929, did this defendant occupy the cellar or a part thereof, at the premises known as No. 913 Broad street, in the City of Newark, County of Essex and State of New Jersey? A Since the beginning of tenancy.

17. On January 10, 1929, was there an elevator located on the premises known as No. 913 Broad street, in the City of Newark, County of Essex and State of New Jersey, which operated from the cellar of said premises to the sidewalk level? A Yes.

18. Was said elevator present on the said premises at the time this defendant became an occupant of the premises known as No. 913 Broad street, in the City of Newark, County of Essex and State of New Jersey? A Yes.

19. For what purpose did this defendant use the cellar or part thereof on or about January 10, 1929? A Storage.

20. Did this defendant, on January 10, 1929, and prior thereto, use the elevator hereinbefore

referred to? A This elevator was in use since the beginning of tenancy.

21. For what purpose did this defendant, on January 10, 1929, and prior thereto, use the elevator hereinbefore referred to? A To carry merchandise.

22. Did any other persons, firms or partnerships use the elevator hereinbefore referred to? A This defendant is advised that it is not required to make answer to this interrogatory.

23. If the answer to interrogatory No. 22 is 'yes' state the names of said persons, firms or corporations. A This defendant is advised that it is not required to make answer to this interrogatory.

24. If the answer to interrogatory No. 22 is 'yes' state for what purpose said elevator was used by the said persons, firms or corporations. A This defendant is advised that it is not required to make answer to this interrogatory.

25. Did any persons, firms or corporations occupy part of the cellar of the premises known as No. 913 Broad street, in the City of Newark, County of Essex and State of New Jersey? A This defendant is advised that it is not required to make answer to this interrogatory.

26. Prior to January 10, 1929, were any repairs made to the elevator hereinbefore referred to? A This defendant is advised that it is not required to make answer to this interrogatory.

27. If the answer to interrogatory No. 26 is 'yes' give the name of the person, firm or corporation making said repairs. A This defendant is advised that it is not required to make answer to this interrogatory.

28. If the answer to interrogatory No. 26 is 'yes' state when said repairs were made. A This defendant is advised that it is not required to make answer to this interrogatory.

29. If the answer to interrogatory No. 26 is 'yes' state at whose request the repairs were made. A This defendant is advised that it is not required to make answer to this interrogatory.

30. On January 10, 1929, or a short time thereafter, were repairs made to the elevator hereinbefore referred to? A This defendant is advised that it is not required to make answer to this interrogatory.

31. If the answer to interrogatory No. 30 is 'yes' state by whom said repairs were made. A This defendant is advised that it is not required to make answer to this interrogatory.

32. If the answer to interrogatory No. 30 is 'yes' state at whose request said repairs were made. A This defendant is advised that it is not required to make answer to this interrogatory.

Respectfully,

COHEN & KLEIN."

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

P. DINICHOLAS, being duly sworn upon his oath, according to law, deposes and says that he is President of P. DiNicholas, Inc., a corporation, one of the defendants in the suit in which the foregoing interrogatories and the answers thereto are made, and that he is familiar with the

case, and that the facts set out in the said answers and the statements made therein are true to the best of his knowledge, as he verily believes.

(Signed) P. DiNICHOLAS.

Sworn to and subscribed before me
this 10th day of February, 1931.

A Master in Chancery of New Jersey.

OSCAR GUENSCH, the plaintiff, sworn in his own behalf.

Direct examination by Mr. Francis.

Q Mr. Guensch, where do you live? A 88 17th avenue.

The Court: Newark?

The Witness: Yes, sir.

Q Where did you live on January 10, 1929? A 321 Waverly avenue, Newark, New Jersey.

Q On that day by whom or by what company were you employed? A By Meir Marx, 41 Avon Place.

Q And what did you do for that company? A I delivered goods like pickles, etc., etc. A line of delicatessens.

Q Were you the driver of the truck? A Yes, sir.

Q On January 10, 1929, at about nine o'clock in the morning, did you have any goods on your truck to be delivered? A Yes, sir.

Q Where were you to deliver them? A Rialto Restaurant on Broad street.

Q Did you have any definite instructions with regard to the delivery of those goods? A Yes, sir, I was told to get a check or bring the goods back.

Q Was there anybody on the truck with you? A Yes.

Q Who was that? A He was helping me.

Q What is his name? A I don't know his last name; I called him "Dan" by his first name.

Q When you drove along Broad street, where did you stop your truck? A In front of the Rialto Restaurant.

Q Did you get out of it? A Yes, sir.

Q Where did you go? A In the restaurant.

Q When you got in there, did you see any people in the restaurant? A Just a chef.

Q Did the chef give you the check? A No, sir.

Q From whom did you get the check if you got it? A Mr. DiNicholas.

Q Do you know who Mr. DiNicholas is? A Yes, sir.

Q Who? I mean what is his connection with the Rialto Restaurant? A I always thought he was the boss.

Mr. Cohen: I move that that be stricken out, what he thought.

The Court: Strike it out.

Mr. Francis: I consent to it.

Q Had you delivered any goods to the Rialto Restaurant on any occasions prior to this one on January 10th? A Yes, sir.

Q About how many times? A About 20 or 30.

Q On those occasions with whom had you dealt? A With Mr. DiNicholas.

Q Who paid you on those occasions? A I only collected one.

Q And from whom did you collect? A Mr. DiNicholas.

Q On the other occasions when you delivered goods to the Rialto Restaurant, where did you place them? A I always went inside and told him I had the goods for him to deliver and he always told me to go outside and lift up the doors and he will send up the elevator.

Q On this occasion you received the check, what did Mr. DiNicholas say to you? A He says, "I will send up the elevator, you go outside and open the door."

Q Did you go outside? A No, sir; I stood there. The check was still wet and I blew it off a little and folded it up and put it in my pocket and I went outside.

Q Are you familiar with the sidewalk in front of the Rialto Restaurant? A Not so good.

Q Where this elevator is located, what is there over the areaway? A Nothing, just two iron doors.

Q There are two iron doors over the areaway? A Yes, sir.

Q And when you went outside were these two iron doors up or down? A Down.

The Court: You mean closed, is that right?

The Witness: Yes, sir.

Q What did you do when you reached the iron doors? A I picked up one and put it down on the sidewalk.

Q And when you picked that one up? A I seen the elevator was even with the sidewalk.

Q And what did you do then? A I stepped on the elevator, raised the door and I went down.

Q Had you started to raise the other door? A Yes, sir.

Q About how high had you gotten it? A About a foot.

Q And then the elevator went down with you? A Yes, sir.

Q Did it go down fast or slow? A Went down fast.

Q And what happened to you when it went down? A I don't remember.

Q What was the next thing you do remember? A I come to in the hospital.

Q And when you came to in the hospital where were you? A On a table.

Q Did you have your clothes on? A Yes, sir.

Q And after you were taken off this table, where were you put? A Upstairs in a ward.

Q And in bed? A Yes, sir.

Q At that time were you experiencing any pain? A Sir?

Q Were you experiencing any pain? A Yes, sir, I was in pain.

Q Where? A My back, my head, the whole side of my arm and my legs.

The Court: You say you were in the hospital when you next remember anything?

The Witness: On a table.

Q When you were put to bed you were experiencing pains in these various parts of your body? A Yes, sir.

Q Were you bandaged anywhere? A Not when they put me in bed.

Q How long after were you bandaged? A That afternoon.

Q And where were you bandaged? A My arm, my hand, my leg and my back.

Q And what was done to your back, what was the nature of the bandage? A Adhesive tape.

Q Can you tell the jury how that was on your back, was there a lot of it, or just a few strips of it? A A lot of it.

Q Extending from where? A Here (indicating), all the way around.

Q Up how high? A Just a little below the shoulder from here (indicating).

Q Who was taking care of you in the hospital? A Dr. Vanderveer.

Q And how long did you remain at the St. Michael's Hospital? A A little over four weeks, four weeks and a couple of days.

Q Were you in bed over that period? A Yes, sir.

Q When you left the hospital where did you go? A Home in bed.

Q And who took care of you at home? A Dr. Flax.

Q When were the bandages taken off your arm and your leg? A The adhesive tape was on my back and the bandages were taken off a couple of days before I went home.

Q Who took the adhesive tape off? A I believe Dr. Flax.

The Court: In the hospital?

The Witness: At home.

Q Do you remember how long after, after you came home that the adhesive tape was taken off? A Three weeks.

Q During all the period at the hospital until you came home, were you in pain at all? A Yes, sir.

Q And where in particular was the pain? A In the back and the head.

Q On which side of your head? A The right side.

Q What did Dr. Flax do for you? A Dr. Flax baked me and massaged me.

Q And where did he bake you and massage you? A My back.

Q Over how long a period did Dr. Flax treat you? A I believe until it was August, around August 16th.

Q And until August 16th how regularly did he call on you for treatment? A He come to the house and I went to his office after that.

Q How regularly, how many times and when up until when? A Almost every day.

Q Over that period what kind of treatment did he give your back? A He massaged and baked it.

Q During the course of this treatment were you given any kind of a support to wear? A Yes, a brace.

Q And where did you wear this brace? A On my back.

Q Can you describe that brace to the jury? A You mean show it to them?

Q Tell them what it looks like. A It has a piece here (indicating) that has two steel rods in the back and a piece in the center with a hollow in the back, and it comes from here to here (indicating). Comes up over my shoulders.

Mr. Francis: May it please the Court, is it proper for me to ask that the plaintiff show this brace to the jury?

The Court: I don't think that is necessary. I think it has been fully described.

Q When were you given this brace to wear? A Last part of June, last week of June.

Q Of 1929? A Yes, sir.

Q And how often did you wear it? A I wore it every day until the first of this year.

Q When the first of this year came around, did you take it off for good? A Not for good; I took it off because it was all sore.

Q Where were you sore? A Right here (indicating) where it cut in on me, on the shoulder.

Q How often since the first of the year have you worn it? A I wear it four or five days a week.

The Court: Why don't you wear it all seven?

The Witness: It is too sore; I give it a chance to heal up where I am sore.

Q How long have you been wearing it? A Since June, 1929.

Q Did you see Dr. Flax after August 16, 1929? A Yes, sir.

Q And how regularly did you see him after that? A Every four or five weeks.

Q And what did he do for you over that period? A He baked me and massaged me.

Q After the 16th of August did you see any other doctor? A Yes, sir.

Q Who was the next doctor you saw? A Dr. Willner.

Q What did Dr. Willner do for you? A He massaged me and baked me also.

Q And over how long a period did he treat you? A Four months.

Q Did any other doctor see you while Dr. Flax was treating you? A I believe Dr. Koppel.

Q And about how many times did you see Dr. Koppel? A About ten times.

Q And did Dr. Koppel take you to any other doctor? A Yes.

Q Who was that doctor? A His brother is Dr. Koppel; I don't know his first name.

Q Were any X-ray pictures taken of your back? A Yes, sir.

Q Who took those? A A Dr. Koppel had them taken by Perlberg.

Q Dr. Perlberg? A Dr. Perlberg.

Q During all this period you were wearing this brace, were you? A Sir?

Q During all this period you were wearing this brace, were you? A Yes, sir.

Q Were you experiencing any pain? A Yes, sir.

Q Did you have any difficulty sitting down? A Yes, sir.

Q What happened when you sat down? A I could not sit long on account of the pain. It comes out down through the back and it is awful bad there.

Q How about your head, the right side of your head? A I have headaches ever since the day of the accident. In the right side of my head is still pain.

Q You have those ever since the accident? A Every day.

Q How about your right ear, can you hear from that? A No, sir, I cannot.

Q What about your nervous condition? A I am nervous.

Q Have you any difficulty sleeping nights? A Yes, sir.

The Court: How was your right ear before the accident?

The Witness: Perfect, I could hear good.

Q Did you work regularly before the accident? A Yes, sir.

Q After August 16, of 1929, did you have any unusual spells? A Yes, sir.

Q When did you have the first one? A In August, on the right side of my head, starting up here (indicating) and becoming stiff, my jaws locked.

The Court: August, 1929?

The Witness: Yes, sir.

Q Did it only extend from your head to the side of your face and to the jaw? A Down to here (indicating).

Q Down to where? A Down to my hip.

Q Where were you at the time this spell took place? A Home.

Q Were you taken any place? A I was taken to the City Hospital.

Q What did they do for you there? A They stuck needles over me.

Q Did you have any sensation when they stuck these needles in you? A No, sir.

Q How long did you stay at the hospital? A A couple of hours.

Q And when you went home, did anybody treat you? A Yes, sir, Dr. Flax.

Q What did Dr. Flax do? A He massaged it and he gave me some medicine to take.

Q And when did that condition clear up? A The day after.

Q And has that occurred any time since then? A Yes, sir.

Q About how many times? A Four or five times after that.

Q And on each of these occasions did your jaws lock? A Yes, sir.

Q And did you have any sensation at all on that right side? A No, sir.

Q How old were you when this accident happened? A 27 years old.

Q And were you married? A Yes, sir.

Q Is your wife living now? A Yes, sir.

Q Have you any children? A Yes, sir.

Q How many? A One.

Q Have you been able to have any sexual relations with your wife since the accident happened? A No, sir.

Q That is right down to the present time? A Yes, sir.

Q Did you have any other kind of spells? A Yes, sir.

Q What are they? A Dizzy spells, fainting.

Q What happens when you have those dizzy spells on some occasions? A I don't know, I just go out. Everything goes black.

The Court: You mean you faint?

The Witness: Yes, sir.

By the Court.

Q How often does that happen? A Happens quite a lot, very often.

Q What do you mean by very often? A I might be all right, if I get home something will go wrong and the first thing you know, I go right out.

Q Does that happen more than once a month? A Yes, sir.

Q About once a week? A About once or twice a week.

By Mr. Francis.

Q What happens if you stand perfectly still and close your eyes? A I keel over.

Q Have you worked at all since the accident? A No, sir.

Q What was your salary at the time of this accident? A $35 a week.

Q Have you made any effort to work since this accident? A Yes, sir.

Q And where did you make this effort? A I tried to take a watchman's job.

Q Where? A On Bergen street.

Q Do you know the name of the company? A No, I don't. I took my brother's place.

Q How long did you work there? A About two hours.

Q What happened? A I was shifted out.

Q Why? A Because I had one of my spells.

Q When you had this spell what happened? A I did not take care of the place. They were coming in and out and taking the stuff.

Q There are different boxes in this place to ring? A Yes, four boxes.

Q And were you able to ring those when you had this spell? A No, sir; I only rang one.

Q Is that why you were discharged? A Yes.

Mr. Gray: I think Mr. Francis is asking him too many leading questions.

Q Have you tried to do any work since? A Yes, sir.

Q What kind of work did you try to do? A I tried to deliver circulars.

Q Were you able to do that? A No, sir; I can't walk far.

Q And when you do walk far, what happens? A I get all pains and stiff down in my legs from the back down.

Q After you got out of bed and during the close of Dr. Flax's treatment, were you able to walk unaided? A No, sir.

Q What did you do, how did you get around? A A cane.

Q How long did you use the cane? A Over a year.

Q How much did you weigh before this accident? A 165 pounds.

Q And after the accident and during the course of treatment did you weigh yourself? A Yes, sir.

Q What was the lowest weight during that period? A 112 pounds.

Q How much do you weigh now? A 120.

Q Did any doctors examine you for the defendants? A I think it was Dr. Perry.

Q And what other doctor? A That is all I remember.

Q Who was Dr. Beling? A Dr. Beling, yes.

Q Where did Dr. Beling examine you? A In his office.

Q And at the time of the examination, did Dr. Beling give you a prescription? A Yes, sir.

Q Is this the prescription (handing prescription to witness)? A Yes, sir.

Mr. Francis: Is there any objection offering this prescription in evidence?

Mr. Cohen: I haven't any objection.

Mr. Gray: I haven't any objection.

(Same received in evidence and marked Plaintiff's Exhibit 3.)

The Court: Did you have it filled?

The Witness: Yes, sir.

Q Are you receiving any medical treatment now? A Yes, sir.

Q From whom? A Dr. Flax.

The Court: Of the same kind, massage and baking?

The Witness: Yes, sir.

Q Where did you get this brace that you wear on your back, do you know what company? A I don't remember, it was in Jersey City.

Mr. Francis: I have a charge for $35.00 for the cost of this brace; is there any objection to having it offered in evidence?

Mr. Cohen: I have no objection.

Mr. Francis: And a St. Michael's Hospital bill; have you gentlemen any objection to that?

Mr. Cohen: I have no objection.

Mr. Gray: I have no objection.

(Same received in evidence and marked Exhibit P. 4.)

Q Is that a St. Michael's Hospital bill? A Yes, sir.

Q Do you know where the doctor is that treated you at St. Michael's Hospital? A No, sir; I do not.

Q Is he connected with the hospital any more? A I couldn't tell you.

Cross examination by Mr. Cohen.

Q Mr. Guensch, where do you live? A 88 17th avenue.

Q You hear me all right, don't you? A Not so good.

Q You heard the first question? A I heard you this time; yes, sir.

Q When did you first go to work for Mr. Marx? A In March, 1928.

Q How tall are you? A Five feet five inches.

Q Five feet five inches? A Yes.

Q And when was it that you weighed 165 pounds, when before the accident? A I weighed that about three years in succession, when I took a job I weighed 165.

Q Was that your weight just before the accident? A Yes, sir.

Q When had you last weighed yourself before that? A It was on a Monday afternoon.

Q What was the date of the accident? A On January 10th.

The Court: What was the day of the week?

The Witness: It was on a Thursday.

Q The Monday previous you weighed yourself, is that correct? A Yes, sir.

Q Whereabouts? A In the 5 and 10, one of these scales out in front of the 5 and 10.

Q Did Marx have a scale? A No, sir.

Q Now, then, what kind of a truck did you drive? A G. M. C.

Q G. M. C.? A No, excuse me; it was a Macar.

Q Do you remember how many tons? A Two tons, I think it was.

Q Was it one of these closed trucks? A Yes, sir.

Q Did it also have a screen at either side? A No, sir.

Q Now, the day of the accident, you testified that you had a young man by the name of Dan with you? A Yes, sir.

Q You don't remember his last name? A No, sir.

Q Were you present when his testimony was taken before this day, the date of the trial? A You mean when they took it at Mr. Walburg's office?

Q Yes. A Yes, sir.

Q You heard the different attorneys ask him and refer to him by name on that day? A No, sir; I wasn't paying any attention what they were saying.

Q But you were in the same room? A I was in the same room; yes, sir.

Q Did this boy work for Mr. Marx, also? A No, sir.

Q He worked for you, did he? A He helped me out.

Q Did Mr. Marx know that? A No, sir.

Q Where did you pick him up on that day? A On Branford Place at Broad street.

Q At the corner? A Not exactly the corner, a little ways in.

Q What hour of the day was that, can you tell us? A In the morning.

Q What time about? A About a quarter-past eight.

Q Were you going west on Branford Place when you picked him up? A I was going around Broad street.

Q Did you make a right turn on Broad street? A Yes, sir.

Q When you got to the Rialto Restaurant, what did you do? A I parked my truck and went inside.

Q Right in front of the store? A Yes, sir.

Q What was it you had to deliver to this restaurant, can you tell us? A I think it was tomatoes, a case of tomatoes and ketchup, I believe.

Q And you went in the store, didn't you? A Yes, sir.

Q You talked with someone there? A Yes, sir.

Q With whom did you talk? A The chef.

Q And later with whom did you talk? A With Mr. DiNicholas.

Q Then you got your check, didn't you? A Yes, sir.

Q What did Mr. DiNicholas say to you with reference to the delivery of the tomatoes and the other merchandise? A He told me, he says he is going down to send up the elevator, I should go out and open the doors.

Q He told you to go out and open the doors? A Yes, sir.

Q That is right, isn't it? A Yes, sir.

Q What kind of a day was it, can you remember? A In the morning?

The Court: What kind of a day was the weather?

The Witness: It was wet out.

Q Quite wet, was it? A It was wet after a rain.

Q It had been raining, hadn't it? A Yes, sir.

Q Suppose you tell the Court and jury just what you did after you left the store and after having talked with Mr. DiNicholas? A I went out and went right between the door, and I took the check and blew on it a little bit. I folded it up and put it in my pocket.

Q Where were you when you did all this? A Right in the doorway between the store, between the doors.

Q And then what did you next do? A I walked over to the elevator.

Q Yes. A I opened one door.

Q Which one? A The one on the right-hand side.

Q Where was your left foot when you lifted the door? A The left foot was in back of the elevator behind the door.

Q Behind the door, do you mean nearer the curb of the street? A Yes, sir.

Q Or the sidewalk? A Yes, sir.

Q And where was your right foot? A My right foot was on the ground.

Q You mean on the sidewalk also? A Yes, sir.

Q Was either of your feet on either of the doors? A No, sir.

Q And then you lifted the right door, didn't you? A Yes.

Q You got hold of the handle? A Yes, sir.

Q And how far back to your right had you lifted this door? A All the way down to the ground.

Q Did you see the chain connecting the two doors? A There is no chain on the doors.

Q And did you permit the door to remain flat upon the sidewalk? A Yes, sir.

Q And then what did you next do? A I stepped on the elevator, I seen the elevator was up.

Q How far up was it? A Even with the sidewalk.

Q Right even with the sidewalk? A Right underneath.

Q The doors? A The doors are on what was even with the sidewalk.

Q When you had opened the one door, the door which had a handle on it, had the platform been even with the sidewalk? A Yes, sir.

Q Did you succeed in opening the other door, the left one? A No, sir, I stepped on the elevator about to raise it up, I had it about a foot when I went down with the elevator.

Q Had you been entirely on the platform? A Yes, sir.

Q Before you started to open the other door? A Yes, sir, just on the elevator.

The Court: Both feet?

The Witness: Yes, sir.

Q Then what happened? A I went down.

Q Both feet on the elevator platform? A Yes, sir.

Q You didn't slip anywhere, of course? A No, sir.

The Court: The elevator didn't go down as soon as you stepped on it?

The Witness: No, sir, I had the door about a foot high, the other door.

Q Did you sign a petition for compensation in the Workmen's Compensation Bureau of this State? A Yes, sir.

Q I show you this petition and ask you if this is your signature (handing petition to witness)? A That is my signature, yes, sir.

Mr. Cohen: I ask that it be marked for identification.

The Court: Let it be marked.

(Same received for identification and marked D. 1.)

Q As you boarded on the platform of this elevator, are we to understand that the elevator then went down the shaft? A Yes, sir, went right down.

Q And can you describe to us the speed at which this elevator went down the shaft? A I couldn't tell you.

Q This elevator platform you say went down the shaft. Now, you are able to tell us, are you not, the rate of speed, if any, at which this elevator went down prior to the time? A I know it drops.

Q Had you ever gotten on the platform before? A Yes, sir.

Q How many times about? A Every time I delivered there.

Q And that is about 20 times? A I can't remember how many times.

Q Do you always go down with the elevator and with the goods? A No, sir.

Q So the first time you ever got on the elevator platform was this time? A I always got on the platform to put my goods on.

Q Can you tell the size of the platform, its width, or length? A No, sir, I did not measure it.

Q Can you tell us the approximate size of it? A I think it is about four foot.

Q Square? A I couldn't tell you, I didn't measure it and I can't remember it. If I see it, I can tell you.

Q In back of you, Mr. Guensch, is a blackboard, was it smaller or larger than that? A Larger than that.

Q Can you tell us about how much larger than that blackboard it is? A It is about as long as that desk (indicating) and it comes out about two feet. That is, getting it down to a "T." That is just what I think it is.

Q Is that equally as wide? A Does that table go all the way back?

Q Yes. A It is about from here (indicating).

The Court: I guess that is about five feet.

Mr. Francis: I will agree that the desk is approximately five feet in relation to what this witness says.

The Court: He also says the elevator, as I understand it, was a little wider than that desk (indicating).

The Witness: No, sir, I did not know the desk came all the way back.

Q Did you say that you never went down on the elevator before? A No, sir.

Q You just always got on it? A Got on it, yes, sir.

Q For the purpose of putting your goods on it? A Yes, sir.

Q But never went down on it? A No, sir.

Q Mr. Guensch, with the platform level with the sidewalk, you were able to put your merchandise on the platform, weren't you, without getting on it? A I opened the door.

Q And is that the only way you were able to open the door? A No, sir.

Q How heavy were those doors, can you tell us? Not necessarily the actual weight or the number of pounds, I mean was it heavy or not? A Heavy, yes, sir.

Q Quite heavy, weren't they? A Yes, sir.

Q In opening the door, did you use one or both hands? A Both hands.

Q And how far had you opened the left door? A About a foot.

Q You mean you raised it about a foot? A Yes, sir.

Q And then what happened? A The elevator went down.

Q And of course, the door fell to the sidewalk? A No, I don't remember, I think the door come right down.

Q Had you received any instructions from Mr. DiNicholas at all with reference to that elevator? A What do you mean?

Q Did he tell you he would send it up and take care of taking the goods down? A Yes, sir, he already told me he would send up the elevator, I should go out and open the door which I done.

Q Had you ever been instructed to wait until his men would take care of that? A No, sir.

Q Never? A Never.

Q Can you remember just the words that Mr. DiNicholas used on that morning with respect to the delivery which you were to make? A All I

remember, he told me he was going down to send up the elevator.

Q He is going down? A He is going down to send up the elevator. He said, "Go out open the door." Before I went out I stopped there and blew the check off, because the check was wet and then I put it in my overalls pocket and I walked out to the door. I dropped one door down flat on the sidewalk when I stepped on the elevator to raise the other door, then I went down.

By the Court.

Q Where was Dan at that time? A He was standing by the truck.

Q On the sidewalk? A Yes, sir, getting the cases ready.

Q What do you mean getting them ready? A Just take them and putting them right on.

The Court: That was a special.

By Mr. Cohen.

Q Had you any other merchandise on your truck? A Yes, sir, but not for that section.

Q Did Dan actually remove the cases of tomatoes or whatever it was that you had delivered? A He had it on the back and all I had to do was just run over and take them and put them on the elevator.

Q When before that day did you deliver any goods to that place? A I believe it was a Saturday before that.

Q The Saturday before the Thursday? A I believe it was.

Q Can you tell us on the average the number of days that you delivered there? A What do

you mean? Every Saturday unless it was a special.

Q Did you know Dr. Flax before the accident? A Yes, sir.

Q Had he treated you before? A For a cold, yes, sir.

Q Anything else? A No, sir.

Q How many times had he seen you before the accident? A He was coming to the house, taking care of the wife.

Q Dr. Willner treated you, that is correct, isn't it? A Yes, sir.

Q Was his treatment of you any different than that of Dr. Flax? A No, sir.

Q Why did you go to Dr. Willner? A Because I owed Dr. Flax some money and I couldn't pay him.

Q You used Dr. Flax a good many times after that, didn't you? A Yes, sir, because I went and had a talk with him. He told me not to worry about the money.

Q How many times did Dr. Willner treat you? A Dr. Willner treated me about four months with an assistant.

Q With a what? A With an assistant.

Q And then after that four months' period, you went back to Dr. Flax after you had a talk with him? A Yes, sir.

Q What about Dr. Koppel, had you known him before the accident? A No, sir.

Q Did he come to your home? A No, sir.

Q You went to his office then, didn't you? A Yes, sir.

Q Where is that? A In Jersey City.

Q Did Dr. Flax recommend Dr. Koppel to you? A No, sir.

Q Who had? A A friend of mine.

Q And what about his brother, how did it come that you went to see his brother for treatment? A He sent me for something else.

Q What was that? A About what we just mentioned before.

Q You mean your inability to have any sexual relations? A Yes, sir.

Q Had you talked with Dr. Flax about this condition? A Yes, sir.

Q Did he recommend Dr. Koppel to you? A No, sir.

Q Did this friend of yours recommend Dr. Koppel for the same difficulty as you had, did he have the same difficulty as you had? A No, sir.

Q How did he know about Dr. Koppel? A I don't know.

Mr. Francis: Objected to as immaterial.

The Court: I will let it stand, he says he doesn't know.

Q Can you tell us, Mr. Guensch, what hour of the day, referring to the day of the accident, was it when you regained consciousness? A I don't know.

Q You did tell us that the first you knew was when you awoke in the hospital? A But I didn't say no time.

Q Have you any idea what part of the day it was? A I know it was in the morning.

Q Did Dr. Fort treat you at the hospital? A No, sir.

Q Did Dr. Shoke treat you at the hospital? A No, sir.

Q Who was it? A Dr. Vanderveer.

Q At the hospital? A Yes, sir.

Q Either here in court this morning? A I don't know, I don't remember him any more.

Q Have you made any attempt to find him? A No, sir.

Q You hear me quite well, don't you? A I can hear you now, yes, sir.

Q Was it cold that day, do you remember? A Yes, sir.

Q Do you remember when it stopped raining on that morning? A No, sir.

Q Was it raining at the time of the accident? A I don't remember.

Q Was the sun shining? A No, sir, it was a cloudy day.

Cross examination by Mr. Gray.

Q Mr. Guensch, as I understand the situation, you were in the store and talked to Mr. DiNicholas and he said he would go down and send up the elevator? A Yes, sir.

Q And as soon as he said that you went down? A I went in between the store and the street and I took the check and blew it off because it was wet.

Q And then you went out and opened the door? A Yes, sir.

Q About how far did you have to walk from Mr. DiNicholas to the door? A From where Mr. DiNicholas was standing to the door?

Q Yes, sir. A I should judge about from here down to that first bench (indicating).

Q Have you ever been down the basement where the elevator shaft goes? A Only once when I first come there.

Q About how long before the accident was this? A When they first opened up.

Q That is about a year, then? A Yes, sir.

Q You had been going there at least once a week during that whole year? A Yes, sir.

Q And sometimes specials? A Yes, sir.

Q About how many times did you go for specials? A I can't remember.

Q This was a special, wasn't it? A This was a special.

Q So you probably was there at least once a week? A No, sir.

Q Not that often? A No, sir.

Q Then once a week and some specials would be between 50 and 60 instead of 20 or 30 times you had been there? A I don't remember how many times I was there.

Q Once a week for a year, that would be over 50, wouldn't it? A Yes, sir.

Q You had only been down the cellar once? A Sometimes I didn't get an order on Saturday, and he doubled his order a week ahead or a week after.

Q You had only gone down to the cellar once? A Yes, sir.

Q About how far from where Mr. DiNicholas and you had the conversation was the door to the cellar and to the elevator shaft? A It was up. His desk is upstairs.

Q Mr. DiNicholas was upstairs? A Yes, sir; by his desk.

Q Did he have to walk downstairs? A I believe so.

Q And then go over and have somebody send the elevator shaft up since the elevator was down, is that right? A I guess so.

Q And you only had to walk from about where you were to the first bench? A Yes, sir.

Q As soon as you got out there, did you start to raise the elevator? A Not right away; no.

Q The door? A Not right away.

Q How long did you stand there? A I was switching that check about from three to five minutes.

Q About three to five minutes doing what? A I was blowing that check; it was wet.

Q About three to five minutes to dry the check? A Yes, sir. I had no blotter; I was blowing at it.

Q Do you know how long three to five minutes is? A Yes, sir.

Q Let us wait just one minute. We will start now.

Mr. Gray: At this time Mr. Gray times one minute on his watch.

Q Now, that is just one minute, and you think it took you four or five times that long to blow on that check, and to dry it? A It was longer than a minute we were waiting.

Q What is that? A It was longer than a minute we were waiting.

Q You still think you waited four or five minutes? A Yes, sir.

Q Before you dried that check? A Yes, sir.

Q Didn't the elevator come up? A No, sir.

Q Did you hear the elevator come up? A No, sir.

Q You can hear that elevator come up, can't you, when you stand there? A I don't know.

Q You have been there a number of times before? A Yes, sir.

Q When they brought the elevator up? A They brought it up, but I never heard it. I was always getting ready on the truck.

Q Do you know whether it was brought up this time or not? A Sir?

Q Do you know whether it was brought up this time or whether it was there? A I don't know.

Q You say you were taking the stuff off the truck, Dan was taking it off that day? A He wasn't taking it off, but he was getting them ready.

Q So that the first time Dan had been out with you was now? A No, sir.

Q How many times had Dan been with you? A About four or five times.

Q You didn't even know his last name? A I just called him "The Kid."

Q How did you get ahold of him; did Mr. Marx put him on the truck? A No, sir.

Q He is a friend of yours? A I have met him, and he asked me if he can't go along with me.

Q He wasn't a regular employee of Mr. Marx? A No, sir.

Q When you lifted this elevator door, you walked around in front of it, or which way does it open; parallel with the building or right opposite with the building? A You see, this is the Rialto Restaurant, and it opens this way (indicating).

Q Then the opening in the door is parallel with the building. You know what parallel means? A Even with the building.

Q Runs in the same direction with the building? A Yes, sir.

Q You say you lifted that up, the outside door nearest the sidewalk, or the one nearest the building? A I did not get you that time.

Q Don't those doors run so when you lift one up, it goes against the building? A No, sir.

Q And runs so it goes on the sidewalk? A Yes, sir.

Q Both on the sidewalk? A Yes, sir.

Q Was it the one nearest the front door that you took first or afterwards, can you remember? A The one nearest the door as you come out.

Q That is the one that has a handle on it? A Yes, sir.

Q That is the heavier one because it has that extra piece on the outside, and the handle? A I don't know if it is heavier than the other one.

Q After you put that door on the sidewalk you saw the elevator there? A I seen the elevator as soon as I picked the door up.

Q As soon as you picked the door up you saw the elevator there? A Yes, sir.

Q You put the door down and it was still there, is that right? A Yes, sir.

Q You walked around and got on and it was still there? A Yes, sir.

Q And then you walked on it? A Yes, sir.

Q You took how many steps on it? A About two steps; I was in front of it.

Q And you leaned and turned around and got hold of this other door? A Yes, sir.

Q You had this door up about a foot? A Yes, sir.

Q Then you say it dropped? A Yes, sir.

Q Do you know what happened to the door you had ahold of? A It was supposed to come down.

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

Q It didn't strike you? A Not that I know of.

Q Had you always transacted your business just this way. You took hold of the handle of this door, got on it to lift it up and did it just that way? A When the door was heavy, I always got on it.

Q This door always weighed the same? A Yes, sir.

Q Every time for a year that you had been getting on that door of the elevator to lift the door, it started all right? A Sometimes it was already there when I got there.

Q But it never dropped before, did it? A No, sir.

Q And every time you had handled the situation just the same? A Yes, sir.

Q And you had been on there probably a minute or so before it dropped? A I believe so.

Q You used this elevator for sending your material down the cellar, is that right? A Yes, sir.

Q And how much did your materials ordinarily weigh? A A case contains six cans, about 20 pounds a can.

Q And how many cases? A 30 cases.

Q You had 30 cases, about 20 pounds each and you used to load this elevator? A No, not all the time.

Q Just that particular day? A It was a special, I went down there.

Q What did the order usually weigh, the total of what you sent down on this elevator? A It all depends on what he gets.

Q What is it usually?

Mr. Francis: Objected to as immaterial.

The Court: If he can tell.

The Witness: I don't know what it is. sometimes we just get a gallon of something, maybe they get a big order.

Q The order sometimes weighed as much as you did, 160 pounds? A Certainly.

Q And is a very heavy order, isn't it, weighing as much as you did? A Yes, sir.

Q The elevator never went down before? A No, sir.

Q Did you ever see any of the other delivery men use that same elevator? A Yes, sir.

Q You never saw it drop with any of them? A No, sir.

Q Did the elevator work any different during that day than it had when you were last there? A No, sir.

Q How did you happen to go to Dr. Willner? A I owed Dr. Flax money.

Q Who sent you to Dr. Willner? A I went there myself.

Q You knew Dr. Willner before? A No, sir, I just happened to go down there. I passed there and stopped in.

Q You saw a sign there? A Yes, sir; I was not feeling good at the time, and I went in.

Q You were treated by him for how long? A About four months.

Q Did you ever tell Dr. Willner or Dr. Flax, or ask them about this trouble you claimed to have? A I have told the doctors.

Q They didn't recommend anybody? A No, sir.

Q You went to some outside friend because your doctors hadn't recommended you to do anything for it, did they treat you for it, either Dr. Willner or Dr. Flax? A No, sir.

Q Did you tell them about it? A Yes, sir.

Q Did you ask them to treat you for it? A Yes, sir.

Q And they didn't? A No, sir.

Q You asked them to recommend some doctor? A No, sir, I did not.

Q You didn't even ask them for some doctor? A I was told not to worry about it; I thought it would go back.

Q How long did you figure for that? A I am figuring ever since.

Q And when did you go to Dr. Koppel? A I don't remember what day it was.

Q Did you go to Dr. Koppel for that particular treatment? A No, sir.

Q What treatment did you go to Dr. Koppel for? A To let him give me a thorough examination. Probably he could help me. I understood he was a specialist in that line.

Q You had gone to him for that particular purpose, for that particular treatment? A Yes, sir. Not for the one directly; I went about my head and particularly to see what was the trouble with my nervousness.

Q You weren't satisfied with Dr. Flax? A I was satisfied with Dr. Flax.

Q Still you went to somebody else? A I just tried to change.

Q Do you remember the bookkeeper from Marx & Company coming to the hospital? A Yes.

Q When was that? A I believe on a Saturday night.

Q How soon after the accident? A Three days.

Q Did you have any talk with him how the accident happened? A No, sir.

Q You didn't say a word to him about that? A We talked. He didn't say much to me because he was in a hurry and he come near closing time.

Q Did you ever go back to Mr. Marx and try to get your job back? A No, sir.

Q You mean to say you haven't done any work at all except the work as a watchman for a couple of hours a night? A Yes, sir.

Q That is the only time you have done any work? A Yes, sir.

Q How have you been living? A Sir?

Q You mean to say you haven't been able to earn any money at all?

Mr. Francis: How have you been living since the accident?

Mr. Gray: I mean what money have you earned?

Mr. Francis: May I have an answer to the question you have put to the witness?

The Court: Can you tell Mr. Gray how you have been living?

The Witness: I have been living up at 18th. We have been starving sometimes, and sometimes something to eat. Sometimes we got a notice we would be put out four or five times for not paying our rent.

Q You have been receiving some money, have you not? A No, sir.

Q You haven't received any money from anybody since the accident? A Yes, sir, I have been borrowing.

Q That is the only money you have had? A Yes, sir.

Q Have you paid the bills? A I still owe bills.

Q Did you pay those bills from St. Michael's Hospital? A I borrowed the money to pay that bill.

Q That bill is not made out to you. A Sir?

Q That bill is not made out to you. A Yes, sir.

Q Look at it and see, and tell us whether it has been paid.

Mr. Francis: Objected to as immaterial.

The Court: He says he did.

Q You think you paid this bill direct to the hospital, do you? A I don't know whether it was paid direct to the hospital, but I was asked for the money.

Q By who? A By somebody.

Q You paid it to somebody despite the fact that it was addressed to Marx & Son and not to you? A Yes, sir.

Q I ask you to look at it and see the word "Draft." Who put the word "Paid" on there, paid by draft? A I don't know who put it on.

Q You didn't then pay by draft? A I gave the money to pay it.

Q Who did you give it to? A This certain party.

Re-cross examination by Mr. Cohen.

Q Mr. Guensch, did anyone remove you from the platform? A I don't remember.

Q Do you remember having walked from the elevator shaft to the back of the cellar? A No, sir, I don't remember.

Q Do you remember having seen the book-keeper, Mr. Seelig? A No, sir, I do not.

The Court: Do you remember having seen the bookkeeper of Mr. Marx in the cellar on the date of the accident?

The Witness: No, sir, I don't remember seeing him.

Q Do you recall Mr. DiNicholas having given you a cup of tea or other refreshments immediately after the accident? A No, sir, I don't remember.

Q You don't remember that? A No, sir.

Q Do you remember having talked with Mr. Seelig at all? A No, sir, I don't remember.

Q Do you know who Mr. Seelig is? A Mr. Marx's bookkeeper.

Q Do you remember having talked with anyone immediately after the accident and in the cellar of the premises in question? A I don't remember.

Mr. Francis: Mr. Guensch, after the accident, did your wife work?

The Witness: She did work.

Mr. Francis: She helped support you and your children since the accident?

The Witness: Yes, sir.

Q You received no compensation from anyone at all since the date of the accident?

Mr. Francis: Objected to as immaterial.

Mr. Cohen: He said he received no money at all since the date of the accident.

Mr. Francis: I am willing to admit, that this man received some money from the State Compensation, under the Compensation Act.

The Court: There is no dispute about it, counsel admits that he did. You may ask him and clear it up.

Q Did you receive any compensation at all from anyone, you needn't say from whom, since the date of the accident? A Yes, sir.

Q Are you still receiving that compensation? A No, sir.

Q When did they cease paying the compensation to you? A About 16 months ago.

Q Sixteen months ago? A Yes.

Mr. Francis: At the time the compensation payments ceased, that cessation was because of an agreement with regard to the institution of this suit, is that right?

The Witness: Yes, sir.

Mr. Cohen: I object to that on the ground that it is leading.

The Court: He already answered.

Mr. Gray: As I understood it, he accepted compensation for some time. He was entitled to have it for a much longer period. He then agreed from the start of this suit that he wouldn't accept any compensation.

Mr. Francis: That has nothing to do with this suit. If he does recover any money in this suit, he is required under the law to pay back every cent.

By Mr. Gray.

Q Now, what do you do when you have these attacks that you say that you have, dizziness? Do you have a doctor there? A No, sir.

Q You wait a while and you get over it? A My wife takes care of me then.

Mr. Francis: I would like to have a Mr. Thompson, if the Court please, take the stand. He is connected with our office as an investigator. Dr. Vanderveer who treated Mr. Guensch at the hospital is on an automobile trip in Virginia, and we are unable to get him.

Mr. Gray: We admit that Dr. Vanderveer treated him.

Mr. Cohen: We admit that Dr. Vanderveer treated him.

IRA FLAX, sworn in behalf of the plaintiff.

Direct examination by Mr. Francis.

Q Dr. Flax, you are a licensed practicing physician of the State of New Jersey?

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

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

Q Do you know the plaintiff in this case, doctor? A I do.

Q When was the first time after January 10, 1929, that you saw him? A I have here a copy of my records on this case if I may be allowed to read it, your Honor.

Q You can use that to refresh your recollection, doctor. When was the first time you saw

him after the 10th of January? A I saw him on February 9th at his home.

Q And what was his condition at that time? A I found him lying in bed complaining of severe pains primarily in his back, his lower back. He was unable to move without having pain and he remained as quiet as possible. In addition to that he complained of soreness in his head, soreness in his right arm and shoulder.

Q And what did you do for him, doctor? A I saw him at his home for a number of days at which time I kept him quiet in bed and subsequently I had him come to my office for baking and massage.

Mr. Cohen: I wonder if the doctor can tell us; he says, "Subsequently."

Mr. Francis: I will prove that, Mr. Cohen.

Q You say you had him come to your office for baking and massage? A Yes, sir.

Q Where were those treatments to be administered, in what part of the body? A To his back.

Q What did you diagnose the back condition to be? A I made a diagnosis of a sacro-iliac strain.

Q You made a diagnosis of a sacro-iliac strain? A Yes, sir.

Q Where is the sacro-iliac joint, doctor? A That is in the junction of the lower portion of the back, the iliac bone which is toward the lower end of the spine.

Q The sacrum is one of the bones of the pelvis? A That is right.

Q How many bones are there in the pelvis? A There is the sacrum, ilium, the ischium and the pubis and then the coccyx coming around.

Q The sacrum, doctor, with relation to size and in comparison with the other bones that form the pelvis, is it larger or smaller than the others? A I don't understand the question.

Q Is the sacrum larger or smaller than any of the other bones that go to make up the pelvic structure? A It is a medium-sized bone in comparison with the others.

Q Can you point out to the jury, on your body, where the sacrum is located? A An area like this (indicating) a square portion right in here below the bending portion of the spine, a sort of a continuation.

Q It is a sieve-shaped bone, larger at the top? A Yes, sir.

Q What rests on the top of the sacrum? A The lumbar region of the spine.

Q What bones make up the sacro-iliac joint? A The sacrum and the ilium.

Q The joint that we refer to as the sacro-iliac joint; how is the iliac bone joined to the sacrum, what kind of articulation is there? A It is, so to speak, a combination of both an immovable joint and movable joint. I mean that there are certain fibres running between the sacrum and the ilium completing the joining. That gives it a tendency towards an immovable joint by keeping the two joints fixed. However, there is a certain amount of synovial fluid in between the hip bones which give it a tendency towards a movable joint. As a result of this it has a slight tendency towards motion.

Q Whenever there is motion, what is the situation with regard to pain? A When normally there is a minimum amount of motion of this joint.

Q How much is there, a great deal or a little force required to move that joint? A Normally?

Q What kind of force will move it so that you will have a sacro-iliac strain? A It may be a terrific force and then again it doesn't necessarily have to be a terrific force, just a sort of an abnormal motion is enough to cause a strain.

Q That was what you diagnosed in this case, a sacro-iliac strain? A Yes, sir. I made a diagnosis of a sacro-iliac strain.

Q Did you have any X-rays at the time? A I did not; no, sir.

Q What did you do for him over this period or after the first time you saw him? A I kept him quiet in bed and subsequently I baked him.

Q After you first saw him, how long did you see him continuously, if you did? A I saw him for the first time on the 9th of February and my subsequent course of treatment ran until the 15th of August.

Q 1929? A Yes, sir.

Q How many times over that period and until August did you see him? A I saw him at his home seven times during this time and 67 times at my office.

Q Seventy-four times in all until August? A That is right.

Q And over that period was the treatment the same, the back? A More or less, yes, sir.

Q Since the 16th of August have you seen him? A Yes, sir.

Q Did you see him after the consultation with Dr. Koppel? Did you recommend any kind of a support? A Yes, I recommended a brace, a spinal support.

Q Can you describe that brace to the jury? A It consists of a lower transverse bar, a side bar

to give him support lower down, then two perpendicular bars up along his back, then it comes with straps across his shoulder and then down to give him support to his lower back so that there should not be any intentional motion if possible. Sort of a restriction to his lower back.

Q If he did not have that support, what would be the effect of this back condition? A He will have more pains than he has.

Q And when there is a condition such as he had before this brace was prescribed was he able to do any work? A No, sir.

Q Was he able to lift anything? A Could not do anything.

Q What have you to say about the case with which he could get in and out of chairs when he was sitting down? A No, sir, very very difficult for him.

Q By the way, doctor, you saw him on the night of February 9th; did you get a history from him? A Yes, sir.

Q What was the history? A The history was that he was injured on January 10th while working: Having fallen down an elevator shaft and taken to St. Michael's Hospital and treated there up until, the day before I saw him at his home.

Q Can you tell us about how many times you have seen him since the 16th of August? A I did not see him very often, I should judge I saw him perhaps once every month or six weeks since that time.

By the Court.

Q Did you give him treatments? A Sometimes I did, it was more or less encouragement for him than anything else. I mean just talking to him, more or less, it was not a case of being able

to do very much for him with the bakings and nothing else could be done.

By Mr. Francis.

Q In August of 1929 when you examined him, when you fixed your steady treatment, what was his condition? A His condition at that time wasn't very much better than it was when I originally saw him.

Q Not very much better? A No, sir, it was not very much better, there was not very much progress. Occasionally he would have a comfortable day but when the condition would reappear.

Q What was his nervous condition over that period? A His nerves were entirely shot to pieces, he was an entirely changed individual from what he was prior to this accident.

Q Do you recall any unusual spells that he had during the course of your treatment? A Yes, sir, I saw him I believe, on January 3rd. I was called up to his house and when I saw him he had what apparently seemed to be lockjaw. He was unable to open his mouth. I took him to the City Hospital. It was decided that he did not have the true lockjaw, that is, tetanus but it was hysteria and after working on him there for perhaps an hour or so, we finally managed to get a little relaxation but he could not open his jaw probably even when he left the hospital. Then I treated him with sedatives and the condition abated the following day.

Q Have you treated him since for this condition? A For this lockjaw?

Q Yes. A I don't think I ever saw him ever have another attack like that.

Q Doctor, with regard to his ear condition, did you do anything for that? A I did not. He complained to me about his ear, and I suggested to him that he should see an ear specialist for that condition.

Q With regard to this sexual impotence that he complained of, did you do anything for that, or did you treat him? A He told me about that. I attributed it to his general run-down condition, and tried to build him up.

Q Assuming, doctor, that that condition arose after this accident and that he still complained of it, what would you say with regard to the possibility of it clearing up sometime in the future? A That is a very difficult question to answer, Mr. Francis.

Q Do you think it will clear up? A I couldn't say, I don't know, I wouldn't care to vouch an opinion. It may and it may not. I wouldn't make a definite statement.

Q Can you tell the jury, can you give the jury any opinion as to its cause other than the nerves? A In this particular case, I think it is entirely due to the fact that his nerves are shot to pieces and his physical condition is very poor. If you can improve his general condition, possibly that will return.

By the Court.

Q You knew him before the accident? A Yes, sir.

Q About what would you say his weight was before the accident? A I should judge it must have been about a hundred and sixty undoubtedly.

Q He was fairly husky then? A Oh, yes, very well developed.

Q And he lost weight? A No question about it.

By Mr. Francis.

Q Does he require treatment, or will treatment do his condition any good? A I don't think it will improve his back any; I don't think any treatment will at the present time.

Q Do you think that he is able to do any work? A No physical work.

Q Doctor, with regard to the history you obtained from him on that day, have you your records there which you wrote down just what he told you; I show you the record or what purports to be a record signed by you and ask you if that is the record you obtained from him, the history you obtained from him on there? A Yes, sir, this is my writing, my record.

Q Can you tell the jury specifically what history you obtained from him?

Mr. Cohen: Objected to.

The Court: I take it this is for the purpose of refreshing his recollection.

Q I want the specific history given to the doctor, and I am giving him his own record to refresh his recollection. A He was injured on January 10th, as the result of having fallen down an elevator shaft. He was then taken to St. Michael's Hospital where he remained until the 9th of February, and when I saw him there was an injury to his—

Q (Interrupting.) This, doctor, is the record I am concerned with, the history of the accident. A I see what you mean.

Mr. Cohen: If your Honor please, it seems to me that the purpose of that memorandum is to refresh his recollection as to what history was given by this plaintiff to this doctor, and to which I think he has already testified.

The Court: He may not have; I can't tell; apparently he did not.

Mr. Francis: I want it specifically understood that I want the history and detail of what was given to the doctor.

Mr. Cohen: May I have the opportunity of cross examining him on that record before he is permitted to use it?

The Court: You may.

By Mr. Francis.

Q Doctor, is that a part of your office records? A Yes.

Q Yes? A This is a copy.

Q That is not the original, is it? A No, sir.

Mr. Cohen: Objected to.

Mr. Francis: In whose handwriting is that, doctor?

The Witness: That is my own handwriting.

By Mr. Cohen.

Q Where did you prepare it? A This?

Q Yes. Where is the original? A At my office.

Q Have you been asked to bring the original? A No, sir; I have not been asked to bring any records.

Mr. Cohen: I don't think he should be permitted to use it.

The Court: It is a copy.

By the Court.

Q Was it made at the time you made the original? A Was it made at the time I made th original?

Q Yes. A No, sir.

Mr. Cohen: Then I object to it, if your Honor please.

The Court: I think it is objectionable.

By Mr. Francis.

Q Can you get that original record here by two o'clock, doctor? A I guess so.

Cross examination by Mr. Cohen.

Q Doctor, in response to a question put to you by Mr. Francis, you were asked with regard to the history of the case; am I correct in having understood you to say that he told you that he fell down a shaft? A No, sir.

Q What was it, with reference to what? A I know exactly what my paper stated, having looked at that record and remembering that he had told me that.

The Court: What did he tell you?

The Witness: He told me that the elevator broke and dropped down with him.

Q Didn't you on direct examination say that he gave you a history of having fallen down in

an elevator shaft? A If I did say that, I was wrong.

Q Doctor, do you know whether or not Dr. Fort at St. Michael's Hospital treated your patient? A I don't know anything that happened at St. Michael's Hospital, except what Mr. Guensch told me.

Q Didn't you concern yourself at all with the diagnosis made at the hospital? A Yes, sir.

Q You did? A Yes.

Q When was it you saw the record of the St. Michael's Hospital? A I didn't see the records at St. Michael's Hospital.

Q Where did you see the records of that hospital? A As I stated, I did not see the records of St. Michael's.

Q When you answered in the affirmative that you were concerned with the diagnosis made at the hospital, just what do you mean? A I spoke to this Dr. Vanderveer.

Q Over the telephone or at the hospital? A Over the telephone.

Q When, can you tell us when, after the accident in point of time? A Within a few days after I saw him for the first time. I remember having had difficulty in getting in connection with this doctor.

Q Do you know Dr. Fort of St. Michael's? A I do not.

Q Have you heard of a Dr. Fort? A I may have met him once or twice at St. Michael's. I believe it is the same doctor.

Q At St. Michael's? A I believe it is the same doctor.

Q Do you know whether or not Dr. Fort treated your patient at St. Michael's Hospital? A I don't know anything about it. All I know

is what Mr. Guensch stated to me: That the interne in charge of the case was this Dr. Vanderveer and I spoke to him.

Q You are not on the staff of the St. Michael's Hospital, are you? A No, sir.

Q Have you ever done any work at St. Michael's? A No, sir.

Q When for the first time had you seen any X-rays? A I did not see any X-rays.

Q Not at any time? A No, sir.

Q And yet you treated this patient? A Yes, sir.

Q Doctor, as I recall your testimony, you saw this patient about 70 times? A That is right.

Q Over a period of a great number of months? A Yes, sir.

Q And didn't you, at any time, doctor, during that period, consult any X-rays at all? A Yes, I did. I got the report of the St. Michael's X-ray.

Q I show you a paper which purports to be a copy of the report at St. Michael's and ask you whether that information which you received from Dr. Vanderveer was the same as that which appears on that note?

Mr. Francis: I object to the use of the copy.

The Court: Objection sustained.

Mr. Francis: The original is here if Mr. Cohen would like to use it.

Mr. Cohen: If your Honor please, I don't want any foolish impression to be left with the Court or the jury, but I have no better idea that this is the original record than Mr. Francis has that that is a copy, and I feel that if he will point out the person who

has the custody of these records I will be glad to use him.

Q Do you know whether or not that is an original record of the St. Michael's Hospital, particularly with reference to the case of Oscar Guensch, will you just look at that and see if Dr. Fort treated this plaintiff? Do you see the name of Dr. Fort there? A From this I receive the impression that Dr. Fort is the attending physician in charge of the case.

Q You didn't consult with him at all, did you? A No, sir; I never spoke to Mr. Fort.

Q Does it appear anywhere from the record which you may examine before answering that, doctor? A Dr. Vanderveer at that time was an interne and Dr. Fort was either the Chief of Staff or in charge of that particular case over at the hospital.

Q What does it say about Dr. Fort there, doctor; you seem to be having some difficulty? A There is nothing to show who was in charge and who was the interne. At one place I notice here on an X-ray report the name of Oscar Guensch, his age, his ward and service they put him under. Then Dr. Vanderveer—I can't tell whether he was the interne entered on these records or what.

Q But you do say Dr. Fort was in attendance? A Yes, sir.

Q The information which guided you in giving this witness proper treatment was that received from Dr. Vanderveer? A That is right.

Q Over the telephone, I suppose? A Yes, sir.

Q You are talking about an injury to the sacro-iliac joint? A Yes, sir.

Q Is it true that in the entire structure of the back, all the nervous system, the central nervous system, or any other nervous system, that this joint is of a medium size compared with the other bones in the back? A I don't understand your question.

Q You were asked by Mr. Francis to give the size of the sacro-iliac joint, and as I recall it you said that it was comparatively of a medium size. A He asked me for the size of the bone, not of the joint.

Q Well, you call it the joint, let us call it the bone. A Of the sacrum?

Q Of the sacrum. A Yes, sir; that is the name of the bone I had reference to.

Q You spoke of a synovial fluid, that prevents friction, doesn't it; isn't that its function in the joint there? A Yes.

Q That wasn't disturbed at all, was it? A No.

Q From any observation you made either from your observation or from X-rays, the synovial fluid wasn't disturbed? A No, sir; that wasn't touched.

Q It permitted movability? A Very limited.

Q To what extent was the motion limited? A It is almost imperceptible. The motion of that joint is almost imperceptible; there is a minimum amount of motion.

Q How did you determine that, not having seen any X-rays at any time during the period over which you treated this plaintiff? A In this particular case?

Q Yes. A I am just trying to tell you what the normal condition of that joint is from what I learned at school and from what I know.

Q What was it that aided you in determining the exact status of that condition? A The terrific pain in the extreme region of this joint, his inability to perform normal motions like friction and rotation and backward motion and extension, and so on.

Q You say something about Guensch having been "shot to pieces"? A About what?

Q About Guensch, particularly with reference to his nervous condition, that he was "shot to pieces." Just what do you mean by that, doctor? A I know him since 1926. He has always been a very quiet individual who did his work, took care of his wife and family. He has always been a very quiet individual who did his work, took care of his wife and family. His general physical condition was very good.

Q How often did you have occasion to see him between 1926 and 1927? A I couldn't tell you; I might have seen him about 10, 12 or 15 times over a period of a year.

Q For what purpose did you call on him? A I treated him once or twice, perhaps three times, for a cold.

Q Anything else? A Yes, sir; I treated his wife; I delivered his wife twice.

Q I am talking about him. A Seen him for illness?

Q Yes, sir. A I may have seen him several times and I don't know how many times.

Q On each occasion you tell us it was for a cold. A I don't remember.

Q Can you recall? A I can't recall.

Q On each occasion you came to see the family, was he there also as you recall it? A I don't know whether he was there at all times; I know I saw him there quite a number of times.

Q You concerned yourself with the patient in the house, I suppose, rather than with anyone else? A I wouldn't necessarily concern myself only with the patient; I might sit down and talk with him or somebody else in the family.

Q Were your relations of a social character? A Not exactly; just a free attitude towards my patients.

Q But you didn't fraternize with him? A No.

Q Weren't familiar or intimate with anybody? A No, sir.

Q What do you mean by having told us that you have always taken care of his wife and family? A I know his attitude at the time his wife was pregnant.

Q That of the average husband, I suppose? A Yes, sir.

Mr. Cohen: No further questions.

Cross examination by Mr. Gray.

Q Doctor, you are a general practitioner, are you not? A Yes, sir.

By Mr. Francis.

Q Doctor, do you remember what your bill was up until August 16th? A I think it was $155 up until August 15th.

Q Is that a reasonable charge, doctor? A Yes, sir.

Mr. Francis: That is all.

By Mr. Cohen.

Q Were you paid, doctor? A I was paid $155.

Q Yes. A Yes.

Q By whom? A By the Hudson Casualty Insurance Company.

Q He didn't pay you, did he? A No, sir.

Q That someone that paid him compensation? A I don't know about that.

Mr. Francis: Objected to as immaterial.

The Court: Objection sustained.

Q Did you ever refuse to give Guensch treatment because of lack of funds? A No, sir.

By Mr. Francis.

Q There was a period, doctor, over some months when he didn't come to see you at all?

Mr. Cohen: Objected to as leading.

Q Was there a period over which he didn't come to you at all? A Yes, sir.

Q After that period he came back to you? A Yes, sir.

By Mr. Cohen.

Q It wasn't because you refused to treat him that he didn't come to see you?

Mr. Francis: I object to that on the ground that the witness did not say that.

The Court: Nor did this witness say that, he has already said to the contrary.

Mr. Cohen: Your Honor will recall that the plaintiff said that he went to Dr. Willner because he hadn't money to pay Dr. Flax.

Mr. Francis: May it please the Court, these records have been examined by counsel. May I now offer it in evidence?

(Same received in evidence and marked Exhibit P. 5.)

DR. LEO KOPPEL, sworn in behalf of the plaintiff.

Direct examination by Mr. Francis.

Q Dr. Koppel, you are a licensed and practicing physician in the State of New Jersey? A Yes, sir.

Q And have been for how long? A Twenty years.

Q Do you specialize in any particular branch of your work? A Traumatic surgery, diagnosis and treatment.

Q How long have you been so specializing, doctor? A 17 years.

Q Have you any hospital connections? A I am connected with the Jersey City Hospital for 17 years.

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

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

Q Doctor, did you see and examine Mr. Guensch, the plaintiff in this case? A I did.

Q What was the date that you first saw him? A I first saw Mr. Guensch on March 19, 1929, in my office.

Q At your office? A About four o'clock in the afternoon.

Q And where is your office, doctor? A 921 Bergen avenue, Jersey City.

Q What was his condition at that time, what did your examination disclose? A Mr. Guensch was suffering from pain on the left side on his back, the lumbar region. He was suffering from pain in the right sacro-iliac region, and he was complaining of a difficulty of hearing in the right ear.

Q Were there any other complaints? A Not traumatic, except neurological.

Q What was his neurological condition? A He showed neurological symptoms.

Q What diagnosis did you make as to his back condition? A He had a tender spot right over the first transverse process of the first lumbar vertebra on the left side which was suspicious of a fracture; I did not make a diagnosis of a fracture then, but the symptoms pointed to it. He also had symptoms in the right sacro-iliac joint which was suspicious of a slight separation of the joint.

Q How about his ear, doctor, did you do anything for that? A No, I did not.

Q Did you make any definite diagnosis as to what the condition there was? A I did not.

Q You don't specialize in ear work, do you, doctor? A No, sir.

Q You spoke of a sacro-iliac separation; can you describe that particularly to the jury? A It is a joint between the sacrum and the ilium in the pelvis. It is a fixed joint held together with ligaments, due to traumatic causes the ligaments become loosened and the joint slides. The degree

of the spreading depends on the force of the trauma.

The Court: Can you tell the jury what you mean by the word "trauma"?

The Witness: Injury.

Q Caused by falls? A That is right.

Q Doctor, is a sacro-iliac sprain or a separation painful? A It is.

Q Was there any objective sign of this separation that you saw when you noticed him? A Oh, yes.

Q What was it? A A person with a sacro-iliac sprain has certain characteristics which sometimes he doesn't even know. The mode which he sits down on a chair and the way he gets off. The way he favors this side. All these things together with the tenderness on pressure give you a positive diagnosis.

Q Was there anything that you could see as you examined his back and attempted to have him bend that concerned your diagnosis? A Spasm on the side, overlying the transverse process of the first vertebra.

Q By objective signs you mean things you can see, which confine a diagnosis? A Yes.

Q Is a sacro-iliac sprain incapacitating, doctor? A To a certain extent, yes.

Q When the patient does any work, is there pain? A Yes.

Q You said he had neurological symptoms. What do you mean by that? A He showed neurological symptoms, of course, ordinary symptoms of nervousness and complaint of dizziness and headaches and other things that he doesn't

know anything about, and I recommended a neurological specialist to see him.

Q Were any X-rays taken to your knowledge, doctor? A At my request, I had Dr. Perlberg take the X-rays of the parts that I examined.

Q Did you receive those X-rays? A I did.

Q After you received them, was your diagnosis changed? A My diagnosis was confirmed.

Q How many times in all did you see Guensch, doctor? A I saw him four times.

Q What was your diagnosis over those four times and what was it on the last occasion when you saw him, had it changed any? A Not as far as my part of the work was concerned. He had the slight separation of the sacro-iliac joint. He had a fracture of the transverse process of the first lumbar vertebra, and his condition was just about the same on the first examination as on the last examination.

Q You spoke of a fracture of the transverse process of the first lumbar vertebra. A That is right.

Q What do you mean by "vertebra?" A It is one of the bones that make up the vertebral column. The spine.

Q Is that the same as the spine? A Yes, sir.

Q Where is the first lumbar vertebra with relation to the sacro-iliac joint? A It is five vertebra above the sacro-iliac joint.

Q Is that painful, doctor? A If the injured keeps quiet, I don't think it is. If he attempts to move, either turn his body or go forward or backwards, of course, that fracture of the transverse process is painful.

Q Did you recommend any device to enable him to get about? A I called up his attending physician and I told him I thought that this man ought to have a brace.

Q What kind of a brace did you recommend? A A spinal brace to brace the spine.

Q Was it subsequently purchased? A Yes, I had it purchased.

Q What treatments did you use generally for sacro-iliac dislocations and for fractures of this sort? A Rest and strapping and a brace.

Q Do you know whether or not this sacro-iliac condition is permanent? A It is permanent.

Q Do you know how long he will have to wear this brace? A I think that he ought to do without it.

Q You think he ought to go without it? A Yes, sir.

Q Why did you recommend it, doctor? A Because I recommended it for over a period of years. Now, since the accident, he has worn this brace for about two years. Now, in my mind the condition is a permanent condition and I think that he ought to give himself a little more movement, be a little freer. I think it will help his mental condition. I don't think the pain is very much worse than it was before when I saw him. It is almost stationary. That is my personal opinion. I think he ought to do without the brace.

Q In other words, you say it is permanent now and the brace won't do him any good? A Right.

Q He says he uses the brace, doctor, to support his back and the spinal column; would it

not ease the pain and permit him to go about more freely without it? A That is right, yes.

Q And with this permanent sacro-iliac condition, doctor, how long will that effect his ability to do any work? A It will always handicap him, always disable him to the extent that he will favor this side more than the other. In other words, his movements are not as free and not as unrestricted as they were before the accident.

Cross examination by Mr. Cohen.

Q Doctor, you say you saw him four times in all? A Yes, sir.

Q You don't recall the dates? A I do, I have them marked.

Q When was it, doctor? A March 19, 1929, June 10, 1929, September 24, 1929, April 12, 1930.

Q April 12, 1930, was the last visit? A That is right.

Q About a little over a year since you have seen him? A That is right.

Q You have a brother who is a physician, too? A That is right.

Q Are you the physician whom he first saw, did he see you first or your brother? A He came to see me first.

Q He came to see you first? A Yes.

Q And do you know as a matter of fact whether he saw your brother also? A On his second visit, he complained to me of loss of sexual power. My brother who was a neurologist and is connected with the Jersey City Hospital for treatment of these diseases was present in the office at the time—

Q You consulted him? A Yes, sir.

Q Do you know of your own knowledge whether this plaintiff, Mr. Guensch, ever resorted to any neurological surgery at all to correct that injury to the sacro-iliac joint? A Not in the interval when I saw him.

Q If there is any injury to the nervous system, it is perfectly proper, is it not, to resort to neurological surgery? A A sacro-iliac injury is not a nerve injury.

Q It is below the lumbar, isn't it? A It is entirely in the pelvis. The nerves have nothing to do directly with the injury except in so much that the force of the injury and the pain that the injured has to go through reacts on his nervous system, but not directly due to his sacro-iliac condition.

Q You were asked with respect to the objective symptoms, and you answered that he moved about with difficulty, favoring one side or the other side, that I think is what you said. A That is right.

Q May not that be the result of a heavily contused portion of the body, may not that give the same result objectively? A No, for this reason; from my experience in these cases. The injured, he can't perform those movements just exactly as he should with a sacro-iliac strain. When you ask him to sit down, and he doesn't know why—you ask him to sit down, you talk to him, and all of a sudden you ask him to sit down. He will put his two hands on a chair and slowly sit down, and make a face then. When you ask him to stand up for no reason at all, he will put his hands on the board and slide off the board. This together with the physical condition

of tenderness over the joint of tenderness, when he swings his body to the opposite side—when he swings his body to the opposite side altogether, all the symptoms taken as a group leads one to believe that the man is suffering from a sacro-iliac separation, and then that to make the diagnosis final I always have X-rays taken. The X-ray proved in this case that my diagnosis was right.

Q Have you any report from any hospital or any physician to guide you before? A I did, I had the reports of St. Michael's present right before me when I first examined him.

Q You did not have the original record? A I don't know.

Q Did you have a paper of which this is a copy (handing paper to the witness)?

Mr. Francis: Objected to.

Mr. Cohen: I asked him if that is a paper—

The Witness: I only had that X-ray diagnosis, I did not have the sheets.

Q Isn't that what it is? A It wasn't that paper, just an X-ray diagnosis alone. Here you have a diagnosis which I did not have on my paper.

Q Then, as I understand it, you specialize in these accident cases—specialize in traumatic surgery, I believe? A Yes, sir.

Mr. Cohen: That is all.

Cross examination by Mr. Gray.

Q Doctor, the sacro-iliac joint is about the strongest joint in the body, is it not? A It has to be, yes.

Q You say the injury is in proportion to the force of the trauma? A It has to be.

Q It has to be a very severe trauma to dislocate the sacro-iliac joint? A Not all of them. Some peculiar accidents are caused where a twist, a very uneven twisting may sometimes produce a separation.

Q Didn't you testify on your direct examination, it was due to the amount of the force of the trauma? A In this particular case?

Q In this particular case it had to be a very severe trauma to produce this condition? A That is right.

Q Now, this fracture you speak of, the process in the vertebra, is that the portion of the bones that sticks out on the side? A One on each side.

Q It isn't connected up with the process above it at all, it is just kind of an extension of the spine, is it not? A That is right.

Q It does not perform any function particularly in supporting the body? A Yes, it does. It is one of the anchors for the muscles of the spine.

Q It isn't part of the support, except that it is an anchor for one of the muscles? A I didn't say that. I can't answer that question the way you think it ought to be answered because it performs this function. While it supports the muscles and if anything goes wrong with the articulation or with the attachment, it is just like a bridge. This whole muscle that is dependent

on this articulation begins to get out of order, and that is why he had muscle spasms.

Q But there is no pressure on the surface of the vertebra, if anything, it is a pull rather than a pressure, is that right? A Yes, that is it.

Q And it is only very small upon the process, is it not? A Yes, it is about—

Q The fracture when you saw it from the X-rays several months later was completely healed, was it not? A Yes.

Q And it healed perfectly, I mean there was no separation or anything of that kind. They generally do heal; so far as the actual process of the vertebra was concerned, that was healed at the time you saw him, and he was suffering only from the sacro-iliac strain, is that right? A No, you see, after a man who has got to work hard, and I presume in all these cases that these men have to work hard, from the history I got in this case, a transverse process that has been fractured is not a transverse process that has not been fractured.

Q What is the difference if it heals perfectly and is just as strong as it is before? A It may give him pain.

Q What is that? A It may give him pain.

Q It is just as strong as it was before? A Yes.

Q In taking this X-ray—did you take the X-rays yourself? A I never take X-rays, I have an X-ray man.

Q Were you there when Dr. Perlberg took them? A I was not.

Q How many pictures did he take, do you remember? A Sir?

Q How many pictures did he take, do you remember? A I am not sure.

By Mr. Francis.

Q Is this the X-ray report you had when you referred to a copy of the St. Michael's Hospital records (handing papers to witness)? A Yes, sir, I don't know whether this is exactly the paper.

Q This is a copy of the one that you have, is that it? A Yes. It read the same as this.

Q Doctor, did you get a history from Mr. Guensch? A Yes, we always get a history.

Q What history did you get from him? A Mr. Guensch told me when he came, about stepping on an elevator.

Mr. Cohen: If your Honor please, I object to this on the ground that he is not the attending physician.

The Court: But he is a treating physician.

Mr. Cohen: As I recall this particular case, only the attending physician was consulted by Guensch, and I think he said he saw him only four times.

The Court: I don't think the cases go so far as to say you can restrict the history by any except the attending physician.

I will allow it.

Mr. Cohen: Exception.

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

Exception noted as ground of appeal.

Q Will you give us the history, doctor, that you got? A The history that Mr. Guensch gave me was that while stepping on an elevator,

it broke and he fell down the shaft, I don't recollect how many feet he said.

At 1 o'clock P. M., the Court takes a recess until 2 o'clock P. M.

After Recess.

IRA FLAX, resumes the stand in behalf of plaintiff.

Direct examination (continued) by Mr. Francis.

Q Doctor, did you bring back your original record card with you, setting forth the history of the case? A I brought back the card I made originally at Mr. Guensch's home.

Q Will you tell the Court and jury what history you obtained from him at the time? A The history is as follows: Injury on January 10, 1929, about 9 A. M. Elevator dropped while he was standing on it. Doesn't remember any more until he found himself in St. Michael's Hospital.

Mr. Francis: I offer the card in evidence.

Mr. Cohen: I object to it as improper.

LEO KOPPEL resumes the stand in behalf of plaintiff.

By Mr. Cohen.

Q Doctor, prior to your first examination of Mr. Guensch, had you known him at all? A No.

Q At whose request did you examine him?

Mr. Francis: May it please the Court, I object to that as immaterial.

The Court: Of what materiality is that?

Mr. Cohen: To impeach the credibility of the plantiff's testimony. Only for that purpose. If it is not for that purpose you may strike it out.

The Witness: He was sent to me for an estimate and for a diagnosis of his disability resulting from his injury.

The Court: The question is who sent him, if you know.

A I believe the Hudson Casualty Insurance Company.

The Court: And then the Hudson Casualty paid you?

The Witness: They did.

By Mr. Francis.

Q What was the amount of each bill on each of those occasions, doctor? A The amount was $10.00 for the examination.

Q And you made four such examinations? A Yes, sir.

Q That was $40? A That is right.

Q And that is a reasonable charge? A That is my charge.

By Mr. Cohen.

Q Did Mr. Guensch tell you that a friend of his sent him to you? A I don't believe he did.

HARRY J. PERLBERG, sworn in behalf of the plaintiff.

Direct examination by Mr. Francis.

Q You are a licensed and practicing physician of the State of New Jersey?

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

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

Mr. Francis: I would like to establish the fact that he is an X-ray man.

Mr. Cohen: We will admit that, also.

Q Doctor, did you take any X-ray pictures of the plaintiff in this case? A I did.

Q Upon what date did you take them? A March 19, 1929, in my office.

Q What did those pictures disclose? A They revealed the presence of a fracture of the transverse process of the first lumbar vertebra on the left side. They also showed a separation of the right sacro-iliac articulation.

Q Doctor, I show you three X-ray plates and ask you if those are the pictures you took? A These are the films of Mr. Guensch.

Mr. Francis: I would like to offer these X-rays in evidence.

(Same received in evidence and marked Exhibit P. 6.)

Q Doctor, at whose request did you take these X-ray pictures? A Dr. Koppel.

Q And you were paid I take it? A Yes, sir.

Q By whom? A The bills were sent to Dr. Koppel's office, and paid from there.

Q You don't recall with whose check? A I do not; no, sir.

Q What was your bill, doctor? A I believe the bill in this case was about $20.00.

Q How much? A About $20.00, if I remember rightly.

Mr. Cohen: We agree that that is reasonable.

DAVID CARPENTER, sworn in behalf of plaintiff.

Direct examination by Mr. Francis.

Q Where do you live, Mr. Carpenter? A 166 Avon avenue.

Q Where did you live on January 10, 1929? A 550 Bergen street.

Q Did you know Mr. Guensch before January 10, 1929? A No, sir.

Q On that morning, at about 9:15, were you on Broad street? A Yes, sir.

Q Where were you exactly at that time? A We stopped just a little bit this side of the Rialto Theatre.

Q When you say "we," who do you mean? A The gentleman who I was helping.

Q What was his work? A He was driving, delivering milk.

Q For who? A For the Alderney Milk Company.

Q Where was your truck parked at that time? A Not exactly what you would call the right-hand side of the street going towards South Broad.

Q Do you know where the Rialto Theatre and the Rialto Restaurant are? A If I am not mistaken, the Rialto Theatre is right across from the City Hall.

Q And where is the Rialto Restaurant? A Right next to it.

Q Where was your truck parked with respect to those two places? A If I am correct, about 25 or 30 feet this side of the restaurant.

Q Nearer to Broad and Market or nearer to the park? A Broad and Market.

Q Were there any other vehicles parked in front of you? A One truck, sir.

Q Do you know what truck that was? A Marx's pickle.

Q Marx's pickle? A Marx's something, pickle factory or something.

Q Were you on the truck or on the sidewalk, or where? A Standing on the sidewalk.

Q Did you see Mr. Guensch, or did you see a man near the truck, or on the sidewalk at that time? A There was a young fellow standing near on the back of the truck on the sidewalk. I seen another man walking towards the elevator.

Q As he reached the elevator, do you mean the elevator or the doors? A The doors of what should be the elevator.

Q When he reached those doors what did you see him do?

Mr. Cohen: I object to that. He did not say whether he reached those doors.

Mr. Francis: I will withdraw the question.

Q When you saw him walk somewhere, where did he walk to? A He was walking from the front, from the door in front of the restaurant toward the side, he was walking down along the side.

Q And where did he stop? A He stopped where the elevator should be.

Q And what did you see him do if anything? A I seen him pick one door up and then he stepped over there, I thought the elevator was there. He went down to pick up the door, then he disappeared.

Q What did you do then? A At the same time he was picking up the door, the fellow that I was working with, he called for me and I turned around, I turned away when he reached to pick up the door, I turned around and then when I looked back, the man who had picked up the door had disappeared, and I went on and I didn't think anything about it.

Q Did you subsequently remember that there had been an accident there? A It was a couple of days later. A friend of mine by the name of Bill, I couldn't remember his last name, I only know him from seeing him around the different corners. I asked him how long he was working, for he was out of work for some time which I knew.

Q Where did you see this man? A Up on Park street.

Q What was he on, was he on a vehicle or what? A He was right on the truck.

Q On the same truck? A I couldn't say whether it was the same one he was riding on the truck.

Q Did you have any conversation with him? A I stopped him. I said, "How long have you been working"; he said he had only been working there last week.

Mr. Cohen: Objected to as hearsay.

Q After that conversation with the man who was driving the pickle truck at that time where did you go? A I went to the hospital to see the gentleman who was hurt.

Q What hospital did you go to? A St. Michael's.

Q Did you see Mr. Guensch there? A Yes, sir.

Q When you came there, what did you do? A I gave him my name there. I told him I happened to see him there. He asked me if I had seen him on the elevator; I said that in case he ever needed me as a witness will he look me up.

The Court: Strike it out.

Q When did you give your name to him? A When I went to the hospital to see him.

By the Court.

Q When did you go to the hospital, how long after the accident? A The following week, sir.

Q Sometime the next week? A Yes, sir, it was on Sunday.

Q What is that? A It was on a Sunday of the following week.

Cross examination by Mr. Cohen.

Q Mr. Carpenter, where do you live? A 166 Avon avenue.

Q 166 Avon avenue? A Yes, sir.

Q And for whom were you working on the date of the accident? A I was not working, sir.

Q You were not working? A No, sir.

Q What about this truck, this Alderney truck, do you know someone on that? A I knew the man who was driving it.

Q What was his name? A Joe Riffel.

Q Joe Riffel? A Yes, sir.

Q What hour of the morning was this? A I was riding with him about four o'clock in the morning, up until noontime, around eight or nine o'clock at that time.

Q Were you in court this morning? A Yes, sir.

Q From the time that court opened? A Yes, sir.

Q You heard the testimony this morning given by Mr. Guensch? A Was I there, sir?

Q Were you in court this morning; I ask you whether you were in court this morning and your answer was that you were? A Yes, sir.

Q Had you heard the testimony given by Mr. Guensch? A Yes, sir.

Q The question previous to this one was this: What was the hour at which you saw Mr. Guensch in front of the Rialto or next to it? A I

couldn't say the exact time, sir, it was around nine o'clock.

Q And can you tell us the kind of a day it was? A The sidewalks were wet; like a foggy sort of a morning.

Q Can you tell us the day of the week? A Not exactly, no, sir.

Q Was it the former part of the week or the latter part of the week? A Latter part of the week.

Q That I suppose is from Thursday on, is that so? A Yes, sir.

Q Was it on a Saturday? A No, sir.

Q Was it on a Friday? A I can't tell you, sir.

Q Were you standing when Mr. Guensch first came out of the restaurant? A In front of my truck, sir.

Q You saw him come out of the restaurant? A Yes, sir.

Q What was he doing between the time that he left the restaurant and the time that he got on this elevator or platform? A I seen him come out. He had his hand in his pocket and he walked towards the doors. He opened one of them up and stepped on the elevator.

Q You saw him doing nothing else from the time he came out of the restaurant until he got on this platform or elevator? A I saw him take his hand out of his pocket.

Q Did he have both of his hands in his pockets? A No, sir, I couldn't say that because I don't know. I remember having seen his hand in his pocket when he come out.

Q How far away, either north or south—when I say north, that is Broad and Market,

south is the opposite—how far north was he from the direction of the elevator? A He was south.

Q How far south? A He walked south.

Q Pardon me? A He walked south.

Q How far north were you from the elevator? A About 20 or 30 feet.

Q In which direction were you going? A I was going straight towards him.

Q And for how long a time had you been looking, or had your eyes fixed on that particular point? A I couldn't say exactly how long.

Q About how long, I don't want exactly, you don't have to tell me exactly. A It is hard to say, sir.

Q Was it five minutes? A Five minutes is a long time.

Q Can you tell me how many minutes? A I imagine—say five minutes.

Q Was there anything peculiar about this plaintiff or the vicinity in which he was then walking that attracted your attention to him? A Only that I had asked the helper who was the driver.

Q Which helper? A The man who was helping him on his truck. I didn't know he was helping him at that time.

Q What was it that made it apparently of importance to find out who the driver was? A Because I was inquiring about certain things he had that I wanted to buy for my mother.

Q Who was that, Mr. Guensch? A Yes, I asked this young man if he was the boss and he says, "No, the boss is inside."

Q You are talking about Mr. Guensch? A Yes, sir.

Q Then you had known him before the accident? A I did not.

Q What was it he had that you wanted for your mother? A I wanted to inquire about some pepper hash.

Q Did you know that Mr. Guensch at nine o'clock in the morning or thereabouts would be at 913 Broad street on that particular date? A No, sir, I didn't.

Q You took a chance that he might be there? A I just happened to see the truck, when I seen it it came to my mind and I inquired.

Q How do you know whether he had this particular product that your mother wanted? A I didn't know, I only knew from the concern he worked for that they handled it.

Q Was that the young man who was his helper? A Yes, sir.

Q Whereabouts did this conversation take place with reference to the restaurant, either north or south of the restaurant? A I was talking to the helper right in front—I was talking to the helper right at the rear of the truck.

Q And where was that? A Right in front of the one I was helping on.

Q Was that on Broad street? A In front of the Rialto Restaurant.

Q Was it directly in front? A No, sir, it was more so in front of the theatre than it was at the restaurant.

Q And this conversation took place about 20 or 30 feet away? A It wasn't that far away.

Q About 20 feet? A Yes, sir.

Q In which direction was this helper facing? A At the time he was talking to me he was facing toward Market street.

Q So that he was facing north, is that right? A Yes.

Q You were facing him and therefore south? A Yes, sir.

Q How long had this conversation taken place between you and this helper? A Only a few seconds, I asked him a question and he answered it.

Q I didn't get you. A Only a few seconds, I asked him a question and he answered it right away.

Q Then what did you do after the questions were answered? A I walked back to my truck again.

Q After you asked the questions you walked back to your truck? A I walked back to my truck.

Q Was the Alderney truck in back of Marx's truck towards Market street? A Yes, sir.

Q Was it parked at the curb? A Yes, sir.

Q Opposite I suppose, the Marx truck? A It was parked also.

Q Do you remember whether or not the tailboard of the Marx truck was down? A I couldn't say; I think it was, sir.

Q So that this is the order of events as I understand it: Marx's truck was parked in front of the Rialto Restaurant, your truck or the Alderney truck was in back, that is north, and you were facing south, and the helper was facing the opposite direction, and you had a conversation with him. Now, what did the helper do after he answered all your question? A I don't know what he done, I turned around and walked toward my truck, I don't know what he done, whether he just stood there.

Q Did this young fellow go back to the restaurant or did he go back to the truck, or what did he do? A He was standing there, just standing there.

Q Were you watching him? A No, sir.

Q Had you seen him at all? A I didn't see him after. I just walked back to my truck. I seen him standing there, I didn't pay any attention to which way he turned.

Q How long had you been in your truck before you saw Guensch? A I was only a few minutes.

Q A few minutes? A Yes, sir.

Q Tell us the position that Mr. Guensch assumed in opening the door to this lift? A I seen him lift the one door up.

Q Which door was it? A The right-hand door.

Q And where were his feet? A I didn't take notice as to where he had his feet.

Q He stepped on the doors? A I couldn't say, the next I noticed his whole body bending down to open the door, but I didn't notice to look where his feet were placed.

Q How far did he get the right door up before this accident occurred, can you tell me? A He had the right door open the whole way.

Q When you say the whole way, was it flat, perpendicular to the sidewalk? A Lay on the sides, picked it up and laid it down.

Q What happened next? A Then he stepped in and started to lift the other door.

Q You were 20 or 30 feet away? A Yes, sir.

Q And did you see what was under the door? A I did not, sir.

Q Guensch was in front of you and therefore you couldn't see anything under him? A No, sir, I was too far away to see anything.

Cross examination by Mr. Gray.

Q Mr. Carpenter, are you married? A Yes, sir.

Q Were you married at the time? A No, sir.

Q Were you living with your mother then? A A woman I call my mother. It isn't actually my mother, it is a woman I call mother.

Q You say you were working for the Alderney business? A No, sir.

Q How long had you been riding around, how many days, with this Alderney driver? A I didn't ride with him steadily, sir, I used to only ride with him every once in a while.

Q About how many times had you ridden with him prior to this? A Maybe eight or ten times.

Q Did he have a horse-drawn truck or an automobile truck? A He had an automobile truck and I helped him on his truck.

Q And you had been riding around with him? A Yes, sir.

Q Did he make wholesale deliveries or retail deliveries? A He made retails.

Q And to whom was he delivering a retail delivery there? A I did not say he was making a retail delivery, I did not say what he was doing.

Q What was he doing? A I don't know what he was doing, I didn't mind the man's business. I was only riding and helping him. He stopped and went in, I do not know when

and where he was going and what he was going to do.

Q And you started at four o'clock that morning? A Yes, sir.

Q In January, around that time you had ridden with him seven or eight times, starting out four o'clock in the morning? A Sometimes he started away earlier.

Q You would ride with him then? A Yes, sir.

Q Did he call for you, wake you up at that time in the morning? A If I would see him the day before, he would ask me what I was doing, if I was doing anything the next day, and he asked me if I would go with him the next morning, and I would say, "Yes."

Q What time did you have to get to work? A Sometimes one o'clock, sometimes two o'clock; it is according to what time he told me.

Q Do you know the number of his truck, the delivery number? A I do not, sir.

Q Where do you work now? A At the present time, H. R. Ritter, Northern New Jersey Hotel.

Q And how long have you been working for them? A Started to work for them in December.

Q December of 1930? A Yes, sir.

Q How soon after this occurrence on Broad street did you get a job? A I couldn't tell you exactly how long after it was.

Q About? A I don't know, sir.

Q You know when you went to work, don't you? A I have had quite a few jobs, and I have been laid off time and time again, sir. I don't know exactly when I went to work, it might be a month, maybe a week, I don't recall; it was quite a while I was out of work.

Q How long have you been riding around with the milkman? A I was out of work over a year at that time.

Q What had you done previous to that? A Drove a truck.

Q And how much did you get? A $35.00 a week.

Q And after having been out of work for over a year, and after earning $35.00 a week, when you saw a pickle truck, you thought of the delicacy that the lady you call your mother wanted? A Yes, sir.

Q What kind of a truck was this Marx truck? A I don't recall exactly the kind of a make truck it was.

Q I mean, was it an open truck, closed truck or what? A Closed truck.

Q What sign did it have on? A It had the name Marx on the side.

Q Where did it have that name Marx? A On the side of it.

Q On the side of it? A Yes.

Q You were in the back, 25 feet in back, and you could see the sign on the side? A When you walk away, if you can walk away from a truck, two or three feet, and you glance ahead, you can see the name on the side of the truck.

Q I understood you were on the truck. A I did not say I was on the truck; I say I was standing alongside the truck.

Q Why did you get off the truck? A I got off the truck after the driver got out with the cream or what it was on it.

Q You stood there? A Yes, sir.

Q Then you saw this name "Marx"? A I didn't exactly say the name Marx. I seen the barrels in there and that is what attracted my at-

tention first. Then I walked out. I seen what it was, then I inquired.

Q You made some remark about the man putting his foot on the door or something like that, he wouldn't have put it unless the floor had been there; did you say anything like that? A I did not say put it on the door.

Q What did you say? A I say I seen him when he opened the door and stepped in to lift the other. I said I don't think he would step in if there wasn't anything to step on.

Q Why did you think there was nothing there? A I don't say I don't think there was nothing there; I don't think a man would be foolish enough to step on nothing and pick a door up.

Q That is just it, you couldn't say whether there was an elevator there or not? A I couldn't say whether there was an elevator there or not; I was too far away.

Q Were you here this morning? Did you hear this morning that there was no door there or floor there? A I do not; I do not know whether there was a floor there or not.

Q Just your surmise that he wouldn't step there unless the floor was there? A I can answer that, but it might not sound right to you. I know a man had to be awful dumb to step on an empty space, if there wasn't anything to stand on.

Q That is the reason why you say this? A That is why, I imagine there is something to step on.

Q Did you see this man go down? A At the same time he lifted the door, the man I was working with called me. I heard a noise, I looked back and I found he was gone.

Q Why did Joe call you? A He wanted to go.

Q He didn't say anything about the man? A He did not see the man. I don't know who he was seeing.

Q He did not know, you are sure, the man had disappeared? A No, sir.

Q When was the first you knew about this? A The following week.

Q And who was this fellow Bill; you don't know his name? A I only know him by "Bill."

Q How long had you known him? A I can't say for any certain length of time. I know him from being around the corner.

Q What corner? A Bergen and Avon.

Q That is where you spent your time when you were out of work, around that corner? A That is where I live, right on the corner.

Q You never found out this fellow Bill's last name? A I never tried to find it out.

Q You next saw him driving a truck for Marx Brothers? A I seen him driving a truck. Because I knew he was out of work for some length of time, when I seen him driving a truck; naturally, I was curious. I wanted to know how he could get a job and I couldn't.

Q Did you notice what truck he was driving? A Marx's.

Q That is the reason you asked him, because he was driving Marx Brothers' truck? A Not only because he was driving that truck, but because he was driving a truck. I would ask him if he was driving any kind of a truck.

Q What did he tell you? A He told me he had only got the job a few days before that. That the fellow that was driving a truck was hurt on Broad street, was in the St. Michael's

Hospital. I asked him how it happened and he says that the fellow was hurt at the Rialto Restaurant and he said he was in St. Michael's Hospital. I asked him, I said, "What is his name?" and he told me what his name was. I was down there when he was there, I seen him just before it happened and he told me the date, the time, and I recalled that I was there. I don't recall now what date he said it was. I said, "I think I will go up and see him"; so I went up to the hospital and inquired if Mr. Guensch was there. They told me he was there. I asked them if I could see him. They asked me who I was. They told me, "All right"; so I went up to see him.

Q When Bill told you that this man had been hurt on Broad street, you had next seen the man step on the elevator, and hadn't seen any accident, why did you think there had been an accident and this was the man? A I didn't think there was an accident until he told me.

Q Why did you think to ask him? A I didn't think to ask him whether there was an accident. I asked him how he got the job and he told me the way he got the job. The man who was driving the truck was hurt, that he fell. He says he was hurt, and he fell on an elevator, and he says that is how he got the job.

Q But you didn't think that Guensch had fallen when you saw him that day? A No, sir.

Q Then why did you make inquiry about a man who had an accident that day?

Mr. Francis: Objected to.

The Court: Objection sustained.

Q The mere fact that Bill had told you that a man had been hurt at the Rialto Theatre and you

were there at the time, how did you associate the two? A Because that was the last day I was riding with Joe and I happened to be there. It was the last stop I had made and I recalled it from that.

Q Still you didn't know while you were there that any man had been hurt, did you? A No, sir.

By Mr. Cohen.

Q Is Joe Goldy the driver of the milk truck? A Joe Riffel.

Q R-i-f-f-e-l, I think it is spelled. A I think that is the way he spells it.

Q Where did he make a delivery on that morning? A Where did he make a delivery on that morning?

Q Yes. A He made several.

Q Near the Rialto. A He didn't make any around the Rialto. He only stopped in there. Why he went in, I don't know, where he went or what building he went in, I could not tell you.

Q Where were you situated with him just immediately before he got off on Broad street? A I was riding on the truck with him.

Q And did you see where he went? A He pulled up on Broad street and got out, and went in some building, what building he went in I could not say.

Q Did he tell you? A No, sir, I didn't ask him.

Q You had to get off, didn't you, in order to let him out? I believe that is what you said. A I had to let him off so I could get out.

Q You didn't watch him after that? A No, sir, I didn't pay any more attention to him.

Q You went back on the truck? A No, sir, stood by the front of it.

Q Is Joe Goldy the friend whom you met on the corner? A I never heard of Joe Goldy, I never heard of him.

Q You say you met someone with whom you were talking, that is Bill? A I said the fellow by the name of Bill.

Q And did he work for Marx? A He was working for them when he told me.

Q You don't know whether they have more than one truck? A I couldn't tell you, sir.

By Mr. Francis.

Q Mr. Carpenter, after this accident did you make a statement setting forth the facts of the accident as you knew them?

Mr. Gray: I don't think that is material.

Mr. Cohen: I think that is objectionable.

Mr. Francis: I will withdraw the question.

May it please the Court, the testimony of the helper on the Marx truck at the time of the accident was taken before trial by consent. May I read it into the record?

The Court: You may.

Mr. Francis: I would like to have it go into evidence.

Mr. Cohen: No objection.

Mr. Gray: No objection.

The Court: All right, we are consented that it will go in with the jury.

(Same received in evidence and marked Exhibit P. 7.)

(Mr. Francis reads the testimony as follows:)

"NEW JERSEY SUPREME COURT.

ESSEX COUNTY.

OSCAR GUENSCH,
Plaintiff,
vs.
THE TRUSTEES OF THE THIRD PRESBYTERIAN CONGREGATION IN NEWARK, and P. E. DENICHOLAS, INC.,
Defendants.

Transcript of testimony of Daniel Costello, examined before trial, taken before William E. Davenport, a Supreme Court Examiner of New Jersey, at the office of Harley, Cox & Walburg, Esqs., Military Park Building, Newark, N. J., on Friday, January 30, 1931, at four o'clock P. M.

Appearances:

Harley, Cox & Walburg, Esqs., by Harry E. Walburg, Esq., for the plaintiff.

Langdon E. Morris, Esq., for the Trustees of the Third Presbyterian Congregation of Newark.

Cohen & Klein, Esqs., by Philip Klein, Esq., for P. E. DeNicholas, Inc.

It is stipulated and agreed by and between the attorneys for the respective parties, that the testimony of the witness may be taken stenographically and afterwards reduced to typewriting, the

signature of the witness to his said testimony being waived.

(Signed) WM. E. DAVENPORT,
Supreme Court Examiner of New Jersey.

DANIEL COSTELLO, being duly sworn by the Examiner on behalf of the plaintiff, testified as follows:

Direct examination by Mr. Walburg.

Q Mr. Costello, where do you live? A My home town?

Q Your home? A I am staying in Bellaire, Ohio.

Q When are you going back to Bellaire, Ohio? A Tomorrow.

Q Is that where your father and mother lives? A Yes.

Q With whom did you stay while in Newark? A With Mr. Guensch, now.

Q Have you any relatives in Newark? A My grandmother.

Q Where does she live? A On Van Buren street, Newark.

Q How long have you known Mr. Guensch? A Three years.

Q Did you know him during the year 1928? A Yes, sir.

Q How did you come to know him? A I was with my grandmother then.

Q On Van Buren street, Newark? A Yes. All I happened to see, he called a couple of boys over to help fix the truck.

Q Where was this? A On Van Buren street.

Q Was Mr. Guensch driving a truck then? A Yes.

Q What year was that? A That was in the summer—in July.

Q In 1928? A About that.

Q Where were you when you actually came over? A Near the East Side Park playing.

Q Who went over with you? A A colored boy and I.

Q What did you do with the truck? A The tailboard, we fixed it.

Q After that time did you ever see Mr. Guensch? A Yes, he told me to go over to the garage on days—busy days.

Q Where you ever with him on the truck? A Yes, I was.

Q Was there any particular day you would go with him on the truck? A On busy days.

Q What would you do on the truck? A Help take cases off and bring them in the store and bring the empty cases back.

Q What would you take in the stores, what kind of cases? A Tomato cases, ketchup cases, sauerkraut, herring and so forth.

Q Do you remember January 10, 1929? Was Guensch hurt? A I was on the truck with him that day.

Q Where did you meet him on that day? A On Branford Place.

Q What time of the day did you meet him? A In the morning, quite early.

Q Did you go on the truck? A I asked him first.

Q Did you go on the truck? A I got on.

Q Did you ride on the truck? A Yes.

Q Where did you go from Branford Place? A The Rialto Restaurant was his first stop.

Q And where is that? What street? A On Broad street.

Q When you got to the Rialto Restaurant, what did he do with the truck? A He parked it right in the front.

Q What did you do? A We both got off.

Q Where did you go? A Inside the restaurant.

Q When you got into the restaurant, how long did you stay in there? A We were there a few minutes.

Q Was Mr. Guensch in the restaurant with you? A Yes.

Q Who else was in the restaurant? A Mr. Cook.

Q While you were there did anybody else come in? A No; Mr. Guensch, and I, and the cook were there, as I remember.

Q How long did you stay there? A Mr. Guensch wanted to collect a check.

Q Did he get a check while there? A He had to wait for the owner.

Q Did DeNicholas come in? A Yes.

Q Did Guensch get a check? A Yes.

Q What did he do after he got the check? A I went out towards the truck and Guensch followed me.

Q How long were you outside before Guensch came out? A I went before him.

Q How long were you outside before he came out of the restaurant? A Say about five minutes; about that.

Q After he came out of the restaurant, what did he do, if anything? A I went near the elevator to lift the door up a little bit, and it was kind of heavy and I dropped it. Before I

dropped it I saw the platform even with the sidewalk.

Q Let us go back. Where was this door? A On the sidewalk.

Q Level with the sidewalk? A Yes.

Q What kind of doors were they? A Iron doors.

Q One or two doors? A Two.

Q You say you started to lift one? A Yes, one with the handle.

Q Was it heavy or not? A It was heavy then.

Q How high did you lift the door up? A Say about five inches.

Q When you lifted it up could you see underneath the door? A Yes, a platform.

Q What kind of platform? A Wooden.

Q Did you lift the door all the way up? A No, about five inches.

Q Why didn't you lift it all the way up? A It was heavy.

Q What did you do with it? A Dropped it.

Q What did you do then? A I went to the truck and Guensch came out and he grabbed that handle and raised it up and threw it over, and he got on the elevator to lift the other door up and he went down.

Q Who went down? A Guensch.

Q Did you see him after he went down? A He was standing on the platform.

Q Did you look in? A Yes.

Q After he went down, where was the elevator? A It was kind of slanting, like.

Q Where was it in relation to the basement? Was it all the way down? A Yes, it was.

Q Where was Guensch, laying on the elevator? A Laying on the right side.

Q He hadn't rolled off the elevator? A He was down already.

Q Was he laying on the elevator when you saw him? A Certainly.

Q When Guensch lifted the door and put it down could you see the elevator then? I mean before he went down. A Yes.

Q Where did he put the door? A He threw it over on the sidewalk.

Q Did that door fall on the sidewalk? A Certainly, it made a noise.

Q Could you see the platform then? A Certainly I seen it.

Q Where was Guensch standing? A Inside on top of it.

Q After the platform went down what did you do? A I looked over and I seen him laying in the corner and blood was coming out of his mouth, and I went back like and I waited a few minutes until a lady passed, and she said, 'Oh, my God—'

Mr. Walburg: Strike that out.

Q Did anybody come around? A Just a few people.

Q What did you do? A I went to notify his wife.

Q How old were you at the time? A About seventeen.

Q How old are you now? A Twenty.

Q When were you twenty? A July 2nd.

Q You went and told his wife and you saw his wife that same day? A Yes.

Q And you saw his wife that same day? A Yes.

Q And you told her what happened? A I told her."

(Mr. Cohen reads the cross examination as follows:)

"*Cross examination* by Mr. Klein.

Q Where do your parents live in Bellaire, Ohio? A 329 East 22nd street.

Q How long have they lived there at that address? A Oh, not quite three years.

Q How long have you been living in Newark? A I don't live here, I board here.

Q How long have you been boarding in Newark? A Say about three weeks.

Q For the last three weeks? A Yes.

Q Where were you before that? A With my mother in Ohio.

Q How many times in the last three years have you been back and forth from Bellaire, Ohio? A Twice.

Q You were here three years ago, were you not? A Yes.

Q And at that time you were boarding with whom? A My grandmother.

Q Now, this last time when you returned from Bellaire, Ohio, with whom have you been living? A With my grandmother.

Q With whom are you boarding now? A Mr. Guensch, for the last few days.

Q How long have you been boarding with him? A Five days now.

Q Are you paying him anythng for your board? A He was just keeping me and told me he would help me get a job.

Q He promised to get you a job? A Yes.

Q Did he get you the job? A No, sir, not yet.

Q Is that why you are returning to Bellaire? A I am going tomorrow.

Q Are you going out by train? A By car.

Q In whose car? A My uncle's.

Q What is his name? A David.

Q What is his last name? A Costello.

Q Where does he live? A On Van Buren street.

Q What number? A 29.

Q Where does your grandmother live? A Van Buren street.

Q What number? A 29, second floor.

Q The first time you met Guensch was when he had trouble on Van Buren street near the East Side Park? A About there.

Q And you went over to help fix his truck? A Yes, I had another fellow.

Q Did he pay you for your services then? A He just gave me some cigarette money.

Q When was the next time you saw Guensch after that? A The next time?

Q Yes. A I used to go over to the garage on South Sixth street to see him. Probably a week later. He told me I could give him a hand being helper and make a few dollars with him.

Q You went up to his garage on South Sixth street? A Yes.

Q How often did you see him after that? A I didn't go every day; every busy day.

Q Can you give us some idea whether once or twice a week? A Twice a week.

Q Twice a week from that time on steadily? A Yes.

Q And he paid you? A Certainly he paid me.

Q In cash? A Certainly, he paid my meals and for cigarettes.

Q At the end of every day? A Tuesdays and Fridays was the busy days.

Q That is as far as you can remember? A Yes.

Q Now, do you recall the day of the accident? A In January.

Q You remember the day of the accident? A Yes.

Q And you met Guensch there? A On Branford Place.

Q Near where? A Treat Place.

Q How did you happen to meet him? A I was looking for a job in a shoe shine place on Branford Place near the Branford Theatre. There are two shoe shines there and I was trying in both places and couldn't get in there, and I happened to turn around and see this big truck in traffic and I seen him and called him and I asked if I could get on, and he said "Sure, come along."

Q Had you gone into that shoe shine shop to apply for a job? A I did.

Q Who did you see there? A A big fellow.

Q Do you know his name? A No, I don't know his name.

Q Is that shoe shine parlor there yet? A Two of them.

Q Which one was it you went to? A I went to both of them.

Q Do you know the name of the manager you spoke to for a job? A No.

Q Did you ever work at those shoe shine parlors? A No.

Q Is that your regular job? A I used to shoe shine back home in Bellaire.

Q Did you have a box? A I used to have a box.

Q Where is the last you ever worked in a shoe shine place in this vicinity in Newark? A I used to go on Broad street.

Q At what address? A Do you mean like a store?

Q Yes. A No, with a box; I went around with.

Q In Newark? A Yes.

Q When was the last time you carried a box to shine shoes? A I don't exactly know any more, but about, say—I was only about seventeen then. I am around twenty now.

Q What is the last work you ever done? A I worked in an ice plant.

Q Where? A In Bellaire.

Q What is the name of the ice plant? A I only worked there a couple of days.

Q What is the name? A I don't know.

Q You don't know? A No.

Q Did you ever have a job in Newark? A In Newark? Only with Mr. Guensch on the truck and sometimes little odds and ends with shoe boxes.

Q You just met Guensch on the day of the accident accidentally? You didn't meet him by appointment, did you? A No, sir.

Q Did you go to school in Bellaire? A No, I used to go to school in Newark. Most of the time I stayed with my grandmother more than my mother.

Q What was the last school you attended in Newark? A Lafayette Street School.

Q How long ago was that? A I left school about fifteen.

Q What grade were you in? A I left school about 7-B.

Q Lafayette Street School? A Yes, Lafayette Street School on Lafayette street near my grandmother.

Q You never went to school in Bellaire, Ohio? A No, I never went there to school.

Q Where were you born? A In Newark, New Jersey.

Q Is your father living? A Yes.

Q Is your mother living? A Yes, sir.

Q They live together in Bellaire, Ohio? A Yes.

Q On the day of the accident you say you got on the truck with Mr. Guensch? A I did.

Q Did you hail him first, or did he hail you first? A I hailed him first.

Q And then you hopped on the truck? A I asked him first and he said, "Come on, kid."

Q And then which way did you go? A South on Broad street.

Q South on Broad street? A Yes.

Q And Mr. Guensch stopped the truck in front of where? A The Rialto Restaurant.

Q Had you ever been there with Guensch before? A A couple of times.

Q For what purpose? A Delivering cases.

Q What sort of truck did Guensch drive? A A Maccar.

Q Closed? A Closed in front, a big truck. Not the whole truck will be, he carried boxes, bags and sauerkraut.

Q Do you know how many ton truck it was? A No, I do not.

Q What kind of body did it have on? A Red color.

Q Painted red? A Yes, and the name on either side M. Marks.

Q The name on the side? A Yes.

Q Was it entirely covered? Was it a covered body or a rack body? Did it have a roof over the entire truck? A Yes.

Q And closed sides all the way to the roof? A Only like—no, all plain around it; the ordinary truck.

Q Can you tell us whether it was a closed or open body? A A closed body.

Q Could you take articles off the side of the truck, or did you have to go around to the back of the truck to unload? A From the back.

Q From the back only? A Yes.

Q When you got in front of the Rialto Restaurant, and as soon as the truck stopped, who jumped off first? A I always jumped off first.

Q And what did you do in this case? A I waited for Mr. Guensch. Every place we would go we would go in together. He went first in the restaurant, and I followed him.

Q Why did you go in? A I always did that.

Q Why did you go in on this occasion? A Every place we delivered a case I always followed him.

Q Why? A In case the storekeeper wants two cases I went out and got two cases. Sometimes we would both get it together.

Q You heard Mr. Guensch ask for the payment of a bill, is that correct? A A check.

Q He asked for a check? A Yes.

Q And you waited until he got the check? A Yes.

Q Why did you wait there? What interest did you have whether he got the check or not? A That's my habit, I always waited.

Q Couldn't you have waited at the truck? A No.

Q You couldn't have waited at the truck? A I always do that, every store he would go to.

Q What happened after he received his check? A The boss gave it to him—DiNicholas.

Q And after the boss, whoever he was, gave him the check, what happened? A I went out first and I waited a few minutes outside so I grabbed the elevator by the door handle.

Q Was Guensch outside at the time you grabbed it? A Not quite. I grabbed the door—the first door—

Q The first thing you did after you came back out of the store, you walked over to the elevator and grabbed the door? A Not right away, I waited a few minutes.

Q Where were you standing while waiting? A Leaning against the truck. First he told me —I remember now—first he said, 'O. K., kid, I will have to get started.' I went out and waited two minutes, and I grabbed the handle of the elevator and it was kind of heavy and I slammed it and Mr. Guensch came out.

Q If I have your story right now, you left the store? A Yes.

Q Went outside and waited two minutes? A Yes.

Q And when he didn't come out in two minutes you walked over to the door of the elevator and grabbed the handle of the door? A Yes.

Q Then what did you do? A I raised it to that height (indicating), and I seen the wood there that has got to be there.

Q That is your opinion? A How are you going to put articles on if there is no platform?

Q You opened the door how wide? A This high.

(Agreement between counsel that the witness indicates about six or seven inches.)

Q Then what did you do? A Dropped it.

Q Why? A It was kind of heavy.

Q Pretty heavy, wasn't it? A Certainly it was heavy.

Q Did you lift it with your two arms or just one? A With the left hand.

Q After you dropped it, what did you do? A I went back to the truck and Mr. Guensch came out and he went over and grabbed it with his hand. He grabbed it up like that (indicating) and swung it over.

Q He swung it over? How much do you weigh? A I weigh about 120 or 121. Shall I proceed?

Q You say you saw Mr. Guensch take hold of the same handle? A The same handle.

Q And he lifted the door up? A Yes.

Q And swung it all the way back? A I didn't say swung it, he just lifted it up and knocked it over.

Q Knocked it over? A Yes.

Q When it was knocked over the door was lying parallel with the sidewalk? A Yes, entirely flat.

Q You are positive of that? A Yes.

Q You couldn't be mistaken in that? A No, sir.

Q Then what did Mr. Guensch do? A He got on the platform.

Q With only one door open? A Certainly. I can do it myself. It's about that wide (indicating)—more than that.

Q How many doors are there to that elevator? A Two doors. He got on and lifted the other door up and was on top of the platform and turned around to raise the other one and he went down, and that door slammed too.

Q Had he lifted the other door over on the sidewalk? A The second one? Yes.

Q The second floor? A No. He held that one there.

Q How did he hold it? A I can show you this way (indicating).

Q Illustrate as best you can. A Suppose this was the door (indicating).

Q Lying flat on the sidewalk? A There is supposed to be two doors.

Q One door is open? A Both doors are down. This is the handle there. He grabbed it and swung it over and it slammed down, and he got on the platform with both feet and turned around this way (indicating) with one hand under the left door.

Q Under the second door? A That's what I say. He grabbed it like that, about that high (indicating).

Q With which hand? A The left.

Q And lifted that one about how high? A About that high.

(Agreed between counsel witness indicates about one foot.)

Q Yes. A And when he lifted it that high he went down and that door slammed and the other door was still open yet.

Q The other door was flat with the sidewalk? A Yes.

Q Now, Mr. Guensch was standing on the platform before it went down? You saw him standing there? A He wasn't standing.

Q You saw him standing on the platform? A Yes.

Q With his both feet on the platform? A Yes.

Q You are positive of that? A Yes.

Q Could you be mistaken about that? A I cannot.

Q You remember that very distinctly? A Yes, as if it happened yesterday.

Q How far below the level of the sidewalk was the platform? A It was even.

Q Even with the sidewalk? A Yes, and I can't be mistaken about that. I know it.

Q You remember that? A Yes, sir.

Q How far away from the elevator doors were you standing at that time when he was on the platform? A I was about eight feet away.

Q What time did this accident happen? A In the morning.

Q What time in the morning? A About—between—nine-thirty.

Q What is your answer? A Nine-thirty.

Q About nine-thirty, is that your answer? A About that time, nine-thirty.

Q What kind of day was it? A A clear day, of course.

Q A clear day? A Why, sure.

Q Was the sun shining? A No, it was in wintertime, in January.

Q Was the sun shining? A No, sir; not in the morning.

Q Did you ever see the sun out in the morning in the wintertime? A No, I never did. I get up about 11 o'clock.

Q You were up before 11 o'clock this morning, weren't you? A That day I was supposed to go to work and that morning I was broke and I didn't have a penny to my name or nothing, and the only chance to make money as I saw.

Q But you are sure it was a clear day? A Exactly.

Q It wasn't snowing? A That I don't remember.

Q Was it raining? A No, sir.

Q What was the condition of the sidewalk and the pavement? A I don't know.

Q Was there snow on them? A I can't remember that.

Q Was it dry? A Well, kind of misty like.

Q The sidewalks and pavements, were they dry? A Sure they were dry.

Q What is next to the Rialto Restaurant on the south? A There is a restaurant and then there is a dress shop.

Q And beyond that? A There is a dress shop. I know every store on that corner.

Q You saw Mr. Guensch and the platform go down, is that right? A Yes, sir.

Q What was the next thing that you observed? A What happened, do you mean?

Q The next thing that you saw, yes? A I didn't see anything. I was too exhausted; I was nervous and scared.

Q You didn't see anything after the platform and Mr. Guensch went down? A I seen first one lady passing down to business.

Q Did you see Guensch after he dropped down? A Yes, I looked over and seen him there.

Q You saw him there? A Yes.

Q What was he doing? A He was hurt. What could he do?

Q What was he doing, lying over on his back or what? A On his right side like.

Q Bent over? A Bent over like.

Q How long did he stay that way? A Search me. I don't know.

Q What did you do? A What would anybody else do?

Mr. Walburg: Don't argue with counsel; tell him what you did.

Q What did you do? A I just went away and notified his wife.

Q Did you come back to the store? A No, sir.

Q You never went back to the store? A No, sir; never."

(Cross examination read by Mr. Gray as follows:)

"*Cross examination* by Mr. Morris.

Q When is your birthday? A July 2nd.

Q What year? A 1931.

Q Not your anniversary. What year were you born? A 1912.

Q You are sure of that? That is what you are told? A Told? No. What do you mean 'what I was told'?

Q You don't remember the day, do you? A My mother told me that.

Q In the year 1912? A Yes.

Q You were born in Newark? A Yes, sir.

Q On July 2, 1912? A Yes.

Q When did this accident happen that you have just told us about? A In January.

Q January of what year? A 1928, about that.

Q Is that the nearest you can come to the date that this accident happened? A That's all I can remember of dates. I put that down in my memory.

Q Were you ever employed by Mr. Marx? A No, sir.

Q And the money you got for working on the truck was paid you by Mr. Guensch? A Yes, sir.

Q When you lifted up one of the doors covering the elevator, which door was it, the left or the right door? A The left door.

Q It was the left door as you faced the building? A Yes, sir.

Q Which of your hands did you use in taking hold of the handle? A The left.

Q Did you bend over the door to lift? A Yes, sir.

Q And you raised it from five to seven inches? A About that.

Q And you say that when you lifted this door, bending over it and raising it only five or seven inches, you could see what was underneath? A Yes, sir.

Q You are positive? A Yes.

Q After Mr. Guensch was down in the elevator you didn't go in the restaurant? A No, sir.

Q You didn't call the proprietor of the place or tell him that the accident happened, or any-

thing like that? A No, sir; I didn't do anything.

Q You didn't try to get aid for Mr. Guensch? A No, sir.

Q Did you notice whether or not he struck or was struck by the closed door when he went down the elevator shaft? A No, sir; all I know is that he went down and I was right in front.

Q It wasn't necessary, was it, for him to stand on this platform to raise the other door? A It was necessary.

Q In what respect was it necessary? A Suppose he would raise both doors open? He would be on the platform the way I figured it. When I get the cases off the truck I hand each to him while up on the sidewalk.

Q It wasn't necessary for him to stand on the platform to open the second door, was it? A What do you mean by that?

Q You said there were two doors over the elevator? A Yes.

Q He had opened one? A Yes.

Q He was standing on the sidewalk when he opened that one door, wasn't he? A He was standing on the platform.

Q I don't think you understand me. When he opened the first door he stood on the sidewalk, did he not, to open it? A The first one, yes.

Q He could have opened the second door from the sidewalk, could he not? A He went on.

Q If he had stood on the sidewalk couldn't he have opened it in the same manner as the first door he opened? A I don't know about that.

Q You don't know? A No.

Q You are sure your birthday was July 2, 1912? A Yes.

By Mr. Klein.

Q Immediately after this accident you notified Mr. Guensch's wife? A Yes.

Q How did you notify her, by telephone? A I went to the house.

Q Where does he live? A On Waverly avenue.

Q Do you know the number? A No, I don't; I just know the house.

Q Near what street? A Kipp street is across the street from it.

I hereby certify that the foregoing is a true and accurate transcript of the above-entitled matter as taken stenographically by me at the time, place and date hereinbefore set forth.

(Signed) WM. E. DAVENPORT,
Supreme Court Examiner of New Jersey."

AMBROSE DOWD, sworn in behalf of the plaintiff.

Direct examination by Mr. Francis.

Q Doctor, you are a licensed practicing physician of the State of New Jersey? A Yes.

Q And have been for how long? A Twenty-one years.

Q Have you specialized in any branch of your profession? A Yes.

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

Q For how long have you specialized in that? A Fifteen or sixteen years.

Q Are you connected with any institutions? A A number.

Q Will you enumerate some of them to the jury, please? A Home and Hospital for Crippled Children, St. James' Hospital, Irvington General Hospital, and the various State hospitals.

Q Doctor, did you at my request, or at the request of Mr. Walburg's examine Mr. Guensch, the plaintiff in this case? A Yes.

Q What is the date of your examination? A March 5, 1930.

Q What did you examination disclose? A Objectively he presented a perforation of the right ear drum, with a marked loss of hearing in that ear, a loss of bone conduction around that ear. He had a positive Rhomberg. By that I mean he could not stand erect with his feet together and his eyes closed. He had changes in his back abdomen and the region below the middle of the back. His knee jerks were increased, his abdominal reflexes and other reflexes below the waist were all increased and deep sensibility was disturbed. He had a marked tremor of his right hand. He had a marked oral sepsis; by that I mean he has vocal restriction about his mouth; his heart was somewhat enlarged, systolic murmur was, I believe, 106 and his diastolic 40. He had marked tenderness of the lower back with a very marked limitation of motion of the back. Inability to bend laterally or ante-posterially.

Q Was he wearing a brace at that time? A Yes, he was wearing a brace at that time, a leather and a steel brace.

Q Doctor, did you form any opinion as to the extent of Mr. Guensch's permanent disability? A Yes.

Q What is that opinion? A About two-thirds of it.

Q Sixty-six and two-thirds per cent. of total permanent disability? A Yes.

Q You said, doctor, he had a perforation of the right ear, did you not? A Yes, sir.

Q Did you determine what percentage, about, his loss of hearing was? A His loss of hearing in the right ear was 90 per cent.

Q You spoke of a loss of bone conduction on the right side, what is that? A When a tuning fork is applied to the mastoid on that side, vibrations are not adequately conducted to the interior of the ear.

By the Court.

Q Is that ear condition permanent? A A substantial percentage of that is permanent. There may be some improvement but a substantial percentage of that is permanent.

By Mr. Francis.

Q What treatment would improve it, doctor? A I don't think any would improve that. Time is the element in that.

Q You think within the passing of time there may be some improvement? A I said there may be; I don't think there will be.

Q This positive Rhomberg you spoke of, what kind of a test is that? A Placing a man

in an upright position, his feet together and his eyes closed. If his equilibrium is all right, there isn't anything to disturb him; he would stand there perfectly still. He didn't stand there perfectly still; he swerved and would have fallen had he not been caught.

Q What did that indicate? A Indicates pathology of his nervous system.

Q Hyperesthesia, what is that? A Hyperesthesia is increased sensibility.

Q Where? A In this case the abdomen and lower back and his legs.

Q You said something about marked sensory disturbance below the tenth dorsal region? A That is the same as hyperesthesia. Changes in each sensibility. By that I mean when a tuning fork is applied to his feet and legs, the vibrations are not conducted through to the brain.

Q You spoke of increased knee jerks; what is that? A Interference with transmission of the impulses.

Q Increased abdominals, what do you mean by that? A Same thing.

Q Increased cremaster? A Same thing.

Q You spoke of increased genital reflexes? A Same thing; they are all cumulative.

Q What do you mean by a disturbance of deep sensibility in the lower sensibilities? A Same thing; I have already covered that.

Q Did you make any diagnosis as to his back condition? A Yes, I thought he had a hemorrhage within the spine, within the spinal canal.

Q And, doctor, where is the sexual energy produced?

Mr. Francis: I withdraw that question.

Q Would a hemorrhage, doctor, to the spinal cord or spinal canal produce sexual impotence? A It may do so. Sometimes it does if it is at the right level.

The Court: You said you thought he had a hemorrhage in the spinal canal.

The Witness: Yes.

Q Assume, doctor, that Mr. Guensch was injured in an accident on January 10, 1929; that X-ray pictures were subsequently taken which disclosed the presence of a fracture of the transverse process of the first lumbar vertebra; assume further that since the accident he has been sexually impotent, what would you say was the cause of that sexual impotence? A It would be difficult, I think impossible, to say in this case, but there are two elements. The first element is the hemorrhage in the spinal canal which is rather a devious thing. The second element, psycho-neurological condition; one or both may bring that condition about.

The Court: Is it probable in your opinion, that either one or the other is the result of the accident?

The Witness: Yes.

Q Both of those conditions are present in this case? A Both of those conditions are present in this case.

Q Doctor, can you give us any idea as to whether or not that sexual impotence is permanent? A I think you are getting pretty far in the field of conjecture there. Permanence is a long time to a man of 28.

Q Is it your opinion that there will be any improvement in that case? A In the back?

Q Yes. A I think perhaps that may improve with the passage of time. He will have a substantial permanent disability, not necessarily sexual; industrial.

Q Doctor, is this man able to do any work? A He may do some work, like work sitting down, using his hands. He can see and get about; he can do some work. He isn't a total disability; he is about two-thirds disability.

By the Court.

Q It depends on the nature of the work? A It depends on the nature of the work, certainly.

Q How about as a truck driver? A Oh, no; he couldn't drive a truck.

Q He is 100 per cent. disabled as to that? A As far as driving a truck is concerned he is 100 per cent. total loss.

By Mr. Francis.

Q This brace that he had on when you examined him, will he have to wear that the rest of his days? A He shouldn't.

Q Do you think that he should abandon it, doctor? A I certainly do.

By the Court.

Q You mean at this time? A I mean at this time.

Q It has served its purpose by this time? A It has served its purpose by this time.

By Mr. Francis.

Q The brace itself will afford no further improvement? A No further relief.

Q Doctor, I show you a prescription marked P. 3 in evidence for the plaintiff, and ask you what that prescription is for? A A sedative.

Cross examination by Mr. Cohen.

Q Doctor, on the 6th day of December, 1929, or within a few days thereafter, the plaintiff in this case filed a complaint in which he seeks to make a recovery for damages by reason of certain alleged injuries, and sometime prior thereto he also filed at the Workmen's Compensation Bureau a claim for compensation, would you say that the impending litigation in both courts, both the Workmen's Compensation Bureau and this court, affects in any way his neurological condition? A It will affect the functional part of it, not the organic part of it.

Q Would you say that upon the close of the litigation, that he would show some recovery with respect to the functional phase of his condition? A I expect him to.

Q Would you say, doctor, that not infrequently litigants are often affected seriously in their nerves, maybe because of such impending litigation? A Unquestionably.

Q Would you say that one who is suffering from the nervous condition which you describe, contributes to that condition? That is the sexual impotency, would you say he was affected seriously or otherwise by reason of these suits hanging over his head, so to speak? A No, I don't understand your question.

Q Can we agree, doctor, that the impending litigation might affect what has been described as sexual impotency? A If the impotency is due entirely to the psycho-neurological condition, yes,

of course. If it is due on the other hand to the hemorrhage within the spinal cords—

Q You don't know which contributes to that situation? A I think they are both contributing to that, and I said the impotence will probably improve with the passage of time.

Cross examination by Mr. Gray.

Q Doctor, just what do you mean by a hemorrhage of the spinal cord? A I mean that he has had a hemorrhage within the membranes of the spinal cord that has impeded the efficiency of the cord and it is unable to transmit impulses of them as efficiently as it was intended to.

Q Would you have to have an injury directly to the cord to do that? A No, sir.

Q What would cause that? A A blow to the back, a fall—sometimes falling on your feet, or falling on your head would produce it; sometimes diseases would produce it.

Q Sometimes diseases would produce it? A Yes, sir.

Q It isn't such an unusual condition, is it? A Unusual? We see a substantial number of cases.

HENRY SEELIG, sworn in behalf of plaintiff.

Direct examination by Mr. Francis.

Q Mr. Seelig, on January 10, 1929, by whom were you employed? A By M. Marx & Son.

Q And what is your occupation? A I was bookkeeper and shipping clerk.

Q And on that day was Oscar Guensch in the employ of your employer? A He was.

Q And as a truck driver? A Yes, sir.

Q On that day, sometime during the morning, did you receive a telephone call regarding an accident? A I did.

Q And when you received this call, where did you go? A I went down to the Rialto Restaurant.

Q When you arrived at the Rialto Restaurant, where did you go? A I saw Mr. Di-Nicholas first and then we went down to the cellar together.

Q When you went down to the cellar was Guensch still there? A He was.

Q And where was he? A He was stretched out on a bench.

Q The front or rear of the cellar? A At the rear of the cellar.

Q And did you look at the elevator? A I did.

Q What was the position of the platform of the elevator at that time? A The elevator was laying over I should say, 45 degree angle.

Q Half-way down the shaft, was it?

Mr. Cohen: If your Honor pleases it becomes very important to fix the time, otherwise, it wouldn't be admissible.

Q What time was it? A About nine o'clock in the morning, that I got the telephone call.

Q What time was it that you got there and saw this elevator? A About a quarter of after nine, or ten after nine.

Q How far down the shaft was the elevator in this tipped position? A I should say more than half down.

Henry Seelig, for Plaintiff, direct.

Q When you say tipped at a 45-degree angle, do you mean one side of the platform was lower than the other? A Yes, sir.

Mr. Cohen: Objected to as leading.

The Court: Don't lead.

Q Did you notice anything else about the elevator? A I did not.

By the Court.

Q What do you mean when you say about half way down? A I should say the distance between the bottom of the elevator and the top was ten feet, the elevator was about five feet up from the bottom.

Q Did you estimate, Mr. Seelig that the length of the shaft from the level of the street to the pit of the cellar was about 10 feet? A I wouldn't say that.

Q I mean in your best judgment. In response to the Court's question you said it was half-way down? A Yes, sir.

Q As we have it, it is about five feet, based upon your judgment of the depth of the shaft? A Yes, sir.

Q Did you talk to Mr. Guensch? A I asked him, he didn't answer me.

Q Yes or no, did you talk to him? A I did.

Q What did you say to him and what did he say to you? A I asked him, I asked him whether he recognized me and he did not.

Mr. Francis: I did not hear that.

A (Continuing.) I asked him whether he recognized me and he did not.

The Court: He said he did not?

The Witness: He did not know where he was.

By the Court.

Q You asked him whether he knew and he said, "No, sir." I want to know whether he said, "No," he did not recognize you, or he said nothing. A He said nothing.

Cross examination by Mr. Cohen.

Q What else was said either by you or by him in your conversation with him?

Mr. Francis: I object to the form of the question.

Mr. Cohen: I will withdraw it.

Q Did Mr. Guensch talk with you at all? A Pardon?

Q Did Mr. Guensch talk with you at all? A He did.

Q What did he say to you? A He gave me the check.

The Court: What did he say to you, not what did he do, what did he say, what were his words? You weren't asked what he did, but what he said to you.

The Witness: He said, "To tell my wife about the accident."

Q He said "To tell my wife about the accident"? A Yes, sir.

Q And about how many minutes after you got there did he say that, can you tell us? A I should say about ten minutes after.

Q About ten minutes after? A Yes.

Q What else did he say besides requesting you to tell his wife about the accident?

Mr. Francis: May it please the Court, I object to that on the ground that it is not proper cross examination. If Mr. Cohen wishes the witness to testify as to conversation he can make him his own witness. I didn't touch on any conversation on direct examination.

Mr. Cohen: I think, if your Honor please, it is proper cross examination. We are intending to impeach the credibility of the plaintiff. He says he knew nothing until he got to St. Michael's Hospital and for that purpose I think it is proper cross examination.

The Court: I think the mere fact that he talked with you is enough for your purpose without going into what he said.

By the Court.

Q Did he talk much with you? A Quite a little.

Q Intelligently? A Yes.

Q Did he answer questions? A Yes.

Q And gave you instructions or requests? A Yes.

Q And gave you the check? A Yes, sir.

Q Did he say something when he gave you the check? A He probably said, "Here is the check."

Q Did he tell you—did he give you anything more than just the check, had he any other collections? A No, sir.

Q Any cash? A No, sir.

By Mr. Cohen.

Q Do you remember a Mr. Speigal having come to your place of business and talked to you about this? A Yes, sir.

By Mr. Francis.

Q Did Mr. Guensch work regularly prior to this accident? A He did.

By Mr. Cohen.

Q How much did you pay him, or your employer? A $35.00 a week.

Q Were the doors closed when you came there, the doors in the cellar? A Yes, sir.

Q Were the street doors closed, or what? A Yes, sir.

Q You came there about ten minutes after you received the telephone call? A Yes, sir.

The Court: You understood the doors of the sidewalk?

The Witness: Yes, sir.

WILLIAM LYONS, sworn in behalf of the plaintiff.

Direct examination by Mr. Francis.

Q Mr. Lyons, on January 10, 1929, what was your occupation? A Ambulance driver for the City Hospital.

Q On that day, around nine o'clock, that morning, did you go down to the Rialto Restaurant in response to a call? A I did.

Q When you arrived there did you see Mr. Guensch? A Yes, sir.

Q Where was he? A In the cellar.

The Court: What hospital?

The Witness: Newark City Hospital.

The Court: City Hospital?

The Witness: Yes, sir.

Q Was he in the front or the rear of the cellar? A Rear.

Q Standing up or lying down? A Lying on a table.

Q What was his appearance? A His eyes were shut, moaning, whether he was conscious or unconscious I couldn't say.

Q How did you get this man out of the building? A I got him out up a stairway on a stretcher.

Q Did you carry him out? A Yes, sir.

Q Before you carried him out, did you look at the elevator? A I did.

Q Why did you look at the elevator? A The stairway leading to the cellar was very narrow and had several turns, at least one bad turn and I was looking for a more convenient way to get him out.

Q Did you have any difficulty to see that elevator?

Mr. Cohen: Objected to as immaterial. I don't see that that is material, whether he encountered any difficulty in coming from the back stairs to the place. I think it is an improper question.

The Court: It might be and it might not be very important.

Mr. Francis: This man wanted to go to look at the elevator to see if he could put the patient upon it and take him up, and he encountered a great deal of difficulty from a man who is here in the court room, who didn't want him to see it. I want to prove that.

The Court: If that is the situation, it is permissible.

Mr. Gray: I don't think it is binding on the Presbyterian Church unless it was somebody associated with us.

Mr. Cohen: We might parallel that with an employee, say the Public Service, making some statement. It certainly wouldn't bind the employer and therefore I think it highly improper.

The Court: Anything he said wouldn't bind them.

Mr. Francis: If he doesn't connect it up, I will consent to it being stricken out.

Q Will you tell us whether you had any difficulty getting to see this elevator? A The only difficulty was when I went to walk to the front of the cellar. Some gentleman wanted to know where I was going.

Mr. Cohen: I object to that unless it is shown that it was this defendant.

Q Do you recognize the man in the court room who said this to you? A I haven't seen him around.

Q Is that the gentleman (indicating)? A It might be, I couldn't say. It was two years ago.

Q Did you look at the elevator? A Yes, sir.

Q What was the position when you looked at it? A The east end of it was, I will say, two or three feet higher than the west end of it, and the west end was approximately, about three feet, from the ground and the east end was approximately five feet from the ground.

Q Did you notice anything else about it? A It tipped slightly to the right along with the tip in the air, that is, the east end of it.

Q Did you take Guensch out? A Yes, sir.

Q And to what hospital did you take him? A St. Michael's.

Cross examination by Mr. Cohen.

Q Mr. Lyons, can you tell us the position of the elevator in the shaft, I mean with reference to the tip from either the level of the sidewalk or the pit of the cellar? A I say the west end of the elevator—

Q (Interrupting.) That isn't what I mean. A It was not on a level.

Mr. Cohen: May I withdraw the question?

Q Can you tell us the size or the depth of the shaft as you observed it on that day? A I will say approximately ten or twelve feet.

Q Can you tell us where the platform was with reference to either the level of the sidewalk or the pit of the cellar and the platform? A You mean the elevator itself, or part of the elevator?

Q The platform? A The platform was tilted.

Q Sir? A The platform was tilted on a 45-degree angle; I don't know whether you mean the east or the west end of it.

Q I mean the east of it, the lower end of it. A About three feet from the ground.

Q About three feet from the ground? A About three feet.

Q You mean the ground in the cellar? A The ground in the cellar.

Q Then there is the cellar surface, isn't there? A I didn't see that.

Q You looked at the elevator? A I didn't look at the ground in the immediate vicinity there.

Q How do you know it was three feet? A I mean from the general appearance.

Q I mean by the general appearance? A The general level I mean.

The Court: In the cellar?

The Witness: In the cellar.

Q When did you get there? A About 9:30, I believe.

Q 9:30? A I am not sure of the hour.

By the Court.

Q Did you see Mr. Seelig there, the last witness? A I didn't.

Q Would you say he was there or wasn't there? A I couldn't say, your Honor.

Q You took the man out? A Yes, sir.

Q Can you remember how many people were there when you found them, they on the bench in the rear of the cellar? A There was a few there, maybe two or three.

Q Did anybody come with you? A The doctor.

Q Who was the doctor? A Dr. Appelbaum.

Q Is he connected with the hospital? A He is finished with his interneship and I believe he is in New York at present.

MORTON C. NOBLE, sworn in behalf of plaintiff.

Direct examination by Mr. Francis.

Q Mr. Noble, on January 10, 1929, where were you employed? A I am doing a little work for the Presbyterian Church. That was all I was doing at the present time.

Q What kind of work did you have to do? A Collecting rents.

Q And where were you collecting rents from? A From the stores.

Q And around the stores? A 907-915 Broad street.

Q 907 to 915? A Including 915.

Q And referring to 913 Broad street, how many tenants are in that building, or were in that building on January 10, 1929? A Two. There were three on the second floor and one on the first floor.

Q What building is next door, at 9:15? A The lobby of the Rialto Theatre.

Q Do the people connected with the Rialto Theatre have the right to use this elevator as well? A Two tenants have a right to use it.

Q I am asking you—

Mr. Cohen: I move to strike that out.

The Court: Strike it out.

Q To the people employed by the Rialto Theatre have the right to use that elevator? A The Rialto Theatre have a right to use it.

Q Did you go down to the property, the Rialto Restaurant, on January 10, 1929, in the morning in response to a telephone call? A I did.

Q And who called you? A Mr. DiNicholas.

Q And who was Mr. DiNicholas? A He is the proprietor of the Rialto Restaurant.

Q Did Mr. DiNicholas tell you anything regarding the then condition of the elevator? A I don't get that question.

Q Did Mr. DiNicholas tell you anything about the elevator when you got down there to see him?

Mr. Gray: I object to that as binding on the Third Presbyterian Church.

The Court: I will allow it. Of course, it isn't binding on you.

Q What did he say to you with regard to the cables of that elevator at that time? A One of the cables was off.

Q When you obtained that information from Mr. DiNicholas, what did you do? A I telephoned the Otis Elevator Company to send a man down and put it on.

Q And did that repair man come down, do you know? A He did.

Q Did he repair the elevator?

Mr. Cohen: If your Honor please, I object to that on the ground that the inter-

rogatories admit ownership by the Trustees of the Third Presbyterian Church.

(Counsel argue.)

The Court: I think you are anticipating at this time.

(Counsel argue further.)

Mr. Francis: I want to ask for that question.

Mr. Cohen: We object to it.

The Court: Objection sustained.

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

Exception noted as ground of appeal.

(Counsel argue.)

Mr. Cohen: Under those circumstances I should like to have the testimony struck out.

The Court: As to what?

Mr. Cohen: As to the condition as he found it. As to the last answer that he gave.

The Court: You mean that he 'phoned the Otis Elevator and the man came and fixed it?

Mr. Cohen: Yes, sir.

The Court: Let that be struck out.

Mr. Francis: I don't think the testimony Mr. Cohen has repeated is all in the record. In other words, I think the witness had answered that he obtained this information, that he called the Otis Elevator Company. I think that that testimony is proper, anything beyond that, I think is improper.

Cross examination by Mr. Cohen.

Q You know, do you, of your own knowledge that the Trustees of the Presbyterian Church leased the premises to both the Railto Restaurant and the Rialto Theatre? A No.

Q But, do you know of your own knowledge that the other tenant, the Rilato Theatre used the elevator in common with the Rialto Restaurant? A Yes, sir.

Q Do you know that of your own knowledge? A Yes.

Q Your answer is "yes"? A Yes.

Q Please answer; the stenographer can't get the shaking of your head.

Mr. Gray: I think the Trustees will consent that both the Rialto Theatre and the Rialto Restaurant used this lift and the lease so provided.

Q The Church, did it not, always took care of the elevator?

Mr. Gray: I object to that as immaterial and improper.

The Court: I think that may be proper with respect to the duty.

Mr. Francis: I object to any argument between these two defendants on the ground that it is not binding upon the plaintiff.

Mr. Gray: I think the leases are the proper evidence.

The Court: Do you want to put it in?

Mr. Gray: Yes, sir.

ALBERT PFAFF, sworn in behalf of plaintiff.

Direct examination by Mr. Francis.

Q Mr. Pfaff, on January 10, 1929, with what company were you connected? A Otis Elevator.

Q The Otis Elevator Company? A Yes, sir.

Q On that day, did you receive a 'phone call to go down to the Rialto Restaurant? A I did not, not on the 10th.

Q What was that, not on the 10th? A Not on the 10th.

Q Did you go down to the Rialto Restaurant? A Yes, sir.

Q When you arrived there, did you look at the elevator, examine the elevator?

Mr. Cohen: If your Honor please, I object to it on the ground that it is two days after; it is too remote.

The Court: It is one day after.

Mr. Cohen: Even so, I think it is too remote.

The Court: I will allow it; it may be, but I can't tell now.

Mr. Gray: It will be subject to be stricken out if it isn't connected up?

The Court: Yes.

Q When you got down, did you examine the elevator? A Yes, we did.

Q In what condition did you find it?

Mr. Gray: There ought to be some connection before they put this man on to testify as to what condition the elevator was in. It is at least 24 hours afterwards.

The Court: I will allow it.

Mr. Gray: I take an exception.

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

Exception noted as ground of appeal.

Mr. Cohen: I have the same exception.

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

Exception noted as ground of appeal.

Q What was the condition of the elevator platform when you got down there? A The elevator platform was at a 45-degree angle.

Q At a 45-degree angle? A Yes, sir.

Q And how far down the shaft? A How far?

Q When you say at a 45-degree angle, you mean one end was lower than the other? A Yes, sir.

Q Considerably lower? A Yes, sir.

Q What kind of an elevator is this? A It is what we call a hand power elevator.

Q Is that a modern elevator or an old one?

Mr. Cohen: I object to that; there is no allegation of negligence in operation.

The Court: Objection sustained.

How could the kind of elevator show the lack of maintenance?

Q How did it go up and down, automatically or by hand? A By hand.

By the Court.

Q Was the shaft close to the building or out to the curb? A Close to the building.

Q And how was it operated by hand? A There is a sort of a flywheel with a handle on it which in turn is connected with a pair of gears.

Q What kind of ropes or cords or chains are there on which the elevator goes up and down? A There are two drums which the cables are attached to.

Q Steel cables? A Iron cables.

By Mr. Francis.

Q Those drums are where? A In the pit of this lift.

Q Was there any kind of a brake on that elevator? A Yes.

Q Where? A On the machine.

Q Is that a hand-operated brake or otherwise? A Hand operated.

Q When you arrived there, what was the condition of the cables with respect to the drums?

Mr. Gray: Same objection.

The Court: Your objection goes to all of this testimony.

The Witness: On one drum the cable was off about three turns, on the other it was off about one.

Q This hand brake that you spoke of, how is that used? A It works on a cam which when it is lifted up, releases the shoe, and when it is dropped down it faces the shoe to the flywheel.

Q When the elevator is up at street level, should that brake be on? A Absolutely.

Q If it isn't on, what happens? A The car will start to go down.

Mr. Cohen: I object to that on the ground that it is purely speculation. He said, "If

it is on." I don't know whether it is on or off and therefore I think it is objectionable. I move that it be stricken out.

The Court: Strike it out.

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

Exception noted as ground of appeal.

Q Was there any guard on this drum to hold those cables on? A No.

Q When I spoke of a guard, what kind of a guard is used to hold those cables on?

Mr. Cohen: Objected to as immaterial.

Objection sustained.

Q If there had been a guard on that drum—

Mr. Cohen: I object to that; wait till he asks the question.

Q If there had been a guard on that drum, what would its effect have been on the operation of that elevator in connection with the possibility of the cables coming off?

Mr. Gray: I object to that, your Honor.

The Court: Is it to show that this elevator was improperly constructed?

Mr. Francis: Improperly maintained. It seems to me everything should be done to safeguard users of the elevator.

The Court: It seems to me that would be marked under the head of improper construction, not improper maintenance. The evidence is that that has been used many

times, which indicates there was clearly no improper construction.

Mr. Cohen: I object to it.

The Court: Objection sustained.

Mr. Francis: May it please the Court, the construction of this elevator—we don't charge that it was constructed by the defendant, either defendant, but it was put in there and was used in the condition, where there was no guard on the drum.

(Counsel argue.)

Mr. Francis: I move to amend the complaint to set forth improper construction.

Mr. Cohen: We allege surprise.

The Court: Objection sustained.

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

Exception noted as ground of appeal.

Q Did you or your company ever do anything to this drum prior to this accident at the request of the Trustees of the Third Presbyterian Church?

Mr. Gray: I object to that.

The Court: What is the purpose of objecting to that?

Mr. Gray: I don't think it is proper because he did not ask that question exactly in that form before. He may have misunderstood it.

The Court: He was trying to show the duty was on the Third Presbyterian Church to maintain it, and he wants to show by this witness that they did, in response to the re-

quest of the Church, make repairs only for that purpose.

Mr. Gray: How would he know whether it was to be charged against the tenants, or what the situation was. We have the leases here.

The Court: I don't know, but he might.

Mr. Gray: How would he know that the Church called?

(Counsel argue.)

The Court: I will allow the question if he can answer it.

(Counsel argue.)

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

Exception noted as ground of appeal.

The Court: Did you at the request of the Church or at the request of any of the officials go there at any time in regard to the elevator?

The Witness: Not by the request of any of the officials of the Church.

By Mr. Francis.

Q Will you give us the name of the individual who made this request?

The Court: Can you?

A The clerk in our office.

By the Court.

Q In other words, your men went out where you were instructed to go? A Yes.

Q You have no direct dealings with your customer? A No, sir.

Cross examination by Mr. Cohen.

Q Mr. Pfaff, when you came on the 11th day of January—you came on the 11th day of January? A Yes.

Q What time of day was it? A I don't remember.

Q Was it morning, noon or afternoon? A It was in the morning.

Q Can you tell us the depth of that shaft, or the distance that the elevator or platform moves from the level of the sidewalk to the pit of the cellar? A About ten feet.

Q Then feet? A Yes.

Q Am I correct in saying that it was your judgment that at the time you came for the inspection of this elevator it was half-way down; is that correct? A Yes, sir.

Q So it was five feet either above the cellar or below the surface of the street? A One corner, the car was at an angle of 45 degrees in the shaft.

Q What part of it was at that angle? A The platform.

Q Which part of the platform? A The whole platform.

Q Did it tilt to the north, south or east or west; was it placed in a rectangular position? A The lowest part of the car was in toward the building?

The Court: West?

The Witness: West.

By the Court.

Q And the hind part was toward the curb of the street? A Facing Broad street, yes.

Q Can you tell us the speed at which that elevator travels; that is, how many feet per minute? A It all depends on the load and the gravity. The speed which gravity will let it go.

Q Do you know the capacity of that elevator? A It had no capacity on it.

Q Did you notice the number marked in the shaft? A There was no number when I was there.

Q No Number? A No.

Q You say, you don't know just what its capacity was when you inspected it? A No.

Q Were you in a position to estimate the capacity at all? A No.

Q Did you make a test as to its speed at all? A No.

Q Have you inspected elevators of similar or identical character? A I do not inspect elevators.

Q Assuming, Mr. Pfaff, that the elevator platform traveled to the point at which it was when you inspected it, can you tell us the effect of the cable coming off the drum?

Mr. Francis: I object to that on the ground that the witness has not qualified as an expert elevator man. I think I have been precluded from asking him the very same questions with respect to the hand-brake.

The Court: I think not.

Q What were your duties with the Otis Elevator Company? A Repair man.

Q What kind of repairs? A General, any kind.

Q Were you able to repair a drum if it was necessary, such as the kind that existed in this shaft? A Repair the drum?

Q Yes. A There was nothing wrong with the drum.

Q There was nothing wrong with it? A Whatever there would be wrong with it, I couldn't repair the drum. I couldn't repair the drum unless it be a new one.

Q Would you be able to install a new one if it became necessary? A Yes.

Q You are familiar with the mechanism? A Yes.

Q And how to install them? A Yes.

The Court: How long have you been working on elevators.

The Witness: **Eleven years.**

Mr. Francis: I would like it understood on the record that the questions put to him as an expert regarding the conditions of this elevator or what caused the condition are part of Mr. Guensch's case.

The Court: I think not. I think they are put to him to show the condition that existed at that time when he got there. They may go in and ask him why. He is an elevator man. It happens that while you don't put him on as an expert, it so happens that he is able to answer them. I think it is all right.

Mr. Francis: It is not proper cross examination.

The Court: It is a little beyond the scope, perhaps.

Mr. Francis: I don't know what the witness is going to say. Assuming it is prejudicial to the plaintiff's case, I don't want it binding on my case.

The Court: Don't you think it is a little beyond the scope of the cross examination? He isn't put on as an expert; he is put on to show what he saw when he got there the next day. The same as any other man who might observe the conditions. You are going one step further and you are asking him questions with respect to causes.

Mr. Cohen: I think, your Honor, that is so.

The Court: I think that brings it outside of the scope of your questioning and you might have taken him and made him your witness.

Mr. Cohen: Your Honor will recall that Mr. Francis just asked this witness questions that were such that required expert knowledge and the only reason that he didn't get it in was because your Honor ruled that it was rather remote.

The Court: He didn't get it in anyway.

Cross examination by Mr. Gray.

Q Mr. Pfaff, you found nothing wrong with the elevator, except you say the cables were off? A That is all.

Q You inspected it thoroughly and that was the only thing wrong? A That is all.

By the Court.

Q And the angle at which the platform was, that was abnormal? A That was abnormal.

Q That was caused by the cables coming off, wasn't it? A Yes, sir.

Adjourned until tomorrow, Tuesday, May 5, 1931, at ten o'clock A. M.

SECOND DAY.

Tuesday, May 5, 1931.

Pursuant to adjournment.

Present, counsel as before stated.

CHARLES WILLIAM ROEHM, JR., sworn in behalf of plaintiff.

Direct examination by Mr. Francis.

Q Mr. Roehm, with what company are you connected? A The Otis Elevator Company.

Q You have been connected with that company for how long? A Seven years.

Q And what is your connections with the company? A It is my work to visit elevators that are broken and will not run, advise the customer what is wrong with them and how much it will cost to fix them and get it running again.

Q Did you have any particular designation for that occupation, such as appraiser, estimator, inspector, etc.? A You might call it solicitor.

Q Are you familiar with the type elevator which is located at 913 Broad street in the City of Newark? A I am.

Q Can you describe to the jury how that elevator is operated?

Mr. Cohen: He did not testify that he had seen this elevator.

Q Have you seen it? A I have seen it.

Mr. Cohen: May I cross examine him on that? He may have seen it this morning.

The Witness: I did. The reason I went there—

Mr. Cohen: (Interrupting.) I don't care for the reason.

By the Court.

Q Have you seen it before? A I have seen the type before.

Q This elevator. A I went to the building to—

The Court: (Interrupting.) My question is: Have you ever seen this elevator before this morning?

The Witness: Not before this morning, not this particular elevator.

Mr. Cohen: I object to it.

The Court: What is the purpose of it?

Mr. Francis: This witness is an expert.

Q How long have you been in the elevator business? A Seven years.

Q Are you familiar with the different and various types of elevators that are used in buildings? A Every one.

Q How many different types of elevators does your company make? A Passenger, freight and sidewalk. Hydraulic also.

Q Are you familiar with all those types? A Yes, sir.

Q Did you inspect and examine those types after they have been installed when there are complaints as to defects? A For the purpose of repairs?

Q Yes. A Yes.

Q Are the repairs or improvements to the various elevators that you inspect repaired at your suggestion? A Yes.

Q And to what department are your suggestions made with regard to the elevators? A The Service Department.

Q How long have you been engaged in inspecting various types of elevators and recommending repairs where you deem repairs necessary? A Since November 5, 1928.

Q Are you familiar with this type of elevator? A I am.

Q Will you explain to the jury how it is operated generally?

Mr. Cohen: If your Honor please, I think before Mr. Francis proceeds any further I should be entitled to cross examine him as to his qualifications.

By Mr. Cohen.

Q What is your name, sir? A Roehm.

Q Mr. Roehm, you testified you were solicitor and salesman, did you not? A I did.

Q Just what does that embrace, what are the duties of a solicitor? A The duties of a solicitor

are to answer calls from customers who are complaining that their elevator won't run, that it is broken, or something is wrong which they do not know.

Q You received the calls at your office? A At our office.

Q Yes. A I am sent to the building to determine what is wrong with their elevator. If they desire an estimate, naturally I have to know what is wrong with it in order to figure on the job and every detail. I tell them what is wrong with it, bring it to my office, present my office with the things that I found wrong with it and they in turn make up a price and I return to the customer and endeavor to sell the repair job to them.

Q Don't the customers in their telephone calls tell you what is wrong with the elevator? A They are not elevator men.

Mr. Cohen: He said he determines what is wrong with them.

The Witness: If an elevator won't run, there may be 101 different things wrong with it and it is up to me to find out what it is.

Q Have you had any mechanical experience at all? A I have worked two years for the Otis Elevator Company, constructing elevators.

Q You have constructed elevators? A Two years inspecting and repairing elevators.

Q You have no degree of any kind from any school? A No, sir.

Q Then what experience that you have is secured right with the elevator company? A Yes, sir, there is no school or college that teaches you elevators.

Q There are schools and colleges that teach you mechanical, civil and electrical engineering, aren't there? A There are.

Q And under what heading would you say an elevator comes? A An elevator comes—in elevator construction there is only one place you can learn them and that is from experience.

Q In order to be able to construct an elevator, you are obliged, are you not, to have some kind of mechanical knowledge, attained either by experience as you were taught by someone, or through some course in college or other school? A No, sir, you start as an apprentice first.

Q Then you are taught by someone who does possess the knowledge? A By the elevator company.

Q In the company it is by some man? A Exactly, they are employed by the elevator company.

Q What is that? A They are employed by an elevator company.

Q And those men possess some mechanical knowledge, do they not? A Yes, sir.

Q Then as an apprentice, you would get the knowledge from them, would you not? A Exactly.

By Mr. Francis.

Q Will you describe this particular elevator to the jury, please? A It is an elevator that is operated by a series of gears. The main or large gear has a handle on it which is cranked. The other gears are meshed down to a smaller size, which in turn drives another large gear which is on the same shaft in the pit with the two drums. The gears are on the outside of the rails. The

shaft that runs through the drums runs over across the whole bottom of the elevator pit and on those drums are cables. One cable on each drum. The drum is curved and the cables rest in grooves. The cables go up the shaft around a sheave and down to a center point on the guard on both sides. There is also a brake on the elevator which is applied to a pulley or shoe which is part of the same casting of the main gear with the handle on it. The brake is applied by pressure and if enough pressure is applied to the brakes it will push down far enough to lock it until the pressure is released by pulling the brake handle up again. The elevator travels up and down between two guides by means of cranking with the handle on the large gear and brake elevator.

By the Court.

Q Of what dimension is the platform? A The platform is approximately five feet by five feet.

Q This particular elevator? A Approximately.

Q Square is it not? A Yes, practically square.

By Mr. Francis.

Q The drums that you spoke of in this particular case, are they on a level with the cellar floor or are they in a pit? A There must be a pit in order for the elevator to be constructed. The drums are about ten inches approximately, below the bottom landing level in the cellar.

Q And is that the situation in this case? A That is the situation in this case.

Q Assume that on January 10, 1929, the plaintiff in this case went into the Rialto Restaurant, finished his business there, was told by Mr. DiNicholas to go outside, that he would send the elevator up, assume further that he went outside and lifted up one of the iron doors and saw the elevator up, stepped on the platform and the elevator went down with him, what would you say was the cause of that elevator going down?

Mr. Cohen: I object to that, if your Honor please, I think the facts included in a hypothetical question do not give rise to an inference that only one thing may cause it. Your Honor may readily see that.

Mr. Gray: I think he ought to include in the hypothetical question the fact that the man had put both feet on the elevator and was in a position where he could get in front on the elevator, and had been there a sufficient length of time to pull the door up.

The Court: I think that should be included. He stood with both feet on the elevator, raised, stooped to raise the other door and got it up about a foot when the elevator descended. Add that to the question and then what is your answer?

The Witness: In order for that type of elevator to fall, it has to be caused by possibly two things, possibly three. First the cables pulling out of the sockets which did not happen as our man found when he went down there—

Mr. Cohen: Objected to.

The Court: You are not to answer this question by reason of what someone has

told you, but only answer it by dismissing everything that you know about this case from your mind. Base your answer entirely on the facts that are embraced in the question and only those facts.

By Mr. Francis.

Q Tell us the first possibility again. A It may have pulled out of the sockets.

Q The second? A The cables break.

Q And the third. A By the cables coming off the drums.

By the Court.

Q Cables slipping off the drum, was first, wasn't it? A That was third.

Q What was first? A Cables pulling out of the sockets.

Q Second? A Cables breaking.

Q Third, cables slipping off the drums, is that it? A Exactly.

By Mr. Francis.

Q What causes the cables to slip off the drum? A If that elevator is run down below its landing level, the car platform is allowed to rest on the drums. You will get slack cable and that is the only way you can get slack cable by releasing the tension of the cables.

Mr. Cohen: I wonder if I may have that answer?

(Answer repeated.)

Mr. Cohen: If your Honor please, I move that that be stricken out on this ground: There is absolutely no evidence in this case

that that is what happened, that it went below the level or into the pit and therefore I think that he is going out of the field of conjecture which is not proper evidence in this case. He is not confining himself to the facts in the case.

The Court: He first told the three things that could cause an elevator to drop, then he was asked what might have caused the third reason that he gave as an expert. He stated what could have caused it. That is the question and I think the answer is right.

Mr. Francis: If the Court please, it is based also on the testimony of the other elevator man. When he got there the cable was off.

Mr. Cohen: He testified that it was midway in the shaft.

The Court: At that time.

Mr. Cohen: There is no evidence in the case that the platform went subsurface or in the pit. I am willing to wait subject to a later objection.

Mr. Gray: Same here.

By Mr. Francis.

Q When that elevator was down below the normal landing surface, the cable becomes loose as they are slack. Will the elevator go up? A It will.

Q On the way up what happens? A The cables on being slack have slipped a groove or two and on being cranked up they are running off the drums until they get off at the top. They are either off by that time or ready to come off

according to how many grooves they have slipped.

Q Will that elevator in its then position, the street level, stay there, will it start? A Well, unless some pressure is given it to force the cables completely off the drum.

Q Assuming that a man weighing between 160 and 165 pounds stepped on the elevator platform when it was in that condition, what would occur? A If the cables were in that position that they were just ready to come off, and an extra pressure or weight was applied to them, they would come off.

The Court: Then what would happen?

The Witness: They would wrap around the shaft until the elevator was taken up.

The Court: Then what would happen, it would stop with a jerk?

The Witness: Exactly.

Q Assume that in this particular case the plaintiff went into this restaurant, transacted his business, was told to go outside and the elevator would be sent up to him, he went outside, raised one of the doors, saw the elevator up, stepped in on the platform. At that time he weighed 165 or 160 pounds, that he stepped in on the platform with both feet, started to raise the other door up, the elevator went down with him. Afterward when they went to take him off, the platform was between half and two-thirds of the way down the shaft, testified at a 45-degree angle, and one of the cables was off, what would you say was the cause of that condition, of those three possibilities that you mentioned?

Mr. Cohen: If your Honor please, I object to the question. I think the witness has already stated that it can be one of three causes. He definitely says only one of three. He can't select one of the three.

The Court: He didn't quite do that. He said that there is a possibility of this occurring by one of three ways. Now, he is asked, he is given a new hypothetical question with elements in that were not in the first question and he is asked in view of that specific hypothetical question which of the three he would say, if he can, was of this. I think it is proper.

Defendants' counsel pray an exception to this ruling of the Court.

Exception noted as ground of appeal.

Q (Repeated by stenographer.) "Assume that in this particular case the plaintiff went into this restaurant, transacted his business, was told to go outside and the elevator would be sent up to him, he went outside, raised one of the doors, saw the elevator up, stepped in on the platform. At that time he weighed 165 or 160 pounds; that he stepped in on the platform with both feet, started to raise the other door up, the elevator went down with him. Afterward when they went to take him off, the platform was between half and two-thirds of the way down the shaft, testified at a 45-degree angle, and one of the cables was off, what would you say was the cause of that condition, of those three possibilities that you mentioned?"

The Court: Strike it out. Please give the question over again, Mr. Francis.

Q Assume that on this day, the plaintiff went to the Rialto Restaurant, transacted his business, was instructed to go outside, that the elevator would be sent up to him; assuming that at that time he weighed between 160 and 165 pounds; assuming further that on going outside he raised one of the doors so the elevator platform was up, stepped on the elevator platform with both feet, started to raise the other door, when said platform went down with him. Assume further that while his body was up on the platform or after it had been taken off or left the platform it was between one-half and two-thirds of the way down the shaft and the platform was tipped at a 45-degree angle to one side, and assume further that Mr. Pfaff, a repairman, or a serviceman from your establishment made an inspection of the elevator and found one cable off, or found two cables off, which in your opinion—

Mr. Cohen: I think we ought to definitely say one or two. This witness may have a right under the question to infer that there were two.

Mr. Francis: I think he said on one side it was quite a bit off and on the other side it was quite a bit off.

The Court: Frame your question that way.

Q (Continued.) Assume, further, Mr. Pfaff, your serviceman made an inspection of this elevator and found the cable on one side considerably off and slightly off on the other side, which of those three possibilities which you have mentioned would you say was the cause that this elevator dropped?

Mr. Gray: I have the same objection. He said he was on the platform. I think he said just about as he was over the door.

The Court: Amend the question to that effect. After the other hypothetical question. That he not only raised the door, but then got in on the platform and was raising the second door and got it up about a foot, when the elevator dropped, the platform dropped. With that amendment, what is your answer?

Mr. Cohen: May I interpose the same objection?

The Court: You may.

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

Exception noted as ground of appeal.

The Witness: The cable off the drum.

By Mr. Francis.

Q Have you the records with you of your service department, of the bill which was sent out after Mr. Pfaff visited the premises where this elevator is located? A I have.

Q Will you produce it, please?

Mr. Gray: I object to it as immaterial.

Mr. Francis: We are eliminating causes. My purpose is to show that after Mr. Pfaff was there, this bill was sent to one of these defendants, that it was paid, and that it was for the one particular thing which this witness has said was the cause of this fall. It seems to me perfectly proper evidence.

Mr. Cohen: The Court has already ruled out that question under the Levy Case.

The Court: Objection sustained.

Mr. Francis: Has your Honor ruled the question out?

The Court: This is cumulative anyway. Mr. Pfaff has testified what he did. This witness says this was the cause. What difference does the bill make?

Mr. Francis: Except to show control in one or both of these defendants.

The Court: The objection is still sustained.

Mr. Francis: Exception.

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

Exception noted as ground of appeal.

Q When the elevator is in a position below the level of the cellar floor and there is slack in the cable, is that apparent to anyone using that elevator, that is, any person who is in the act of sending it up? A There is a brake on the elevator for the purpose of stopping it anywhere that you desire to stop it.

Mr. Cohen: That ought to be stricken out as not responsive.

Mr. Francis: I consent to it being stricken out.

The Court: Strike it out.

Q When there is slack on one of these drums, can you see the slack before you start to send it up? A You can.

Cross examination by Mr. Cohen.

Q Mr. Roehm, if there is a slack in the cable, how many feet per minute, if you know, will the elevator descend? A It would descend with the speed of gravity, less the friction that might be in it.

Q But we are not engineers or elevator men; can you tell us just what that means, how many feet? You know under nromal conditions the rate of speed of that elevator? A It depends on how you gear it.

Mr. Francis: It seems to me immaterial.

Q Did you crank it? A No.

Q Did you apply the brake? A I did.

Q What for? A To see if it worked.

Q Was the elevator in motion? A No, sir.

Q How could you have any use of the lever or brake if the elevator wasn't in motion. What was the purpose in applying it? A You can tell by the pressure on it.

Q Wouldn't you be able to tell with more certainty if you actually had the car either ascending or descending and then applied the brake so that you may determine the amount of pressure necessary while the car is in motion, or the elevator? A In applying that brake, I applied the brake and tried to turn the crank handle and I could not do it. That is sufficient to determine that the brake will work.

Q The brake worked perfectly, didn't it? A It won't work perfect unless it is absolutely brand new. I saw the brake lining starting to wear. No brake lining will be perfect if it starts to wear.

Q Suppose you reline the brake? A You could do that.

Q Do you know whether the brakes were relined or not? A I do.

Q Would the elevator, after descending and the slack is taken up, stop? A The slack from the cables after they come off the drum?

Q When you have a slack in the cables? A Yes, it will.

Mr. Cohen: If your Honor please, with your permission I should like to pass on the cross examination to Mr. Gray, because as the evidence appears there, the owner of the elevator knows about it. I should like to have the opportunity of further cross examining him.

Mr. Gray: If your Honor please, in regard to the testimony involving the brake. What he tells us may have nothing to do with the brake condition in 1929, and that has nothing to do with the ownership of the elevator, because he gave no testimony at all. I move to strike out the testimony as to the condition of the brake in 1929 as compared with today.

The Court: Motion allowed. Let the last question and answer be struck out with respect to the brake.

Cross examination by Mr. Gray.

Q Mr. Roehm, will the elevator go up when these cables are off? A It will.

Q How do you get it up if the cables are slack? A As soon as you start to crank the handle you take up the slack.

Q When this elevator was sent up, as it was sent up, and the testimony was that it had gotten to the street level, the slack would have taken up, or it wouldn't have gotten to the street level, is that right? A If you let slack get into those cables—

Q (Interrupting.) Please answer the question. A With slack cables and you start to crank the elevator up, the cables will jump a groove or two on the drum and as you crank it, the cables are wound on the drum until the drum is filled. Then they either start to jump off on to the shaft or wrap up around the top of the flange on the drum.

Q When it was brought up to the street level, as it was, the slack was taken up, wasn't it? A The cables undoubtedly were tight, but they were in a position to run off the drum.

Q Then the pressure put upon this platform when he walked on it, was that sufficient to cause it to come off the drum? A I couldn't state that.

Q This man certainly took two or three steps on the elevator according to his testimony before, and then started to lift the door and got it about a foot high before the thing dropped. Now, the cables must be taut to have withstood that pressure of the two or three steps and lifting this elevator door a foot high, wasn't it? A His weight possibly wasn't enough to throw them off, but the additional pressure necessary to raise the door a little may be enough to let it go down.

Q Now, these drums you say have grooves in them, is that right? A Exactly.

Q And the cable is in all of these grooves, is that right? A Exactly.

Q Then if it had sufficient power, or strength, or whatever you call it, sufficient tightness in the cable to hold it there, how would more pressure which would necessarily tighten the cable, rather than loosen it, make it fall?

Mr. Francis: I object to the form of the question. It incorporates a fact which this witness must use, which may or may not exist: "Which must necessarily tighten the cables if the man put pressure on the cables, it would loosen it rather than tighten it."

The Court: If there is anything in the question that is given as a conclusion that is not correct, you may point it out in the answer. You may answer it.

The Witness: If the cable is on the flange or drum, it isn't in the groove; it is on a round or possibly flat surface, and if additional pressure is applied other than that of holding the car itself up, it will throw the cable completely off the flange or drum and unwrap a few point turns around the shaft of the drum.

Q The more pressure you put on the elevator, the tighter the cables get on the drums, don't they? A Yes, sir.

Q Wouldn't that thing necessarily apply to the flange? A In a groove, but not on a flat or round surface.

Q The pressure is downward, is it not? A Exactly.

Q And the downward pressure tightens the cable, does it not? A It does.

Q If it is on the flange, doesn't it tighten it on the flange as well as it does on the drum? A It will pull it off the flange.

Q The pressure is right straight down, how does it go sideways? A Because it leads possibly to the flanges on the side, naturally, as the cables wind up on the drum.

Q Would that happen the very first time a substantial load was put on the elevator, it would come off the load? A If it was heavy enough a load.

Q A load of 165 pounds, that would be applied before with the cables in that condition, would that cause it to come off the flange? A I can't state that; I don't know how much pressure would have been necessary.

Q How much pressure would be necessary to do it? A The weight of the man, plus the pressure to raise the door.

Q That condition would make it slide off the flange, would it, if that pressure had occurred previously to that, that condition of a loose cable would have happened before, wouldn't it? A I didn't get the sense of your question.

Q I am trying to find out, Mr. Roehm, this: if this condition you said existed, the cables being loose, or being on the flange, either as soon as sufficient pressure, the amount that was testified was used, wouldn't that cause the cable to come off? A Sometimes it does and sometimes it doesn't.

Q What is the difference? A It is a mechanical thing that happens; sometimes it does and sometimes it doesn't.

Q Explain it to me. Maybe I am intelligent enough to understand it, I don't know. You were a civil engineer for five years. A It is just a case, if the cables are twisted on a drum, sometimes they are—if the cables are twisted on a drum sometimes they will stay there and run for

a week; sometimes they will come off the minute any excessive pressure will come on. That is what we find from our experience.

Q You are an expert? A I am not an expert. I didn't testify that I am an expert.

Mr. Gray: I move to strike out all his testimony.

The Court: He is an expert and I have so ruled.

Mr. Gray: I think he ought to answer the questions.

The Court: Even if he is an expert he can't answer all questions. I think he is called as an expert because of his experience, but that doesn't mean he can answer every question. That doesn't mean necessarily that he may have aims as an expert. He has given expert testimony and you may cross examine him by giving expert questions. If he can't answer them, he will say so. It is for the jury to say how much of an expert he is.

Q Did you examine the flanges on this drum? A I have.

Q Is it a round one or a square one? You said something about a flange may be round, or square.

The Court: He did not say square, it is round.

Q Then, wouldn't the pressure on that tighten the cable just the same as it would on the drum? A If you have a round cable on a round flange and you applied pressure to it, it will stay

there until enough pressure is applied to it to push it off.

Q Then, if this same amount of pressure had been applied to this elevator while the cables are in the same condition, the same results would have occurred previously, is that right?

Mr. Francis: I object to it on the ground that is purely speculation.

The Court: It must be so in the opinion of this witness; that is what he has been testifying to. I will allow it.

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

Exception noted as ground of appeal.

The Witness: It could happen.

Q How could it happen; will you explain that? A You mean the cables to come off this drum?

Q No, off the flange? A By applying pressure. Sometimes it comes off by just running the elevator up. In other words, if you haven't got your car at the top and other cables have started to come off, sometimes they have skipped the groove and by the time you get the elevator to the top, the cables have reached the edge of the flange and they come off the shaft.

Q Isn't it a fact that it is more likely to occur when you are going up, than it is when you are coming down? A Yes, sir.

Q Isn't it more likely to occur if that is the condition that existed either on the flange or on the chute if a sudden pressure is applied rather than just an ordinary pressure? A You mean for the cable to come off, if it were possible to come off?

Q Yes. A The sudden pressure would knock it off quicker than a steady pressure.

Q Then, if this man instead of stepping on the elevator had dropped a heavy load on it, that would cause the condition just the same?

Mr. Francis: I object to that on the ground there is no testimony to substantiate such a hypothetical question.

The Court: I will allow it.

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

Exception noted as ground of appeal.

The Witness: If he dropped a heavy load on it, it possibly would have gone down.

Q Wouldn't it have been just as likely, or more likely to have done it, than a steady pressure if it had been on for some time? A I can't answer that question.

Q From your experience, how long would you say in an ordinary case, the elevator would operate with the cables in a position where it would come off on account of applying the pressure? A I can't answer that.

Q It happens rather quickly, doesn't it? A I beg your pardon?

Q It happens rather quickly, doesn't it? A I beg your pardon?

Q As soon as the cable begins to come off, it continues, doesn't it? A Providing the cables do not overlap themselves on the drum and start to wind back or forward. The cables overlap themselves occasionally.

Q Does the operation of the elevator indicate whether the cables are overlapping themselves or

coming off on the flange or anything? A It depends entirely on the operation of it.

Q I mean, if you are operating the elevator, can you tell whether the cable is overlapping itself? A You can.

Q How does it manifest itself? A You can see it.

Q If you are operating it, it does not show in the operation of the elevator, does it? A Surely, the drum is right in front of you.

Q I mean, if you are in the cellar? A It is the only place you can operate it, from the cellar.

Q You can't operate it from the platform? A No, sir.

Q Where is the brake? A On the main driving gear.

By Mr. Francis.

Q Mr. Roehm, this condition that you have described of slackening of the cable, the various conditions that you found on the drum, may or may not that condition exist over a long period of time before the elevator suddenly drops? A It can exist for a period of time before they will come off.

Q And that is, it may be on that drum with slack over a long period of time, then, later, roll itself off? A Not on the drum with slack. It comes down on the drums which allows slack, which allow the cables to cross themselves on the drum and the elevator can be operated with the cables crossed on the drum.

Q Assuming it existed over a long period of time, over that entire period, that condition of the drum is apparent to the person operating?

Mr. Cohen: I think he said assuming it existed for some time.

The Court: Objection sustained.

Q You say it may exist over a long period of time before the cable will come out? A Yes, sir.

Mr. Gray: I object to that.

The Court: He has already gone over that quite repeatedly.

Q If it does exist over a long period of time, is that condition apparent to users of the elevator?

Mr. Gray: There is no testimony to that effect.

The Court: But he has already said if it did exist, it would be seen. I suppose that would be whether it existed over a long period of time or a short period of time.

By Mr. Gray.

Q Can you tell in the operation of the elevator whether or not that drum— A If the cables are crossed at a fairly even amount on both drums it will operate almost as freely as if they were in the grooves. If one was crossed more than the other or to a great extent, it will pull the platform up cross-cut and you will get a binding. It will be hard to pull that platform up.

Q If the platform goes up and down regularly, you will say the elevator is operating properly? A Yes, sir.

Q As long as it stays on the drum, even though it is caught, it is in good operating condition? A No, sir.

Q If it operates properly? You shouldn't operate the elevator with the cables crossed.

Q Is it an unusual condition to find those cables crossed? A No.

Q As I understand you say that these cables would be crossed only because the elevator is sent too far down in the shaft and allows the cables to slacken, is that right? A Exactly.

Cross examination by Mr. Cohen.

Q Which way does the cable reel, towards the guide or away from it? I mean which way does it turn up? I think you said it had several grooves. As you raise the elevator? A It reels towards the center.

Q From the guide going up? If the cable already used up in raising the elevator was upon the center, it wouldn't then reel towards the center, would it? A I don't get what you mean.

Q There are several grooves in this drum there, aren't there? A Yes, sir.

Q In raising the elevator, which way does the cable reel? A It reels up towards the center of the elevator. Towards the center or half ways from the rails to the center.

Q Your company never did any business with P. DiNicholas, did it?

Mr. Gray: I object to it as immaterial.

The Court: I will allow it.

The Witness: No, sir.

By the Court.

Q What is the circumference of this drum? A I should say approximately ten inches to one foot, about one foot.

Q Then, if the cable was in its accustomed groove, and three turns of the cable off the drum, that would cause it to drop if a sudden or sufficient pressure were put on it when the elevator was in that condition, three times ten inches, wouldn't it? A No, sir.

Q The circumference of the drum is what? A Is one foot, just through the center, through the core.

Q Let me put it this way, if the cable was three times on one drum, slack or out of place, that is the proper term, how far would the elevator drop in order to take up that slack, is that intelligible enough? A Yes, it is. It would drop the number of turns it came off the drum. There is little more than three feet per turn.

Q That would make nine feet if it were off three turns, that would take it to the bottom of the shaft almost, wouldn't it? A No, sir, because you have the cable wrapped around the shaft which is about five inches in circumference. You have to deduct the number of feet that are wrapped around the shaft. The amount that it would drop is the difference between the diameter of the drum, plus your turns, the difference of the diameter of your shaft.

Q Assume, that Mr. Pfaff when he got there found that the cable was off three turns on one drum and one or two turns on the other drum, would that indicate anything to you with respect to the distance that the elevator would drop because of the slipping of the cables? A It would.

Q What would that indicate to you as to the distance it would drop under those circumstances? A About five feet.

By Mr. Gray.

Q If it dropped five feet, that would take up all the slack, the cable would be tight, wouldn't it? A There is no slack there, the slack was obtained when the elevator was run to the bottom and the cable started to cross on the drum and in winding it up, it is wound up crossed cable.

Q Then if it came down, it took up that slack, didn't it? A There was no slack when it was at the top. The slack was obtained before the elevator started to be wound up.

Q If the elevator started down, was there any slack when the elevator was at the street level? A It would not be at the top if there was any slack. There is nothing to hold it there.

Q When it dropped, if it did, wouldn't it take up that slack and then be tight either on the drum, or on the shaft, on the flange if there is no slack? A Well, I don't get your question.

Q What caused it to drop, in your opinion? A The cables being crossed in the position to come off the drum.

Q Would they come off the drum? A They would.

Q Then what happened to the elevator. The elevator came down, didn't it, and took up and tightened that cable? A It tightened the cable around the shaft of the drums.

Q Then the cable would be when it got partway down, taut? A Exactly.

Q And there wouldn't be three or five turns off the drum, would there? A Yes, they would be wrapped around the shaft.

Mr. Francis: May it please the Court, I would like to offer in evidence the table on mortality, showing the value of a dollar at Mr. Guensch's present age.

Mr. Cohen: I object to it.

Mr. Francis: I have a photostatic copy of the American Experience Table of Mortality which is in corpus juris and which is used by the larger insurance companies.

Mr. Cohen: I object to that.

(Counsel argue.)

Mr. Cohen: On second consideration I am really not concerned, I am satisfied with it, because I am not interested in damages, I am interested in the question of liability which we deny.

Mr. Francis: I would like to offer this in evidence.

(Same received in evidence and marked Exhibit P. 8.)

PLAINTIFF RESTS.

Mr. Cohen: On behalf of the defendant, P. DiNicholas, Inc., I should like to move for a non-suit on the following grounds:

On the ground that there is no proof of ~~actual~~ ACTIONABLE negligence on the part of the defendant, P. DiNicholas, Inc., which would entitle this case to go to the jury.

There has been no proof of notice to the defendant, P. DiNicholas, Inc., of any defect in the elevator or that any defect existed for such a long time as to charge said defendant with knowledge of any defect in the elevator or platform or any part thereof.

Defendant, P. DiNicholas, Inc., respectfully asks for a non-suit on the further ground that the plaintiff was guilty of contributory negligence.

Mr. Gray: I respectfully ask for a non-suit on the ground that the defendant, P. DiNicholas, Inc., had control of the elevator there.

I respectfully ask for a non-suit on the further ground that there has been no proof of notice and on the ground that there was contributory negligence on the part of the plaintiff.

The Court: I think the question of contributory negligence is a question of fact for the jury. And on that theory the motion on that ground is denied.

I will deny both motions.

Mr. Cohen: I take an exception.

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

Exception noted as ground of appeal.

Mr. Gray: I take an exception.

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

Exception noted as ground of appeal.

(Counsel argue.)

JAMES H. BROTHERS, sworn in behalf of defendant, Trustees of the Third Presbyterian Congregation.

Direct examination by Mr. Gray.

Q Doctor, you are a duly licensed and practicing physician of the State of New Jersey? A I am.

Mr. Francis: I will be glad to admit the doctor's qualifications.

Q Did you examine this plaintiff at my request? A I did.

Q Will you tell me when you examined him? A In June, 1930. June 19th.

Q You examined him where? A At the office of his attorneys, Harley, Cox & Walburg.

The Court: What day in June was it?

The Witness: June 19, 1930.

Q Will you tell us just what you did and what you found when you examined him? A I made a complete physical examination, looking to see if he had any skull or brain injuries.

Q About how long did this examination take? A About three-quarters of an hour.

Q Will you tell us just what you did now and what you found? A The man complained particularly of his right hip and the fact that he had headaches. I examined him and could find nothing referable to a skull or brain injury. There were no symptoms at that time referable that he had a skull or brain injury. Examination of his back showed that he had motion in all directions. He had motion of his hip muscles,

and he moved with no locking of the hip joints or sacro-iliac joints. This blood pressure was 122-72. His reflexes were normal and equal and there was no ankle clonus and no loss of deep reflexes.

Q What do you mean no ankle clonus? A That means he has no irritation of the central nervous system or spinal cord.

Q What test did you make to learn that? A I made all the usual tests of Mr. Guensch, looked for an astigmas, looking for any paralysis of the muscles. I gave him the wrist drop, the wrist reflex, the knee jerks, ankle motion and questioned him as to whether he had any loss of sensation, any place, any part of his face, body or limbs, and tested him for staggering and swaying and took his blood pressure. I went over his back to see whether he had any loss of motion.

Q Had he any spasm in his neck or had he any motor paralysis in his limbs, facial expression, or other parts of his body? A No.

The Court: All negative?
The Witness: Yes, sir.

By the Court.

Q Did you give him the Rhomberg? A I did, and he did not sway or stagger. He complained of headache and dizziness at the time he was in the office.

By Mr. Gray.

Q Then from the tests you made, you couldn't find that he had any objective symptoms to cause him to have a headache? A I could not, except for his complaint.

Q The subjected symptoms you found lead you to believe that he did, or did not have a headache? A I couldn't find any reason. He might have a headache, I couldn't tell unless the headache is severe enough to cause his forehead to wrinkle. Whether he had a slight headache, of course, I could not tell. I also went to St. Michael's in connection with this examination to see the X-ray plates which were made at the time he was there and they were negative for any fracture.

Mr. Francis: I move to strike it out.

The Court: Strike it out.

Q Did you see any X-ray plates in connection with this? A I did.

Mr. Gray: Your Honor, I would like to have him testify as to the X-ray plates.

Mr. Francis: They can be subpoenaed if Mr. Gray wants them. I will let Mr. Gray have Dr. Brothers read the X-ray reports which were attached to the original record of the hospital if he wants to.

Q I show you the X-ray report and ask you if that report is the same as that shown by the X-ray? A That is the same report I saw at the time I saw the X-rays and I agree with it.

Q Then you agree that the X-ray on the right shoulder was negative? A That is right.

Q And the right elbow was negative? A Yes.

Q And the dorsal lumbar spine, excepting a suspicious line to the left transverse process of the first lumbar vertebra, is that definitely a

fracture? A That is the fifth lumbar, not the first.

Q It is first here. A As I remember it, it was fifth. That is what I have here, five.

Q And that the pelvis was negative. You agree to that? A That is right. And I had a picture of the right hip, too.

Q And the only thing shown on the X-ray was a suspicious line in the transverse process of the first lumbar vertebra, or as you have it, the fifth? A That is right. With no definite expression of fracture. It was just a suspicious line through that transverse process coming off from the end.

Q Will you explain what the transverse process is? A It is analogous to the ribs.

Q It is a definite supporting part of the back? A It is used for muscles; it is used for muscle supports, yes.

Q But it is not part of the bony support, except for the purpose of attaching muscles? A That is right.

Q When you examined him, did you find anything wrong with the muscles which would ordinarily be attached to this lumbar vertebra process? A I did not.

Q Did you make an examination definitely for the purpose of trying to learn whether that was so? A I did; I examined his back thoroughly in all positions.

Q You say you took his blood pressure? A Yes.

Q And without giving us the figures, tell us what those figures mean. Does that mean the normal, high or low? A 122-72, which is normal for his age. 122 systolic and 72 dystolic.

Q Is this normal; was his blood pressure normal? A Yes.

Q Doctor, how long have you been practicing? A I have been practicing as surgeon for some time, since 1917. In New Jersey since 1919.

Q There has been some testimony that he had a hemorrhage to his spinal cord; did you find any evidence of that? A I did not.

Q Did you find any evidence of a spinal condition? A I found no evidence of any central lesion from tests.

Q Would the fact that he had the normal blood pressure as you have found negative the idea that there had been a hemorrhage into the canal?

Mr. Francis: Objected to as leading.

The Court: I will allow it.

Q Would it or would it not be an indication of whether he had a spinal hemorrhage or not? A It was certainly an indication that there was no such condition because his pressure would go down or up under those circumstances.

Q Doctor, did you find anything in his condition which you thought would be permanent? A I did not.

Q Did you find anything that you thought would disable him at the time of this examination? A I did not find any underlying condition.

Cross examination by Mr. Francis.

Q Doctor, do you spend a good deal of your time in court, testifying? A I do; I am called in on many occasions for an opinion as an expert.

Q The great majority of them is for defendants, is it not? A It is in the proportion of about three to five. Three plaintiff cases to five defense cases.

Q And you testify a great deal for Mr. Gray in the defense of his cases, do you not? A I have testified a number of times, but not as many times for Mr. Gray as I have for some other people.

Q You have testified for a number of years for Mr. Gray; is that right? A That is right; I have.

Q Did you ever testify for Mr. Gray in a plaintiff's case that Mr. Gray tried? A Yes, sir.

Q You did? A I have on several occasions.

Q In any event, the great percentage of your work is defense work, is it not? A Five to three; yes, sir.

Q Who asked you to make this examination? A Mr. Gray.

Q Mr. Gray, personally? A Mr. Gray, through a letter.

Q You made it June 19, 1930? A That is right.

Q In our office? A That is right. I think you were present, I am not sure, but as I remember it.

Q And that was over a year and six months after this accident? A About a year and a half after the accident was said to have occurred.

Q And you examined him; you made a Rhomberg examination of this man? A That is right.

Q And you say there was no swaying? A There was not.

Q Was that the occasion when Dr. Beling and Dr. Singer also examined this man? A No,

I was there alone. No one was there but myself and someone from your office. I thought it was you.

Q Did you know that Dr. Beling and Dr. Singer also examined this man for the defendants, too? A I did not; no, sir.

Q Did you know that Dr. Beling gave this man a prescription after his examination of him?

Mr. Gray: I object to that. I don't see how that is proper cross examination.

Mr. Francis: May I finish my question?

Mr. Cohen: The proper cross examination requires him to confine himself to the examination in chief. There is no evidence in the case that Dr. Beling and a Dr. Singer examined him on the part of the defendants.

The Court: Yes, there is. I think it is rather objectionable and going a little beyond the scope of the cross examination.

Q Doctor, when experts called in for the defense, make examinations of plaintiffs they all go through this Rhomberg, the Babinsky and the ankle clonus and the reflexes of the knees, etc., do they not? A That is, there are certain stereotype tests that are used.

Q Doctor, I show you a prescription marked P. 3 in evidence signed by Dr. C. C. Beling and ask you what that is? A Tablets of luminol.

Q What are they? A They are a nerve sediment.

Q That is the only thing luminol is given for? A That is, some people are told to take a tablet at night with a glass of warm milk.

Q Doctor, assume that you examined the plaintiff, that you gave him a Rhomberg test,

that he swayed so much and almost fell so that you had to catch him at the conclusion of your examination, will you give him luminol? A That has nothing to do with swaying at all. Those things are given to people who complain of an indefinite nervous system. They aren't given for swaying, if that is what you are getting at.

Q Does swaying indicate a nervous condition? A Swaying does indicate some disorder to the posterior lobe of the cerebellum. It may come after some nerve disease or a semi-circular canal disease.

Q At the close of an examination, one that you conducted, and at the close of which you found the patient to have a positive Rhomberg and have exaggerated reflexes and have a positive, I think you call it, Babinsky, and you found that on the Rhomberg he almost fell, you had to catch him, would you think it is a good idea to give him luminol?

Mr. Gray: Objected to.

The Court: Objection sustained. We have no testimony from Dr. Beling who gave that prescription.

Q You say you saw this hospital report and there was a suspicious fracture line? A There was a mark which was suspicious, but not definitely a fracture.

Q Did you know when you made this examination that subsequent X-ray plates had been taken by an X-ray specialist which disclosed a positive fracture of the transverse process of the first lumbar vertebra? A I did not.

Q I think the doctor said separation of the sacro-iliac joint. Did you find that true? A No, sir.

Q A separation of the sacro-iliac joint is what, doctor? A It is a separation of that joint between the part of the sacrum and the ilium which is part of the hip's girdle.

Q By the way, doctor, when you examined this man, did he have a brace on his back? A He was wearing a corset.

Q What is the difference between a corset and a brace? A A brace is something which is rigid; a corset is something used for support and may or may not be rigid.

Q You assumed that he was wearing this corset for support, didn't you? A I did.

Q And what do you think that he was wearing it for, for what particular condition? A I was told he was wearing it for an injury to his back. That it had been given to him to wear for that injury.

Q And you say that you couldn't find anything at all the matter with his back? A Not that I couldn't find; I didn't find.

Q You didn't find? A I did not.

Q The sacro-iliac injury is a painful condition, isn't it? A If a person has it, yes.

Mr. Francis: I move that that part of the answer, "If a person has it" be stricken out.

The Court: Strike it out.

Q And sacro-iliac injuries are generally permanent, are they not, doctor? A They may or may not be.

Q What are the great majority of cases? A If they are still present by X-ray and physical

findings, such as a separation in which you can place your exploring finger into the joint and locate the joint, they are permanent after he has it a year or more.

Q Assume, doctor, that this accident happened January 10, 1929, that he had an injury to his back, that he was examined by Dr. Dowd sometime in the latter part of 1930, I think March 5, 1930; at that time an examination disclosed the presence of the fracture of the transverse process of the first lumbar vertebra and the sacro-iliac dislocation and also assume X-rays had been taken prior to the time which showed that condition and that time was more than a year after the accident, would you say that those conditions are permanent?

Mr. Gray: If I remember correctly, the testimony in reference to an X-ray showed a healed fracture, not that it was there at that time.

The Court: Evidence of there having been a fracture.

Q (Continued.) Would you say that that was a permanent condition? A If those facts are true, yes.

Q Doctor, this transverse process that Mr. Gray spoke of, that is part of the spine, is it not, the transverse process? A Yes, it comes out from the side of the body.

Q And up in the dorsal region of the back where the ribs are, the ribs are attached to the transverse processes to the side, isn't that right? A That is not true in some instances. In some instances the transverse process may become extra ribs.

Q Up in the thoracic region, the ribs either articulate with the transverse process or are part of the transverse process, is that right? A No, they articulate in that region.

Q Doctor, the lumbar region, that is bony spoors, they are part of the spine. Of course, there are no ribs there. A There are no ribs there.

Q And they serve as muscle attachment? A That is right.

Q When that fracture happens, what happens to the muscle? A They sag in that region and they do not have the same definite support until it heals.

Q When a man has a sacro-iliac injury over a period of from January 10, 1929, to date, to the date of Dr. Dowd's examination, you say that condition if it is found is a permanent one, is that right? A That is right, if it is found it is permanent.

Q It will serve as a means of incapacitating the man that has that injury from doing work, will it not, doctor? A It may, and usually does to some extent.

Q By the way, did you examine this man's hearing? A I certainly did.

Q Did you find that negative, too? A I found that he heard less well with his right ear than his left, but he can hear the spoken word with both.

Q Why didn't you tell us that on direct examination? A I am sorry, I didn't mean to leave it out.

Q That was the only thing that you found that wasn't negative about the man, so you left it out? A That isn't the reason I left it out, it was an oversight.

Q Did you decide what caused this diminishing of hearing in the right ear? A I did not.

Q Why didn't you? A Because I am not an ear specialist.

Q What are you specialist in? A In diagnosis, particularly traumatic and general surgery.

Q Assume, doctor, that there is testimony in this case that this man was sitting, and suddenly had the whole side of his face go numb and right arm and body down to his hip and he was taken to the City Hospital and at the time pins and needles were stuck in there and there was no sensation, what would you say was the cause of that? A There could be several causes of that.

Q What are they? A He might have some nerve injury which would be hardly likely to affect him down his whole body because on its face there is one group of nerves, the cranial, down below he would have the cervical, down below that he would have the peripheral and down below that he would have the lumbar nerves. It is hardly possible for a man to have the lesion which would involve all those nerves throughout his whole spinal cord and have it at such a moment that he would get the sensation at the same time. If it is due to a hemorrhage on the cord, it is from an injury, I think it would start either below the hemorrhage, ascend up over his body over a period of time and if it started above the hemorrhage, the reverse order would be true. There would be a definite time between the time when one set of nerves became effective and then the others.

Q Doctor, I am asking you again what would cause that condition? A I am trying to give you the answer.

Q You are going off into the realm of what is possible. You said there were several causes. Tell me what the causes are. A I am giving them to you as fast as I can. An increase in the spinal fluid due to some inflammation. A hemorrhage to the spinal cord can be caused by a compression fracture with pressure on the cord and it is the last thing that would cause it. Another thing that would cause it would be neurasthenia.

Q If there were a hemorrhage to the spinal cord, that would cause it? A That would, but, it would not come altogether, as you say, sitting in a chair.

Q Neurasthenia might also bring it on? A That is right.

Q Doctor, there has been testimony in this case that this man has been sexually impotent since the accident; what is the cause of sexual impotence? A The most usual cause is over-indulgence which is seen in most people that are treated for that condition, or if you have some interference with the nerve which directly affects the filling of the gonad bulb of the penis, that would cause it. If you have a prostatic disease, that would cause it. If you have an old gonorrhea with an involvement of the two little glass-like bodies, one on each side of the prostate, that would cause it. There are a number of causes of sexual impotence.

Q Would a hemorrhage to the spinal cord cause it? A It might at a certain level, but, it would have to pick out that particular level.

Q So that a hemorrhage to the spinal cord might cause this paralysis or numbness on the right side and might also bring on sexual impotence, is that right, doctor? A It might, with my explanation that it would not come on all at

one time, the whole side of your body while sitting in a chair. There would be a time period from the time one part of your body was involved until it involved the opposite end of your body and it might do so. That would not come on in two or three minutes. It is usually a matter of days.

Q Doctor, you said it was your impression that the transverse process of the fifth lumbar vertebra was injured? A That is right.

Q When you noticed the X-rays at St. Michael's Hospital, was there a suspicious line at the fifth vertebra? A That is my impression from the report.

Q Have you your report with you, doctor? A I have a copy of it.

Q At the time of your examination your diagnosis was that he was becoming neurasthenic? A I was not.

Mr. Gray: If Mr. Francis desires, I would like him to put it in evidence.

Q Didn't you say he is becoming somewhat neurasthenic? A No, not as I remember the wording of that report.

Q Did you say, "The most that can be said for this man that perhaps due to labor conditions, etc., and the fact that he had an accident, he was becoming somewhat neurasthenic?" A "Perhaps" is in there. That is the word I am looking for. You didn't read it before.

Q You are willing to make the slight concession that perhaps he might be becoming neurasthenic? A That is right. Because he had no definite symptoms of neurasthenia.

Mr. Gray: I ask that that report be marked in evidence.

The Court: Let it be received and marked.

(Same received in evidence and marked Exhibit D-a.)

By Mr. Gray.

Q Dr. Brothers, there has been some testimony, some question as to how often you testified for me in court. When did you first meet me? A Wasn't that with the firm of Harley & Gray?

Q You testified for that firm? A Yes, sir.

Q Is Mr. Harley not now the senior member of the firm that employs Mr. Francis? A I don't know whether he is the employer or not, but he is the senior member of Harley, Cox & Walburg.

Q Do you still testify for that office? A I did.

By Mr. Cohen.

Q Have you made a great many examinations for Harley, Cox & Walburg?

Mr. Francis: I object to that.

The Court: I will allow it.

A I have made several for them. I don't know just exactly how many.

Q Covering the period of how many years? A Ever since they have been in business. I don't know how many years.

Q Doctor, there has been some evidence that this plaintiff is sexually impotent and that you have given causes. May not a person be sexually

impotent as to a particular person of the opposite sex and not be as to others?

Mr. Francis: I object to that.

The Court: I will allow it.

Q Is it not well established? A People have perversions to certain other people.

Q In fact, it is quite common, is it not, doctor? A That is right.

Q Doctor, there is some evidence in the case that luminol was given to this plaintiff. Isn't it true that a physician or any other person or professional man who has had a hard day in his respective enterprise and he is somewhat exhausted mentally or otherwise, is it not quite common for him to take luminol? A It is common in that you don't need a prescription to get it. Any one can buy it.

Q It is not used merely by persons that are suffering from neurasthenia, is it? A Certainly not.

Q You testified, doctor, that you made an examination of his hearing and that he had no difficulty in hearing the spoken voice. Just what was the test and what volume did you apply in making the test? A Just the ordinary test with the audible voice. I am not an ear specialist.

Q Just as you were speaking now? A He closed his eyes and I spoke lower than I am speaking now, lower than I am speaking to you and I had him put his finger in the canal of his right ear, then spoke and he answered questions, such as his age and his first name and I knew that he heard. I asked him the same questions with the finger in his left ear and he answered

less readily with the right ear. But he can hear the modulated spoken word with each ear.

By Mr. Francis.

Q Doctor, you spoke of sexual impotence being in existence because one person might have a perversion for another one? A Yes.

Q Would you regard a child as fairly good evidence of the non-existence of such a perversion?

Mr. Gray: I object. I think he testified that he was married and it does not appear when this cause may follow. It may follow at the birth of the child. I think it is improper and I will object to it.

The Court: I will consider the child being in existence the ultimate end of intercourse, certainly.

MORTON C. NOBLE, sworn in behalf of defendant Third Presbyterian Congregation.

Direct examination by Mr. Gray.

Q Mr. Noble, you are associated with the Trustees of the Third Presbyterian Congregation? A Yes, sir.

Q And what is your connection with them, what is your position? A I am a Trustee.

Q A Trustee? A Yes, sir.

Q Do you have any duties other than that of a Trustee? A Collector of rents.

Q And do you collect the rents at 913? A I do.

Q And did you in 1929 and for sometime previous? A Yes.

Q In collecting those rents, how frequently did you go into 913? A I don't know, I have no regular time in going there. I go in probably sometimes once a week, sometimes twice a week. Sometimes I don't go in for a couple of weeks, but as a rule I go through there whenever I feel it is necessary.

Q And 913 at the time had the restaurant and the Rialto Theatre in it? A What was that?

Q I said at the time of this accident, 913 had the Rialto Restaurant and the Rialto Theatre in there as tenants? A Yes, sir.

Q This elevator or sidewalk lift in 913 ran from the sidewalk down to the cellar? A Yes, sir.

Q About how far down was it from the sidewalk to the cellar, do you know? A After the accident?

Q How deep was the shaft? A I should say about nine feet.

Q And the elevator is about five feet by five feet? A Yes, sir.

Q Do you know how soon before the accident you had been there? A I couldn't tell you.

Q Do you know whether it was a couple of days, or whether you had been down in that cellar or not?

Mr. Francis: I object to it on the ground that he said he couldn't tell us.

The Court: He is asking him again. I will allow it.

Q Have you any idea of the time before that? A Not exactly, probably three weeks.

Q Did you see anything wrong down the cellar when you were there? A I did not.

Q Did you look at the elevator? A Yes.

Q And did it seem to be in perfectly good shape and condition? A Yes.

Q Did you have a man on the premises as a janitor or cleaner? A Yes.

Q What is his name? A Mr. Howard.

Q Did he stay on the premises all the time? A All day. He gets there early in the morning and goes away about half-past five at night.

Q He doesn't only enter 913, he enters other buildings besides, doesn't he? A His business is running the furnaces and keeping the halls and stairways clean.

Q Had this elevator been overhauled shortly before this accident?

Mr. Francis: Objected to as leading. I am willing to have Mr. Gray fix the definite time.

Q Do you know whether shortly previous to this accident this elevator had been overhauled or repaired?

Mr. Francis: I object to that as leading.

Mr. Gray: I asked him if he knows.

The Court: I will allow it.

Q Do you know? A It had.

Q Do you know the date? A No, sir.

Q About when? A I should say about four to six weeks.

Q Do you know what was done to the elevator at that time? A I don't know exactly,

I called them to have a new platform put on and to do whatever repairs was necessary.

Q Who came in and did that? A The Otis Elevator people.

Q You do not know the exact date? A No, sir.

Q Did you ever have any complaint about this elevator before the accident, between the time when it was repaired? A No, sir.

Mr. Francis: I object to that.

The Court: I will allow it.

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

Exception noted as ground of appeal.

Cross examination by Mr. Francis.

Q Mr. Noble, you say that the last time you were on this property was about three weeks before this accident? A That is as near as I can remember.

The Court: He didn't quite say that. He said he went to the property once or twice a week, usually, that he went down the cellar probably two or three weeks before the accident for the last time, isn't that right?

The Witness: That is correct.

Q Was there any other person besides you who had charge of the repairing of these various properties owned by the Congregation on Broad street? A No, sir.

Q So that whenever any repairing was done to all those buildings along Broad street you ordered it? A I did.

Q Have you ever been employed by an elevator company? A No, sir.

Q Are you familiar at all with the construction or method of operation of an elevator? A I am.

Q You are? A Yes, sir.

Q Where did you get your experience? A My business, I am a machinist.

Q Did you ever operate an elevator? A No, sir.

Q Did you ever build an elevator? A No, sir.

Q When you went into the cellar two or three weeks before this accident, you didn't do anything to the elevator, did you? A No, sir.

Q Did you run it? A No, sir.

Q Was it down or up the last time you were there? A It was down.

Q Did you examine the cables? A No.

Q Did you look at the platform? A Yes.

Q Did you try the handbrake? A No.

Q So that when you went down two or three weeks before this accident, you were walking around the cellar and you glanced over and saw that the platform of the elevator was there, and that was the extent of your inspection, is that right? A That is right.

Q You said about four to six weeks before this accident you had some work done on the elevator? A Yes, sir.

Q Part of the elevator was broken, was it? A One of the boards on the elevator was broken.

Q How long has that elevator been in that property, do you know? A Ever since the building was built.

Q How long ago was that? A I think it was built in 1914 or '15, I am not sure which.

Q So the elevator was about 15 years old at the time of this accident? A About that.

Q Had you ever had any work done on it prior to this time, four or six weeks? A I think so.

Q Do you remember what you had done on other occasions? A I think I had new cables put on one of them.

Q And on this occasion you had one new bracket installed and you had an old bracket repaired on the elevator? A I do not remember.

Q Would you recognize the Otis Elevator repair sheets? A No.

Q You don't remember what they did? A No.

Q When you ordered this work to be done five or six weeks before this accident, was the elevator then in such a damaged condition as an ordinary observer could see it was damaged? A They could see that plank was broken.

Q Could you also see there were broken brackets on the elevator? A No, you couldn't see the brackets were broken.

Q Did you see anything else that required repairing then besides the floor board? A They reported to me and told me that the plank was broken and if I wouldn't have it repaired, so I ordered the Otis Elevator people to go down and fix this plank and to do whatever work was necessary.

Q Did they tell you, or did you know that the cables on that occasion were replaced in a score on the drums? A No.

Q Did you know that? A No, sir, I did not.

Q Did you know that the cables on this elevator were in the habit of slipping out of this score on the drum?

Mr. Gray: I object to that. There is no such testimony. Mr. Francis has no right to ask these questions.

The Court: I think the question is objectionable.

Q Did you know on this occasion five or six weeks before the accident, as I have said, that Mr. Pfaff repaired the cables in the score on the drum? A No, sir.

Q If that were on Mr. Pfaff's worksheet, would you say that he did that? A I have no reason to doubt it.

Q Will you look at Mr. Pfaff's worksheet and see if that is on there?

Mr. Cohen: It doesn't appear anywhere in those papers that it is Mr. Pfaff's worksheet.

Mr. Francis: Yes, sir, because it is signed by Mr. Pfaff. I was wrong about that question. He replaced the cables and score on the drum after the accident.

Mr. Gray: I think your Honor ought to have this testimony struck out then. It was put in under a misapprehension.

The Court: I see there is no testimony to strike out.

Q Now, this other man you have down in the cellar, what is his name, please? A The janitor?

Q Yes. A Mr. Howard.

Q And he took care of all of your buildings along Broad street, did he? A He doesn't have anything to do with the elevators.

Q He cleaned the place and kept the furnaces going? A Yes.

Q And if there were any defects around in the stairways or the elevator, he would report them to you, would he? A He would report it to me.

Q He is not an elevator man? A No.

Q His duties just require him to take care of the furnaces and the stairs of all those buildings along Broad street, they take up most of his time? A All of his time.

Cross examination by Mr. Cohen.

Q Mr. Noble, for how long a time prior to your retirement, if that be the case, were you a machinist? A How long a time?

Q Yes, sir. A All my life, all my business life.

Q Can you tell us about how many years that covers? We will say 35 years or more? A More than that, probably 40 years.

Q There is nothing complicated about the mechanism of this elevator, is there? A Not at all.

Q On the contrary, it is rather simple, is it not? A Very simple.

Q You have testified, I believe, that about four or six weeks, not recalling the exact date, you had installed a new platform; that is correct, is it not? A Yes.

Q Now, all of these repairs to which you testified have always been at your behest, or request? A It has.

By Mr. Gray.

Q Mr. Noble, I ask you to look at that and tell us if you recognize what it is (handing piece of paper to witness)? A That is a lease of the Southern Candy Company with the Trustees of the Third Presbyterian Church.

Q And was that lease subsequently signed to P. DiNicholas, the defendant? A Yes, it was.

Mr. Francis: If the Court please, I suppose the lease is proper in so far as it affects the relationship between these two defendants, but any agreement in this lease with reference to repairs is not binding on the plaintiff.

The Court: It isn't offered for that purpose, I suppose.

Mr. Gray: Your Honor, I want to show the condition with reference to the control of the premises.

Mr. Cohen: It occurs to me that I could properly object to the introduction of that lease, because it is one between the Trustees of the Church and the Southern Candy Company. That is not the best evidence. It is a mere statement. The best evidence would be the assignment. We will consent to it.

The Court: I will allow it subject to the limitation, however, that it is not necessarily binding on the plaintiff.

Mr. Gray: I offer the lease in evidence.

(Same received in evidence and marked Exhibit D-b.)

Mr. Gray: If your Honor wouldn't mind, I would read one or two paragraphs that are

pertinent. I do not want to bother with the whole thing.

Mr. Cohen: It occurs to me that while I have no objection to the introduction of that lease—

The Court: He has the form of the assignment right here.

Mr. Gray: This is the lease between the Southern Candy Company and the Presbyterian Church which has been assigned and this is the important part: The party of the first part is to have the use of the sidewalk lift in common with the tenant of the south of the premises hereby rented. That is one clause I think that is pertinent. The seventh clause reads as follows: The lessor or the agents shall have the right to enter in the premises at reasonable hours of the day or night to examine the same, or run telegraph or other wires or to make such repairs, additions or alterations as it shall be necessary for the safety, preservation or restoration of the said building or for the safety or the convenience thereof and also that the said property to be
the said notice shall not be removed or obliterated by any tenant. The party of the first part not being bound however, to make any repairs unless it be elsewhere a different lease. Expressly so agreed.

Mr. Cohen: I object to that on the ground that it appears here that that has been overridden, that they did all the repairs. If you will read the cases you will find that it enured to anybody eles'e benefit.

The Court: That is all, Mr. Noble.

THOMAS G. ELDER, sworn in behalf of defendant P. DiNicholas.

Direct examination by Mr. Cohen.

Q Mr. Elder, where are you employed? A New Jersey Compensation Bureau.

Q In what capacity? A As an investigator.

Q Did you pursuant to an order of this Court, produce petition which I show you (handing petition to witness)? A Yes, sir.

Mr. Francis: If the Court please, I should be permitted to cross examine this witness as to whether or not he has supervision over the records. All we have is an admission of litigant's signature on a paper.

The Court: You can examine him if you have any doubt about it.

Q Did you bring that paper from the original files of the Workmen's Compensation Bureau at Trenton? A Yes, sir.

Cross examination by Mr. Francis.

Q You say you were an investigator connected with the Compensation Bureau? A Yes.

Q What kind of work do you do? A I investigate some accidents, and serve process papers.

Q Who in the Workmen's Compensation Bureau has charge of the records? A Chief Clerk.

Q The Chief Clerk was the only one who has charge of those records, isn't that right? A He has direct charge, I suppose.

Q You have no control whatsoever over those records of the compensation, have you? A Not control of the records, no.

Mr. Francis: I object to it.

Mr. Cohen: Who gave you that petition?

The Witness: The Chief Clerk.

Mr. Cohen: If your Honor please, I think this is perfectly proper.

The Court: I haven't any doubt that it is competent.

Mr. Cohen: I offer this in evidence.

Mr. Francis: I object to it on the ground that it is not properly proved and on the ground that it is incompetent.

The Court: I will allow it.

(D. 1 formerly marked for identification received in evidence and marked D. 1.)

Mr. Cohen: I would like to read it to the jury.

The Court: You may.

Mr. Cohen: This is a petition of the New Jersey Department of Labor, Workmen's Compensation Bureau, Trenton, New Jersey. Employee's Claim Petition for Compensation. Oscar E. Guensch, Jr., Petitioner, vs. Maier Marx, Respondent. Attorney for Petitioner, Joseph A. Ward, 1060 Broad street, Newark, New Jersey.

To the Workmen's Compensation Bureau of New Jersey: The Claimant respectfully alleges the following facts: 1. What is your name? Answer: Oscar E. Guensch, Jr.

2. Where do you live? Answer: 321 Waverly Avenue, Newark, New Jersey.

3. Sex. A. Male.

4. Age? A. 28.

5. Married? A. Yes.

6. By whom were you employed at the time of this accident (give name and address)? A. Mier Marx, 49 Avon Place, Newark, New Jersey.

7. What was the business of your employer? A. Delicatessen supplies.

8. Did you give written notice to your employer at the time you were hired, or later, that the Compensation Law should not apply to you? A. No.

9. Did you receive such notice from your employer? A. No.

10. Did your employer have knowledge of your accident—

11. Did you notify your employer of your accident? A. Yes.

12. If so, on what date? A. Date of accident, January 10, 1929.

13. Have you made claim to your employer of compensation? A. Yes.

14. What was your regular occupation, what kind of work were you doing at the time of the accident? A. Driver and delivery man. Delivering goods and collecting.

15. When did the accident happen? A. January 10th, 1929, at 9:00 o'clock A. M.

16. Where did the accident happen? A. Rialto Restaurant, 913 Broad Street, Newark.

17. What was the nature of the accident and how did it happen? A. Had de-

livery of goods and collection of money. Went into restaurant — received check — asked that elevator be sent up for goods. Went out to elevator lift on sidewalk, covered by two heavy iron doors. Had lifted one door half open and saw that elevator was up. The sidewalk was wet, as the day was rainy, I slipped, fell on the elevator, the chain broke and down I went.

18. On what day were you compelled to stop work because of the injury? A. January 10, 1929.

19. On what date were you well enough to work again? A. Don't know.

20. If still disabled, on what date do you think you will be able to work—

21. Give nature of any injury from which you will recover. A. Awaiting medical reports.

22. If any permanent injury has resulted, either amputation or loss of usefulness of any member, or impairment of any physical organ, explain fully. A. Awaiting medical reports.

23. Were your wages fixed by piece-work? A. No.

28. State the amount of weekly wages? A. $35.00.

29. How much money have you received from your employer as compensation (not medical aid) since your accident? A. $120.00.

30. Has your employer promised to pay you any compensation—

32. Was medical aid required? A. Yes.

33. Did you receive medical, surgical or hospital services? A. Yes.

34. Did you request your employer to furnish these services? A. Yes.

38. Give name and address of physician and hospital. A. St. Michael's Hospital, Newark, and Dr. Ira Flax, S. Belmont Avenue and Bigelow Street, Newark.

40. Are you willing that the Compensation Bureau endeavor to secure compensation for you, by agreement, before calling for an official hearing? A. Yes.

Your petitioner therefore prays that your Honorable Bureau will determine the amount of compensation due to your petitioner from the said defendant, under the Act entitled "An Act prescribing the liability of an employer to make compensation for injuries received by an employee in the course of the employment, establishing an elective schedule of compensation and regulating procedure for the determination of liability and compensation thereunder," approved April 4, 1911, and the Acts supplemental thereto and amendatory thereof, and that your petitioner may be awarded his costs in this proceeding, and such other or further relief as may be proper.

And your petitioner will ever pray, etc.

(Signed) Oscar Guensch, Petitioner,
Address, 321 Waverly Avenue.

Oscar Guensch of full age, being duly sworn according to law, on his oath deposes and says: That he is the petitioner named in the foregoing petition; that he has read

the same and is familiar with the contents thereof; and that the matters and things therein set forth are true according to the best of his knowledge and belief.

(Signed) Oscar Guensch,
Petitioner.

Subscribed and sworn to before me, this Twentieth day of March, 1929, at Newark, N. J.

(Signed) Joseph A. Ward,
Atty. at Law of N. J.

The foregoing claim petition has been presented by the petitioner to the Workmen's Compensation Bureau for hearing and determination in accordance with the provisions of the Workmen's Compensation Act.

We hereby notify you that unless an answer shall, within seven days after the service of this notice, be filed with the Secretary of the Bureau, in the State House at Trenton, the facts alleged in the petition will be deemed to be admitted and no testimony will be required from the petitioner to prove such facts.

I, William E. Stubbs, Deputy Commissioner and Secretary of the Workmen's Compensation Bureau, do hereby certify that the foregoing is a true copy of the Petition in the cause wherein Oscar E. Guensch, Jr., is Petitioner, and Meyer Marx is Respondent, now on the files in my office.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of the said

Bureau, at Trenton, N. J., this 24th day of April, 1931.

(Signed) W. E. Stubbs,
Deputy Commissioner and Secretary.

The Court: Will you read the date when it was filed?

Mr. Cohen: March 21, 1929.

By Mr. Francis.

Q Do you know that this petition which Mr. Cohen has read to you and which was filed by Mr. Ward was discontinued? A Did I know it was discontinued?

Q Yes.

Mr. Cohen: We will agree to that.

The Witness: This is the petition he made under oath.

Mr. Francis: I move to strike out his remark.

The Court: Strike it out.

Q Did you know that a petition must be signed within one year of the date of the accident in order for the Bureau to have jurisdiction to consider a compensation claim? A Yes.

Q Do you know that as far as the legal question is concerned in this case it is immaterial whether this plaintiff stepped on the platform and the elevator went down?

Mr. Cohen: I object to that.

Mr. Francis: I will withdraw the question.

Q Have you the complete compensation file in this case with you? A No, sir.

Q Were you instructed only to bring this one petition to court? A That is all that I was asked for.

Mr. Cohen: If your Honor please, the Court made an order to that effect that this petition, the original petition, be produced. He has obeyed the order. He is obligated to obey the mandate of the Court.

Q Do you know at whose request the application was made to the Court limiting the order to the production of this one petition? Was that made by Mr. Cohen? A As far as I know the offices of Cohen & Klein.

Mr. Cohen: I should like to offer a certified copy of the petition signed by the person who has the custody of the original records.

The Court: Why do you need that, if you got the original here?

Mr. Cohen: For this reason: If there is any doubt in the mind of counsel at all, I want to make certain of it.

Mr. Francis: Whether there is any doubt in my mind at all is of no significance. My objection to it is on the ground that it is not properly proved, it is immaterial and irrelevant to this issue.

The Court: You mean to the certified copy?

Mr. Francis: To the original and certified copy.

The Court: It might be material.

Mr. Cohen: It is extremely so.

The Court: I will allow it.

(Same received in evidence and marked Exhibit D. 2.)

CHARLES F. A. RILEY, sworn in behalf of defendant DiNicholas.

Direct examination by Mr. Cohen.

Q By whom are you employed? A Department of Labor, Workmen's Compensation Bureau, Newark.

Q In what capacity are you employed? A Chief Clerk in the Newark office.

Q Have you a record of a stipulation entered into between Oscar E. Guensch or by his attorney and in his behalf and the attorney for the respondent, that is in the case, wherein Oscar E. Guensch is petitioner and Meyer Marx is respondent in the Workmen's Compensation Bureau? A No, I have no stipulation there.

Q Does this form a part of your record, that paper (handing paper to witness)? A Yes, sir.

Q Original record? A Yes, sir.

Mr. Cohen: I offer that in evidence.

Mr. Francis: I have no objection.

(Same received in evidence and marked Exhibit D. 3.)

Charles F. A. Riley, for Defendant DeNicholas, cross.

By Mr. Francis.

Q This stipulation that you have just put in evidence is a discontinuance of that suit, is it not?

Mr. Cohen: I object to it on the ground that it speaks for itself.

The Court: Do you know?

The Witness: All that I know is that it is a notice asking for a discontinuance.

Q This paper that has been offered in evidence, do you know what that is? A No, I didn't look at it.

The Court: Next question.

Q Look at it (handing paper to witness). Is it a continuance of the compensation suit? A Yes, sir.

Q Do you know if any petition has been filed subsequent to this suit? A No, there hasn't. Not that I know of.

Q Do you know whether another petition has been filed subsequent to that one? A No, sir, I do not.

Q If another petition has been filed, where would the record be? A In Trenton.

Q Did you, at Mr. Cohen's request, when you received a subpoena to produce this record, also receive instructions to look at the records in Trenton and see if another petition was filed? A No.

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

By Mr. Cohen.

Q Does your record there (indicating) show the number of times and dates when Guensch came to 1060 Broad street, to your department? A Yes, sir.

Mr. Francis: Objected to as immaterial.

Mr. Cohen: We offer it and think it is proper for this reason: Mr. Guensch testified of his physical disability and I think we may show that he did actually go there, which indicates some ability, unless it may be proved that he was carried in on a stretcher and show that there was a general improvement. I think it would be proper in order to impeach his credibility.

The Court: I will allow it, if that is the purpose of it.

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

Exception noted as ground of appeal.

Q Will you give us the date? A Visit was on May 23, 1929. Guensch appeared with attorney Ward and E. H. Daldner. Then again on June 4, 1929, petitioner appeared attorney and E. H. Daldner. On June 20, 1929, petitioner appeared with E. H. Daldner again.

The Court: The question is what dates did he come?

The Witness: On July 3, 1929, he appeared again. July 18, 1929, August 1, 1929, August 15, 1929.

The Court: October 16, 1929, that is the last time he appeared?

The Witness: August 15, 1929.

Mr. Cohen: Can I read that?

The Court: You may.

Mr. Cohen: New Jersey Department of Labor, Workmen's Compensation Bureau, Oscar E. Guensch, Jr., petitioner, versus Meyer Marx, respondent.

To The Workmen's Compensation Bureau of New Jersey:

1. The claimant respectfully submits that he no longer desires to continue to prosecute his petition for compensation against the aforesaid respondent, Meyer Marx.

2. Claimant requests that the petition be disposed of by the Bureau.

3. Claimant recites that Joseph A. Ward, 443 Broad Street, Newark, N. J., Attorney at Law, has furnished legal services to the claimant from about the date of the accident to date of this notice.

Signed, Oscar E. Guensch, Joseph A. Ward, Attorney, F. Holbert Higgin for respondent, dated August 16, 1929.

HARRY HOWARD, sworn in behalf of defendant Trustees of Third Presbyterian Congregation.

Direct examination by Mr. Gray.

Q Mr. Howard, you were on the premises of 913 Broad street? A Yes, sir.

Q The premises are occupied by the Rialto Theatre and the Rialto Restaurant? A Yes, sir.

Q Did either of those gentlemen ever complain to you about the condition of the elevator, or anybody in their employ? A Not of late.

Q I mean around the time of the accident? A No, sir, I don't know if they did.

Q Did you ever go in these premises? A Oh, yes.

Q You didn't clean in the premises of the Rialto Theatre or the Rialto Restaurant? A No.

Q You didn't have charge of the elevator? A No.

Q Did you ever operate the elevator? A No, sir.

Q Did the elevator run from the street down to the premises, at least to the Rialto Theatre and the Rialto Restaurant? A Yes, sir.

Q Did you ever see the elevator at all? A Oh, yes, frequently. Right from the top. Very seldom down. I had no cause to go down.

Q That was down at the premises that you had leased? A Yes, sir.

Q Did you ever go down as a matter of interest to yourself? A Not frequently. I had to go down occasionally.

Q Did you ever look at the elevator? A Only from the top.

Q Did you ever look at the elevator? A Only from the top. When I see it working, I know it is in perfect order.

Mr. Francis: I move to strike that out.

The Court: Strike it out.

Q From what you saw of the top, there was nothing wrong with it?

Mr. Francis: Objected to as leading.

The Court: Objection sustained.

Q Did you ever hear of anything being wrong with it at the time of this accident on January 9, 1929? A Yes, I heard there was something wrong with it, but I didn't see it.

Q I mean before the accident. A Oh, there was nothing wrong then, I know that.

Mr. Francis: I move to strike that out.

The Court: I will let it stand.

Cross examination by Mr. Francis.

Q Mr. Howard, you said in answer to Mr. Gray, that you didn't know that you had received any complaints about it before this accident? A What do you mean by that?

Q You don't remember or you didn't get it? A I don't know. I didn't receive no complaint about it. I found out afterwards.

Q Can you tell us what you meant by: "You didn't know, that you had received any complaints before the accident"? A I received no complaint.

At 1 o'clock P. M., the Court takes a recess until 2 o'clock P. M.

AFTER RECESS.

JOHN S. HERRON, sworn in behalf of defendant DiNicholas.

Direct examination by Mr. Cohen.

Q Mr. Herron, are you connected with the public schools of this city? A I am principal of the Lafayette Street School.

Q And have been for how long? A This is my eighth consecutive year as principal of that school.

Q And as principal, you are familiar with the records regarding the attendance of the students in your school? A Yes, sir, that is one of my duties.

Q Did you at our request search the records for one Daniel Costello? A Yes, I did.

Q Did you? A Yes.

Q Covering what period, Mr. Herron? A That would cover the full and permanent records of the school.

Q And did you find in your records the attendance of one Daniel Costello?

Mr. Francis: I object to that on the ground that it is hearsay.

The Court: I will allow it.

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

Exception noted as ground of appeal.

Q Did you find that he ever attended the school? A I searched very deliberately and had the clerk of my office also go through the records.

The Court: Tell us only what you found, Mr. Herron.

Q Did you with the clerk search the records? A I could find no record of Daniel Costello having attended the Lafayette Street School.

Mr. Cohen: That is all.

D. MINOR LAKE, called as a witness in behalf of defendant Trustees of Third Presbyterian Congregation.

Direct examination by Mr. Gray.

Q Mr. Lake, what is your occupation? A Manufacturer.

Q Of what? A Elevators.

Q Do you manufacture sidewalk elevators and lifts? A Yes, sir.

Q And how long have you been in that business? A About 35 years.

Q You take an active part in the business? A Yes, sir.

Q You take an active part in the business? A Yes, sir.

Q Do you inspect the elevators? A I manage the business. I see that they are installed properly.

Q And you are thoroughly familiar with the manufacture and operation of elevators? A Yes.

Q Did you at my request examine the elevator at 913 Broad street this morning? A Yes, sir.

The Court: This morning, did you say?

The Witness: Yes, sir.

Q Will you describe the sidewalk lift at 913 Broad street, Newark?

Mr. Francis: I object to it on the ground that it is too remote.

The Court: I suppose it is for the purpose of showing the type of elevator and the mechanism of it.

Mr. Cohen: For the same reason that the gentlemen who examined it yesterday.

The Court: I will allow it.

A It is the regular type of sidewalk elevator. With very few exceptions the same as we manufacture and a number of others.

Q What is the size of the platform? A I should judge somewheres around five feet by five feet.

Q And what is the distance from the cellar to the sidewalk? A Somewheres about nine feet.

Q Will you describe the mechanism of that elevator, that is, the manner in which they raise it and lower it? A There is a system of gears, mounted on to a channel iron and it is operated by a crank which is attached in this case to a brake wheel and the gears connect from the elevator of the crank to a set of drums on a shaft at the bottom and these drums are what the cables wind on to lift and lower the car it operates on.

Q Around the drums placed on the floor or on the bottom of the car. A Below the floor, usually.

Q Below the floor usually? A Yes.

Q When the elevator is up, is the cable off the drum or on the drum, or what? A The drum should be about full.

Q The drum should be about full? A Of cable.

The Court: He asked when the elevator is up.

The Witness: Yes, when the elevator is up, the drum should be about full of cable.

Q And when the elevator is down, where is the cable? A There is very little cable on it. About a wrap.

Q Why is that, does the cable operate over something at the top? A Operates over a wheel at the top.

Q You say when the elevator is level with the street, there is one wrap of cable around the drum? A No, sir, it should be full.

Q When it is down, you say there is how much on the drum? A Usually about a wrap.

Q And this drum, does it have grooves in it? A Yes, sir. In some cases this drum has.

Q In some cases this drum has? A Yes.

Q And about how far apart are those grooves? A They are supposed to be in the center. Center to center 9/16 of an inch. I didn't measure them.

Q How is this elevator operated; you say by hand power only? A By hand power only.

Q Is the cable taut when the elevator is up? A It should be. It is what holds the car.

Q Then if the cable gets loose, the car will come down? A If the cable gets loose the car will come down.

Mr. Gray: That is all.

Cross examination by Mr. Francis.

Q What is the purpose of the groove on the drum? A To keep the cables in place.

Q And if the cables come out of the groove, what happens? A Sometimes it climbs on other cables, sometimes it gets on the rim of what we call the flange of the drum.

Q When that happens, the cable is loose, is it not? A No, sir, it is tighter after it gets on the flange.

Mr. Francis: That is all.

Cross examination by Mr. Cohen.

Q Mr. Lake, can you get the elevator all the way up flush with the sidewalk if the cable is off the drum? A Well, it is possible but not probable. It could be done.

Q You say it isn't probable? A No. The elevator will be apt to bind.

Q To what level could it go, all the ways up to the surface or flush with the sidewalk? A Not on one side; it wouldn't if it was off one side.

Q In other words, am I to understand that if the cable was off the drum, or one of them, the platform would not be level with the sidewalk? A No.

Q It has been testified by the plaintiff that he lifted one of the doors, the right door and permitted it to rest flush with the sidewalk and that a person, the plaintiff, weighing approximately 165 pounds placed both of his feet on

the platform, that is, his entire body, would you say that it was probable that the elevator would be precipitated down the shaft, midway in the shaft, by reason of the weight of a person? A No.

By Mr. Francis.

Q Mr. Lake, if all the appliances, all the connections, including the brake on this elevator were in good condition, the elevator would not go down with the weight of one man on it? A No.

By Mr. Gray.

Q Mr. Lake, if the man had stood on it for some time, does that make any difference—and then started the elevator, would it be likely to do that? A Not if the brake was on.

Q Doesn't the more weight you put on the platform, doesn't that make the cable just that much tighter?

Mr. Francis: Objected to as leading.

Q Does it or does it not? A It does.

Q Is it probable that more than one round of the cable might come off at one time? How would that operate, if at all? A Not at all probable; of course, it is possible, but not at all probable.

Q And if only one round of the drum came off, how far would the elevator drop, if at all? A One side of it would drop about two feet, a foot and a half, to two feet.

D. Minor Lake, for Defendant Trustees, cross.

By Mr. Cohen.

Q Mr. Lake, it was testified on behalf of the plaintiff that a short time after the occurrence in question, the elevator or the platform was midway, or at least part of it in the shaft, that part of it, that is the part facing you was somewhat tilted, say to the extent of a 45-degree angle, and it is in evidence that the plaintiff slipped and fell, would you say that the fall of the man weighing about 165 pounds from the sidewalk to a distance of five feet would tilt the elevator?

Mr. Francis: I object to that on the ground there is no testimony in the case that he fell to a depth of five feet.

The Court: We can all agree that there has been testimony that it was half-way down, midway.

Mr. Francis: Yes.

Mr. Cohen: I have here the petition for compensation that he slipped and fell. I think it is proper.

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

Exception noted as ground of appeal.

Q Mr. Lake, it was testified on behalf of the plaintiff that a short time after the occurrence in question, the elevator, or the platform was midway or at least part of it in the shaft, that a part of it, that is the part facing you was somewhat tilted, say to the extent of a 45-degree angle, and it is in evidence that the plaintiff slipped and fell, will you say that the fall of

the man weighing about 165 pounds from the sidewalk to a distance of five feet would tilt the elevator? A It couldn't tilt the elevator if the cables were on the drum.

Mr. Cohen: There are no further questions at this time, but I would like this witness to remain.

Mr. Gray: The defendants, Trustees of Third Presbyterian Congregation, rest.

At this time I want to put in the assignment of the lease to Mr. DiNicholas.

The Court: The lease is in evidence. Is there any objection?

Mr. Cohen: We will admit it.

The Court: You don't need to put it in.

ALVIN E. LONG, sworn in behalf of defendant DiNicholas.

Direct examination by Mr. Cohen.

Q Mr. Long, by whom are you employed? A Alderney Dairy Company.

Q In what capacity? A Superintendent.

Q And have been employed by that company in that capacity for how long? A Fifteen years.

Q And what are some of your duties as superintendent? A I have charge of supervising the City and County plants.

Q Does that include supervision over your drivers and employees? A Yes.

Q Can you tell us whether or not, either from memory or by consulting your records,

whether one Joe Riffel was ever employed by the Alderney Dairy Company? A No, I don't know of him. We have no record of him.

Q Did you ever remember anyone by the name of Joe Riffel working for you? A No.

Cross examination by Mr. Francis.

Q Have you your records with you covering the names of the drivers who were employed by the Alderney Dairy Company on January 10, 1929? A Yes, I have.

Q May I see them, please? A (Witness handing records to Mr. Francis.)

Q By the way, have you the records of the New Jersey Milk & Cream Company which is owned by the Alderney Dairy Company? A The Newark Cream Company; that is the parent company.

Q Was that in existence January 10, 1929? A Yes, sir; it is combined.

Q Did you have at that time a Joseph Riffel employed by the New Jersey Milk & Cream Company? A Newark Milk & Cream Company.

Q Newark Milk & Cream Company? A No. This is the week ending January 13th (handing paper to Mr. Francis).

Q What is this? A This is the payroll (indicating), and this is a different date.

Q Is this all? A No (handing paper to Mr. Francis).

Q You have got a lot of "Josephs" on this report, have you? A Yes.

Q Is that all? A No, sir (handing paper to Mr. Francis).

Q Is that all? A That covers the whole week.

Mr. Francis: I will consent to them going into evidence because there are a number of "Josephs" with Italian names. Some similar to this one. Whether that witness had the correct name, your Honor will recall the difficulty I had in getting it.

Mr. Cohen: It is satisfactory as far as I am concerned.

(Same received in evidence and marked Exhibit P. 9.)

Q Will the keeping of these records at all disrupt your organization? A I was instructed not to leave the records. This is our payroll records and more or less confidential.

Mr. Cohen: They are in evidence and it is up to the Court. Unless Mr. Francis will look at it now.

Mr. Francis: I understand the witness objects. If Mr. Cohen would like to have me read all the "Josephs" on the payroll records.

Mr. Cohen: I leave it to your discretion. I haven't any objection.

The Court: I do not wish to interfere unduly with the Alderney Dairy Company.

Mr. Cohen: There are a number of "Josephs" on the payroll. I will agree.

By Mr. Cohen.

Q But, you have no Joseph Riffel on it, have you? A I have been unable to find any records of a Joseph Riffel.

JOSEPH F. McCRUDDEN, sworn as a witness in behalf of defendant DiNicholas.

Direct examination by Mr. Cohen.

Q Mr. McCrudden, are you officially connected with the City Clerk's office? A Yes, sir.

Q Is the Bureau of Vital Statistics one of the departments of the City Clerk's office? A Yes, sir.

Q That is of the City of Newark? A City of Newark; yes, sir.

Q You are here under subpoenas? A Yes, sir.

Q Did you at our request search the records of your office particularly in the department of the Bureau of Vital Statistics for a record of one Daniel Costello? A Yes, sir.

Q Will you tell us what period you covered in your research? A 1910-1914, inclusive.

Q And did you in your records find a record of the person known as Daniel Costello? A No, sir. During the whole period of the years. No Daniel Costello.

Q Did you look particularly in your records for July 2, 1912? A Yes, sir.

Q Did you find a record of the birth of one Daniel Costello under that date? A No, sir.

Q Was your search a diligent one? A Very, sir.

RICHARD FISHER, called as a witness in behalf of defendant DiNicholas.

Direct examination by Mr. Cohen.

Q Mr. Fisher, where do you reside? A Pittsburgh, Pa.

Q Your business is what? A Connected with the garage there.

Q Been in that business for how long? A About two months.

Q Did you at my request, as the result of correspondence had, go to Bellaire, Ohio, in search of one Daniel Costello, particularly on 22nd street? A Yes, sir.

Q On East 22nd street? A Yes, sir.

Q How far is Bellaire from Pittsburgh? A About 64 miles.

Q Will you tell the Court and jury the extent of your search for this witness Daniel Costello in Bellaire, Ohio? A I had an address of 329 East 22nd street in Bellaire, Ohio.

Q That is the testimony given in the case as to the residence, or the place where the witness Daniel Costello was going? A Yes, sir.

Q Now, tell us just what you did and the result of your search. A I went to Bellaire, Ohio, and there is no such number as 329 on East 22nd street.

Q Is there a West? A There is a West 22nd street, yes, sir.

Q Did you go there? A I went to 329 West 22nd street.

Q Did you canvass the entire street? A I did.

Q Did you find the residence of one Daniel Costello or his parents? A No, sir.

Q What else did you do in your search to find this man Costello? A 22nd street is two blocks long, one block for East 22nd and the other was West 22nd. I made a complete canvass of the two blocks and several grocery stores and confectionery stores in the immediate vicinity and found no one who knew or had ever had heard of Daniel Costello or anyone by the name of Costello. I then proceeded to get hold of the mailman. He had never heard of Daniel Costello. I went down to the police station and consulted the telephone directories and could find no trace of the name.

The Court: How big is Bellaire?

The Witness: I should judge about 7,000.

Cross examination by Mr. Francis.

Q What is your occupation, Mr. Fisher? A Salesman.

Q For what company? A Guise Auto Construction.

Q What was your occupation at the time you were first communicated with by Mr. Cohen? A The same.

Q What is the name of the company? A Guise Auto Construction Company.

Q Do you know how Mr. Cohen happened to communicate with you, particularly to make this investigation? A Probably through his friend, because his friend spoke to me about it.

Q Who was this friend who spoke to you about it? A Mr. Leve.

Q What is his occupation? A He is an attorney.

Q He is a what? A He is an attorney.

Q Does he practice by himself? A Yes, sir.

Q Or for someone else? A By himself.

Q And this attorney communicated with you and asked you to make this investigation? A No, sir, he did not.

Q The attorney communicated with you and then you communicated with Mr. Cohen, is that it? A No, sir.

Q How did it happen? A I received a letter from Mr. Cohen asking me to go there.

Q How did Mr. Cohen particularly select you for this inspection or investigation, do you know?

Mr. Cohen: I think the witness has already answered that.

The Court: He said Mr. Leve recommended him.

Q Do you make a practice of investigating accident cases?

Mr. Cohen: I object to that.

The Court: I think he may answer it.

(Counsel argue.)

Mr. Francis: I move that counsel's remarks be stricken from the record.

The Court: Strike it out.

Q Do you make a practice of investigating accident cases? A Not necessarily, no.

Q What do you mean by "not necessarily"? A I have done some investigating work.

Q For who? A Different people.

Q And what are the occupations of those people? A That would be pretty hard to answer, all of them.

Q Some of them. A One man was a salesman in a divorce case.

Q Are you an investigator? A I wouldn't claim that myself, no.

Q How long have you been engaged in investigating work? A Probably over a period of four years.

Q Four years? A Yes.

Q Has the great majority of that work been investigating accident cases? A No, sir.

Q Is this investigation work that you do a side line to your salesman's occupation, or does it represent the greater majority of your effort? A A side line.

Q And do you have any other side line besides that? A No, sir.

Mr. Francis: That is all.

LAWRENCE N. ROSENBAUM, sworn in behalf of defendant DiNicholas.

Direct examination by Mr. Cohen.

Q Mr. Rosenbaum, you are an attorney-at-law, licensed to practice in this State, and associated with our office? A I am.

Q Did you have the briefs of this case under your charge? A Yes, sir.

Q And in the course of your preparation, did you have occasion to go to 29 Van Buren street, Newark, the residence testified to by Mr. Costello? A Yes, I attempted to find such a number.

Q Is there such a number? A No, sir.

Q What else did you do in your search for the residence of Daniel Costello, or his grandmother, as he testified in the depositions read to the jury on yesterday? A I went to Van Buren street and looked for him.

Q Did you find anyone by the name of Costello there? A There is no number 29 Van Buren street. Where No. 29 Van Buren street would be, if there had been a number, was a corner building on the southwest corner of Market street and Van Buren streets in Newark and that building faces on Market street, the side of that building would be 29 Van Buren street, but there is no entrance there. I asked in the neighborhood for anyone by the name of Costello. I asked people who had lived there a number of years and no one knew anybody by that name.

Q Did you make any other effort? A I went to the other corner and inquired from a woman who had lived there for seventeen years and who had never heard of anyone by that name.

Q Had you also consulted the City Director for a period of years? A Yes, sir.

Q And did you find anyone by the name of Daniel Costello? A No, sir.

Q Or the name of his grandmother or father as he testified? A No, sir.

Q What period did you cover in your investigation or research? A I think I looked in directories for 1928, and 1929. I am not positive about that, and 1930. In looking for No. 29 I also looked for No. 129 Van Buren street and found that where No. 129 Van Buren street would be was a factory. I looked for No. 229 Van Buren street and found that to be, if there was such a number, in the middle of the east side of

the park, of Independence Park on Van Buren street.

Cross examination by Mr. Francis.

Q You went into this neighborhood and you looked for a woman who Costello said was his grandmother and you looked for the name Costello, did you not? A I attempted to find a family by the name of Costello.

Q You looked for the grandmother of this young man and you looked for the name of Costello, isn't that right? A That is right.

Q Did you know that his grandmother's name was Costello? A Yes. I understood he had lived with a family by the name of Costello.

Q Did you know that his grandmother's name was Costello? A I don't remember.

Q Did you examine this record before you went out to make this inspection, this investigation? A A few days before.

Q Did you find any reference to the fact that his grandmother's name was Costello in that record? A Some member of his family.

Q Did you find any record that his grandmother's name was given as Costello in the record? A I don't remember without referring to the record.

Q Will you find in that record where Costello's name, his grandmother's name is given as Costello? A On page 10 of this testimony, in answer to a question put by someone with reference to Daniel Costello's uncle, it says—

Mr. Francis: I object to that. I want an answer to my question.

Q You understand what it is? A If you will permit me to finish looking through here, perhaps I will find it. There seems to be no statement of his grandmother's last name, but he did testify.

Q That is all? A May I finish?

Q You have answered my question.

By Mr. Cohen.

Q What did he testify to with regard to the surname of Costello? A He said that he lived with his grandmother and uncle.

Q And what did he say his uncle's name was? A David Costello.

Q Did you find any one by the name of David Costello on what would be No. 29, if it was, or a 129? A No, sir.

By Mr. Francis.

Q You said that this young man testified in that record that he lived with his grandmother and his uncle, and the uncle's name was Costello, is that right? A Yes, sir.

Q You just read that record, is that right? A Yes, sir.

Q Will you turn to page 10 and read to the jury where he said in that record, where he lived with an uncle named Costello?

Mr. Cohen: I beg your pardon, he did not say on page 10. On page 10 it says with reference to going south to Bellaire.

Q I ask you to point out to this jury where Costello testified he lived with his uncle named Costello. Will you point out to me where he said

he lived with his uncle? Just point out anywhere in those questions you pointed out to me where he said with an uncle named Costello, read it and tell us where he said, anywhere in that record, he lived with a man named Costello.

Mr. Cohen: I do not think it is proper for counsel to browbeat this witness.

A "Q What is his name? A David."

The Court: I think he means read it to yourself and then testify.

Q I want you to read that record you have referred to either on page 10 or anywhere else, where this witness Costello said he lived with an uncle named Costello. A "Q In whose car? A My uncle's. Q What is his name—"

Mr. Francis: I object to that.

The Witness: He asked me to read it.

By the Court.

Q What is his name? A David.

Q What is his last name? A Costello. "Q Where did he live on Van Buren street, what number? A 29. Q Where does your grandmother live—"

Q (Interrupting.) You understood my question? A Will you permit me to finish the question?

Q You understood the question? A Yes.

Q Is there anything in that testimony that you have just read to the jury that indicates that Costello testified he lived with his uncle named

Costello? A A reasonable inference can be drawn from the testimony that that is true.

NICK CAPUTO, sworn in behalf of defendant DiNicholas.

Direct examination by Mr. Cohen.

Q Mr. Caputo, what is your business? A Sir?

Q What is your business? A Ice business.

Q Working for yourself? A My father.

Q How long have you been in the ice business, for how long? A A lifetime.

Q I ask you whether you had occasion to deliver to the Rialto Restaurant, deliver ice into the restaurant? A I do.

Q When did you first start delivering the ice? A The first day it opened.

Q Can you tell us what that is about? A Yes, I imagine about three years, maybe a little more, I don't know.

Q You deliver to the present day? A Yes, sir.

Q Tell us the procedure connected with the delivery of ice from the time you first parked your wagon or truck, till the time you completed the delivery?

Mr. Gray: Objected to on the ground that it is immaterial.

The Court: What is the purpose?

Mr. Cohen: The purpose is to show the use of the elevator.

The Court: You may ask him that question.

Q Did you have occasion in your deliveries to use the elevator in question, the platform of the elevator? A I did when I went to that restaurant, I would go in—

The Court: The question is, did you have occasion to use the elevator, the lift?

The Witness: Yes.

Q What did you do?

Mr. Francis: Objected to as immaterial.

The Court: I will allow it.

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

Exception allowed as ground of appeal.

A I would go in the restaurant and tell the spaghetti man or the chef, whoever was there, get the elevator set for me while I would get my ice set. When he had the elevator all set for me, all I had to do was to put the ice on, go downstairs and take it off again.

Q During this period of the deliveries that have been made, delivering ice, did you ever find any trouble with the elevator at all?

Mr. Francis: I object to that.

The Court: I will allow it.

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

Exception noted as ground of appeal.

Q Did you ever ride down with the ice?

The Court: Did you withdraw that question?

Mr. Cohen: It doesn't matter.

The Witness: I never touched that elevator. All I did was put the ice on and took it off.

The Court: The question is did you ever ride down with the ice?

The Witness: No.

Q How did you get downstairs? A Down through the back.

Cross examination by Mr. Francis.

Q How much ice did you put on there at one time? A Three feet, maybe five.

Q And do you remember particularly around this time in January, 1929, whether you had any trouble with the elevator or not? A I was there about two years ago. When I went there I told them to get the elevator set for me, they told me to bring it in with the tongs on account that there was an accident.

Mr. Cohen: Is that after the day of the accident?

The Witness: The same day.

Mr. Francis: That is all.

WALTER DENNIS, sworn in behalf of defendant DiNicholas.

Direct examination by Mr. Cohen.

Q Mr. Dennis, were you on or about January 9, 1929, employed by H. E. Rooney Company? A I was.

Q What was their business? A Paper and twine.

Q In what capacity were you employed by them? A What do you mean?

The Court: What do you do for the paper and twine people?

The Witness: Make deliveries.

Q On January 9th did you make a delivery to the Rialto Restaurant? A Yes, sir.

The Court: What year?

Mr. Cohen: 1929.

The Court: Did you?

The Witness: Yes, sir.

Q Is this your memorandum, canvass memorandum, does this refresh your recollection?

Mr. Francis: He already testified he did.

The Witness: Yes, sir.

Q What did you do, how did you make the delivery on that day, January 9, 1929? A Generally I would go into—

The Court: Not generally, we are talking about January 9, 1929. If you remember, how did you make the delivery on that day?

The Witness: I go into the store and tell the man what I have for him.

By the Court.

Q Did you do that this day? A I am pretty sure I did.

Q That is the only day we are interested in. A That is the only way I knew.

By Mr. Cohen.

Q In order to save time, my thought was this. If I have occasion to ask questions as to a special practice, if I am not able to connect it up, I am perfectly willing that it be stricken out.

Mr. Francis: May it please the Court, I object to the question on the ground that whatever may have been the practice with regard to others, can't bind this particular plaintiff.

Q On that day, 8th day, I think you started to say you walked into the store? A That is right.

Q What did you do? A I generally look for someone to sign for the goods first, the boss or somebody.

Q Did somebody sign for the goods? A Yes, sir.

Q The paper which I show you, is that the paper which you had signed? A Yes, sir.

Q Then after the signature of the person in the store, what did you do? A Got the truck, get the merchandise out.

Q And did you get the merchandise out? A Yes, sir.

Q And then what happened before completion of the delivery? A He told me to leave it on the sidewalk.

Q Is that where you left it? A Yes.

ROBERT G. BAUER, sworn in behalf of defendant DiNicholas.

Direct examination by Mr. Cohen.

Q Mr. Bauer, what is your business? A My business is fireman, stationary fireman.

Q On or about January 10, 1929, were you employed by the Rialto Theatre? A Yes, sir.

Q How long have you been employed by that theatre, or the persons controlling or owning the theatre, prior to the date of the accident? A Since about 1920.

Q And your duties with the Rialto Theatre were what? A Taking care of the boilers, look after the boilers and the property of the house, the rear part of the house.

Q What other duties? A Maintenance man. Taking care of the cleaning. Looking after the cleaning.

Q Are we to understand you did some cleaning, a general utility man? A Only on repairs.

Q On January 10th, there occurred an accident. Had you heard about it?

Mr. Gray: I object as immaterial.

The Court: I will allow it, if it is for the purpose of fixing the date.

Q Had you heard about it, answer yes or no. A Heard about it, yes, sir.

Q Where did you hear about it? A I should judge, perhaps a half hour or so after it occurred.

Q You had been working next door? A Yes, in the Rialto Theatre.

Q Do you know of your own knowledge that the Rialto Theatre, through its employees, including yourself, actually used the elevator in question? A There was nobody else, we might say one or two besides ourselves. One or two besides ourselves had possession of the elevator.

Q But you, in behalf of the Rialto Theatre, actually used the elevator? A Used it more so than any one else.

Q Did you use it on the day in question? A Yes, sir, on the 10th day, I had used it at the early part of the morning, shortly after seven o'clock.

Q What did you use it for? A Brought up a load of scrap iron with a section of a boiler. I had been making a general cleanup on the different scrap around the building.

Q What brought you to the Rialto Theatre as early in the day as that? A I had an appointment with the junk man to take this stuff up.

Q Did you bring the stuff up? A Yes, sir.

Q And did you dispose of it? A Disposed of it to the junk man.

Q By that you mean, do you not, removed it from the platform? A Removed it from the platform and gave it to the junk man who helped me with it.

Q Did you a short time after having removed the junk from the platform of the elevator go downstairs and bring the elevator down, or at least some distance? A Left it down about

half way, just enough to close the doors up and then release the brake like, and after she was down, I might say three or four feet, I put the brake back on again which we always had occasion to do.

Cross examination by Mr. Francis.

Q Do you always leave the elevator half way down? A Mostly, sometimes we had occasion to run it all the way down to let a ladder up.

Q What particularly fixes in your mind that you disposed of junk on the morning of this accident? A How I happen to remember the junk business is because on about a half hour after the accident occurred I heard somebody saying in the house, one of the cleaners said that there must be an accident outside. I went outside and there was the ambulance taking this man away. That is how I happened to remember.

Q How long before that time had you used the elevator? A Used it on an average—

Q On the day of this accident, how long before you heard of this accident, had you used the elevator? A Pretty near two hours.

Q Pretty near two hours? A Pretty near two hours.

Cross examination by Mr. Gray.

Q Mr. Bauer, when you say two or three others, you mean two or three other employees of the Rialto Theatre? A Yes, sir, including the porters.

PETER DiNICHOLAS, one of the defendants, sworn in his own behalf.

Direct examination by Mr. Cohen.

Q Mr. DiNicholas, are you an officer of the defendant corporation, P. DiNicholas, Inc.? A Yes, sir.

Q And is that company conducting a restaurant at 913 Broad street? A Yes, sir.

Q And how long has that company been in business at that particular address? A Three years and a few months.

Q Now, in connection with your business, did you have occasion to use the elevator of that place? A Yes, sir.

Q You know of your own knowledge, whether or not anybody else used the elevator besides yourself? A Yes, sir.

Q Who else used it? A One of the brothers. They got the theatre next door and call it the Rialto.

Q Coming down to the date of the accident, you remember the plaintiff, Oscar Guensch? A What is that?

Q I say you remember Oscar Guensch? A Yes.

Q By whom was he employed, do you know? A By Marx.

Q Had he ever made deliveries to your place before? A Yes, sir.

Q About how many times do you think he made deliveries? A I can't tell you exactly. I have dealt with Marx about a year and would suppose about 50 times or 60, I can't tell exactly, but we have been getting some goods from Marx pretty near every week.

Q You never kept a record every time he came? A In my mind. It is on my books, yes.

Q You remember then Oscar Guensch before the accident? A Yes.

Q Tell us, Mr. DiNicholas, his weight, if you remember it, before the accident? Was he a big man? A Not a very big man.

Q Can you tell us what in your opinion his weight was as you observed him prior to the accident? A Well, I think about 125 maybe something like that. I know he was a much smaller man than me.

Q And what do you weight? A 185.

Q You say a much smaller man than you? A Yes, sir.

Q Then you remember his coming into your place on the morning of the accident? A Yes, sir.

Q And what conversation, if any, did you have with him? A He asked me if I have a check for him.

Q Your answer was what? A Yes, wait a few minutes.

Q Did you give him the check? A Yes, I opened the door, the check was ready and I give it to him.

Q Do you mean to say, Mr. DiNicholas, that the check had already been written? A Yes, sir; from last night.

Q The night before? A I didn't make the checks; my partner made checks.

Q Didn't you make out the check? A I don't make checks out.

Q What conversation did you have with him with regard to the delivery of the tomatoes or whatever he had for you? A He told me he

got a case, that is, 20 or 30, I don't remember now.

Q Speak slowly and loudly so we can all hear you. A He said he got tomatoes for me. I said, "Wait a minute, I will go down and send the elevator up and take care of you," and I left him; I went down to the cellar to call the cellar man which we call the elevator man to take care of the elevator in order for me to go back and take the goods from the front, pick them up, and put them on the platform and take care of the elevator, and send it down.

Q As I understand you, you said take care of the elevator, what would that include? A That included that when I send the platform from down the elevator, raised the two doors which is always raised about three inches. When the platform hits the doors that means the platform is up. Now I take one of the doors to the right, and then I take the other to the left, and then I advise my man to put the goods on from upstairs on the sidewalk.

Q Is there a handle on the right door? A Yes, sir.

Q What is there on the left door that you can get ahold on, I mean at the time of the accident? A Two big rings like this (indicating).

Q Where is that located? A Located right on the edge.

Q On the edge? A Here is the corner, it is right here (indicating).

Q Did you have to get on either of the doors to open that? A No, absolutely.

Q Did you tell him that you would send the elevator up and that he should go out and open

told him to stay now and asked him how he feels. He said, he feels bad. I said, "Wait a minute, I will call Mr. Marx." I called the office.

Q Then Mr. Seelig, the bookkeeper, came? A Yes, sir.

Q Were you there when they had a conversation? A Yes, sir.

Q Did you see Mr. Guensch there; did you see Mr. Guensch hand the check to Mr. Seelig? A Yes, sir.

Q Did you hear the conversation that was had? A Yes, sir.

Q What was the conversation as you remember it? A He said, "Here is the check," and then he says, "The door was heavy and I tried to open it, and the sidewalk was wet and I fell down the hole of the elevator; tell my wife," he says—

Q "Tell my wife"? A Yes, sir.

Q He said that to Mr. Seelig? A Yes, sir.

Q Then, of course, he was taken away in the ambulance? A Yes, we done the rest. We called up the ambulance.

Q Did you stop anybody from going into the cellar? You remember the ambulance driver? A No.

Q Did you talk with the ambulance driver at all? A No; I just brought him down and showed him where the man was and he tried the very best to help get him out in order to go away.

Q And then he was taken to the hospital? A Yes, sir.

Q About this elevator, before Mr. Guensch was taken to the hospital or after, did you see

where the elevator was in the shaft? Did you see where the platform was? A I saw it after.

Q Where was it in the areaway of the shaft? A About half-way.

Q Was that the first time you or someone in your behalf used the elevator on that morning? A That was the first delivery. I think for our part it was the first delivery.

Q For your part? A Yes.

Q And you knew of all these deliveries when you were there? A Yes.

Q And you were there that morning when Guensch came in? A Yes, sir; I never lost a day for three years.

Q But you hadn't used the elevator on that day yet? A I don't think so.

Q Did you ever have anything to do with the fixing of the elevator? A No.

Q Whenever it went out of order, did you ever have anything to do with it? A I called up Mr. Noble who represents the church to fix it for him.

Mr. Gray: I don't see the materiality of this.

The Court: I will allow it.

Q You signed a statement, I think, Mr. DiNicholas, for the plaintiff or someone representing him? A Yes, sir.

Q Did you say—

Mr. Francis: I object to it on the ground that it is immaterial.

The Court: Objection sustained.

Mr. Cohen: I merely wanted—

Mr. Francis: I object to what he wanted.

The Court: Objection sustained. Do not anticipate.

Q Do you know of your own knowledge whether or not the elevator, from time to time, was inspected? A Yes, it was.

Cross examination by Mr. Gray.

Q Mr. DiNicholas, as I understand the situation, just your restaurant and the theatre were the ones who used that elevator; that is right, isn't it? A Yes, sir.

Q Does it run down to the premises being run by you, or does it run down to the premises running to the Rialto Theatre? A I don't understand.

Q Part of the elevator that belongs to you, does the elevator come to that? A There is two doors. One door is for me, one door is for the theatre and the elevator is between those two doors. It is in the middle of the building.

Q And you two were the only ones who used that elevator? A And the theatre.

Q You didn't complain or say that the elevator is out of order before the accident, did you? A I think a few months before.

Q I mean a few days. A It wasn't bad.

Q It was in perfect condition? A It was all right.

Mr. Francis: I object to that.

Mr. Gray: I will withdraw it.

Q What was the condition of the elevator as you noticed it being used by your employees shortly before the accident? A It was a very strong elevator, but it was a little hard to handle it and we didn't like it much. We wanted a little better elevator all the time.

Q After you had said you had complained of it, had it been fixed? A Pardon me?

Q At the time you say it had been fixed once before? A Yes. I think the Otis Elevator sent by the Church came down to fix it.

Q There was no complaint made by you after that? A No.

Cross examination by Mr. Francis.

Q You say that this elevator was kind of stiff and you didn't like it? A No, sir.

Q You always wanted a better one, you never made any repairs to this elevator, did you? A No, sir.

Q Consequently, as long as the elevator ran up and down in the shaft whenever you wanted to use it, that is all you were concerned with, is that right? A Well, in order to send it up and down, that is the purpose, that is all I want from it.

Q As long as the elevator went up or down, you were satisfied that it was all right, is that right? A Yes, sir.

Q When you say the elevator was all right, you base it on you statement that whenever you used it, it went up and down? A Yes, sir, that is all I know about it.

Q That is the extent of your inspection of the elevator? A Yes, sir. The inspection was also made—

Q That is the extent of your personal inspection of this elevator? A I had an expert to inspect the elevator.

The Court: Strike it out.

He means you, personally.

A If I see anything, I report it.

Mr. Cohen: May not an occupier of the premises either personally inspect or cause—

The Court: He may, but that wasn't the question as I understood it. Is there any objection to his testifying as to his own personal knowledge?

Mr. Cohen: There is no objection.

The Court: You may cross examine him, if you want to.

Q Did you ever have anybody inspect it for you? A Yes, there was an inspector there a couple of times.

Q What is his name? A I don't know, it wasn't in my benefit. We have a letter Mr. Spiegal, I think. My record's got it.

Q You say you don't know his name? A No, sir.

Q Is he here in court? A No, sir.

Q Are you sure? A I think it was that gentleman down there if I am not mistaken (indicating).

Q You say that there was a chain? A Yes, sir.

Q Between these two doors? A Yes, sir.

Q When they were open, the chains held the door up, is that right? A Yes, sir.

Q And you say that chain wasn't on on January 10, 1929? A Yes, sir.

Q Have you got any pictures of it? A I haven't got any.

Q When this man left you, left your cellar, you knew that he went to the hospital? A Yes, sir.

Q Do you know how long he had been in the hospital? A They told me he was very long in the hospital.

Q You knew that he was seriously injured, didn't you? A No, sir.

Q You knew that he was badly enough injured to be in the hospital for some weeks? A They told me for a short time.

Q You never took any pictures to show that there is a chain between these two doors? A I didn't, my lawyer did.

Q Did you have any pictures taken after this accident? A My counsellor maybe.

Q Do you know when these pictures were taken (handing pictures to witness)? A If I know when?

Q Yes. A Just a few days after I think. I don't know, I can't remember, I didn't check up.

Q Guensch came around to your store on other occasions to deliver packages, boxes, and crates to you, didn't he? A That day?

Q No, on other occasions before that time. A Before, yes.

Q You told your man down in the cellar to send the elevator up, is that right? A Yes, sir.

Q After the man in the elevator, the man in the cellar, sent the elevator up, he remained in the cellar to take the crates off the platform, didn't he? A No, sir.

Q What did he do? A I came up myself and that man put always on the sidewalk the goods from the truck. I check them up because I have to sign the bill for it and there is three of us doing that work. We check up the goods. He handled it right on the platform of the elevator on the sidewalk; as soon as he put all the merchandise on, I hollered to the man, "All right." I release the bell, and send the goods down. I close the two doors. I give him the check and he goes and my man takes the goods out of the elevator. That is the only way we work it.

Q You said you send your man up to the sidewalk again? A No, another man is there.

Q Another man? A Sure. The spaghetti man, the man who is in the front, of course.

Q The spaghetti man always came out to the sidewalk after the elevator was sent up and put these crates on the elevator platform? A Not always, no.

Q On prior occasions, didn't Mr. Guensch put those crates that he delivered on the platform? A On the platform?

Q Yes. A He leave it on the sidewalk.

Q Didn't you say that Guensch just took these crates off that truck and laid it on the sidewalk, and then went down? A We checked first.

Q What is that? A We checked it up.

Q Who do you mean? A Myself and my employees.

Mr. Cohen: He said he placed them on the sidewalk and checked them.

The Witness: Checked them only.

Q There isn't any necessity for Guensch to be there? Do you mean to say that you and your employees, either with or without Guensch checked these cases and then Guensch went away, and he never helped you put them on the platform at all? A I don't remember who helped me. He was always in a hurry.

Q You don't remember? A No, he was always in a hurry.

Q Just a minute ago we were talking about pictures being taken, and you said they were taken two or three days after this accident? A I couldn't remember. I couldn't remember the pictures when they were taken, but I know they took pictures. More than only us; there was about ten people coming there and taking pictures.

Q Is that two or three days after this accident? A I don't remember.

Q When did you retain Mr. Cohen to represent you in this suit? A Who?

Q Mr. Cohen. When did you take him—

Mr. Cohen: If your Honor please, I think the records speak for themselves. They started a suit in due course and we filed the answer.

Mr. Francis: Then it is admitted by Mr. Cohen that he was retained after this suit was instituted? I am entitled to an answer.

Q When did you retain Mr. Cohen to defend you in this suit? A I can't remember the date, sir.

Q The complaint in this case was served on you shortly after the 6th day of December, 1929, was it not? A Maybe.

Q When you received that complaint, did you turn it over to Mr. Cohen? A No, my accountant did something. I think he turned it over to Mr. Cohen or somebody else, I don't know who it was.

Q Who is Mr. Spiegal? A Associated with Mr. Cohen.

Q Who is Mr. Spiegal? A He used to be my lawyer on many occasions.

Q Up until the time that you received this summons and complaint, and it was turned over to Mr. Cohen, you had not retained Mr. Cohen to represent you in this suit, isn't that right? A Before?

Q Yes. A No.

Q You say that these pictures were taken by your attorney, Mr. Cohen, or through your attorney Mr. Cohen? A I don't know. It wasn't the only pictures taken there. I think some people take pictures and bother me every day. I couldn't remember and I don't know who takes pictures. Every month I find fifteen people, investigators go there and take pictures.

Q You recall that these pictures were taken by your counsellor, Mr. Cohen? A I don't know, sir.

Q What time did you come down to the restaurant that morning? A About nine o'clock.

Q And what time did the restaurant open? A Eleven.

Q Opens at eleven in the morning? A Yes, sir.

Q Were you the first one in the place? A No, sir.

Q Who was the first one there? A Either the chef, the spaghetti man, cooks, myself and one fellow, a cellarman and the elevator man.

Q What time did they get there? A Eight o'clock, they prepare for lunch.

Q Were you there from nine o'clock on? A On every day, sir.

Q On this particular day, were you there from nine o'clock on? A Yes, sir.

Q You weren't there when Guensch's truck arrived with these goods. Didn't he have to wait for you to come in? A I was there in the office. I think he said he went in the kitchen, but I did not see him go in the kitchen, I was in the office.

Q How many crates of foodstuffs, canned stuffs, did Guensch ordinarily deliver to you, which were placed on that platform? A Before you mean?

Q Yes. A There was not a certain amount always. It was ten cases tomatoes, twenty cases tomatoes, 24 cans Italian tomatoes which weigh two pounds five ounces to each can, to each box 24.

Q So you get 10 or 20 cases of tomatoes? A Yes, sir, and also perhaps a barrel of vinegar which is about 45 gallons, he used to bring little barrel pickles, about ten gallons, as well as horseradish. We have no certain amount.

Q In any event, all the stuff you ordered was always placed on that elevator platform? A Not on the platform, on the sidewalk.

Q Also, it was placed on the platform and taken into the cellar? A Placed by my man.

Q You went down to the cellar after the accident, didn't you? A After the accident?

Q Yes. A Yes.

Q Was the elevator all the way down then? A No, sir.

Q You say half way down the shaft and it was tipped at an angle of 45 degrees? A I don't know.

Mr. Gray: He didn't say that.

The Witness: I don't say it was 45 degrees, but it was just a little tipped.

Q Just a little tipped? A It was not level. It was a little bit this way (indicating).

Q Just a little bit that way? A I can't place how much. I didn't measure it.

Q You did not want anybody to go up and look at that elevator, and look at it? A Who says I don't want?

Q Will you answer my question, please. You didn't want anybody to go up and look at that elevator, did you? A Why not?

The Court: Did you or didn't you?

The Witness: I didn't stop anybody. In fact, I called Mr. Noble to come and look at it.

By Mr. Francis.

Q You called Mr. Noble to come and look at it? A And everybody.

Q And did you tell Mr. Noble that some cables were off the drum? A I told him it was out of order. I did not recollect whether the cables was off or anything. I am not a mechanic. I don't understand anything about it.

Q Did you hear Mr. Noble tell us you told him one of the cables was off the drum? A I don't know what Mr. Noble testified.

Q But you didn't tell him the cable was off the drum? A No, I told him I couldn't use it.

Q Do you remember just what you did tell him? A I tell him the elevator is out of order and we can't use it and will you please send somebody to fix the elevator.

Q But you told him the elevator was out of order and it required fixing? A Yes, sir.

By Mr. Gray.

Q Mr. DiNicholas, under the lease that you had with the Southern Candy Company which had been sublet from the Presbyterian Church, you did not have to make any repairs?

Mr. Cohen: I object to it on the ground that that is not the best evidence.

The Court: Objection sustained.

Q Do you know when the inspection you say you had made was done, how soon it was before the accident? A It happened to be the day before I was down there. It happened to be then. I happened to be around because we had to clean some water. There was water under the elevator and I looked pretty good. It was very nice to me.

The Court: That was the day before?

The Witness: Yes, we had orders from the Health Department to take some water that was standing under the elevator from the rain and I had two of my men clean it up and we oiled it. Everything was in order that I know.

Q You said something about having some inspection made by an expert. A I think it was a few weeks before it was inspected.

Q A few days or a few weeks? A I had complained of the elevator and the insurance inspector came and inspected it.

Q I only asked you how long before that? A I think it was 19 days, or something like that, something like 20, maybe.

By Mr. Cohen.

Q Was it cold on that day, do you remember? A It was.

Q Had it been raining, do you know? A Yes, it was a rainy day.

By Mr. Francis.

Q Mr. DiNicholas, you said to Mr. Gray on his examination that there was water in the pit of this elevator and that you had orders from the Health Department to remove it, is that right? A There was about two fingers of water.

The Court: Two feet?

The Witness: No, fingers.

Q That was down in the pit of the elevator? A Under the elevator.

Q Down in the pit of the elevator? A I don't know what "pit" means. I know under the elevator.

Q Was the floor perfectly level where the elevator went down or where it lands, or was it below the cellar floor?

Mr. Cohen: Is there a hole below the cellar?

The Witness: This is the elevator (indicating). After that, in order to have supports it is a little bit lower.

Q It is lower than the cellar floor? A Yes, sir.

Q And the water, was it not in that floor? A Yes, sir, about an inch, an inch and a half of water.

Q And the water was down in the pit? A Yes, sir.

Q You sent two of your men down, the day before this accident to remove the water? A Yes, sir. I was with them in there.

By Mr. Cohen.

Q Whenever it rains you get water in that pit, do you not? A Yes, sir.

Q What do you do immediately after? A We take it out.

Q Has there been a time when you failed to do that? A What do you say?

Q I said has there ever been a time when you didn't remove the water from the pit or the hole as you call it? A No, we always take it out. I have a cellar man. He stands there all day and that is what he does.

By Mr. Francis.

Q Do you know why it was necessary for a health officer to tell you to take the water out of there? A He comes there every week and tell us all those things.

Q Do you know how long this water had been in there before this elevator inspector told you to get it out? A A day, or a day and a half, because the day before it was cleaned up again. It was dry, absolutely.

By the Court.

Q It was dry on the day of the accident? A No, dry the day was after—I mean, the elevator was dry.

Q I am talking about the weather outside. A We had a rainy day.

Q A rainy day? A Yes, sir.

By Mr. Gray.

Q If the pit was dry, why did you clean it out? You had already cleaned out the pit before the accident happened? A Yes, sir.

ROBERT G. BAUER, sworn as a witness in behalf of defendant DiNicholas.

Direct examination by Mr. Cohen.

Q Mr. Bauer, do you remember on the day of the accident and prior thereto, whether or not there was a chain connecting the two doors? A There has been always to my knowledge. Always chains on it.

Q Was it cold on that day? A To my knowledge it was. I know I got in early on account of getting my face—

Cross examination by Mr. Gray.

Q Mr. Bauer, how many loads of scrap iron did you take there? A Only one.

Q Have you any idea what it weighed? A I got half a dollar for it, so, to be honest, I don't know what it was.

Q Was there much of it? A Just a section of one of these small boilers and a lot of scrap pipe. But, I had occasion to use the elevator three or four times a week and take the ashes out.

Q How much ashes did you take out usually? A Four or five cans.

Q At the time? A Yes, sir.

Q About how much did each can weigh? A On the average of 100, 100, 90 pounds, 80 pounds, somewhere around there.

Q You did it every week, two or three times a week? A What I mean two or three times: Sometimes twice a week, sometimes three were less, according to how cold it was.

By Mr. Francis.

Q Did you ever clean any water out of the elevator pit? A I had once or twice helped Mr. DiNicholas because it was 50-50 between the Rialto Theatre and the Rialto Restaurant.

Q How many times during the month prior to January 10, 1929, had you helped Mr. DiNicholas clean the water out of the cellar?

Mr. Cohen: I don't think this is proper cross examination. I merely asked him whether it was cold or whether there were chains.

Mr. Francis: I understand when a witness is recalled the entire record is open again.

Mr. Cohen: Even so, he hasn't testified at any time in his direct examination about cleaning the pit out.

The Court: But he told about the general conditions.

Q About how many times for the month, prior to January 10, 1929, had you cleaned the water out of the pit? A That is something I can't say. I might say once or twice during the season I would help him. According to how heavy the rain storm was.

Q How many men would be in that pit cleaning out the water? A Two. One would be taking it out and the other would be dumping the water into the sink.

COSTAS KOKINAS, sworn in behalf of defendant DiNicholas (examined through an Interpreter).

Direct examination by Mr. Cohen.

Q Mr. Kokinas, by whom were you employed on January 10, 1929? A Mr. DiNicholas.

Q What was your job with Mr. P. DiNicholas? A Kitchen man.

Q And as kitchen man what did you have to do in that establishment? A Cleaning vegetables and clean the cellar.

Q Did you have anything to do with the delivery of merchandise for the restaurant and the operation of that elevator on or before January 10, 1929? A The elevator?

Q Did you ever send the elevator up or bring it down with merchandise? A Mr. DiNicholas just told me to send the elevator up with the spaghetti man and I would send the elevator up.

Q Do you remember the happening of an accident on January 10, 1929? A No.

Q Do you remember hearing about it on the morning of January 10, 1929? A Yes, sir.

Q When did you first learn of the accident and under what circumstances? A The chef sent me down to get oil from the cellar. The elevator was in the front and the oil was downstairs also. Then I heard noise. The doors downstairs were closed.

Q Do you know whether or not there was one set or two sets of doors at either side of the platform, that is one side north and one south of the elevator?

The Interpreter: You are referring to the sidewalk?

Mr. Cohen: No, I mean the doors.

The Witness: Two doors.

Q Were those doors that led to the cellar of the Rialto Restaurant closed when you heard these noises you described? A Closed.

Q Were the noises that you heard—hearing the noise that you did, what did you then do? A I opened the doors when I heard the noise.

Q And what did you see? A I saw a person there and I seen him. I said to him, "What do you want," and he says, "He fell down."

Q Where was the platform in the areaway? A It was in the middle of the shaft.

Q Can you tell us on what part of the elevator Mr. Guensch was either sitting or lying? A It was lying on the side, sort of.

Q Was he prostrate or was he partially sitting down? A He was sitting on the platform in this manner (indicating).

Q Now, what did you do after having seen the man in this posture? A I said, "What are you

doing there; get up from there," and he says, "Hold me," and I held him.

Q Did he then walk back to the rear of the cellar?

Mr. Francis: I object to that as leading.

Q What did he then do? A I grabbed him by the hands and I took him to the rear.

Q Did you carry him or did he walk with you? A He walked.

Q Do you remember whether or not Mr. Seelig, the man who was on the stand yesterday and who said he was the bookkeeper for Marx, and Mr. DiNicholas were talking with him in the rear where he was seated? A Yes, sir.

Q Was use had of the elevator that morning as far as you know?

Mr. Francis: I object to that as leading.

Mr. Cohen: I will withdraw it.

Q Did you hear Mr. DiNicholas ask you to send the elevator up before you heard these noises you described before?

Mr. Francis: Objected to as leading.

The Court: I will allow it.

A First I heard the noises and then Mr. DiNicholas told me to raise the elevator.

Q Did you or did you not before you heard these noises send the elevator up for any purpose whatever? A No.

Cross examination by Mr. Gray.

Q Mr. Kokinas, what time did you get there that morning? A At eight o'clock.

Q Were you the only man there from Mr. DiNicholas who handled the elevator? A Sometimes I was working there. I was the only one that was raising the elevator.

Q Did you raise the elevator that morning before you heard the man on it?

Mr. Cohen: I think he has already answered that; he said, "No."

Q There was nobody else to operate the elevator for Mr. DiNicholas while he was there? A No.

Q Did you work in the cellar all the time? A Yes, sir; all the time that I was there; all the time that I was connected there, I worked in the cellar.

Q And did you always send the elevator up when goods were to be delivered into the cellar? A Anytime they would holler to me to raise the elevator up from upstairs I would raise it for the goods to come down.

Q Was Mr. DiNicholas in the cellar when he told you to raise the elevator up that morning?

Mr. Cohen: I don't think there is any testimony that Mr. DiNicholas called out.

The Witness: Yes, sir.

Q He was in the cellar and up on the street? Did you see Mr. DiNicholas when he told you to send the elevator up? A Yes, sir.

Q Did you say anything to Mr. DiNicholas when he told you to send the elevator up? A At the time that he told me to raise the elevator up, I had the man already.

Q Where were you standing when Mr. DiNicholas told you to send the elevator up? A He called me to raise the elevator up and I say, "Mr. DiNicholas, Mr. DiNicholas, I have a man here and so and so, something happened." That is all I can get out of him.

Q Where were you standing when Mr. DiNicholas told you to send the elevator up? A I had taken about four or five steps from the elevator when Mr. DiNicholas called me to have the elevator raised.

Q And you hadn't raised the elevator at all up to that time? A No, sir.

Q Did you know that M. Marx & Son were going to make a delivery to your restaurant that morning? A No, sir.

Q How long had you been in the cellar before you heard this noise? A As soon as I came down I heard the noise.

Q And you came down for the purpose of sending up the elevator? A I came down to get the oil.

Q And you just happened to come down to get some oil when you heard this noise, is that right? A Yes, sir.

Q Do you understand my question, then, Mr. Kokinas?

(At this point the examination proceeds without the use of an interpreter.)

Q Do you understand me pretty well? A Just a little bit.

Q Have you talked this case over with anybody? A No.

Q You haven't talked it over with anybody at all before you got on the witness stand just now? A I no understand.

(At this point the interpreter is recalled.)

Q Have you talked this case over with anybody before you took the witness stand? A No.

Q So that before you took the stand, Mr. Cohen had no idea at all what you were going to testify to?

Mr. Cohen: I object.

The Court: Objection sustained.

EDWARD H. DALDER, sworn in behalf of defendant DiNicholas.

Direct examination by Mr. Cohen.

Q Mr. Dalder, on October 16, 1929, with whom were you connected? A The Hudson Casualty Insurance Company.

Q Did you have in your charge the matter pending in the New Jersey Department of Labor Workmen's Compensation Bureau wherein Oscar E. Guensch, Jr., was petitioner and Meyer Marx was the respondent? A I did.

Q And was the Hudson Casualty Company or Insurance Company the carrier for Meyer Marx, the employer of Oscar Guensch?

Mr. Francis: I object to that as immaterial.

Mr. Cohen: I want to connect up the connection Dr. Koppel had with them.

The Court: You may answer that.

The Witness: To the best of my knowledge, yes.

Q Do you recall what compensation, if any, was paid to Guensch before he entered into a stipulation to withdraw or to discontinue the prosecution of this suit?

Mr. Francis: I object to that on the ground that it is immaterial to this issue. Whether there was any payment made to this man is immaterial.

The Court: What is the materiality of this question?

Mr. Cohen: To impeach the credibility of that gentleman when he says he was living—

Mr. Francis: It is admitted that there was compensation paid to the man.

By the Court.

Q How much compensation, if any, was paid to Mr. Guensch by the Hudson Casualty Company, do you know? A Of course, I haven't the complete records so I can't say how much.

Q You say you have no records? A I have no records.

Q Have you any recollection? A Yes.

Q What is that recollection? A The required time and calculation to figure it in dollars. I can best give you the answer if I will but say to the best of my recollection he got about a year or perhaps thirteen months' tempo-

rary compensation for temporary disability in addition to 62½ weeks for permanent disability. That is to the best of my recollection.

Q And how much a week, do you remember? A I believe it was $17 a week.

Cross examination by Mr. Francis.

Q Did you talk to Mr. Guensch about this accident? A Yes.

Q What did he say to you about the manner in which this accident happened?

Mr. Cohen: If your Honor please, I object to it.

The Court: Objection sustained.

(Counsel argue.)

Q Mr. Dalder, are you familiar with the Compensation Act?

Mr. Cohen: I think the Court is familiar with the Act and counsel are familiar with it. At least they are presumed to be.

Q Are you familiar with the Compensation Act, Mr. Dalder?

Mr. Cohen: I object.

The Court: I will allow it. I think it is proper of the witness to give testimony at this time with reference to compensation and the period that it was given and the rate that was given.

Q Can you answer that, Mr. Dalder? A I believe I am familiar with the provisions of the New Jersey Act.

The Court: What was your position; I didn't get it in the beginning.

The Witness: I was in the Workmen's Compensation Bureau of the Department.

Q The petition that was signed or served on your company by Mr. Marx was discontinued, was it not? A Yes, sir.

Q You understand, do you not, that under the Workmen's Compensation Act of the State of New Jersey, that every cent that you paid Mr. Guensch must be returned to your company after the disposition of the common lawsuit?

Mr. Cohen: I object to that on the ground that I did not bring it out and therefore it is improper cross examination.

The Court: I think it is immaterial. I will explain that to the jury as a matter of law.

Q This discontinuance was signed and filed October 20, 1929; is that right (handing paper to witness)? A Yes.

Q In order to obtain Workmen's Compensation under the provisions of the Compensation Act a petition must be on file within one year from the date of the accident; isn't that right?

Mr. Cohen: As of what time?

The Court: As of that time.

By the Court.

Q Do you know, Mr. Dalder? A Yes.

Q Is that correct? A Yes, sir.

Q It must be on file within a year? A Yes, sir.

The Court: That is all.

Mr. Cohen: The petition is on file, is it not, Mr. Dalder, as far as you know?

The Witness: To the best of my knowledge.

Mr. Francis: Have you that petition with you by any chance?

Mr. Cohen: It is in evidence.

Mr. Francis: Is this the one you are referring to (indicating)?

Mr. Cohen: I only know of one petition.

Mr. Francis: And this discontinuance relates to that petition which was filed; does it not, Mr. Dalder?

The Witness: Yes, sir.

Mr. Cohen: Doesn't that stipulation say that the petitioner wants the Bureau to dispose of this case; doesn't it say that?

The Witness: Yes.

Mr. Francis: And it was discontinued, was it not, Mr. Dalder?

Mr. Cohen: I object on the ground that it speaks for itself.

The Court: With respect to that stipulation it specifically says it wants the Bureau to dispose of its case. As I have allowed you to ask what it meant, I will allow Mr. Francis the same privilege.

Q What is the result of that stipulation you have in your hand, the discontinuance of the compensation suit?

Mr. Cohen: I object to that. It is a conclusion.

Q Is that compensation petition and that compensation claim represented by that petition that you have in your hand to bring a pending claim against the Hudson Casualty Surety Company?

Mr. Cohen: I object to that on the ground that it is a conclusion. It is for the Court to construe it, not this witness.

The Court: If he knows, I will let him answer it.

Do you understand the question, Mr. Dalder?

The Witness: I believe I do.

Mr. Francis: Is that suit pending now represented by that petition?

The Witness: It has been discontinued by that stipulation.

By Mr. Francis.

Q Are you a member of the Bar? A No.

Mr. Cohen: I move that that answer be stricken out.

The Court: I will allow it.

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

Exception noted as ground of appeal.

Cross examination by Mr. Gray.

Q Mr. Dalder, as a matter of fact, can't he at any time come back if he shows an increased

disability after the time this disability claim was filed?

Mr. Francis: I object to that and refer your Honor to the provisions of the Act. That isn't so.

The Court: If he knows, I will let him answer.

The Witness: Yes, he can.

By Mr. Francis.

Q You say that a petitioner in a Workmen's Compensation claim can go back at any time in lieu of his disability and get compensation? A I did not say that.

Q You paid compensation, did you not? A Yes, sir.

Q And is it not true that under the provisions of the Workmen's Compensation Act the man must file his petition for compensation within one year from the date of the accident or he is forever barred from compensation; isn't that right? A Yes, sir.

Q Assuming that you paid him some compensation and you should be paying him whether his disability increases or decreases, doesn't he have to file a petition within one year from the time of the last payment of compensation to him, or is he barred forever? A He must file a petition within one year of the last date of payment or he is barred.

By Mr. Gray.

Q That is your understanding of the law, Mr. Dalder? That even though he has increased

disability, after he has once filed his petition and compensation commences and then files a discontinuance claim, he must claim compensation within one year if he has greater disability? A Within one year of the last payment.

By Mr. Cohen.

Q Will that be so if the petitioner and the respondent enters into an agreement whereby they have petitioned the Court, as they have this agreement to dispose of the claim—

Mr. Cohen: So far as I am concerned, I withdraw from any further questions.

When you paid him the compensation, he agreed by this stipulation here (indicating) that he had gotten all the money he was entitled to—that the compensation allowed?

The Court: Objection sustained.

Mr. Gray: There is an agreement.

The Court: That speaks for itself.

By Mr. Francis.

Q Mr. Dalder, may I ask you one more question. Dr. Flax, Dr. Willner, Dr. Koppel and Dr. Perlberg all examined this man for the purpose of protecting the interests of your company against this compensation claim, did they not?

Mr. Gray: I object to that. I don't think that is a fact. Dr. Flax also is his own physician, as I understand.

Mr. Cohen: I don't recall any testimony by Dr. Willner.

The Court: I think it is true. Objection sustained.

Mr. Francis: All these doctors whom I have mentioned, sent you reports of the treatment and the condition of this man?

Mr. Cohen: I object to it on the ground that it is not proper cross examination. There is no such testimony on our direct examination.

The Court: Objection sustained.

Q Did Dr. Koppel examine this man at the request of your company in the preparation of his compensation claim against your company? A Yes.

Mr. Cohen: If counsel is going to proceed any further, I will be obliged in fairness to my client to object on each occasion, because it is improper cross examination. Your Honor has already sustained me on three different occasions along the same line of cross examination and I don't want to get up on my feet every time he asks such an improper question.

Mr. Francis: That is all.

At 4:00 o'clock P. M. the Court takes a recess until tomorrow, May 6, 1931, at 10:00 A. M.

THIRD DAY.

Wednesday, May 6, 1931.

Met pursuant to adjournment.

Present counsel as before stated.

LOUIS BRAVAKIS, sworn in behalf of the defendant DiNicholas.

Direct examination by Mr. Cohen.

Q Where do you live? A 286 Ridge Road.

Q Your business is what? A I am employed by Mr. John Harness, a public accountant as his assistant.

Q And you have been employed by him for what period of time? A I have been employed since January, 1928.

Q And did your employer, whose name you just mentioned, do the accounting for the defendant, P. DiNicholas, Inc., or better known as the Rialto Restaurant? A Yes.

Q Will you tell us just what your duties were, what you did and when you did it, that is, in connection with the accounting for Mr. DiNicholas? A Our duty is to audit the books monthly.

Q Monthly? A Monthly.

Q What part of the month? A We make it our business to get there before the tenth of the month.

Q Why is that? A Why?

Q Yes. A In order to make and give him a report that is early for the month that has just passed.

Q And other reason? A What is that?

Q Any other reason why you do it before the 10th? A Another reason is that bills should be paid and we make out the checks.

Q Do you recall on the early part of January a number of checks having been made out in payment of bills for the Rialto Restaurant? A In what year?

Q In 1929. A I do.

Q When those checks were made out, who were present? A Mr. DiNicholas, that is the president of the corporation; Mr. Harness, my employer, and I were there sitting downstairs. We have a small room, a sort of an office down in the cellar.

Q Where is your employer now? A My employer is in the Newark Memorial Hospital, ill.

Q And he has been there how long? A He has been there two weeks, Tuesday makes two weeks.

Q Is he there today? A He is.

Q Have you the checks that you made out on that day or that evening with you? A I have.

By the Court.

Q What evening was it? A January 28, 1929.

Q And how do you fix that date? A Because after auditing the books we call Mr. DiNicholas downstairs into the office and we present him a schedule of accounts payable, that is, a schedule showing the name of the creditor and the amount due him and upon scrutinizing the schedule of accounts payable he marks after the name of a creditor whether it is to be paid or not. And upon doing that we proceed to make out the checks. He then signs the checks.

Q Do you recall whether he signed the checks on that evening, the checks which you have in your hand (indicating)? Do you recall whether those checks were signed that evening? A He always signs the checks.

Q The question is, not what he always does, but just what he did that evening. A He signed the checks because—

Q We didn't ask you the reason. He did? A He did.

Q That night? A He did.

Q And those are the checks (indicating)? A That is right.

By Mr. Cohen.

Q Look over those checks and tell us whether or not there was one made out to M. Marx. Give us the date of it, the bank upon which it is drawn and by whom it is signed. A The check is No. 499, drawn by P. DiNicholas, Inc., against United States Trust Company of Newark, New Jersey. It is made out to M. Marx. $20.05.

The Court: What is the date of it?

The Witness: The date is January 8, 1929.

Mr. Cohen: May I offer the first check in evidence?

The Court: Let it be received.

(Same received in evidence and marked Exhibit D. 4.)

Mr. Cohen: I offer a group from No. 476. One group of checks.

(Same received in evidence and marked Exhibit D. 5.)

Q In whose handwriting are those checks? A The handwriting is my employer's. The signature, of course, is Mr. DiNicholas'.

Q When did you next make out the checks for the bills payable? A The following month.

Q So that you don't know anything as to what transpired between the date on which those checks are dated and the following month when you repeated your duties as you described them, is that correct? A That is right, I do not.

Q Do you know whether or not you had made other checks payable to Mr. Marx during the time that you were employed by him with your employer? A Yes, we have.

Q You have the recollection? A We had made out checks.

Q Was he one of the regular creditors of the defendant? A He was.

Q Do you know of your own knowledge whether or not that check was either mailed or left with Mr. DiNicholas? A That check was not mailed. We never mailed Mr. Marx's checks.

Q Do you know of your own knowledge who had delivered the check to Mr. Marx? A I do not.

Cross examination by Mr. Francis.

Q You say that you made a practice of getting to Mr. DiNicholas' restaurant sometime before the 10th of every month, is that right? A Yes.

Q That was for the purpose of auditing his books? A That is right.

Q When the month ended—when did the month end of Mr. DiNicholas? A The month ends on the last day of the month.

Q And when you audited the books your audit covered accounts payable to the end of the preceding month, isn't that right and the checks which you drew covered accounts payable at the end of the preceding month, isn't that right? A Just a minute, I don't get your point.

Q You say that your audit covered a period from the beginning of the month preceding to the end of that month, isn't that right? A Correct.

Q And the checks which you drew for accounts which were due at the time, at the end of the month preceding the time that you were there, isn't that right? A The checks we make out are not in full sometimes.

Q The checks that you make out are not in full sometimes? That isn't the answer to my question. When you came around there on the 10th or before the 10th of the month, your audit covered a period from the first of the preceding month to the 30th of the preceding month, isn't that right? A Yes.

Q And the checks that you drew covered accounts that were payable from the first of the preceding month to the 30th of the preceding month, isn't that correct? A The accounts may have been due before the preceding month.

Q It may have been due before the preceding month, but in any event your audit covers down to the 30th of the preceding month, isn't that right? A Correct.

Q And the check that you drew covered the debt of Mr. DiNicholas down to the 30th of the preceding month whether it was more than a month or just a month? A The check may not have covered the whole debt.

Q In any event the check covered all of the debt or part of the debt down to the 30th of the preceding month? A Yes.

Q You were only there one day? A One day, that is right.

Q Mr. DiNicholas signs all these checks, doesn't he? A He does.

Q Were you here yesterday when he said he didn't make out any checks or sign any checks, that you did it for him? A I was not here yesterday.

Q Do you remember in this particular month, how long before the 10th of the month that you went there making this audit? A I know that we would go there before the 10th of the month.

Q You don't know, you don't remember particularly when you went there on this occasion? A I can fix the date of the check because the check is never dated ahead.

Q What is the date on the check? A Eighth.

Q You weren't there after that? A No.

Q If a creditor came there on the 10th of the month and said, "I refuse to leave the goods unless you draw a check for me," you wouldn't draw it, would you?

Mr. Cohen: I object to that.

The Court: He might know.

Mr. Cohen: If your Honor thinks it is proper, I will allow it.

The Court: You may answer that.

Q If some creditor came in on the 10th of January and refused to deliver goods until he got a check in payment for them, you wouldn't be there to draw the check, would you? A I wouldn't be there.

Q This check that you have there which has been put in evidence covers the indebtedness of the Rialto Restaurant to Mr. Marx for some period prior to the month of January, 1929, doesn't it? A Correct.

By Mr. Cohen.

Q Do you know what dates appear on those checks that were not mailed, do you know what would happen to those checks that were not mailed? A We leave them at the cashier's desk.

The Court: Those that you leave at the cashier's desk, those are not mailed. Are they signed or not?

The Witness: They are signed.

Q When you leave them at the cashier's desk? A Yes, sir.

CHARLES WILLIAM ROEHM, JR., sworn in behalf of defendant Trustees of Third Presbyterian Congregation, in rebuttal.

Direct examination by Mr. Gray.

Q Mr. Roehm, you have testified previously, I believe, that you are the solicitor and have charge of the repairs and repair records for the Otis Elevator Company? A I have.

Q Have you any knowledge from your position as solicitor in charge of the records of any repairs that have been made at a time previous to this elevator in question? A I have.

Q Can you tell us when those repairs were made? A October 21, 1928, November 27, 1928.

The Court: I think he meant only the last.

The Witness: It is all part of the same job, November 27, 1928, and December 6, 1928.

Q All the same job? A Yes, sir.

Q Will you tell us just what those repairs consisted of, what was done? A Installed new cables, repaired platform, fastened rail brackets, adjusting and tightening entire machine.

Q Could you say from the work that was done— A I haven't finished. Getting car into rails, installed new brackets, repaired old brackets and fixed car so it would come to floor level. That means with the sidewalk.

Q Would you say from your repairs that you made, to your knowledge of the records, that when your job was finished, that the car was in good shape? A Yes, I would.

Q Thoroughly overhauled? A I would.

Q All that work was done by the Otis Elevator? A It was.

Q It was paid for by the Trustees of the Third Presbyterian Church? A It was.

Q Mr. Roehm, you have testified as an expert. There has been some testimony that the cables had crossed on the drum and gotten out of the groove. Could the car be operated if the cables had crossed or gotten out of the groove? A It could.

Q For any length of time? Would it soon put the car out of commission? A If it was run for a number of times it would possibly crush the cables and break them.

Q How many times would it have, either as you say, get so it could not operate the car? A I could not say.

Q Could you give any estimate? A I couldn't say.

Q Does it or does it not interfere with the operation of the car and make it harder and almost impossible to operate after the cables get out of the grooves and cross it? A Yes, sir.

Q You would say that after operating it a certain number of times it would get to the point where it couldn't be operated at all?

Mr. Francis: I object to that as leading. He hasn't said it.

Q What did you say with reference to it? A I said if it was run for a period of time, the cables would be crossed and mashed so that they would break: being twisted and mangled on the drum and come off the drum.

The Court: Come off the drum because they would separate and break?

The Witness: Possibly for that reason and if they switched to the edge of the drum, overlapping each other and fall off, or be pushed off.

By the Court.

Q Is there a flange on the end of the drum to keep the cable from going off? A There is a flange on the edge of the drum, but if the cable is overlapping the cables would be above that flange.

By Mr. Gray.

Q Would a steady pressure or a sudden application of force be more likely to cause those cables to cross or to come off if they were crossed?

Mr. Francis: I object to that as leading.

The Court: I will allow it.

A A sudden jar or a sudden pressure, both or either are just as likely to knock them off as the other.

Cross examination by Mr. Francis.

Q Mr. Roehm, you said that if these cables got out of the groove that it would be more difficult to operate that elevator, it would require greater pressure, greater effort to send it up and down? A It would not.

Q Were you here yesterday when Mr. DiNicholas testified that he didn't like the elevator, that it was hard to operate, that he didn't think it should be there? A I was here.

Mr. Gray: There is no testimony to the effect that any of these complaints are subsequent to these repairs. While he was there the elevator operated hard and he wanted a new one. There is no testimony basing that the complaints were made to the Trustees subsequent to the time that this witness testified. I don't think it is a proper question.

The Court: I will allow it. I am not sure the dates were testified or not.

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

Exception noted as ground of appeal.

Q When you made these repairs in November, or sometime thereafter to this elevator, part of the repairs consisted of straightening the platform in the groove? A No, sir.

Q What was it with reference to straightening? A Repairing the platform which we covered and securing the rails.

Q Didn't you say something about straightening the grooves or putting the platform in the groove? Look at your report, please. A Getting car into rails.

Q Getting car into rails? A Yes.

Q What else? A Repairing platform, fastening rail brackets, adjusting and tightening entire machine, installing cables, install new brackets, repair old brackets, fix car so it would come to floor level.

Q Do you know how the elevator happened to be brought to floor level, the surface of the floor, when you were called in to repair it on this occasion? A No, sir.

Q The doors that are on the sidewalk surface, which were part of the sidewalk and protect the elevator areaway, are they above the surface of the sidewalk? A They are at the top of the doors, flush with the surface of the sidewalk.

Q Do you know why the elevator wouldn't go to the surface of the sidewalk before you came and repaired it on this occasion?

Mr. Gray: He said he didn't know.

The Court: Let him say it again.

The Witness: I do not know.

Mr. Cohen: You may recall that he testified he was there the morning before. Testimony that he gave here regarding other repairs made as indicated on the bills that he has there, would be merely hearsay.

The Court: He says he doesn't know; that is the answer to it. He said he was there yesterday, but I am not sure that he said he had never been there before.

Mr. Cohen: Is that correct?

The Witness: That is correct.

The Court: That was the first time you had ever seen this job?

The Witness: This particular job.

Q With the elevator doors in a normal position, flush, as you say, with the sidewalk, and you send the elevator up, what would be its position underneath those doors? A There should be a clearance between the car platform and the doors.

Q So that when the elevator has reached its full position at the top of the shaft, the elevator doors wouldn't be pushed up two or three inches? A They should not be.

By Mr. Cohen.

Q The cables would be taut, would they not, after the elevator were completely up and flush with the sidewalk? A Yes, sir.

Q You testified that in response to a question put to you by Mr. Gray, that the ~~church~~ CHURCH paid for the repairs, they also ordered the repairs, did they not? A Yes, sir.

Mr. Gray: We concede that.

OSCAR GUENSCH, the plaintiff, recalled in his own behalf, in rebuttal.

Direct examination by Mr. Francis.

Q Mr. Guensch, during the course of your work for M. Marx, in connection with your delivery of foodstuffs to this restaurant, did you have any difficulty with Mr. DiNicholas a short time prior to this accident about that elevator? A Yes, sir.

Q What in particular happened in regard to the putting of crates on that elevator?

Mr. Gray: I object to it; I don't think it is proper rebuttal.

The Court: I do not think so.

Q Will you tell the jury what that was? A When I come there—

The Court: Can you fix the date?

The Witness: Quite a lot of times before that.

Q On this particular occasion I am referring to, now how long before the accident was that? A It was in November.

Q Now, tell us what took place? A I pulled up in front of the place with six gallons of cider to deliver to him and I had it in the street. It was after six o'clock at night and the restaurant was crowded and I asked him if

I couldn't leave it, if I could go on. I had other deliveries to complete. I had to go to New Brunswick. He said he would not accept the stuff unless it was put on the elevator and received by the man there.

Q On these other occasions when you delivered foodstuffs this man would come and the spaghetti man would always come out and put them on the platform? A I done it myself.

Q This Workmen's Compensation petition that has been put in evidence, the attorney's name is Ward; did you know Mr. Ward before this accident? A No, sir.

Q Where did you first see him? A In the hospital.

Q That was immediately after this accident? A Yes, sir.

Q Did you send for him? A No, sir.

Q Do you know who sent him there? A Yes, sir.

Q Then tell who sent him there. A He told me Commissioner Egan.

Q Did he tell you he was going to handle your case for you? A Yes, sir.

Q Did you talk over the accident with him that day? A Yes, sir.

Q After you got out of the hospital or subsequent to that, did you go down to Mr. Ward's office? A Yes, sir.

Q Did you, to the best of your recollection, tell Mr. Ward that you slipped and fell on this elevator and the platform went down? A I told him I stepped on the elevator.

The Court: The question is: did you tell him you slipped?

The Witness: No, sir.

Q Did you tell him you slipped and fell? A No, sir.

Q You are sure? A Yes, sir.

Q Did you tell him it was wet that day? A Yes, sir.

Q When you went down to his office on this occasion subsequent to your release from the hospital, was this Workmen's Compensation petition prepared? A Yes, sir.

Q Did you sign it? A Yes, sir.

Q Did you read it before you signed it? A No, sir.

Q And was that compensation petition subsequently discontinued with your consent? A Yes, sir.

Cross examination by Mr. Cohen.

Q Where is Mr. Ward's office? A In the City Hall.

Q What department? A I don't know.

Q Do you know that he has an office at 1060 Broad street? A I didn't hear that question.

Q Do you know that he has an office at 1060 Broad street? A No, sir; I do not.

Q You wouldn't say that he hasn't an office there? A I wouldn't say; I don't know.

Q You do not know the particular department he is in? A I can't hear you, sir.

Q You don't know the particular department he is in?

The Witness: I can't hear him, your Honor.

The Court: You do not know the particular department in the City Hall in which he is in?

The Witness: No, sir; I do not.

Q How soon after the happening of the accident did Mr. Ward come to the hospital? A About a week.

Q Can you recall the day of the week it was? A No, sir.

Q Can you tell us what time of the day it was? A In the morning.

Q Anybody there besides you and Mr. Ward? A No, sir; the doctor brought him in and he went away.

Q What doctor? A Dr. Vanderveer.

Q Was he the interne there? A Yes, sir.

Q Did you appear with Mr. Ward in the Workmen's Compensation Bureau? A Yes, sir.

Q How many times? A I can't recall.

Q Will you tell us about how many times? A About two, I should judge.

Q And did you appear before the Deputy Commissioner or a Referee? A A Referee.

Q Do you remember who it was, sir? A I think it was Mr. Higgins.

Mr. Francis: I think it is Mr. Wagner.

Q Mr. Ward came there and told you that Commissioner Egan sent him, is that right? A Yes, sir.

Q Were you willing that he should represent you in this case? A Sir?

Q Were you willing he should represent you in the Compensation case? A He told me Commissioner Egan sent him there and I thought it was all right.

Q Do you know Commissioner Egan personally? A No, sir.

Q Why did you think it was all right, because a man named Mr. Egan sent a man to your bed or cot in the hospital?

Mr. Francis: I object to that as immaterial.

The Witness: Will you please repeat the question?

Q (Repeated by stenographer.) Why did you think it was all right, because a man named Mr. Egan sent a man to your bed or cot in the hospital? A I thought it was all right.

Q But you didn't know? A Sir.

Q The doctor sent him in? A Yes, sir.

Q You didn't see him before? A Never seen him, no, sir.

Q You had confidence in him, didn't you? A Yes, sir.

Q That as I get it, Mr. Ward came to the hospital, told you Commissioner Egan sent him there and that he was going to be your lawyer, and you were satisfied? A Yes, sir.

Q You swore to the petition? A I don't remember, sir.

Q You remember the date on which you filed the petition? A No, sir, I do not remember.

Q Do you remember the month? A No, sir.

Q Do you remember the year? A No, sir.

Mr. Cohen: No further questions.

Cross examination by Mr. Gray.

Q You were satisfied with the compensation received and you signed the release, did you not?

Mr. Francis: Objected to.

The Court: Objection sustained.

Q You assigned a discontinuance of the petition? A Yes, sir.

Q Mr. Ward was with you when you did it? A I don't remember.

Mr. Gray: That is all.

Mr. Cohen: This is a surprise to me because we have a right to assume that one appearing as an attorney for a petitioner in any court is one who is presumably retained by the petitioner because he bound himself by everything that followed. Under those circumstances I should like to be afforded about ten minutes in which to get Mr. Ward, whom I do not know at all. I think the jury is entitled to have his story in fairness to everyone concerned, and in fairness to the Court.

The Court: What about it? You mean as to how he was retained?

Mr. Cohen: And whether or not the petition was read to him, whether or not he had sworn to it.

The Court: I haven't any objection.

Mr. Cohen: Not only that, in fairness to Commissioner Egan and in fairness to this member of the Bar.

The Court: I don't see any reflection on the member of the Bar.

Mr. Francis: I don't see there is anything that requires an adjournment.

The Court: We will adjourn for ten minutes.

(At this point a recess was called for ten minutes.)

JOSEPH A. WARD, sworn in behalf of plaintiff in rebuttal.

Direct examination by Mr. Cohen.

Q Mr. Ward, are you a member of the Bar of the State of New Jersey licensed to practice in this State? A Yes, sir.

Q And have been for how long? A Since 1928.

Q And your office is where? A 443 Broad street.

Q And how long have you been in that office there? A Two years.

Q Mr. Ward, I show you what purports to be a petition for compensation made, wherein Oscar E. Guensch, Jr., is petitioner against Meyer Marx, respondent, and ask you to look at it (handing petition to witness). At the time of the signing of that petition, where were you located, where was your office located? A 1060 Broad street.

Q Was that the Industrial Building? A Industrial Building.

Q When for the first time did you meet Mr. Guensch? A If the Court please, this is a matter of a lawyer and a client.

The Court: What difference does it make? If you claim privilege, I will consider it. Is

there any good reason why you shouldn't testify?

Q Did you draft the petition? A I did.

Q Did Mr. Guensch sign it? A He did.

Q Did he sign it in your presence? A He did.

Q Did you read the petition to him? A Yes.

Q Did you administer an oath to him? A Yes.

Q Did he swear to it? A Yes.

Q Is there anything in the petition you omitted to read to him? A No.

Cross examination by Mr. Francis.

Q Mr. Ward, you say you have been practicing law since 1928? A Yes.

Q And you had been admitted a short time before you got this case, isn't that right? A Yes.

Q What is your connection with the City Hall? A Employee of the Law Department at the present time.

Q And what was your connection with the City Hall or Commissioner Egan at the time you got this case? A I was a clerk in the Department of Parks and Public Properties.

Q Now you are in the City Law Department? A Now I am in the City Law Department.

Q Your office is at 433 Broad street? A Yes, sir.

Q Is that an office building? A Yes.

Q You say you prepared this petition? A That is right.

The Court: The question is, you say you prepared this petition, is that right?

The Witness: The petition was prepared by me from facts.

Mr. Francis: I move to strike that out as not responsive.

Q Did you prepare that petition? A I did.

Q You say you read each and every question and answer in that petition to Mr. Guensch before he signed it? A I did.

Q Have you had any other compensation cases since then? A If I said that I had three compensation cases altogether, would that answer your question, because I just can recall.

Q To your best recollection? A I might say I was in on a compensation case since then.

Q When you say you read this to Mr. Guensch, that is your recollection, is it not? A In fact, I read it. I will stick by my answer, I read it to Mr. Guensch.

Q You read it, each and every question to him and you always do that. I suppose you read the petition even after you say you got the information from your client, prepared the petition, then you read it to him before he signed it? A To the best of my recollection I read everything back as he answered the questions. The questions were answered as they were read to the petitioner.

Q So that you took this petition and you read it to him, you read the question to him and then you filled it out as he answered, is that right? A Yes.

Q And you prepared it then at your office? A I did.

Q You had no information before that? A I had no information before that.

Q You had no information before this petition was filed as to the facts? A I did not.

Q Have you a file in this case? A Yes, I have a file.

Q Did you bring that file with you? A I did not.

Q You knew you were coming to testify in this case, didn't you? A Not until two minutes ago.

Q Did Mr. Cohen explain to you over the telephone what you were coming here for? A Yes, he did.

Q Do you know, then, you had a file in this case? A Yes.

Q In this file, did you have a statement from Mr. Guensch as to what he told you about this accident? A I can't recall. Our papers are in the file now. The case is over.

Q Isn't it a fact that you got the information from this man in the hospital and prepared this petition and you wrote then the information on a statement? A Mr. Guensch gave me no facts at St. Michael's Hospital.

Q Did you know why you were coming here to testify? A Yes.

Q And you knew also that you had a file in this case? A Yes.

Q Did you look at the file before you came up here? A No.

By Mr. Cohen.

Q What office were you in when I called you? A Law Department, City Hall.

Q And your law office is at the North National Bank or the old North Ward National Bank? A Yes.

Q Where is that from the Law Department, about how far? A About three-quarters of a mile.

Q Did I ask you to bring your file? A No.

Q From whom did you get your facts which you embodied in the petition? A Over the telephone from Mr. Klein.

Q I mean with respect to the petition, from whom did you get the facts? A From Mr. Guensch.

By Mr. Gray.

Q I want to know, Mr. Ward, were you present at the Compensation Bureau when this case was disposed of? A The matter of final adjudication in the case in the Workmen's Compensation Bureau was by the petitioner himself who immediately requested that he be withdrawn from the Workmen's Compensation Bureau.

The Court: The question was whether you were present at the time.

The Witness: I was present.

Q Was he examined by the doctors while you were there? A Not at the time. There had been a number of hearings in this case and he had been examined a number of times by the doctors.

Q You signed this agreement withdrawing the compensation claim, did you? A Yes.

Q Did you see the examinations made by the State doctors? A No.

Q You did not see those? A No.

Q But you do know they were in the file and had been—he had been examined a number of times by the State doctors?

Mr. Francis: I object to that as leading.

The Court: Objection sustained.

By Mr. Francis.

Q This suit was discontinued, wasn't it, Mr. Ward? A Yes.

Q There was no allowance at that time made to you as a fee in this case, was there? A No.

Q You know, do you not, that an attorney who represents a petitioner in a Workmen's Compensation case is not entitled to any fee or to any agreement with his client for a fee unless it is fixed by the Board and approved by the Board, isn't that right?

Mr. Cohen: I think there is something in the discontinuance.

The Court: You mean in the continuance.

Mr. Cohen: In this agreement (indicating).

Q You know, do you not, that an attorney who represents a petitioner in a Workmen's Compensation case is not entitled to any fee or to any agreement with his client for a fee unless it is fixed by the Board and approved by the Board, isn't that right? A Yes.

Q There was no such approval and no other fee fixed, was there? A My recollection—

Q Yes there was, wasn't there? A I think, yes.

Q Would your files show that? A Whether the fee had been fixed by the Bureau?

Q Yes. A I think there is a consent at the time of this discontinuance.

Q Why didn't you incorporate the fee in your discontinuance? A If there was one, it was not included in there.

Q It was included in there? A If it was included in there, the fact of the matter is, I have received no fee in this case.

Q I want to know if there was any fee fixed by the Compensation Bureau in that discontinuance or in any other document you placed on file in the Compensation Bureau and had approved by the Compensation Bureau?

Mr. Cohen: If your Honor please, may I interrupt at this time. I think the record speaks for itself. Mr. Riley of the Workmen's Compensation Bureau produced that paper, D. 3, on behalf of the defendant, P. DiNicholas, Inc., as a part of the record. The company has cognizance of the fact that Mr. Ward rendered services and is therefore entitled to a fee.

Q Can you answer my question? Whether by any document you filed in the Workmen's Compensation Bureau, a fee was fixed for you in this case? A I can answer, "Yes."

Q And in the answer, "Yes," you mean that a document was filed then in the Workmen's Compensation Bureau fixing that fee, is that right, and that fee was approved by the Commissioner or a Deputy Commissioner or a Referee? A A consent was given by the Referee.

Q Did you file any such document with the Compensation Bureau? A I don't remember.

Q Would your files show if you had? A Probably will.

Q You know that under the provisions of this Act it is unlawful for you to fix any fee that isn't passed upon by the Bureau?

Mr. Cohen: I object to that on the ground that this witness wouldn't testify that the Referee approved of his fee.

Mr. Francis: I withdraw the question.

Q Don't you know that no agreement can be made unless it is placed in writing and put on file in the Workmen's Compensation Bureau?

The Cohen: Same objection.

The Court: I will allow it.

Q Don't you know you can't make any agreement with a working man for a fee that is not placed in writing as part of the compensation or agreement or discontinuance, or whatever it is, and stamped approved by the Board and put on file in the Workmen's Compensation Bureau? A I will have to plead that my recollection of the Act does not go that far.

Q After this was over, you sent Mr. Guensch a bill for $75.00, didn't you? A Yes.

Q You haven't been paid that, have you? A No.

Q You knew what Mr. Guensch's financial circumstances were, didn't you? A Yes.

Q Have you got that bill with you? A No.

Mr. Francis: That is all.

By Mr. Cohen.

Q Did I inform you, Mr. Ward, over the telephone that Judge Porter had granted a short recess for you to come right up? A Yes.

By Mr. Francis.

Q So that your delinquency with respect to your failure to produce the records is due to Mr. Cohen and not to you?

Mr. Cohen: I object to that.

The Court: Objection sustained.

Q Nevertheless you were not asked to bring a file along?

Mr. Cohen: I didn't ask him.

Q You were satisfied to come up and testify in this case to an incident that happened almost three years ago without your files and your notes therein to refresh your recollection? A Yes.

Q And you were satisfied as an attorney to do that? A Yes.

Q In connection with a case that involved what purported to be a—

Mr. Cohen: I object to that, I move that it be stricken out.

The Court: Strike it out.

Mr. Francis: I withdraw it.

By Mr. Cohen.

Q Was this testimony you have given to the best of your recollection—is it not, Mr. Ward? A Yes.

Q You feel you are deficient in your recollection of the facts as you have given them to the Court and jury? A Repeat that, please?

Q Do you feel you are at all deficient in your recollection of the facts as you have given them to the Court and jury? A I don't get you.

Mr. Cohen: I will withdraw it and reframe it.

Q You feel, Mr. Ward, that the facts you testified to before the Court and jury are the facts as you recall them? A Yes.

By Mr. Francis.

Q If you had your file with you, Mr. Ward, you could give us more definitely what they are, irrespective of what your recollection now is, couldn't you?

Mr. Cohen: I object to that, I think he was quite clear.

The Court: Objection sustained.

LAWRENCE N. ROSENBAUM, sworn in behalf of defendant DiNicholas, in rebuttal.

Direct examination by Mr. Cohen.

Q Mr. Rosenbaum, in the preparation of the Guensch case, did you find occasion to consult the office records of the Department of Labor, particularly in the Workmen's Compensation Bureau? A Yes, sir.

Q Did you have the office file in the Guensch case? A Yes, sir.

Q Did you make any notes with respect to those facts which you regarded as pertinent? A I made exactly—

Mr. Francis: I object to that as immaterial.

Q You did make some notes?

Mr. Francis: I object to that.

The Court: I will allow it.

Q Have you your original notes with you? A Yes, sir.

Q Will you tell the Court and jury what you found in the office records with respect to the fee of Mr. Ward?

Mr. Francis: I object to that.

Q Suppose you give it to us as exactly as you copied it from the records? A I saw it on the original folder on the back side; on the last page appears this notation: "October 16, 1929, both counsel appeared. 61 weeks, received the 21st—"

Mr. Francis: I move that it be stricken out. The question was, what did the Compensation file say as to Mr. Ward's fee.

The Court: Confine yourself to the notation.

The Witness: That is all in one notation.

Q Just with respect to the fee, what was done, what did you find from the office record? A Next sentence. "Proceeding discontinued at request of both counsel and by signed stipulation including that of petitioner. $75.00 attorney fees. Approved payable by petitioner. Joseph A. Ward for Mr. Guensch." And it is also signed by the respondent.

Motions for Direction of a Verdict.

By Mr. Francis.

Q Did you have any agreement for the payment of compensation on record? A I saw the agreement that is marked, I think D. 3.

Q The stipulation you mean? A The stipulation.

Q That is the only agreement you found on record? A That is all I found.

Mr. Cohen: In behalf of the defendant, P. DiNicholas, I would like to move for a direction of verdict on the following grounds: On the ground that there is no proof of ~~actual~~ ACTIONABLE negligence on the part of P. DiNicholas, which would entitle this case to go to the jury.

There has been no proof of notice to the defendant, P. DiNicholas, Inc., of any defect in the elevator or that any defect existed for such a long time as charged the defendant with knowledge of any defect in the elevator or platform or any part thereof.

Defendant, P. DiNicholas, Inc., respectfully asks for a ~~non-suit~~ DIRECTION OF VERDICT on the further ground that the plaintiff was guilty of contributory negligence.

The Court: Motion denied.

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

Exception noted as ground of appeal.

Mr. Gray: I respectfully ask for a directed verdict on the ground that the defendant, P. DiNicholas, had control of the elevator.

I respectfully ask for a ~~non-suit~~ DIRECTED VERDICT on the further ground that there has been no proof

of notice and on the ground that there was no contributory negligence on the part of the plaintiff.

The Court: Motion denied.

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

Exception noted as ground of appeal.

Mr. Gray sums up for defendant Trustees of Third Presbyterian Congregation.

Mr. Cohen sums up for defendant P. DiNicholas, Inc.

Mr. Francis sums up for plaintiff.

COURT'S CHARGE.

The Court charges the jury as follows:

PORTER, *J.*

Members of the Jury:

This suit that you have been impaneled to try is one that has been brought by Oscar Guensch against the Trustees of the Third Presbyterian Congregation in Newark and P. DiNicholas, Inc. The plaintiff asks for damages against one or both of the defendants for injuries which he claims to have suffered because of the negligence of one or both of the defendants.

It is not in dispute that on the 10th of January, 1929, in the forenoon around 9 o'clock Mr. Guensch was hurt, on the premises at 913 Broad street, Newark, owned by the Trustees of the Third Presbyterian Congregation in Newark and under lease by it to the other defendant, P. DeNicholas, Inc. It is not in dispute that there was a sidewalk lift or elevator on the

premises, going from the sidewalk to the cellar, the shaft of which was about ten feet in height; that on the elevator therein was a notice, "Freight Elevator," and that it was at or about that elevator where the plaintiff received certain hurts. It is not in dispute that he was taken to St. Michael's Hospital where he was treated, that he has been treated since and that he has not worked since.

There is a dispute as to the responsibility of the defendants for the accident. It is in dispute as to whether there was any negligence on the part of the defendants which was the proximate cause of this accident.

The defendants deny any responsibility for the accident. They deny that there was any breach on the part of either of them, of any duty that they owed to the plaintiff. They deny that there was any act on their part of omission or commission which was an act of negligence.

The charge that Mr. Guensch makes is that there were such acts of negligence by reason of which he was hurt.

Mr. Guensch says that he was employed by M. Marx & Son, dealers in delicatessen supplies, as a driver of the truck of M. Marx; that one of the customers of M. Marx & Son was P. DeNicholas, Inc., who did business under the name and style of the Rialto Restaurant; that while in the discharge of his duties as deliveryman or truckman he came to the premises occupied by the defendant P. DeNicholas, Inc., on the morning of January 10th with some goods that had been purchased by one of the defendants from his employer; that he was under instructions not to deliver them until he received

a check for some money that was due; that he saw Mr. DeNicholas personally in order to collect; that Mr. DeNicholas gave him a check, the ink on which was wet; that he walked outside of the door or stood in the doorway while blowing on the check or waving it to dry the ink on it; that before doing so Mr. DeNicholas invited him to put the goods on the lift or elevator; that Mr. DeNicholas said to him, "I'll go down and send the elevator up."

Mr. Guensch said that he never rode on the elevator; that he had previously delivered goods there a number of times during the year; that he was in the habit of delivering goods there for his employer. I think his testimony was that he could not say how many times he had been there, but it was twenty or thirty times at least. He said he was in the habit of doing what he did on this or what he started to do this day —put the goods on the elevator—not deliver them on the sidewalk to be taken on the elevator by the employees of P. DeNicholas, but to put them on the elevator. He says that was the arrangement that was made, that was the invitation that he received from Mr. DeNicholas and in pursuance to that, after waiting some little time for the check to dry, around five minutes, he stood in the doorway or in the vicinity, he then went out and raised one of the doors, the one with the handle on it, and then having raised that he stepped on to the platform of the elevator which he says was at the sidewalk level and which he saw when he raised the door, and while standing there on the elevator platform he stooped to raise the other door and while in the act of raising it the elevator dropped and the next thing that he re-

calls was that he was on the table in the hospital. He has no recollection of how he got there or anything that happened in the meantime. The plaintiff says that he was hurt, his back was hurt, also his head was hurt—one of the eardrums—the right eardrum, was punctured, that he has continual headaches and backaches, that he is nervous, that he is unable to have sexual intercourse with his wife, that he was twenty-seven years of age at the time of the accident, that he has had spells of numbness on one side from his head to his waist, that on one of those occasions he was unable to open his jaws and had that numbness, for which he was taken to the hospital where he was kept a couple of hours and where he was given treatment: there he was found to have no sensation on that side—pins and needles were stuck in him, and he did not feel them and after that treatment I think his doctor testified that he was all right. His testimony was that he was not suffering from lockjaw or tetanus, but that hysteria caused these symptoms, that he faints at times, that he is dizzy, that he is unable to work, that his wages at the time of his employment when he was hurt were $35 a week.

He tried to work on two occasions, first as a watchman, but he was unable to do the work because of his physical inability and he had to quit—I think only after a very short try—a couple of hours or so. On another occasion he tried to do some work, delivering circulars and found himself unable to do that and he has been unable to work, and he has not worked, from the time of the accident.

He says that he had a brace that was prescribed for him that cost $35. The bill in St.

Michael's Hospital was $166. Dr. Flax's bill was $155, he treated him from the time of the accident or shortly afterwards, I think perhaps from the time of the accident up to the 16th of August of the year in which he was hurt, seven times in the plaintiff's home and sixty-seven times at his office. His treatments consisted of massage and baking for the purpose of overcoming, if he could, this condition of the back which has been diagnosed as a crack or fracture in one of the bones in the lumbar region of the spine, in the main spinal column, one of the side bones to which the muscles are attached, I have forgotten the name of it, and that the sacro-iliac joint that has been described to you has been strained or sprained and that there is a separation there which is a permanent condition.

The doctor says that after August, 1929, he has not given him those massage or baking treatments. He says he sees him every month or six weeks, but feels that there isn't anything that he could do, that the treatments did not improve him or prove successful.

Dr. Koppel who examined him and who testified as to his findings saw him four times at $10 a visit—$40. Dr. Perlberg who took the X-rays at Dr. Koppel's suggestion charged $20.

Mr. Guensch asks that he be compensated in such sum as you think will compensate him for the loss that he has suffered in wages, or may suffer in the future because of his inability to work and earn wages, all the expense that he has been put to or may have in the future in order to effect a cure or improve himself in his condition, and such further sum as you think

will properly compensate him for the pain and suffering and physical disability that he has or may have in the future because of the hurts that he received in this accident.

Dr. Dowd says that he was permanently disabled and would estimate it to be in 66 2/3% of his ability. Dr. Brothers who examined him found no disability, found no neurosis or nerve condition. You will remember that Dr. Dowd testified as to the result of the examinations that he gave the plaintiff, that he gave him the Rhomberg test, a test that consists of having a man stand with his heels together and his eyes closed, and with his arms outstretched. This is to test his equilibrium or stability, as I understand the testimony, and was one of the tests that Dr. Dowd gave him. Dr. Dowd testified that he would have fallen had he not caught him and that is one of the reasons I take it that Dr. Dowd relied upon to form the opinion that he had as to the man's nervous condition and general condition which he has described to us.

Dr. Brothers said that he gave him all of the recognized tests that are given, that are well recognized by medical men, and among them he gave him this same test, and that that manifestation was not present, that he did not sway, that he did not fall, but that this test was negative and that the only thing that Dr. Brothers could find abnormal, I think, was the impairment in his hearing. Other than that he saw no disability, he found no condition in the sacro-iliac joint such as has been described by the others, by Dr. Flax and Dr. Dowd and then the defendant's doctor, Dr. Koppel, and he gave you his reason. And so you have a dispute among the

physicians who have testified here with respect to the nature of this man's hurts and their extent.

This case I say is predicated on the charge that Mr. Guensch makes, that the proximate result of the accident was the negligence of one or both of these defendants because of the fact that the elevator or lift was not in safe and proper condition.

Negligence is the omission to do something which a reasonable man, guided by those considerations which ordinarily regulates the conduct of human affairs, would do, or the doing of something which a reasonable man would not do.

Negligence is never presumed in the law but must be proven. Negligence must be proven to your satisfaction before there can be a recovery. If the testimony is considered by you to be equal and the scales are even as to whether there is negligence or there is not negligence, that is not proof, and in that event there must be a verdict of no cause of action.

The burden is cast on the plaintiff to establish by the clear weight of the testimony the truth of his charge that there was negligence which was the proximate cause of this accident and that it was the negligence of either one or both of these defendants. If you find no negligence, if you find that he has not established that proof by the weight of the testimony, of course your verdict must be no cause of action. But, if he has established it as against both defendants, your verdict will be against both of them without your attempting to say how much each will pay. You fix the sum and then

it is against both of them without dividing the amount. If on the other hand, you should find negligence on the part of but one of the defendants you will so state as to the other defendant no cause of action.

The mere happening of an accident isn't sufficient to establish negligence. It must be proved by the preponderating weight of the testimony.

The defendants not only deny negligence, but, they say as far as they were concerned it was either an unavoidable accident or it was due to the negligence of the plaintiff, that by his misconduct, by his own carelessness, by his own negligence, by failing to exercise that degree of care that a reasonably prudent person should have exercised, he brought about the accident himself. He himself did something that a reasonably prudent person should not have done or failed to do something that a reasonably prudent person should not have failed to have done, and that is the reason for the accident. If you find that to be so, if you find that the defendants have established that by the clear weight of the testimony, because that is their duty, that being an affirmative defense, then of course there can be no recovery no matter how negligent the two defendants may have been.

Mr. Guensch cannot profit by his own wrong. If he jumped into this elevator without looking, if the elevator was not there but halfway down the shaft as they say, you may infer from the testimony that there was negligence on the part of the plaintiff.

The theatre man says that he used the elevator a couple of hours before and left it half way up the shaft. That may be and you may find

from the testimony that Mr. Guensch opened the door and jumped in the elevator shaft when the elevator was not there, and that that was negligence.

If the plaintiff, Mr. Guensch, was where he had no right to be, where he was not invited to be, then he was not an invitee. His case is based on the theory that he was invited to do what he says he was in the act of doing when this thing happened. He says that he was invited to put the goods on the elevator, and in pursuance of that invitation he was hurt. Now, the defendant P. DeNicholas, Inc., said, "No, that was not an invitation at all. He was not invited to do anything of the sort. He was invited to put the goods on the sidewalk and we were to take care of them. It wasn't his job to open the elevator door and put the things on the elevator. That was our job. We didn't invite him to do that." If you find the facts to be that he was doing something that he was not invited to do or that he was doing something he was ordered not to do and under those circumstances he was hurt, then of course he was not an invitee at all and he can't complain if under those circumstances he was hurt, unless the defendants, one or both, were willfully negligent, did some willful act—and there is no charge that they did.

Both of these defendants deny any responsibility. The owner of the property says, "We had no obligation to repair this elevator." On the contrary, in our written lease we have a provision that the defendant tenant should do that. "Yes, we did repair it, but, our assumption of that duty didn't relieve the tenant from doing it and under those circumstances we are only

responsible if we did not properly do that which we undertook to do. We say that we did do properly that which we undertook to do because in the November preceding this accident," October or November perhaps, I have forgotten the exact date, "within a very short time before this accident we had the Otis Elevator people go there and repair it. They went on several different occasions in the prosecution of this work and they put it in firstclass condition." I don't think the testimony was that it was perfect when they got through, as counsel says in his summation. I don't remember that any witness said that it was perfect. At any rate they say they did what was required to do to put it in safe and proper condition. I am quite sure that is the testimony. "Therefore," say the church, "there was no failure on our part to have done properly that which we voluntarily undertook to do and so we have violated no duty."

The law is this in that regard: Where a landlord reserves to himself or itself, this being a corporation, a common passageway for use among several tenants or hallway or elevator, then he is under a duty so far as concerns those people who have the right to use these passageways, the tenants or those who are invited by the tenants to use it, to use reasonable care in the exercise of that duty that it owes to keep that part of the premises in a reasonably satisfactory condition so that people won't be hurt.

The plaintiff says that the landlord did not use that degree of care that it should have used in the discharge of that duty. And it is a violation of that duty that the plaintiff says occurred and for which he asks that you fix the responsibility on the owner.

There is no question here that the owner of these premises had any actual notice of the fact that the elevator was not in proper condition, that it was not in proper repair, that it was in a dangerous condition or a condition that was out of repair, that I can recall. And so in the absence of having actual notice the owner can only be held responsible if a sufficient interval of time elapsed from the time when it became out of repair that the landlord by the use of that degree of reasonable care that it was under a duty to exercise should have discovered it. What I mean by that is: If for instance there was a part of the premises that became broken, if in a hall in an apartment house, where the landlord had reserved to himself the care and custody of the hall that was used in common by the various tenants, a banister or a rail had become broken or destroyed and someone was hurt by reason of that defect, the landlord would be responsible if he had notice of that defect and then had neglected to correct it, or if it had existed for some length of time that he should have discovered it by the exercise of reasonable inspection. The duty is on him not to wait until somebody tells him of something that is out of repair, but he must discover a defect by the exercise of that degree of care which a reasonably prudent owner should exercise in order to keep acquainted with the condition of his property.

In this case I know of no testimony, and I think there was none in the case, that indicated that any representative of the church had knowledge or notice of the unsafe condition of the elevator. However, it would still be responsible

if the elevator was out of repair and that condition would have been disclosed to it by the exercise of that degree of care which I have indicated to you it was under a duty to exercise.

Now, on that point you have some testimony that the reason the elevator dropped was that the cables were not properly wound on the drum. The question was asked of some of the witnesses whether a person looking at the drums and the cables could see that condition. I think the answer was that they might or that they would.

That is the explanation of this accident, that there was a condition that existed there of improper rolling of the cables around the drums, and that when a pressure was put on the elevator it caused it to drop until the slack was taken up. You will remember in detail the theories that were advanced by the expert elevator men on that point. Even though there was this defect or condition of disrepair or whatever it might have been that existed, the landlord would not be responsible unless a reasonable inspection would have disclosed it. That raises a question of fact for you to decide on that point.

As far as the tenant is concerned, while it may be true that the lease required him to make repairs, and while it may be true that the mere assumption of that duty by the landlord didn't relieve him from that necessity, Mr. Guensch is not concerned with, nor is he bound by any arrangement or contract that existed between the tenant and the landlord. He says, "I don't care about that, I am not bound by it," nor is he under the law. "But," he says, "irrespective of whether the landlord should have done it or should not have done it, he was guilty of an act of negligence in inviting me to use something

that was not in good shape. He invited me to use it on the morning that I was hurt, and if in so doing he knew it was out of order, he is responsible if he should have known it was out of order." He is responsible because the same rule applies to him that I have just enunciated as applying to the landlord, either of actual notice or constructive notice. That means that even though the tenant did not know that the elevator was not in proper condition, if a reasonable inspection of it would have disclosed that and he failed to make that inspection or made it negligently, then he is responsible because that would be his negligent act. That is what the plaintiff charges with respect to the defendant, P. DiNicholas, Inc. He says it owed him a duty just as the owner of the building did. He charges that they both owed him a duty and that they both violated it, but, both earnestly deny that they did violate those duties that they owed the plaintiff.

Those are questions of fact that you must decide as well as the other question of fact as to the extent of this man's injuries and the nature of the negligence. These are all questions of fact which are in dispute and must be decided by the jury. That is your function. It is my job to decide questions of law and to explain the law to you that governs the situation, which I am trying to do. You are the judges and the sole judges of the facts and this is a factual question as to the liability as well as to the extent and nature of this man's injuries. It is my duty to submit it to you for your determination and it was because in the opinion of the Court there were questions of fact rather than questions of law involved here that the

Court denied the motions that were made by counsel for the defendants for a non-suit and again for a directed verdict, and that is the only reason those motions were denied by the Court. It does not mean and it can't mean anything else. If you think that that is indication of how I would decide the facts were I in your position, please dismiss that from your mind because you can take no such significance from my ruling. This question of fact is for you to decide and only you, all these questions of fact.

There has been some comment made on the Workmen's Compensation Law. It develops that the plaintiff filed a petition with the Workmen's Compensation Bureau of this State for compensation from his employer on the theory that he was hurt in the performance of his work and under the law, under those circumstances, whether it be his fault or not, he is entitled to compensation from his employer. His employer was insured in the Hudson Casualty Company. This plaintiff had some hearings before the referee or deputy commissioner of the Bureau of Compensation who was hearing the case and he received certain compensation pending a final determination of his claim. Under the law he would be entitled to receive such sums as his injuries warranted.

It seems that after having received compensation he discontinued those proceedings, and filed some sort of stipulation in that matter which is here before you in evidence, and elected to bring this suit. If he should recover a judgment in this suit he will be obliged to pay back to the insurance company or his employer, or whoever paid anything under the Compensation Act, such sums as he paid, the expenses that may have

been paid for the hospital or the doctors, or what not and such sum as he received for compensation because of his disability. Those bits of evidence with respect to that were not admitted on the theory that it had anything to do with this proceeding, because it appears that when he signed and swore to his petition, which was first filed I think in March, 1929, by Mr. Ward, his attorney, with the Bureau of Compensation, he said that the accident occurred because he slipped and fell, whereas here he says that it happened not because he slipped and fell but because he stood on the elevator and it went down when he raised the door. That is evidence only for the purpose of attacking his credibility, because it is a statement inconsistent with the one that has been made here. That is the main purpose for which that and all these proceedings with respect to Workmen's Compensation have been introduced.

We are not concerned with the Workmen's Compensation proceedings except as they might have a bearing on the questions of fact which are here in dispute, having in mind, as I say, the theory of the defendant, that this accident did not happen as this plaintiff here says it happened—that in pursuance with the invitation of Mr. DiNicholas he opened the doors of the elevator preparatory to taking the goods down and while doing that he stood on the elevator platform to raise the other door—but rather it happened that he, through his own negligence or carelessness stepped into the open well of the elevator when the platform was not there, not doing it intentionally, but slipping and precipitating himself into this open well. Not knowing perhaps that he was going to, not intentionally,

step in, but that he slipped in and the elevator was halfway down and it was that fall that caused him the hurts and not the fall of the elevator as he says. The defendants say that is corroborated by a statement he made at the time he signed his petition with the Workmen's Compensation Bureau, that that is inconsistent with what he has said here: Therefore it is admissible for the purpose of attacking his credibility and only that.

I was asked by counsel to refer to the two provisions of the Compensation Act. Do they want me to do so?

Mr. Cohen: It is not necessary.

Mr. Francis: It is not necessary.

Mr. Gray: I would like you to read it, except that you have suggested it was for the purpose of attacking his credibility.

The Court: Whatever other facts appear on the petition that are inconsistent are of course for the same purpose of attacking his credibility.

Counsel for the defendant tenant, P. DiNicholas, Inc., say that if a witness testified falsely you could disbelieve him. That is true with this modification. The correct rule, as I understand it, and you will take what I tell you the law to be, is that if a witness testifies falsely with respect to a material fact for the purpose of deceiving you, then you may disregard all of his testimony if you wish. In other words, you are the sole judges of the facts, you are the sole judges of the testimony and the weight that it will receive. You separate the truth from the untruth. If anyone is testifying falsely, you say who they are. If, as I say, they do it for the purpose of deceiving you with respect to a material fact,

you may disregard everything that they have said. You weigh the testimony, you separate the good from the bad.

Just because the witnesses do not all agree does not mean necessarily that anybody is testifying falsely. What one person may recall and what one person may observe, another may not. You have to take into consideration different intellects and their ability to remember, the difference in their ability to observe. You reconcile the testimony where it does not coincide if you can.

When you come to opinion testimony, it is based upon the ability and the experience that those persons have who give that testimony. Doctors disagree. They have disagreed to some extent in this case. You reconcile their testimony if you can. You give it such weight as you think it is entitled to receive, no more and no less.

You ask yourself what is the likelihood of the stories being true. Do they square with your knowledge of affairs and people? What interest have the witnesses in the outcome of this suit with respect to the credibility that their stories are to receive? You size them up and find the facts after you have weighed all the testimony.

The defendants say that of the three people who testified for the plaintiff with respect to the actual occurrence of this accident, two of them are not to be believed, that Dan Costello, who was said to have been with the plaintiff, the helper on the truck on the morning of the accident, is not reliable. He gave some testimony and it was read here and counsel have pointed out the reasons why he says you cannot believe that man.

Mr. Carpenter, who says he was riding on an Alderney milk truck and who saw this man opening the doors of the elevator and then disappear, and who found out a little later that there had been an accident and then went to the hospital and reported to the injured man, the plaintiff here, that he was a witness, is said by the defendants also to be a man you cannot believe for reasons that have been stated.

The plaintiff says that there is testimony here that proves his case even if you should disbelieve a part or all of the stories that those two witnesses have told because, says the plaintiff, three other witnesses who while they were not there at the minute and did not see it, did take the man from the elevator and found it was tilted on a forty-five-degree angle, that it was in the shaft and not all the way down, that he was hurt, and there was other testimony that has been referred to in summation.

You are the sole judges, I repeat, of the weight that the testimony is to receive at your hands. You are to say just what did happen. You are to say what the real facts are with respect to all of these questions that have been enumerated that are in dispute. You must say what the real facts are from your recollection of what the testimony was, not as I have recounted it to you. I have not attempted to analyze the testimony in detail; I have just referred to some parts of it. There is no significance in my not having referred to some of the parts that you might think very important. You must consider all of it and if I have said anything about the testimony that is incorrect, if it does not coincide with your recollection of what the testimony was, you must follow your

recollection of it, not mine. Disregard my misstatements of the testimony.

When you have found the real facts, then, of course, you will bring in your verdict in accordance with those facts, be the consequences what they may. You are not concerned with the consequences of your verdict. Your duty is clear, your duty is plain. Under your oaths you must weigh the testimony, you must find the real facts without fear or favor. When you have found the real facts under the direction of the Court with reference to the law, you will base your verdict upon those facts, either in favor of the plaintiff and against both defendants, or against one defendant, in which case you will say no cause of action as to the other defendant; or no cause of action as to both defendants.

You may retire.

Counsel for defendant P. DiNicholas, Inc., respectfully prays an exception to the Court's refusal to charge paragraph No. 3 of the defendant's requests to charge.

Exception noted as ground of appeal.

Counsel for defendant P. DiNicholas, Inc., respectfully prays an exception to the Court's refusal to charge paragraph No. 4 of the defendant's requests to charge.

Exception noted as ground of appeal.

Counsel for defendant P. DiNicholas, Inc., respectfully prays an exception to the Court's refusal to charge paragraph No. 7 of the defendant's requests to charge.

Counsel for defendant P. DiNicholas, Inc., respectfully prays an exception to the Court's re-

fusal to charge paragraph No. 8 of the defendant's requests to charge.

Exception noted as ground of appeal.

Counsel for defendant P. DiNicholas, Inc., respectfully prays an exception to the Court's refusal to charge paragraph No. 10 of the defendant's requests to charge.

Exception noted as ground of appeal.

Counsel for defendant P. DiNicholas, Inc., respectfully prays an exception to the Court's refusal to charge paragraph No. 11 of the defendant's requests to charge.

Exception noted as ground of appeal.

Counsel for defendant P. DiNicholas, Inc., respectfully prays an exception to the Court's refusal to charge paragraph No. 12 of the defendant's requests to charge.

Exception noted as ground of appeal.

Counsel for defendant P. DiNicholas, Inc., respectfully prays an exception to the Court's refusal to charge paragraph No. 14 of the defendant's requests to charge.

Exception noted as ground of appeal.

Counsel for defendant P. DiNicholas, Inc., respectfully prays an exception to the Court's refusal to charge paragraph No. 15 of the defendant's requests to charge.

Exception noted as ground of appeal.

Counsel for defendant P. DiNicholas, Inc., respectfully prays an exception to the Court's refusal to charge paragraph 16 of the defendant's requests to charge.

Exception noted as ground of appeal.

Counsel for defendant P. DiNicholas, Inc.,prays an exception to that part of the Court's charge wherein the Court stated, "As long defect existed for such a period of time as the defendants should have discovered it."

Exception noted as ground of appeal.

Counsel for defendant P. DiNicholas, Inc., prays an exception to that part of the Court's charge wherein the Court confined contributory negligence to the act of failing to look only.

Exception noted as ground of appeal.

Counsel for defendant P. DiNicholas, Inc., prays an exception to that portion of the Court's charge wherein the Court stated "that the same rule as applied to the defendant landlord with reference to the discovery of the defect, should also apply to the tenant," wherein the Court should have referred only to the landlord and only used that word without referring to or using the word "tenant."

Exception noted as ground of appeal.

Counsel for defendant P. DiNicholas, Inc., prays an exception to that portion of the Court's charge wherein the Court stated that if the jury found there was a defect of which the defendants had notice, or that it existed for such a period of time that they should have discovered it, without qualifying it by stating that the plaintiff could not recover if he should be guilty of contributory negligence.

Exception noted as ground of appeal.

Counsel for defendant P. DiNicholas, Inc., prays an exception to that part of the Court's charge wherein the Court stated, "If you find that there was negligence you must find a

verdict for the plaintiff," without adding necessarily that the defendants must have notice and or sufficient knowledge of the defective condition, and without adding the exception of contributory negligence.

Exception noted as ground of appeal.

Counsel for defendant Trustees, &c., prays an exception to the Court's refusal to charge paragraph 1 of the defendant's requests to charge.

Exception noted as ground of appeal.

Counsel for defendant Trustees, &c., prays an exception to the Court's refusal to charge paragraph 2 of the defendant's requests to charge.

Exception noted as ground of appeal.

Counsel for defendant Trustees, &c., prays an exception to the Court's refusal to charge paragraph 3 of the defendant's requests to charge.

Exception noted as ground of appeal.

Counsel for defendant Trustees, &c., prays an exception to the Court's refusal to charge paragraph 4 of the defendant's requests to charge.

Exception noted as ground of appeal.

Counsel for defendant Trustees, &c., prays an exception to the Court's refusal to charge paragraph 5 of the defendant's requests to charge.

Exception noted as ground of appeal.

Counsel for defendant Trustees, &c., prays an exception to the Court's refusal to charge paragraph 6 of the defendant's requests to charge.

Exception noted as ground of appeal.

Counsel for defendant Trustees, &c., prays an exception to the Court's refusal to charge paragraph 7 of the defendant's requests to charge.

Exception noted as ground of appeal.

Counsel for defendant Trustees, &c., prays an exception to that part of the Court's charge wherein the Court stated that there was no presumption of negligence, and in completing the principal statement, by stating, specifically, that there is a presumption against negligence.

Exception noted as ground of appeal.

Counsel for defendant Trustees, &c., prays an exception to that part of the Court's charge wherein the Court stated that if the jury found there was a defect of which the defendants had notice or that existed for such a period of time that they should necessarily have discovered it," without adding that the defendants must have notice and or sufficient knowledge of the defective condition, and without adding the exception of contributory negligence.

Exception noted as ground of appeal.

Counsel for defendant Trustees, &c., prays an exception to that portion of the Court's charge wherein the Court stated, "When a landlord reserves to himself any portion of the premises for himself and several tenants, he is under the duty to use reasonable care."

Exception requested on the ground that this portion of the premises where the accident occurred was not reserved for the use of the general tenants, but for the defendant P. Di-Nicholas, Inc., and the Rialto Theatre.

Exception noted as ground of appeal.

PLAINTIFF'S REQUESTS TO CHARGE.

1. Where it is within the power of a party to a suit to produce evidence to support his contention or his defense and he fails to do so, the jury may infer that such testimony, if produced, would be unfavorable.

2. The plaintiff's petition to the Workmen's Compensation Bureau, which has been introduced in this case, may not be treated by you as substantive evidence of the manner in which this accident happened. It was offered and admitted to attack the credibility of the plaintiff and it may only be considered by you for that purpose.

3. Insofar as the questions of the duty of one or both of these defendants to maintain this elevator in a reasonably safe condition for use and of the charge of negligence against them and of the testimony adduced in support of that charge are concerned, it is immaterial whether the plaintiff slipped and fell on the elevator and then it went down with him, or whether he stepped on it with both feet and it then went down.

4. Whenever an owner of property provides something such as a passageway or stairway, or in this case, the elevator, for use in common by his tenants, the law imposes upon him the duty of maintaining it in a reasonably safe condition for use.

5. Any arrangements, by lease or otherwise, that these defendants may have had between themselves as to repairs to this elevator are not binding upon this plaintiff. The duty to use reasonable care to have the elevator safe for use

as far as this plaintiff is concerned, exists independently of any such agreement to repair and cannot be delegated one to the other in such a manner as to bind the plaintiff by such agreement.

DEFENDANT'S TRUSTEES OF THE THIRD PRESBYTERIAN CONGREGATION IN NEWARK REQUESTS TO CHARGE.

1. Unless the plaintiff has satisfied you by a preponderance of all the evidence that the defendant, Trustees of the Third Presbyterian Congregation in Newark, had actual or constructive notice of the defect which is alleged to have caused the plaintiff's injuries, the plaintiff cannot recover against this defendant.

2. Unless the plaintiff has satisfied you by a preponderance of all the evidence that the defendant, the Trustees of the Third Presbyterian Congregation in Newark, had a reasonable time within which to repair the alleged defective elevator after having received notice, actual or constructive, of its defect, your verdict must be in favor of the defendant, the Trustees of the Third Presbyterian Congregation, and against the plaintiff.

3. Unless the plaintiff has satisfied you by a preponderance of all the evidence that the defendant, the Trustees of the Third Presbyterian Congregation, committed some act which an ordinary reasonably prudent man would not have committed under the same or similar circumstances or unless they omitted to do some act which a ordinary reasonably prudent man would

have done under the same or similar circumstances, then your verdict must be in favor of the defendant, the Trustees of the Third Presbyterian Congregation, and against the plaintiff.

4. To recover a judgment against the defendant, the Trustees of the Third Presbyterian Congregation in Newark, the plaintiff must satisfy you by a preponderance of all the evidence that the alleged defective condition had either been in fact brought to the previous notice of this defendant or, failing in proof of such actual notice, that the defect had existed for such a space of time before the accident as to have afforded the Trustees sufficient opportunity to make proper inspection of the elevator to ascertain its condition as to safety and to repair its defects.

5. Unless the plaintiff satisfies you by a preponderance of all the evidence that the defendant, the Trustees of the Third Presbyterian Congregation in Newark, had some control, authority or management of the elevator and space where the accident is alleged to have occurred, your verdict must be in favor of the defendant, Trustees of the Third Presbyterian Congregation, and against the plaintiff.

6. The defendant, Trustees of the Third Presbyterian Congregation in Newark, is not responsible and is not chargeable with acts of negligence committed by the tenant or tenants of its building without its knowledge, consent or authority.

7. That inasmuch as the lease between the Trustees of the Third Presbyterian Congregation and P. DiNicholas, Inc., provides that the Trus-

tees shall not make repairs to the premises unless they desire to do so, that is, they are not obliged to unless they wish to do so, if they undertake to make repairs, they are responsible only if the repairs are improperly made by them, and even then, if they have them made by an independent contractor who is competent, they are not responsible for any condition resulting from the repairs.

DEFENDANT'S P. DiNICHOLAS, INC. REQUESTS TO CHARGE.

The defendant P. DiNicholas, Inc., respectfully requests the Court to charge the jury, in part, as follows:

1. The mere happening of an accident is no evidence of negligence.

2. Negligence is not to be presumed; it must be proved affirmatively by the party alleging it by the greater weight of the evidence.

3. If you find as a fact that the accident was unavoidable, then I charge you that your verdict must be for the defendants.

4. When the plaintiff's evidence is equally consistent with the absence as with the existence of negligence on the part of the defendants, the plaintiff must fail—because there is always a presumption against negligence and in favor of innocence.

5. If this plaintiff was negligent himself in any manner, and this negligence contributed to the accident, then the verdict must be for the defendants.

6. If you find as a fact that the plaintiff was in a place where he was not ordered to be, or where he had no right to be, then even if the defendants were negligent, the plaintiff cannot recover.

7. If the defendant P. DiNicholas, Inc., or its agent, inspected, or caused to be inspected, the elevator, and this inspection was carefully and properly made, and at reasonable intervals, and such inspection did not disclose the danger, the verdict must be for the defendant, P. DiNicholas, Inc.

8. If you find as a fact that it was the landlord who had the duty to repair this elevator, and that the defendant P. DiNicholas, Inc., reported to the landlord whenever the elevator needed repair, then there must be a verdict in favor of the defendant P. DiNicholas, Inc.

9. The denial of an application for non-suit or application for a direction of a verdict in behalf of one party or the other, is not to be construed by the jury as a favorable decision in favor of one or the other as to the liability in the case, but is merely to be construed as a decision on the part of the Court that the case should go to the jury for determination. The Court was merely deciding that there was some conflicting evidence here dealing with the question of liability which would have to be submitted to you for your determination.

10. If the plaintiff exceeded the bounds of his invitation, and in so doing was injured, he cannot recover any damages for the injuries so sustained.

11. I charge you that if you find that the plaintiff knew that this was not a passenger, but a freight elevator, he assumed all the risks incident to carriage upon it.

12. If you find as a fact that the elevator was partly under the control of a third party not connected with the defendant, P. DiNicholas, Inc., then you must find a verdict in favor of the defendant, P. DiNicholas, Inc.

13. In order for the plaintiff to prove actionable negligence against the defendant P. DiNicholas, Inc., it must first satisfy you from a preponderance of the evidence that the plaintiff was an invitee.

14. If you do find that the plaintiff was an invitee, then in order for the plaintiff to recover he must further show that the defective condition, if any there was, was brought to the notice of the defendant P. DiNicholas, Inc., or failing in proof of such actual notice, the plaintiff must prove that the defect, if any there was, had existed for such a space of time before the occurrence of January 10, 1929, as would have afforded the defendant P. DiNicholas, Inc., sufficient opportunity to make proper inspection of the elevator and elevator shaft to ascertain their condition as to safety, and repair their defects.

15. I charge you that in the absence of proof of either actual notice of a defective condition or of proof of its existence for such space of time before the occurrence that the defendant P. DiNicholas, Inc., should have inspected and repaired the defect, you are to presume that

the defendant P. DiNicholas, Inc., used reasonable care under the circumstances.

16. If you find that the witness knowingly told an untruth in any particular, you are, in your judgment, justified in not believing any of such witness' testimony.

Exhibit P. 1.

Interrogatories directed to the Trustees of the Third Presbyterian Church in Newark.

Read into Record at page 30.

Exhibit P. 2.

Interrogatories directed to P. DeNicholas, Inc.

Read into Record at page 34.

Exhibit P. 3.

Patient's Name—Guensch Age

Address..... Date—4/6/31

R Copia 531221

Tab. Luminol gr ¼

50

Sig. One every 4 to 6 hours.

C. C. Beling.

Nard. P.T.T.

GUS. A. KOELBLE, Prescriptionist

362 Springfield Ave., Newark, N. J.

Phone 1933 Bigelow

Exhibit P. 7.

Deposition of Plaintiff's witness Daniel Costello.

Read into Record at pages 124 to 144.

Exhibit P. 8.

TABLE OF MORTALITY.

Present value at four per cent. interest of an annuity of $1 during life, first payment to be made at the end of the year; also showing the widow's percentage of the net proceeds arising from the sale of land in which she is entitled to dower, her age at the time of sale being given.

Age.	Present value of $1 per annum.	Widow's percentage of sale.	Age.	Present value of $1 per annum.	Widow's percentage of sale.	Age.	Present value of $1 per annum.	Widow's percentage of sale.
15	19.0283	25.3711	42	14.9884	19.9845	69	6.6272	8.8363
16	18.9417	25.2556	43	14.7494	19.6659	70	6.3070	8.4093
17	18.8515	25.1353	44	14.5025	19.3367	71	5.9928	7.9904
18	18.7574	25.0099	45	14.2477	18.9969	72	5.6849	7.5799
19	18.6596	24.8795	46	13.9849	18.6465	73	5.3829	7.1772
20	18.5579	24.7439	47	13.7144	18.2859	74	5.0862	6.7816
21	18.4520	24.6027	48	13.4362	17.9149	75	4.7938	6.3917
22	18.3420	24.4560	49	13.1057	17.5343	76	4.5051	6.0068
23	18.2277	24.3036	50	12.8583	17.1444	77	4.2193	5.6257
24	18.1089	24.1452	51	12.5595	16.7460	78	3.9363	5.2484
25	17.9854	23.9805	52	12.2546	16.3395	79	3.6564	4.8752
26	17.8568	23.8091	53	11.9440	15.9253	80	3.3796	4.5061
27	17.7233	23.6311	54	11.6280	15.5040	81	3.1083	4.1444
28	17.5846	23.4461	55	11.3072	15.0763	82	2.8420	3.7893
29	17.4404	23.2539	56	10.9820	14.6427	83	2.5796	3.4395
30	17.2906	23.0541	57	10.6530	14.2040	84	2.3184	3.0912
31	71.1351	22.8468	58	10.3207	13.7609	85	2.0574	2.7432
32	16.9735	22.6313	59	9.9855	13.3140	86	1.7989	2.3985
33	16.8056	22.4075	60	9.6481	12.8641	87	1.5478	2.0637
34	16.6316	22.1755	61	9.3092	12.4123	88	1.3096	1.7461
35	16.4510	21.9347	62	8.9695	11.9593	89	1.0847	1.4463
36	16.2634	21.6845	63	8.6296	11.5061	90	0.8673	1.1564
37	16.0691	21.4255	64	8.2901	11.0535	91	0.6536	0.8715
38	15.8676	21.1568	65	7.9518	10.6024	92	0.4539	0.6052
39	15.6591	20.8788	66	7.6156	10.1541	93	0.2907	0.3876
40	15.4431	20.5908	67	7.2822	9.7096	94	0.1374	0.1832
41	15.2196	20.2928	68	6.9524	9.2699			

Exhibit D. b.

Exhibit D. b.

THIS INDENTURE made this Seventeenth day of February One Thousand nine hundred and Twenty Five.

BETWEEN

THE TRUSTEES OF THE THIRD PRESBYTERIAN CONGREGATION IN NEWARK

party of the first part, and The Southern Candy Company, a corporation of the State of

party of the second part.

WITNESSETH: That the said party of the first part, hereinafter called the lessor, doth hereby demise and lease unto the said party of the second part, called the lessee, and the said lessee do hereby take, and hire, the store numbered 4 in building of the lessor, located in the City of Newark, Essex County, New Jersey, and known as 905-915 Broad Street, being the store at #913 Broad St. immediately North of the entrance to the Rialto Theatre, to be used as a sales room for the sale of candy, ice cream, soda water, etc., together with that part of the cellar underneath the store now occupied by them and for no other purpose, for a term to commence on the First day of May 1925, and to end on the first day of May, 1930, at ten o'clock in the forenoon of that day, at the rent of EIGHTY FIVE HUNDRED Dollars, per annum, lawful money of the United States, payable as follows: in equal monthly installments of in the sum of 1/12 of the annual rent reserved under this letting, for each year. The Party of the second part are to have the use of the sidewalk lift in common with the tenant to the South of

Exhibit D. b.

the premises hereby rented on the first day of each month in advance.

The above letting is upon the following conditions:

FIRST: The lessee shall without any previous demand therefor pay to the lessor, or to its successors, assigns, agents or attorney, the said rent at the times and in the manner above provided, and in case of the non-payment of said rent at the times above stated, or in case the said leased premises shall be deserted or vacated, the lessor, its successors, assigns, agent or attorney, shall have the right to and may enter the same as the agent of the said lessee, either by force or otherwise, without being liable for any prosecution therefor, and to re-let the said premises as the agent of the lessee, and to receive the rent therefor, and as the agent of the lessee to take possession of any furniture, or other property, on the said premises, and sell the same at public or private sale, and to apply the same and the said rent to the payment of the rent due by these presents, and the expenses of re-entering, holding the lessee liable for the deficiency if any, the lessee hereby waiving the benefit of all laws made or to be made exempting property from levy and sale either on distress or judgment.

SECOND: Except as hereinafter stated by Paragraph 5-A, this lease covering said premises shall not be assigned, let or under-let, nor shall said premises be used or permitted to be used for any purpose other than as above mentioned, nor for any business or purpose extra hazardous, and that in the proper use thereof the lessee will comply, at his own expense, or

Exhibit D. b.

otherwise, with all State, County and City ordinances and health codes, and such business shall be conducted in a manner that shall not be an annoyance or nuisance to other tenants, nor shall this lease be assigned without the written consent of the lessor endorsed thereon, and in case of a breach of this condition, the lessor, its successor, assigns, agent or attorney, may re-enter and re-let the said premises, this lease by such unauthorized act becoming void if the lessor, its successors, assigns, agent or attorney shall so elect.

THIRD: The lessee shall quit and surrender said premises at the end of said term in as good condition as the reasonable use thereof will permit, and shall not make any alterations, additions or improvements in said premises, without the written consent of the lessor, and all alterations, additions or improvements which may be made by either of parties hereto upon the premises, except movable office furniture put in at the expense of the lessee, shall be the property of the lessor and shall remain upon and be surrendered with the premises as a part thereof at the termination of the lease.

FOURTH: In addition to the rent reserved under the terms of this lease, the tenant further agrees to pay his proportion of the City charge for water consumed in the building where the demised premises are only in the event, and not otherwise, that the party of the second part installs in the said premises an ice cream or an ice making machine.

FIFTH: The lessor will provide at its expense steam heating for said building for use from the Fifteenth day of October to the Fif-

teenth day of May in each year, and the rent hereinbefore agreed to be paid by the lessee shall include the cost of heating the portion of the building hereby rented during the term, but the services of any janitor, and gas or electric lighting consumed by said lessee, shall be at the expense of the lessee. The provision above regarding steam heating shall not include the day of each week commonly called Sunday. The lessee may renew this lease for a further period of five years from May 1st, 1930 to May 1st, 1935, for a rental of $8750.00 per year, upon the same terms and conditions and otherwise herein set forth at length, PROVIDING six months notice, prior to May 1st, 1930, is given to the lessor of the intention of the lessee herein to exercise this option of renewal, but this notice must be in writing.

FIFTH-A: Notwithstanding anything hereinbefore contained, this lease may be assigned by the party of the second part, upon the following conditions: If the party of the first part finds that they are unable to carry the premises on account of the rent fixed and charged, in relation to the business conducted by them in said premises, they may assign this lease to such person or persons, or corporations, as may be acceptable to the party of the first part, as assignees of this lease, providing that if the party of the second part herein profits in money by the execution of said assignment that the party of the first part herein shall receive 50% of the consideration paid for the assignment of the lease, or 50% of any increased rental, which the assignee is to pay.

Exhibit D. b.

SIXTH: The lessor will provide sufficient gas or electric lighting for the halls and stairways in said building, the same to be entirely under the control of and regulated by the lessor, its successors, assigns, agent or attorney. The lessor will cause said halls and stairways of the premises to be cleaned and cared for by the janitor of the building.

SEVENTH: The lessor, or its agents, shall have the right to enter the demised premises at reasonable hours in the day or night to examine the same, or to run telegraph or other wires or to make such repairs, additions and alterations as it shall deem necessary for the safety, perservation or restoration of the said building, or for the safety or convenience of the occupants thereof, and also exhibit the said premises to be let and put upon them the usual notice "To Let," which said notice shall not be removed or obliterated by any tenant, the party of the first part not being bounden, however, to make any repairs unless it be elsewhere in this lease expressly so agreed.

EIGHTH: In case of the destruction of said building or premises by fire or the elements, during the term hereby created, or previous thereto, or such partial destruction thereof as to render the premises demised wholly untenantable or unfit for occupancy, or should they be so badly injured that the same cannot be repaired within sixty days from the happening of such injury, then and in such case the term hereby created shall cease and become null and void from the date of such damage or destruction, and then the lessee shall immediately surrender said premises, and all interest therein,

Exhibit D. b.

to the lessor, its successors, assigns, agent or attorney, and the lessee shall pay rent within said term only to the time of such surrender; and in case of such destruction, or partial destruction, of said building by fire or the elements as above mentioned, the lessor, its successors, assigns, agent or attorney, may re-enter and re-possess said premises discharged from this lease, and may remove all parties therefrom. But should said premises be repairable within sixty days from the happening of said injury, the lessor, its successors, assigns, agent or attorney may enter and repair the same with all reasonable speed, and the rent shall not accrue after said injury or while repairs are being made, but shall re-commence immediately after said repairs shall be completed. But if said premises shall be so slightly injured by fire or the elements as not to be rendered untenantable and unfit for occupancy, then the lessor, its successors, assigns, agent or attorney agrees to repair the same with reasonable promptitude, and in that case the rent accrued and accruing shall not cease or determine.

NINTH: The rules and regulations in regard to the said building, printed upon this lease, shall during the term be in all things observed and performed by the lessee and by the clerks, servants and agents of the lessee.

TENTH: In case of violation by the lessee of the foregoing covenants, agreements and conditions, or of the rules and regulations now or hereafter to be reasonably established, or either of them, this lease shall thenceforth, at the option of the lessor, become null and void, and the lessor may re-enter without notice or demand;

Exhibit D. b.

and the rent in such case shall become due, be apportioned and paid on and up to the day of such entry, and the lessee shall be liable for all loss or damage resulting from such violation as aforesaid.

ELEVENTH: Any chattel attached by nails, screws or otherwise to the said premises, in violation of any of the conditions of this lease or the rules and regulations attached thereto, shall thereby be forfeited to and forthwith become the property of the said lessor and be left and remain upon the said premises at the expiration of this lease.

TWELFTH: The lessor shall not be liable to the lessee for any damage to any goods and chattels in the demised premises, caused by any leakage in the roof or from any fixture or any leakage whatsoever, whether from breakage or defect, or otherwise. This agreement shall also include leakage from the sprinkler system installed in said building, caused in any manner whatsoever.

If at any time during the term herein demised the lessee shall become bankrupt or shall compound his debts or assign over his estate or effects for the payment thereof, or if any execution shall issue against him or any of his effects, which shall remain unsatisfied for five days or which shall not be stayed, or if a Receiver or Trustee shall be appointed over his property, or if this lease shall by operation of law devolve upon or pass to any person or persons other than the said lessee or his heirs, executors or administrators, then and in either of such cases this lease shall, at the option of the said lessor, cease and come to an end three days after no-

Exhibit D. b.

tice of such election shall be sent by mail to the said lessee addressed to the premises herein demised with the postage prepaid.

IN WITNESS WHEREOF, the said party of the first part has caused its corporate seal to be affixed, and these presents to be signed by its President, and the said party of the second part has caused its corporate seal to be affixed and these presents to be signed by its President, the day and year first above written.

TRUSTEES OF THE THIRD PRESBYTERIAN CONGREGATION IN NEWARK,

By P. J. BARTLETT, L. S.
President.

SOUTHERN CANDY COMPANY,

By W. G. BALDWIN, L. S.
President.

Signed, sealed and delivered
in the presence of

Attest:
W. C. WARNER

Attest:
H. C. HILDEBRAND,
Acting Secretary.

THIRD CONGREGATION
SEAL
NEWARK

SOUTHERN CANDY COMPANY
CORPORATE SEAL
NEWARK, N. J.

Exhibit D. b.

RULES AND REGULATIONS

1. The sidewalk, halls, passageways, elevators and stairways shall not be obstructed by any of the tenants or used by them for any other purpose than ingress and egress from and to their respective apartments and for signs on boards erected for that purpose.

2. The floors, skylights, windows, doors and transoms that reflect or admit light into passageways or into any place in said building shall not be covered or obstructed by any of the tenants. The toilet-rooms, water-closets and other water apparatus shall not be used for any purposes other than those for which they were constructed, and no sweepings, rubbish, rags, ashes, ink, chemicals or the refuse from the electric batteries, or other unsuitable substances, shall be thrown therein. Any damage resulting from such misuse or abuse shall be borne by the tenant by whom or by whose employees it shall be caused.

3. No sign, advertisement, notice or thing shall be inscribed, painted or affixed on any part of the outside of said building, nor on the inside thereof, unless of such color, size and style, and in such places, upon or in said building, as shall be first designated, by the lessor and indorsed hereon, and must conform to style adopted for other stores and offices in the building. Awnings, if required, to be furnished by tenant at the lessee's expense, and to conform to scheme adopted for entire building front.

4. No safe shall be put or hoisted in any part of said building except through the elevator shafts. Tenants shall arrange with the lessor, or

Exhibit D. b.

its agent, as to time for receiving or delivering safes, furniture or freight.

5. No tenant shall do or permit anything to be done in said premises, or bring or keep anything therein which will in any way increase the rate of fire insurance on said buildings, or on property kept therein, or obstruct or interfere with the rights of other tenants, or conflict with the laws relating to fires or with the regulations of the Fire Department, or with any insurance policy upon said building or any part thereof, or conflict with any of the rules and ordinances of the City of Newark.

6. No tenant shall employ any person or persons other than the janitor of the lessor for the purpose of cleaning or of taking charge of said premises, it being understood and agreed that the lessor shall be in nowise responsible to any tenant for any damage done to the furniture or other effects of any tenant by the janitor or any of its employees, or by any other person, or for any loss of property from leased premises, however occurring. Tenants shall see that the windows are closed and the doors securely locked before leaving the demised premises.

7. No carpet, rug or other article shall be hung or shaken out of any window, and nothing shall be thrown or allowed to drop by the tenants, their clerks or employees, out of the windows or doors, or down the passages or skylights of the building, and no lessee shall sweep or throw, or permit to be swept or thrown from the leased premises, any dirt or other substance into any of the corridors or halls, elevators or stairways of said building, or into any of the light shafts or ventilators thereof.

Exhibit D. b.

8. Telegraphic or telephonic wires and instruments shall be introduced only with the consent in writing of the lessor, who will direct the electricians as to where and how the same are to be placed, and without such direction no boring or cutting for wires will be permitted.

9. Tenants shall not use or keep in building any explosives, kerosene, burning fluid or other illuminating material, except gas, electric light or candles. Nor shall any bed or bedding be brought or placed in or upon the demised premises, nor shall they in any event be used as a lodging place. Nor shall any animal or bird be kept on or about the premises.

10. No articles shall be fastened to or holes drilled or nails or screws driven into the walls or partitions, nor shall the walls or partitions be painted, papered or otherwise covered, or in any way marked, or broken without the written consent of the lessor. Tenants desiring to put in telephones or call boxes, will notify the lessor, who will designate where the same shall be placed, as provided above.

11. The lessor reserves the right to rescind any of these rules and to make such other and further reasonable rules and regulations as, in its judgment, may from time to time be needful for the safety, care and cleanliness of the premises, and for the preservation of good order therein, which, when so made, and notice thereof given to the lessee, shall have the same force and effect as if originally made a part of the foregoing lease; such other and further rules not, however, to be inconsistent with the proper and rightful enjoyment by the lessee under the foregoing lease of the premises therein referred to.

Exhibit D. b.

LEASE

905-915 Broad Street

THE TRUSTEES OF THE THIRD PRESBYTERIAN CONGREGATION IN NEWARK

—TO—

SOUTHERN CANDY COMPANY

Store #4 and part of the cellar

Dated May 1, 1925
Expires May 1, 1930
Rental—$8500. per annum

Option for 5 yrs from May 1, 1930 to May 1, 1935 at $8750. per annum.

Scharringhausen & Hartpence
COUNSELLORS AT LAW
800 Broad Street
Newark, N. J.

Exhibit D. 1.

NEW JERSEY DEPARTMENT OF LABOR
WORKMEN'S COMPENSATION BUREAU
Trenton, N. J.

Employee's Claim Petition for Compensation

OSCAR E. GUENSCH, JR.,
Petitioner,
vs.
MEYER MARX,
Respondent.

Received at Trenton Mar 21 1929
Claim Petition No.....
Date of Accident....., 19....
Attorney for Petitioner Joseph A. Ward 1060 Broad St. Newark, N. J.
(Address)

To the Workmen's Compensation Bureau of New Jersey:

The claimant respectfully alleges the following facts:

1. What is your name? Oscar E. Guensch, Jr.
2. Where do you live? 321 Waverly Avenue,
(Street Address)
Newark, N. J. Newark
(City or Town)
3. Sex Male 4. Age 28 5. Married Yes

Exhibit D. 1.

6. By whom were you employed at the time of the accident? (Give name and business address) Meyer Marx 49 Avon Place
(Name) (Street Address)
Newark, N. J.
(City or Town)
7. What was the business of your employer? Delicatessen supplies
8. Did you give written notice to your employer at the time you were hired, or later, that the Compensation Law should not apply to you? No
9. Did you receive such notice from your employer? No
10. Did your employer have knowledge of your accident? .....
11. Did you notify your employer of your accident? Yes
12. If so, on what date? Date of Accident Jan 10 1929
13. Have you made claim to your employer for compensation? Yes
14. What was your regular occupation, and what kind of work were you doing at the time of the accident? Driver and delivery man. Delivering goods and collecting
15. When did the accident happen? Jan 10 1929 at 9 o'clock a. m.
(State month, day, year and hour)
16. Where did the accident happen? Rialto Restaurant, 913 Broad st. Newark
17. What was the nature of the accident, and how did it happen? Had delivery of goods and collection of money. Went into restaurant—received check—asked that ele-

Exhibit D. 1.

vator be sent up for goods. Went out to elevator lift on sidewalk, covered by two heavy iron doors. Had lifted one door half open and saw that elevator was up. The sidewalk was wet, as the day was rainy, I slipped, fell on the elevator, the chain broke and down I went.

18. On what date were you compelled to stop work because of the injury? Jan 10 1929
19. On what date were you well enough to work again? Don't know
20. If still disabled, on what date do you think you will be able to work? ?
21. Give nature of any injury from which you will recover. Awaiting medical reports
22. If any permanent injury has resulted, either amputation or loss of usefulness of any member, or impairment of any physical organ, explain fully. Awaiting medical reports
23. Were your wages fixed by piece-work? no
24. If so, what was your average weekly wage? .....
25. If wages were fixed by the hour, state rate per hour. .....
26. Give number of hours in an ordinary working day. .....
27. Give number of days in an ordinary working week. .....
28. State the amount of weekly wages. $35.00
29. How much money have you received from your employer as compensation (not medical aid) since your accident? $120.00
30. Has your employer promised to pay you any compensation? .....

Exhibit D. 1.

31. If so, how much?.....
32. Was medical aid required? yes
33. Did you receive medical, surgical or hospital service? yes
34. Did you request your employer to furnish these services? yes
35. Were they furnished?.....
36. If so, between what dates?.....
37. If not what sum did you expend for medical, surgical or hospital services?.....
38. Give name and address of physician and hospital. St. Michaels Hospital, Newark, and Dr. Ira Flax, S. Belmont ave & Bigelow St. Newark.
39. What other facts are there which you believe important? .....
40. Are you willing that the Compensation Bureau endeavor to secure compensation for you, by agreement, before calling for an official hearing? Yes
41. If you are unwilling state reasons.....

Your Petitioner therefore prays that your Honorable Bureau will determine the amount of compensation due to your Petitioner from the said defendant, under the act entitled "An Act prescribing the liability of an employer to make compensation for injuries received by an employee in the course of the employment, establishing an elective schedule of compensation and regulating procedure for the determination of liability and compensation thereunder," approved April 4th, 1911, and the Acts supplemental thereto and amendatory thereof, and that your petitioner may be awarded his costs in this

Exhibit D. 1.

proceeding, and such other or further relief as may be proper.

And your petitioner will pray, etc.

OSCAR GUENSCH
(Petitioner)
321 Waverley Ave.
(Address)

STATE OF NEW JERSEY }
COUNTY OF } SS.:

OSCAR GUENSCH of full age, being duly sworn according to law, on his oath deposes and says: That he is the petitioner named in the foregoing petition; and that he has read the same and is familiar with the contents thereof; and that the matter and things therein set forth are true according to the best of his knowledge and belief.

OSCAR GUENSCH
(Petitioner)

Subscribed and sworn to before me, this Twentieth day of March 1929, at Newark, N. J.

JOS. A. WARD,
Atty. at Law N. J.

(This affidavit may be sworn to before a Deputy Commissioner or a Compensation Referee, or any other person authorized to administer an oath.)

Exhibit D. 1.

TO THE RESPONDENT

The foregoing claim petition has been presented by the petitioner to the Workmen's Compensation Bureau for hearing and determination in accordance with the provisions of the Workmen's Compensation Act.

We hereby notify you that unless an answer shall within ten days after the service of this notice, be filed in duplicate with the Secretary of the Bureau, in the State House at Trenton, the facts alleged in the petition will be deemed to be admitted and no testimony will be required from the petitioner to prove such facts.

WORKMEN'S COMPENSATION BUREAU

.....

Secretary.

EXHIBIT D. 2.

NEW JERSEY DEPARTMENT OF LABOR
WORKMEN'S COMPENSATION BUREAU
Trenton, N. J.

Employee's Claim Petition for Compensation

OSCAR E. GUENSCH, JR.,
Petitioner,
vs.
MEYER MARX,
Respondent.

Received at Trenton March 21, 1929
Claim Petition No.....
Date of Accident .....19....
Attorney for Petitioner Joseph A. Ward, 1060 Broad St., Newark, N. J.
(Address)

To the Workmen's Compensation Bureau of New Jersey:

The claimant respectfully alleges the following facts:

1. What is your name? Oscar E. Guensch, Jr.
2. Where do you live? 321 Waverly Avenue,
(Street Address)
Newark, N. J.
(City or Town)
3. Sex Male 4. Age 28 5. Married? Yes
6. By whom were you employed at the time of the accident? (Give name and business

Exhibit D. 2.

address) Meyer Marx 49 Avon Place,
(Name) (Street Address)
Newark, N. J.
(City or Town)

7. What was the business of your employer? Delicatessen Supplies
8. Did you give written notice to your employer at the time you were hired, or later, that the Compensation Law should not apply to you? No
9. Did you receive such notice from your employer? No
10. Did your employer have knowledge of your accident? .....
11. Did you notify your employer of your accident? Yes
12. If so, on what date? Date of Accident Jan. 10, 1929
13. Have you made claim to your employer for compensation? Yes
14. What was your regular occupation, and what kind of work were you doing at the time of the accident? Driver and delivery man. Delivering goods and collecting
15. When did the accident happen? Jan. 10, 1929 at 9 o'clock A. M.
(State month, day, year and hour)
16. Where did the accident happen? Rialto Restaurent, 913 Broad St. Newark.
17. What was the nature of the accident, and how did it happen? Had delivery of goods and collection of money. Went into restaurant—received check—asked that elevator be sent up for goods. Went out to elevator lift on sidewalk, covered by two

Exhibit D. 2.

heavy iron doors. Had lifted one door half open and saw that elevator was up. The sidewalk was wet, as the day was rainy, I slipped, fell on the elevator, the chain broke and down I went.

18. On what date were you compelled to stop work because of the injury? Jan. 10, 1929

19. On what date were you well enough to work again? Don't know

20. If still disabled, on what date do you think you will be able to work?.....

21. Give nature of any injury from which you will recover. Awaiting medical reports.

22. If any permanent injury has resulted, either amputation or loss of usefulness of any member, or impairment of any physical organ, explain fully. Awaiting medical reports

23. Were your wages fixed by piece-work? No

24. If so, what was your average weekly wage? .....

25. If wages were fixed by the hour, state rate per hour .....

26. Give number of hours in an ordinary working day .....

27. Give number of days in an ordinary working week .....

28. State the amount of weekly wages. $35.00

29. How much money have you received from your employer as compensation (not medical aid) since your accident? $120.00

30. Has your employer promised to pay you any compensation? .....

31. If so, how much?.....

32. Was medical aid required? Yes

Exhibit D. 2.

33. Did you receive medical, surgical or hospital services? Yes
34. Did you request your employer to furnish these services? Yes
35. Were they furnished?.....
36. If so, between what dates?.....
37. If not, what sum did you spend for them during the first four weeks after the accident? .....
38. Give name and address of physician and hospital St. Michaels Hospital, Newark, and Dr. Ira Flax, S. Belmont Ave. & Bigelow St. Newark.
39. What other facts are there which you believe important? .....
40. Are you willing that the Compensation Bureau endeavor to secure compensation for you, by agreement, before calling for an official hearing? Yes
41. If you are unwilling state reasons.....

Your Petitioner therefore prays that your Honorable Bureau will determine the amount of compensation due to your petitioner from the said defendant, under the Act entitled "An act prescribing the liability of an employer to make compensation for injuries received by an employee in the course of the employment, establishing an elective schedule of compensation and regulating procedure for the determination of liability and compensation thereunder," approved April 4th, 1911, and the Acts supplemental thereto and amendatory thereof, and that your petitioner may be awarded his costs in this proceeding, and such other or further relief as may be proper.

Exhibit D. 2.

And your petitioner will ever pray, etc.

OSCAR GUENSCH
(Petitioner)
321 Waverley Ave.
(Address)

STATE OF NEW JERSEY }
COUNTY OF } SS.:

OSCAR GUENSCH of full age, being duly sworn according to law, on his oath deposes and says: That he is the petitioner named in the foregoing petition; that he has read the same and is familiar with the contents thereof; and that the matters and things therein set forth are true according to the best of his knowledge and belief.

OSCAR GUENSCH
(Petitioner)

Subscribed and sworn to before me, this Twentieth day of March 1929 at Newark, N. J.

JOS. A. WARD,
Atty. at Law of N. J.

(This affidavit may be sworn to before a Deputy Commissioner or a Compensation Referee, or any other person authorized to administer an oath.)

Exhibit D. 2.

TO THE RESPONDENT.

The foregoing claim petition has been presented by the petitioner to the Workmen's Compensation Bureau for hearing and determination in accordance with the provisions of the Workmen's Compensation Act.

We hereby notify you that unless an answer shall, within seven days after the service of this notice, be filed with the Secretary of the Bureau, in the State House at Trenton, the facts alleged in the petition will be deemed to be admitted and no testimony will be required from the petitioner to prove such facts.

WORKMEN'S COMPENSATION BUREAU.

.....

Secretary.

I, WILLIAM E. STUBBS, Deputy Commissioner and Secretary of the Workmen's Compensation Bureau, do hereby certify that the foregoing is a true copy of the Petition in the cause wherein Oscar E. Guensch, Jr., is Petitioner, and Meyer Marx is Respondent, now on the files of my office.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of the said Bureau, at Trenton, N. J., this 24th day of April, 1931.

(SEAL) W. E. STUBBS,
Deputy Commissioner and Secretary.

Exhibit D. 3.

NEW JERSEY DEPARTMENT OF LABOR

WORKMEN'S COMPENSATION BUREAU

OSCAR E. GUENSCH, JR.,
Petitioner,
vs.
MEYER MARX,
Respondent.
} *Notice*

To the Workmen's Compensation Bureau of New Jersey:

1. The claimant respectfully submits that he no longer desires to continue to prosecute his petition for compensation against the aforesaid respondent, Meyer Marx.

2. Claimant requests that the petition be disposed of by the Bureau.

3. Claimant recites that Joseph A. Ward, 443 Broad Street, Newark, N. J., Attorney At Law, has furnished legal services to the claimant from about the date of the accident to date of this notice.

OSCAR E. GUENSCH,
JOSEPH A. WARD,
Attorney.

F. ARTHUR HIGGIN,
per C. M. D. for Respondent.

Oct. 16, 1929.

Exhibit D. 4.

P. DE NICHOLAS INC.
RIALTO RESTAURANT

No. 499

Newark, N. J. Jan. 8, 1929.

Pay to the Order of M. Marx.....$20.05/100

Twenty & 05/100.....Dollars

UNITED STATES TRUST COMPANY
of Newark
Newark, N. J.

P. DeNicholas
Pres

Stamp—United States Trust Company of Newark, N. J.

Endorsement—Pay to the Order of GUARANTY TRUST COMPANY, Newark, N. J. MEIER MARX

P

RUBBER STAMP—Received Payment through the Newark Clearing House Prior Endorsements Guaranteed Jan 12 1929 Guaranty Trust Company 22 of Newark, N. J. 22

PERFORATED—Paid-A 1-12-29—55-663

Exhibit D. 5.

Exhibit D. 5 consists of 36 checks of defendant P. DeNicholas, Inc., all dated January 8, 1929, to the order of various creditors.

Exhibit D. 9.

James H. Brothers, M. D.
128 Broad Street
Newark, N. J.

Gl. Mr. Gray.

DEFENDANT

Rialto Restaurant.

INJURED

Oscar Guensch, 28, married, living at 88 17th Ave., Newark, N. J.

ACCIDENT

January 10, 1929 at 9:00 A. M. when he said he was delivering some materials in an elevator when the cable broke and he fell into the elevator shaft 12′ or 15′. He was taken to St. Michael's Hospital, remaining six weeks and he claims he was in bed until the following August. He claims that he has not worked yet This

EXAMINATION

was made June 19, 1930 and I have been delayed in the report in that it was necessary for me to see the x-rays at St. Michael's Hospital, and in that Dr. Fort on whose service he was was away I did not see them until July 15, 1930. He now complains of pain in the right thigh, pain in his back and headache. He further complains that he cannot hear with his right ear and that he is dizzy at times and cannot remember and that his right eye bothers him at times. Both his limbs measure 32″. There is no shortening. Motion of the hips, knees and akles normal.

Exhibit D. 9.

He complains of pain over the sacro-iliac joints and says that in his right leg this runs down to the internal malleolus. X-rays in the Hospital do not disclose any fracture of this hip or pelvis. X-rays of his back are negative in the Hospital, excepting that there is a suspicious area in the left transverse process of the fifth lumbar. However, Dr. Hood reports it as not definitely a fracture. X-rays of his right shoulder and elbow in the Hospital are also negative for fracture. Motions of the shoulder, elbow are normal as is motion of the wrist and fingers, his blood pressure is 122-72. He states that he has been treated lately by Dr. Flax, who gave him a corset to wear. He was wearing the corset at the time of my examination. I cannot find any evidence of fractures in this man on examination, and there is no evidence in the x-rays of such. He, however, claims that he has this pain in his back and pain in his head an in his right shoulder and arm and right leg. I can find no reason for them, there being no symptoms relative to a skull or brain injury. He is not dizzy on test, does not sway, localization, muscle sense, normal, reflexes normal. The most that can be said for this man that perhaps due to labor conditions, etc. and the fact that he has had an accident, he is becoming somewhat neurosthenic. He counts fingers at 7′ or 8′ accurately, but less readily with the right eye than the left. This, of course, is only his answer and if their complaint alleges

Exhibit D. 9.

an eye injury, I would suggest that he be examined by Dr. Dias or some such Specialist.

JAMES H. BROTHERS, M. D.

New Jersey Court of Errors and Appeals

OSCAR GUENSCH, *Plaintiff-Appellee,* *vs.* THE TRUSTEES OF THE THIRD PRESBYTERIAN CONGREGATION IN NEWARK, AND P. DENICHOLAS, INC., *Defendants-Appellants.*	*On Appeal.*

BRIEF OF DEFENDANT-APPELLANT, P. DE NICHOLAS, INC.

Introductory Statement.

This is an appeal on behalf of the defendant-appellant, P. DeNicholas, Inc., from a judgment entered in the New Jersey Supreme Court, Essex Circuit, at the April 1931 term, in favor of the plaintiff-appellee, Oscar Guensch for $17,000 against said P. DeNicholas, Inc., and its co-defendant, The Trustees of the Third Presbyterian Congregation in Newark. The latter defendant also appeals. This memorandum is submitted for the defendant-appellant, P. DeNicholas, Inc.

Facts.

This was an action at law in tort. The complaint was in three counts. The first count alleged that The Trustees of the Third Presbyterian Congregation in Newark, were the owners of premises known as No. 913 Broad Street, Newark, N. J.; that P. DeNicholas, Inc., was a lessee of said premises; that the defend-

ants maintained and controlled a sidewalk lift at the premises, operating between the basement and sidewalk in front of No. 913 Broad Street, Newark, N. J.; that the plaintiff was invited to make use of the elevator, and was using the elevator for the purpose of delivering certain merchandise to the defendant, P. DeNicholas, Inc.; that the elevator fell as the result of negligent maintenance and operation on the part of both defendants; and that the plaintiff was thereby injured. The second count is substantially the same, but charged negligence in the maintenance and operation solely against the defendant, P. DeNicholas, Inc.; whereas, the third count confines the allegations to negligence upon the part of The Trustees of the Third Presbyterian Congregation in Newark (State of Case, p. 15, l. 30 to p. 20, l. 11).

Issue was joined upon answers which denied the material allegations of the complaint, this appellant specifically denying that it had control of the elevator and that it was a lessee thereof. The defendant, P. DeNicholas, Inc., set up as separate defenses that the plaintiff was contributorily negligent; and, that after it entered into possession of the aforesaid premises, the co-defendant, The Trustees of the Third Presbyterian Congregation in Newark, the landlord, exercised dominion over the premises, and in particular, over the elevator shaft, by repairing and maintaining the same, and that the said landlord had reserved unto itself the right of inspection of the said premises, including this elevator and its shaft, and had exercised that right exclusively; and as a further separate defense this appellant alleged that if any negligence had existed it was chargeable solely to The Trustees of the Third Presbyterian Congregation in Newark; and as a

fourth separate defense appellant set up that the elevator was used by plaintiff contrary to instructions given to him by it, and he thereby assumed the risk incident to the said unlawful use (State of Case, p. 23, l. 1 to p. 25, l. 25).

At the trial, the plaintiff testified that he was making delivery of merchandise for his employer, one Meier Marx, to the restaurant at No. 913 Broad Street, Newark, N. J., operated by the defendant-appellant, P. DeNicholas, Inc. (State of Case, p. 39, l. 29 to p. 40, l. 2). That he informed Mr. DeNicholas that he had a shipment on his truck, and that DeNicholas said, "I will send up the elevator, you go outside and open the door" (State of Case, p. 41, l. 16 to l. 19). That plaintiff went outside, opened one door covering the elevator shaft, stepped on the elevator, started to raise the other door, then the elevator fell and the plaintiff fell with it (State of Case, p. 41, l. 29 to p. 42, l. 13).

It was shown that the building, which also included No. 915 Broad St., Newark, N. J., was owned by The Trustees of the Third Presbyterian Congregation in Newark, and had been leased to the Southern Candy Co. Inc., not a party to this action, who had sub-let to the defendant-appellant, P. DeNicholas, Inc.; and it was shown with reference to the elevator, that the joint right to use it had been given to the Southern Candy Co., and through it, to the defendant-appellant, P. DeNicholas, Inc., and also to the Rialto Theatre, a tenant of The Trustees of the Third Presbyterian Congregation in Newark, located in the same building, and whose theatre was immediately adjacent to the restaurant of P. DeNicholas, Inc., on the southerly side of the aforesaid building. The ele-

vator was not part of the demised premises (State of Case, p. 368, ll. 15 to 30), but appellant merely had a right of user thereof together with the Rialto Theatre (State of Case, p. 368, l. 37 to p. 369, l. 1; p. 162, ll. 7 to 9; p. 164, ll. 10 to 13), and that the Theatre exercised this right of user more than appellant (State of Case, p. 269, ll. 9 to 17). It also developed that The Trustees of the Third Presbyterian Congregation in Newark had control of the elevator and shaft, exercised their right to inspect the same and did on all occasions make repairs to the elevator (State of Case, p. 222, l. 26 to p. 223, l. 7; p. 223, ll. 35 to 40; p. 227, ll. 9 to 12 and ll. 34 to 40; p. 313, ll. 21 to 30; p. 317, l. 36 to p. 318, l. 4).

POINTS.

This appellant has set forth twenty-four separate grounds of appeal (State of Case, p. 7, l. 1 to p. 14, l. 30), which it will argue under the headings:

I. The trial court erred in its refusal to grant the motion for non-suit made by this defendant-appellant, P. DeNicholas, Inc.

II. The Court erred in its refusal to grant the motion of the defendant-appellant, P. DeNicholas, Inc., for a direction of a verdict in its favor.

III. The trial court erred in permitting the plaintiff's witness, Albert Pfaff, to testify over objection with reference to the condition of the elevator as he found it.

The trial court erred in permitting the witness, Albert Pfaff, to testify over objection on his

direct examination in answer to the following question or questions:

> "When you arrived there, did you look at the elevator, examine the elevator? In what condition did you find it?"
>
> "In what condition did you find it?"

IV. The trial court erred in permitting the witness, Charles William Roehm, Jr., to testify over objection and in answer to the question and/or questions set forth under Grounds of Appeal 3 and 4 (State of Case, p. 7, l. 39 to p. 9, l. 28), and which are repeated at length herein under Point IV in argument.

V. The trial court erred in charging the jury in part as set forth in Grounds of Appeal numbers 7 and 8 (State of Case, p. 9, l. 35 to p. 10, l. 31), and to be set forth at length under Point V when argued.

VI. The trial court erred in charging the jury in part as set forth in Grounds of Appeal numbers 10 and 11 (State of Case, p. 11, ll. 4 to 19) and to be repeated at length under Point VI when argued herein.

VII. The trial court erred in refusing to charge the jury the defendant's third request to charge, which request to charge is repeated herein in the Argument.

VIII. The trial court erred in refusing to charge the jury the defendant's eighth request to charge, which request to charge is repeated herein in the Argument.

IX. The trial court erred in refusing to charge the jury the defendant's eleventh request to charge, which request to charge is set forth at length under the argument of this point herein.

X. The trial court erred in refusing to charge the jury the defendant's fourteenth and fifteenth requests to charge, which requests to charge are set forth at length under this point in the argument advanced herein.

ARGUMENT.

POINT I.

The trial court erred in its refusal to grant the motion for a non-suit made by this defendant-appellant, P. De Nicholas, Inc.

Under this heading the appellant will argue the following sub-heads:

(a) *That there was no proof of actionable negligence on the part of the defendant, P. De-Nicholas, Inc.*

(b) *That there was no proof of notice to the defendant, P. DeNicholas, Inc. that there was any defect in the elevator or that any defect existed for such a time as to charge this defendant with knowledge thereof.*

(c) *That the plaintiff was guilty of contributory negligence.*

In order to show that at the time plaintiff rested his case there was no evidence upon which the jury could properly proceed to find a verdict in behalf of the plaintiff against this appellant, it will be necessary to review certain parts of the plaintiff's case.

At the time this defendant made its motion for a non-suit, the proofs established by the plaintiff were, in their most favorable light for him, as follows: That the plaintiff was delivering certain goods to the restaurant of the de-

fendant, P. DeNicholas, Inc. (State of Case, p. 39, l. 38 to p. 40, l. 5); that this restaurant was located in a building at No. 913 Broad Street, Newark, N. J. (State of Case, p. 34, ll. 31 to 35); that the said premises were occupied by the defendant, P. DeNicholas, Inc., by virtue of a lease which had been made between The Trustees of the Third Presbyterian Congregation in Newark, and Southern Candy Co. Inc. (State of Case, p. 35, ll. 1 to 15); that the defendant, P. DeNicholas, Inc., was a sub-tenant of the said Southern Candy Co. Inc. (State of Case, p. 32, ll. 16 to 19); that the defendant, P. DeNicholas, Inc., *had the use of a certain elevator which operated from the cellar of these premises to the sidewalk level in front thereof* (State of Case, p. 36, l. 37 to p. 37, l. 5; and p. 32, l. 4 to l. 9 and l. 30 to l. 35); that this elevator was a freight elevator, used for the purpose of carrying merchandise (State of Case, p. 37, ll. 3 to 9); that the premises, No. 915 Broad Street, Newark, N. J., but in the same building as P. DeNicholas, Inc., were also leased by the landlord to the Rialto Theatre, which adjoins the premises of P. DeNicholas, Inc. (State of Case, p. 35, l. 33 to p. 36, l. 5; p. 161, ll. 29 to 36); *that all the tenants of No.* 913-915 *Broad Street, Newark, N. J., had the right to use and did use the elevator in question* (State of Case, p. 32, ll. 4 to 9, and ll. 30 to 35); that at the time the plaintiff came to the restaurant as aforesaid, for his delivery of merchandise, he advised someone in the restaurant that he had a delivery on his truck, and that the said person said to plaintiff, "I will send up the elevator, you go outside and open the door" (State of Case, p. 41, ll. 16 to 19); that the elevator was covered by two heavy iron doors (State of Case, p. 41, ll. 29 to 30,

and p. 128, ll. 24 to 25); that the plaintiff went outside of the restaurant (State of Case, p. 41, ll. 20 to 23), and on to the sidewalk, and opened the door on the right (State of Case, p. 41, ll. 38 to 40, and p. 55, ll. 19 to 20), saw that the elevator platform was up even with the sidewalk (State of Case, p. 56, ll. 6 to 13), stepped on the elevator platform with both feet, and while standing on the platform, raised the left door a foot or two and then the elevator fell down, the plaintiff falling with it (State of Case, p. 56, ll. 19 to 40). The plaintiff testified that it was unnecessary for him to stand on the platform in order to open the doors (State of Case, p. 59, ll. 5 to 10). That was the gist of plaintiff's own testimony.

The plaintiff produced as other witnesses, four doctors with whose testimony appellant will not deal because no question of damages is here involved.

Two of the plaintiff's witnesses, Carpenter and Costello, merely stated that they saw him disappear down the shaft (State of Case, p. 108, ll. 24 to 32, and p. 128, ll. 28 to 32). Their testimony had nothing to do with any question of negligence on the part of the defendants.

The witness, Henry Seelig, testified that he arrived at the scene of the accident some fifteen minutes after he received a telephone call that the accident had occurred (State of Case, p. 152, ll. 33 to 37); that he examined the elevator at that time and found that the elevator platform was more than half way down the shaft and tipped at a 45 degree angle (State of Case, p. 152, ll. 24 to 27), and he was asked this question:

> "Did you notice anything else about the elevator?"

and his answer was:

"I did not."

(State of Case, p. 153, ll. 11 and 12).

Plaintiff's witness, William Lyons, testified that he was the driver of the ambulance of the Newark City Hospital, and that he arrived at the scene of the accident at 9:30 A. M., perhaps more than a half hour after the fall (State of Case, p. 156, ll. 35 to 37 and p. 160, ll. 26 to 28). He testified that he looked at the elevator at that time and testified only that the platform was somewheres in the middle of the shaft, and he was then asked:

"Q Did you notice anything else about it?

A It tipped slightly to the right along with the tip in the air, that is, the east end of it."

(State of Case, p. 159, ll. 4 to 13).

Neither witness said anything about the cables.

The witness, Noble, who testified he was employed by the co-defendant, The Trustees of the Third Presbyterian Congregation in Newark, and that he was the collector of rents for the row of buildings owned by the defendant, The Trustees of the Third Presbyterian Congregation in Newark, showed that the building in question was occupied by more than one tenant (State of Case, p. 161, ll. 17 to 33). The plaintiff proved by this witness' testimony that in this row of buildings, the restaurant and theatre in question were occupied respectively by the Rialto Restaurant (operated by P. DeNicholas, Inc.) and the Rialto Theatre (State of Case, p. 161, ll. 29 to 36), and that in addition to the respective premises demised both P. DeNicholas, Inc.,

and the Rialto Theatre, were granted the right to use the elevator in question, and did both exercise this right of user (State of Case, p. 164, ll. 6 to 19); and that was admitted by counsel for the Trustees of the Church (State of Case, p. 164, l. 19 to l. 23).

The next witness for the plaintiff was, Albert Pfaff, who testified that he was an employee of the Otis Elevator Co., and that he was called to the premises on the day following the accident. He was asked by plaintiff's counsel to describe the condition of the elevator as he saw it at that time. Objection was made to this testimony, argument being based upon the fact that it was not shown that the condition of the elevator was the same at the time this witness examined it as it was more than twenty-four hours before. The court overruled this objection and exception was duly taken and allowed thereto (State of Case, p. 165, l. 18 to p. 166, l. 13). This witness thereupon testified that he found the platform at a 45 degree angle (State of Case, p. 166, ll. 14 to 22), and with respect to the condition of the cables upon which the elevator platform was moved up and down in its shaft, and which operated over drums at both the pit of the shaft and at the head of the shaft, that on one drum the cable was off about three turns, and on the other drum it was off about one turn (State of Case, p. 167, ll. 7 to 28). This testimony was given despite the fact that the witness, Seelig, who examined the elevator shortly after the accident happened, had definitely stated that he had looked and seen nothing else wrong with the elevator except the two things he mentioned, namely, that the platform was half way down the shaft and tipped at an

angle. Nor did the witness, Lyons, see anything except that the elevator was midway in the shaft and slightly tipped.

The next and final witness for the plaintiff was, Charles William Roehm, Jr. Mr. Roehm testified that he too was connected with the Otis Elevator Company (State of Case, p. 175, ll. 24 to 25). The plaintiff attempted to qualify Mr. Roehm as an elevator expert, although the witness himself did not seem to think that he was an expert, and so stated in his own testimony (State of Case, p. 194, ll. 7 and 8). This witness' entire testimony was based upon the assumption that he was an expert in the line of elevators, and upon that assumption he was asked numerous hypothetical questions based upon the testimony already submitted in the case, but mostly upon the testimony of the witness, Pfaff. These questions were asked over objection by counsel for this appellant, and exceptions were duly taken and allowed to the overruling of the court of these objections (State of Case, p. 184, l. 27 to p. 185, l. 20; and p. 186, l. 4 to p. 187, l. 20). Roehm was asked what in his opinion *could* have caused the fall of the elevator (State of Case, p. 181, ll. 4 to 12), and in response thereto gave his opinion that there *could* have been three possibilities; first, that the cables might have pulled out of the sockets; second, that the cables might have broken; and third, by the cables coming off the drums (State of Case, p. 182, ll. 12 to 25). There had been no competent testimony by which any of these possibilities could have been applied to the facts in this case, and this witness himself eliminated the first two (State of Case, p. 181, l. 4 to p. 182, l. 34); and the only testimony whereby the third possibility could have been applicable in this

matter was that of the witness, Pfaff, as set forth just above, and whose testimony this appellant deemed improper. Part of the testimony on this point was,

> "Q Tell us the first possibility again. A It may have pulled out of the sockets.
> Q The second? A The cables break.
> Q And the third? A By the cables coming off the drums.
> Q Cables slipping off the drum, was first, wasn't it? A That was third.
> Q What was first? A Cables pulling out of the sockets.
> Q Second? A Cables breaking.
> Q Third, cables slipping off the drums, is that it? A Exactly.
> Q What causes the cables to slip off the drums? A If that elevator is run down below its landing level, the car platform is allowed to rest on the drums. You will get slack cable and that is the only way you can get slack cable by releasing the tension of the cables."

(State of Case, p. 182, ll. 11 to 34.) However, basing recovery on the testimony of this witness, Roehm, and endeavoring to charge negligence upon this appellant by bringing the case within the third possibility, plaintiff's counsel brought out by this witness that the only way in which the cables could have come off the drums was by permitting the platform of the elevator to sink below the surface of the cellar floor and into the pit of the elevator, and therein rest upon the drums. This witness said that that was the only way to cause slack cables (State of Case, p. 182, ll. 28 to 33), but that even with slack cables the elevator could have been operated up and down in its shaft (State of Case, p. 183, ll. 31 to 35; p. 190, ll. 36 and 37). Plaintiff, however, offered no testimony to prove whose servant or agent had allowed the plat-

form to descend into the pit, in order to establish liability on this theory, and indeed failed to prove that in fact the platform had ever been below the cellar level. It had been shown that when the plaintiff stepped on the elevator platform it did not immediately fall (State of Case, p. 67, ll. 21 to 34), but that it only fell after he had lifted one of the heavy iron doors, while standing on the platform with both feet. It had also been shown that the plaintiff weighed about 165 pounds at that time (State of Case, p. 52, ll. 19 to 24). **This witness, Roehm, after saying** that the elevator would not fall with slack cables, was asked what would cause it to fall, and in answer thereto he testified that some pressure would be necessary to force the cables off the drums (State of Case, p. 184, ll. 7 to 17), and added that the weight of plaintiff plus the pressure he **exerted by lifting the heavy door *might*** have been enough to cause the fall, (State of Case, p. 191, ll. 22 to 36; p. 193, ll. 17 to 19), and that even then it might not happen. (State of Case, p. 193, l. 25 to p. 194, l. 8.) This expert said that the movement of the elevator up and down would indicate that it was operating properly, (State of Case, p. 198, ll. 35 to 37).

That was the plaintiff's case. He neither charged nor proved actual notice of any defect to this appellant, nor that a condition existed for such space of time with regard to the elevator as would in the slightest degree legally charge this appellant with knowledge that a dangerous condition existed. On the contrary, plaintiff proved that even with a slackened condition in the cables, the elevator would operate up and down in the shaft without falling, (State of Case, p. 190, ll. 36 and 37), and that one who raised the elevator from the cellar to the side-

A He says, 'I will send up the elevator, you go outside and open the door'."

(State of Case, p. 41, ll. 16 to 19.)

In Paragraph 4 of the First Count, and in Paragraph 3 of the Second and Third Counts of the Complaint, plaintiff charges as follows, (State of Case, p. 16, ll. 15 to 20, and p. 17, ll. 28 to 33, and p. 19, ll. 4 to 10):

> "At the aforesaid time, the plaintiff herein was lawfully invited by the defendants to make use of the aforesaid elevator, and was using the aforesaid elevator for the purpose of delivering certain merchandise to the defendant, P. DeNicholas, Inc."

The plaintiff's proofs showed conclusively that what he himself did went beyond the averment aforesaid. He did more than prepare to place certain merchandise upon the elevator, and, instead, placed himself personally upon said elevator.

Assuming, in connection with the invitation, that when the plaintiff opened the right door the elevator was not up at the sidewalk level, his only task then would have been to open the left door and wait for the elevator to rise to the sidewalk level; but plaintiff states that when he opened the door, the platform was up, (State of Case, p. 42, ll. 4 and 5); he did not prove how or when it had been elevated to the sidewalk level. It might very well have been level with the sidewalk when the invitation was given, and then it would not have been necessary for this appellant to operate the elevator up to the sidewalk level. In fact, there was no testimony that this appellant did do anything in connection with the elevator either before or after the invitation was given.

This appellant extended an express invitation only to open the door guarding the elevator shaft intending that this elevator be used only for the purpose of placing merchandise thereon, which plaintiff knew. (State of Case, p. 16, ll. 15 to 20; p. 17, ll. 28 to 33; p. 19, ll. 4 to 10). The plaintiff knew the elevator was only for freight, (State of Case, p. 16, ll. 15 to 20). Plaintiff testified that he had never personally ridden down on the elevator (State of Case, p. 57, ll. 35 and 36). Plaintiff's expert said the fall was caused by only one thing—the excessive pressure suddenly exerted when plaintiff stood on the platform and lifted the heavy door. (State of Case, p. 184, ll. 6 to 17; p. 191, ll. 22 to 36; p. 193, ll. 12 to 19.) This appellant was under no duty to anticipate that the plaintiff would exceed the bounds of his invitation to open the door by stepping on the elevator platform, and further exceed said invitation by exerting the sudden and execessive pressure that he did while standing thereon. " It is not negligence to fail to foresee and guard or provide against, or take precautionary measures to prevent, accidents or injuries resulting from a peculiar, unusual, and unexpected occurrence which could not have been reasonable anticipated." 45 Corpus Juris 868.

In *Ryerson* v. *Bathgate*, (*supra*), the essential facts were the following: The plaintiff desiring to be rid of a cat which she owned, entered the butcher shop of the defendant, and after acquainting defendant's agent with her intentions and he being willing to take the cat, the defendant's agent walked to a door and partially opened it and said "put her in here." The said plaintiff at that time was holding the cat, but after hearing those words and seeing plaintiff's agent open the door, ran across the

floor of the shop towards the open door and continued through the door, falling down a flight of steps hidden in the darkness behind the door. That being the state of plaintiff's case, defendant moved for a non-suit, which the lower court granted. On appeal, this court sustained the non-suit for the reason that plaintiff had exceeded the bounds of her invitation by entering the door herself instead of strictly following the words of the invitation, which the court held meant merely to put the cat in the door. This court said that when the plaintiff stepped through the door, her status as an invitee changed and she became a licensee, the court applying the rule as cited above.

The plaintiff here had said that he had on various occasions before the date in question, stepped on the elevator while loading his goods thereon, (State of Case, p. 58, l. 35 to p. 59, l. 4), but added that it was not necessary for him to do so (State of Case, p. 59, ll. 5 to 10). However, from course of conduct, no invitation will follow. Mere passive acquiescence in a certain use of property involves no liability; an invitation cannot be spelled out from it. *Saunders* v. *Smith Realty Co.*, 84 N. J. L. 276. But plaintiff did not even prove that this appellant knew of or acquiesced in the said course of conduct of plaintiff.

Appellant respectfully contends that these rules and the construction of the invitation in the case of *Ryerson* v. *Bathgate* (*supra*), present the exact situation as in the case at bar. This appellant's agent merely told the plaintiff to go out on the sidewalk in front of the store and open the door covering the elevator shaft. He even mentioned only one door, according

to plaintiff's own testimony (State of Case, p. 41, l. 19). It must be remembered that the plaintiff intended to use the elevator only to deliver merchandise as charged in the complaint, and he admitted that it was not necessary for him to step on the elevator platform in order to open the doors. He was thereby doing an act for his sole convenience in stepping on the platform. (State of Case, p. 59, ll. 4 to 10.) Therefore, when plaintiff did step on the elevator, he became, as did the woman in the *Ryerson* case, only a licensee, and having proved no acts of willful negligence on the part of P. DeNicholas, Inc., it is submitted that the learned trial court erred in refusing to grant a non-suit.

This appellant further contends that no actionable negligence was proven against it because plaintiff failed to prove any duty on its part to keep the elevator in safe condition. It cannot be controverted that in order for one to be charged with the duty of keeping an elevator in safe condition, he must have the right of control thereover. *Connors* v. *Newton,* 77 N. J. L. 125; *Handlon* v. *Copestone Temple Association,* 106 N. J. L. 362.

With respect to the elevator upon which the plaintiff herein was injured, it was not shown that P. DeNicholas, Inc., had the right of control thereover. In fact, it was proved by the plaintiff that this appellant was an occupant of the restaurant at No. 913 Broad Street, under a sublease, but this appellant had only the *right to use* the elevator at No. 913-915 Broad Street *in common with* the tenant at No. 915 Broad Street—The Rialto Theatre. The right to use does not carry the right or duty to control, and plaintiff did not show that P. DeNicholas, Inc. had the

actual right or duty to control the elevator and shaft. In fact, by establishing that the landlord had leased only the restaurant, but had given only *the right to use the elevator* to this appellant and the Rialto Theatre the plaintiff showed that the landlord had retained entire control over the elevator. (State of Case, p. 32, ll. 4 to 9, and ll. 30 to 35.) It cannot be disputed that where a landlord leases a building to various tenants, but retains control of certain portions thereof for the common use of tenants, the landlord becomes the one who is responsible for any defective condition in said reserved portion. *Gillvon* v. *Reilly,* 50 N. J. L. 26; *Gleason* v. *Boehm,* 58 N. J. L. 475; *Siggins* v. *McGill,* 72 N. J. L. 263; *Kramer* v. *Lehrhoff,* 99 N. J. L. 47. In 36 *Corpus Juris,* 212, the rule was laid down as follows:

> "Where a landlord has furnished agencies, appliances, or instrumentalities for the common use of several tenants of a building, he is in general liable for any injuries arising from his neglect to keep the same in proper repair. The duty owed by a landlord extends not only to the tenant himself, but to members of his family, employees, guests, and invitees, and in general all coming in under tenant's title. The duty of the landlord to make repairs in such cases cannot be delegated, and he will not be relieved by the employment of an independent contractor."

The case of *Handlon* v. *Copestone Temple Association,* 106 N. J. L. 362, decided in the Court of Errors and Appeals, is authority for the proposition that liability for negligent condition of premises lies on the party having control. In that case it appeared that the tenant had the exclusive possession and control of the premises and it was the only one permitted to enter the

cellar way, with the exception of the Public Service to inspect the meters. The landlord could not have entered to inspect or make repairs. The lower court was reversed for failure to direct a verdict in behalf of the landlord. Mr. Justice Parker in his opinion cited this very important quotation from *Ingwersen* v. *Rankin,* 47 N. J. L. 19:

> "'* * * if a nuisance is created by the tenant during the term of the lease, no liability falls on the landlord pending that term for the reason that he has no legal means of abating it; he cannot enter upon his tenant's possession for that purpose and would be a trespasser if he did so. *The test of his liability is his power to have remedied the wrong.*'' (*Italic ours.*)

adding:

> "To the same effect is the case of Connors *v.* Newton, 77 N. J. L. 125."

The case at bar is the same, although the positions of the landlord and tenant are reversed. Here the landlord retained the elevator shaft in his own possession and the tenant, this appellant, had no right in connection with it, except to use the elevator. The tenant had "no power to remedy any wrong."

To paraphrase Chief Justice Gummere's words in the *Handlon case, supra,* the basis upon which plaintiff rested his claim against this appellant, as appears from the averment in his complaint, is that this appellant carelessly, recklessly, and negligently maintained the elevator so as to permit it to fall while plaintiff was preparing to place certain merchandise upon it, and that by reason of such negligence plaintiff was precipitated into the basement of the premises (State of Case, p. 16, ll. 21 to 27), and with respect to this

averment appellant contends that the proofs failed to support said averment of the complaint, but, on the contrary, show conclusively that the obligation to make repairs to the elevator rested solely upon the Trustees who did, in fact, make said repairs at all times exclusively.

In the case of *Weinberger* v. *Kratzenstein,* 75 N. Y. Supp. 537, the facts were as follows: Plaintiff was injured by falling into the well-hole of an elevator which was jointly used by two tenants. Plaintiff having business with one of the tenants, had gone to the shaft to take the elevator, and while waiting for it, leaned against the chain which was the only guard to the shaft; the chain broke and plaintiff fell into the shaft. Motion to dismiss the complaint as against the tenant was granted, and the case being submitted to the jury, the landlord was held liable. The upper court sustained the verdict and ruling of the trial court below, and at pp. 538 and 539, said:

> "But there was no obligation resting upon the defendant Kratzenstein & Co., (tenant) to provide a guard or gate inasmuch as the other tenants in the building had as much right to use the elevator as he did, and the obligation to repair the elevator was upon the owners, and they attended to the same. This is not only undisputed, but the lease expressly gives them the right to enter the building at any time for the purpose of making inspection and repairs."

The last witness for plaintiff was Roehm, and up to the time he took the stand, plaintiff had failed to prove any actionable negligence. Roehm was called by plaintiff as an expert, although he himself did not deem himself to be one (State of Case, p. 194, ll. 7 and 8). He said he had seen the elevator for the first time

on the same day he took the stand to testify, approximately two and one-half years after the accident (State of Case, p. 176, ll. 4 to 30). His co-worker, Pfaff, had told the jury that the cables were off the drums when he viewed the elevator more than twenty-four hours after the fall. Roehm said that the only way this elevator could have fallen was as a result of slack cables (State of Case, p. 182, ll. 11 to 34). He testified there was only one possible way that slack cables could be caused, and that was by someone having operated the elevator down into the pit below the level of the floor; then the platform would rest on the drums and the cables become loose (State of Case, p. 182, ll. 28 to 34). If that were true, what would have been the cause of the plaintiff's fall and the moving and proximate cause of the injury? None other than the act of a person who permitted the elevator to go below the floor level when operating it. Who was that person? The plaintiff must answer that question to fix liability on this theory. But the plaintiff did not answer that question.

Appellant contends, therefore, that the rule laid down in the case of *Rom* v. *Huber,* 94 N. J. L. 259, applies fully to the case at bar. In that case an action was brought by Rom to recover for injuries sustained because he slipped on some soap in the scrub room of the defendant's establishment. The Court of Errors and Appeals stated at page 259:

> "There was no evidence that the soap on the floor—if, indeed, there was soap—was due to the negligence of any servant of the defendant. The evidence was that soap gets on the floor of the scrub room where patrons of the bath are rubbed by the attendants and might, by contact with the feet, be sent to the door of the steam room where Rom

> fell. There is nothing in this to show negligence. The occasional fall of pieces of soap on the floor is inevitable, and as patrons went from one room to another we cannot assume that the only persons whose feet might have sent the soap through the door, if that was the fact, were employes of the defendant. There is no evidence that it was impelled by the foot of the defendant, or his agents, or that it might not have been by customers of the bath."

There was no evidence in the case at bar that any servant of this appellant had operated the elevator to sink below the level of the cellar and on to the drums while he was engaged in the operation of it; there was no evidence then, that the slack in the cables, if there was any, could be attributed to this appellant. It might have been done by servants of the Rialto Theatre or of The Trustees of the Third Presbyterian Congregation in Newark. *Rom* v. *Huber supra* is peculiarly similar.

Furthermore, if the elevator did fall into the pit at any time, that may very well have been caused by a structural defect in the elevator and elevator shaft and chargeable only to the owner. Plaintiff, realizing that, moved to amend his complaint at the trial to allege improper construction (State of Case, p. 169, ll. 6 to 22), but the trial court refused to permit the amendment.

Roehm also testified that even with slack in the cables, the elevator could have been operated up and down in the shaft (State of Case, p. 182, ll. 31 to 34), and he said further that the only way that the elevator could fall while in that condition, was by the exertion of some sudden and extra pressure or weight to the elevator,

which would jar the cables off the drum (State of Case, p. 184, ll. 7 to 25; p. 191, ll. 22 to 35; p. 193, ll. 12 to 19; p. 196, ll. 4 and 5) although it would not necessarily happen even then (State of Case, p. 193, ll. 19 to 34). This was related by Roehm on his direct testimony. Therefore, this appellant contends that the proximate cause of the fall would be the sudden pressure applied to the platform, which in this case was applied by the plaintiff himself.

Roehm also said that with the cables in the position testified to, that is, off the drums, that sometimes a fall would occur and sometimes it would not occur (State of Case, p. 193, ll. 25 to 34). How then could this appellant who was no expert be charged with anticipating a fall of the elevator? Any fall of the elevator under this condition would be purely unavoidable and accidental, and therefore, not negligence.

Roehm further testified that the slack in the cables was visible to one operating the elevator. Even if that were true, still this appellant would not be chargeable with the duty of observing it, because it had a right to rely upon the landlord, who should have kept the elevator and cables in such a state of repair that they could not have become slack.

Even if a servant or agent of this appellant had actually seen the slack in the cables, it is respectfully contended that there was no negligence on the part of this appellant, because this appellant was under no duty to anticipate that the plaintiff would overstep the bounds of his invitation and board the elevator, when he had merely been invited to open the doors at best; and could not anticipate that once on the

elevator the plaintiff would exert the pressure that he suddenly did.

Furthermore, Roehm said slack in the cables, although visible, would not necessarily mean the elevator would fall, and said that the cables would become taut when the elevator reached the top of the shaft. How then could the ordinary, reasonable, prudent man be charged with anticipating something that might not happen, when even an expert could not say whether or not the elevator was dangerous? If the operator saw that the cable was slack and then saw it tighten when the platform was up, the thought of danger would be dispelled. Plaintiff's witnesses Seelig and Lyons did not see any defect in the cables, and they were looking for defects immediately after the accident.

The Court's attention is respectfully called to the fact that plaintiff absolutely failed to prove that any servant of this appellant operated the elevator so as to have it at the sidewalk level. The only testimony on that point was plaintiff's testimony that Mr. DeNicholas said that he would send up the elevator, and plaintiff's statement that when plaintiff opened the door, the elevator was up.

> "Q On this occasion you received the check, what did Mr. DeNicholas say to you?
> A He says, 'I will send up the elevator, you go outside and open the door.' "
> * * * * * * * *
> "Q What did you do when you reached the iron doors?
> A I picked up one and put it down on the sidewalk.
> Q And when you picked that one up?
> A I seen the elevator was even with the sidewalk."

(State of Case, p. 41, ll. 16 to 19; p. 41, ll. 38 to 40; and p. 42, ll. 1 and 2). Positive proof that this appellant actually operated and sent the platform to the sidewalk level was essential to prove liability. The so-called invitation alleged to have been extended plaintiff in the words quoted above only show a statement of intent to operate the elevator if that were necessary. Appellant again reiterates that there was no proof of such operation. It can not be presumed from the mere words uttered by Mr. DeNicholas (above quoted) that appellant did what Mr. DeNicholas said it would do. Negligence is never presumed, in fact, all presumptions are in favor of cautious and reasonable action and away from negligence. *Alvino* v. *Public Service Ry. Co.*, 97 N. J. L. 526, 117 Atl. 709; *Ryan* v. *Public Service Ry. Co.*, 101 N. J. L. 361. Appellant therefore respectfully contends that, there being an absolute absence of proof of the operation by this appellant of the elevator, it should have been presumed that this appellant was not negligent in this connection.

Furthermore, the actionable negligence plaintiff was obliged to prove was the negligence he had charged in his complaint, to wit, negligence in the maintenance and operation of the elevator (State of Case, p. 16, ll. 22 to 27; p. 17, ll. 34 to 40; p. 19, ll. 11 to 18). He did not prove that this appellant was under any duty to maintain the elevator. In fact he proved the contrary, and the court's attention is respectfully directed to the argument set forth above in connection with the failure to prove control in this appellant.

Nor was there proof of negligent operation by this appellant with reference to plaintiff's

charge in his complaint that this appellant "permitted it (the elevator) to fall while the plaintiff was preparing to place certain merchandise upon it." By assuming as a fact that the elevator in question did go up and was level with the sidewalk as a result of operation by this appellant's servant, (although there was no proof of the latter), and relying upon plaintiff's testimony that the elevator did not immediately fall, but remained in that position until plaintiff placed his full weight on the elevator and exerted a sudden and excessive pressure while standing thereon, then the plaintiff himself put in motion the moving cause of the fall, and therefore plaintiff failed to show that this appellant in so operating the elevator was negligent.

Plaintiff proved no facts from which appellant would have been legally chargeable with notice of any existing defect.

Assuming, however, that a duty owing from this appellant to plaintiff had been shown, it next was incumbent upon plaintiff to prove a legal failure of said duty. In other words, he would then have to prove the existence of a defect and either actual or constructive notice thereof, within the rule laid down in *Schnatterer* v. *L. Bamberger & Co.*, 81 N. J. L. 558.

This appellant contends that the proofs established by the plaintiff are barren of such evidence. The only witnesses who had testified with reference to any of the happenings before the

fall were the witnesses, Carpenter and Costello, who merely said that they had seen the plaintiff step on the elevator and fall down, not testifying about any defect.

Seelig and Lyons saw the elevator within approximately one-half hour after the fall (State of Case, p. 152, ll. 33 to 37; p. 160, ll. 26 to 28), whereas, Pfaff, came more than 24 hours later (State of Case, p. 171, ll. 9 to 15). Seelig and Lyons each testified that the elevator was tipped and half way down the shaft, adding that no other defect was visible. Seelig and Lyons expressly said that there was nothing else wrong with the elevator, Seelig saying that it was tipped and half way down the shaft, and Lyons saying that it was tipped only slightly. There was certainly, therefore, no basis for the testimony of Pfaff, that the cables were off (this will be treated further herein under point III). Pfaff, however, and despite the testimony of Seelig and Lyons and over objection, said the cables were off. There was, therefore, no proof that a defect had existed before the accident, nor proof that this appellant had notice of any defect or knowledge thereof, or that a defective condition had existed for such space of time before the occurrence that this appellant would have been charged with the knowledge thereof under the doctrine of *Schnatterer* v. *L. Bamberger & Co.* (*supra*).

The doctrine of *Res Ipsa Loquitur* does not apply to hold this appellant liable for the reason that it is elemental that before *Res Ipsa Loquitur* can enter into a case, it must first be proven that the instrument that caused the fall was in the *exclusive* control of the defendant or defendants, and that no others had the control

of said instrument. In other words, to come within the doctrine, a plaintiff must join as parties defendant all those he claims had the right to exercise control and who did exercise control over the instrument or thing that caused the injury. The United States Supreme Court has so held in the case of *San Juan Light and Transit Co.* v. *Requena,* 224 U. S. 89, in which the court upon this subject stated: (at page 98 and 99)

> "When a thing which causes injury, without fault of the injured person, is shown to be under the *exclusive control of the defendant,* and the injury is such as in the ordinary course of things does not occur if the one having such control uses proper care, it affords reasonable evidence, in the absence of an explanation, that the injury arose from the defendant's want of care." (Italics ours.)

Citing our New Jersey case of *Bahr* v. *Lombard,* 53 N. J. L. 233, for this principle.

In the latter case, the Court of Errors and Appeals, said at page 237,

> "* * * The use of instrumentalities of enormous power, and of complicated structure and operation, not only raises the standard of duty proportionately with the increase of danger; it also gives rise to obligations springing from the *exclusive control of these complicated agencies, and from the almost exclusive knowledge of their structure and mode of operation."* (Italics ours.)

In the case of *Gilroy* v. *Standard Oil Co.,* (not officially reported), 151 Atl. 598, the Court of Errors and Appeals said that in order for the rule of *Res Ipsa Loquitur* to apply, the instrument which causes the injury must be wholly

and entirely within the control of the defendant, the court saying at page 600:

> "The explosive was entirely within the control of the defendant and the means of obtaining the information as to its condition and the causes which impelled the explosion were wholly within the defendant's possession."

The doctrine, therefore, would not be applicable to this defendant, because it was not shown by the plaintiff that this appellant had any right of control over the elevator in question, and if it had so shown, the doctrine still would not be applicable, because the Rialto Theatre, who had as much right to use the elevator as this appellant, was not a party defendant in this suit.

This appellant, therefore, contends that the doctrine of *Res Ipsa Loquitur* not applying and plaintiff having failed to prove actual or constructive notice of a defect, this motion for a non-suit on this ground should have been granted.

Plaintiff was guilty of contributory negligence.

This appellant further urged that a non-suit should have been granted for the reason that the plaintiff was guilty of contributory negligence. Appellant respectfully calls the court's attention, in this connection, to the extent of the invitation plaintiff alleged he had been granted.

> "I will send up the elevator, you go outside and open the door."

(State of Case, p. 41, ll. 16 to 19).

Construed even in the best light for the plaintiff, this invitation was merely to open the door. Certainly, therefore, when the plaintiff went beyond this invitation, and did something he did not have to do, according to his own testimony, he assumed whatever risk there was connected therewith and became contributorily negligent.

Furthermore, it is shown that when the plaintiff did step on the elevator platform, it did not immediately descend (State of Case, p. 55, ll. 37 to 40), but that it only fell after the plaintiff had both feet on the platform, and had lifted the heavy left-hand door a short distance. Plaintiff admitted that it was not necessary for him to step on the platform to open the door (State of Case, p. 59, ll. 9 and 10), and that he could have put his goods on the elevator from the sidewalk without stepping on the elevator (State of Case, p. 59, ll. 5 to 10).
It had also been shown that the door was very heavy, and that the plaintiff weighed 165 pounds (State of Case, p. 59, ll. 11 to 15; p. 52, ll. 19 to 25). The plaintiff's witness, Roehm, testified that the fall could only have been caused by an excessive and sudden pressure upon the elevator (State of Case, p. 184, ll. 10 to 17; p. 191, ll. 25 to 35; p. 193, ll. 35 to 40; p. 194, ll. 4 to 7; p. 196, ll. 4 and 5).

Therefore, appellant contends that the proximate and moving cause of the fall was this excessive and sudden strain put to the elevator by the plaintiff himself, and of course, even if the plaintiff contributed to the fall in the slightest degree, he would be barred from any recovery.

Furthermore, appellant contends that plaintiff was contributorily negligent because he stepped on an elevator which he knew was not a passen-

ger elevator, but a freight elevator, and in so doing, he therefore, assumed the risk. *Hall* v. *Murdock,* 114 Michigan 233, 72 N. W. 150. In that case, the Supreme Court of Michigan, held that if the plaintiff knew that the elevator was not a passenger but a freight elevator, he assumed all the risk incident to carriage upon it. Owners are under no legal obligation to put safety appliances on elevators not intended to carry passengers. The court said,

> "When therefore one is permitted or invited by the owner to ride upon a freight train or elevator, said owner does not guarantee that either is equipped with the most approved appliances in use upon those carrying passengers, and, if he has provided those which are in common use, and has exercised reasonable care in inspecting, repairing, and managing them, he has done all that the law requires. The mere fact that the occupants of this block rode upon this elevator, is no evidence that the defendant intended it for that purpose, even if such use were known to them."

The testimony in the case at bar shows that the plaintiff knew that this elevator was a freight elevator, because he said in various places that he used the elevator for goods almost weekly during the year (State of Case, p. 60, ll. 29 to 40).

This appellant at this point respectfully requests that it be permitted to refer back to the argument above with reference to the case of *Ryerson* v. *Bathgate, supra,* in which case it was held that the plaintiff was contributorily negligent for exceeding the bounds of an invitation. Appellant contends that that case applies here.

The Court of Errors and Appeals said in *N. J. Express Co.* v. *Nichols,* 33 N. J. L. 434, that

it is undoubtedly the law in this state that if it appears by the plaintiff's evidence that his own negligence contributed to the injury for which he sues, it becomes the *duty* of the trial court to non-suit, and that a reversal will be granted for a failure to non-suit.

Appellant, therefore, respectfully contends that the learned trial court should have granted this appellant's motion for a non-suit for the reason that plaintiff was contributorily negligent.

* * * * * * * * * *

Plaintiff's entire proofs were circumstantial. There was no direct evidence of negligence, and it is respectfully submitted that even the circumstantial evidence did not establish actionable negligence, plaintiff not having shown that he had been invited to do what he did do, nor that this appellant owed any duty to plaintiff which it had legally violated, nor affirmatively proved that any servant of this appellant had negligently operated the elevator, and even if there was such proof it is submitted the plaintiff was guilty of contributory negligence barring his recovery.

The plaintiff failed to prove that this appellant lowered the platform or caused the platform to be lowered below the cellar level so as to cause any slackening of cable; plaintiff failed to prove that appellant saw or should have seen that the cables were slack; plaintiff failed to prove that this appellant knew or should have known that slackened cables constitute a dangerous condition; plaintiff did not prove that this appellant raised or caused to be raised the elevator platform from the cellar surface to the

sidewalk level. However, plaintiff on his own case proved the following:

(1) That this appellant was under no duty to maintain the elevator, but, on the contrary, the plaintiff did prove that the Trustees of the Church were exclusively in control thereof and chargeable with its maintenance, therefore failing to substantiate the averment in the complaint in that regard;

(2) That what plaintiff did prior to the fall was beyond the limits of the invitation extended to him;

(3) That although he did show on his own testimony that the elevator platform was at the sidewalk level when he raised the first door, plaintiff failed to prove by whom or when it was so raised to that level;

(4) And lastly, that by his own acts, the plaintiff, in stepping on the elevator and exerting the sudden and excessive pressure that he did by lifting the heavy left door while standing on the platform, himself caused the elevator to fall.

Furthermore, this appellant invokes the doctrine of *Price* v. *New York Central R. R. Co.*, 92 N. J. L. 429 in support of its contention that the plaintiff did not prove facts sufficient to establish actionable negligence upon the part of this appellant. In the *Price* case, the plaintiff was a fireman employed by the defendant on one of its locomotives. While riding in the cab thereof he suffered severe head injuries. No one saw the actual accident, but the proof was that on a passing engine an iron rod extended about 4 inches on the side on which plaintiff's head was extended from the cab to watch the signals. This

rod was in a position about 9 inches above plaintiff's head when and if extended; the clearance between the engines was two feet nine inches. Shortly after the two engines passed, the plaintiff was observed by the engineer to be in a dazed condition, with an abrasion on his head. The negligence alleged by the plaintiff was carelessness in the placing of the iron rod in such a position as to permit it to strike the plaintiff. In discussing this state of facts, the Court of Errors and Appeals, speaking through Mr. Justice Bergen, said at p. 432:

> "With these circumstances we are asked to presume, without proof thereof, that the rod may have changed its position from one of safety to one of danger to the plaintiff, and upon this presumption to further presume that it did in fact strike him, which is not allowable. The only presumptions of facts which the law recognizes are immediate inferences from the facts proved."

Citing *Manning* v. *John Hancock Mutual Life Insurance Co.*, 100 U. S. 693.

The situation in the case at bar is identical. The plaintiff attempts to establish that this appellant negligently operated the elevator by asking the jury to base presumption upon presumption to conclude a final finding of negligence. The plaintiff shows only this: that appellant said to plaintiff: "I will send up the elevator" and shortly thereafter plaintiff went outside and opened the elevator door and saw that the platform was up. There was no positive and actual proof that when those words were said the elevator was down, nor was it actually proved that the elevator was raised up to the sidewalk and that *this appellant* actually raised it to that position. As far as the proofs show, it might have been at the sidewalk

level all the time. This latter theory has substantiation in the plaintiff's own testimony (State of Case, p. 65, ll. 33 and 34, and p. 66, ll. 7 to 9), where plaintiff said he did not hear the elevator being operated. Therefore, the plaintiff asked the jury to presume without proof thereof, that the elevator was down when the words were uttered, and then to presume that it was sent up thereafter, and to presume further that this appellant actually operated the elevator to the sidewalk level, and then upon those presumptions, to further presume that the appellant was negligent in its operation thereof, this latter presumption to be based upon the testimony of the position in which the elevator was found sometime after the accident.

Furthermore, the facts necessary to supply a basis for these presumptions were not proved. The Supreme Court of the United States has said:

> "Whenever circumstantial evidence is relied upon to prove a fact, the circumstances must be proved, and not themselves be presumed."

Manning v. *Insurance Company*, 100 U. S. 693 at p. 698. And the N. J. Court of Errors and Appeals, speaking through Mr. Justice Garrison, in *Wyckoff* v. *Birch* (Not officially reported), 71 Atl. 243, at p. 246, said:

> "Arguments based upon isolated circumstances or detached statements of witnesses or upon general allegations of negligence go for nothing when unsupported by testimony as to concrete facts. In its essence negligence is always concrete. 'There is,' as was said upon another occasion, 'no such thing as negligence at large,' *Bien* v. *Unger*, 64 N. J. Law, 596, 46 Atl. 593."

It is respectfully submitted, therefore, that plaintiff did not establish such a state of facts from which a jury could have reasonably inferred a cause of action in negligence, and that the trial court committed reversible error for failing and refusing to grant this appellant's motion for a non-suit.

POINT II.

The trial court erred in its refusal to grant the motion of the defendant, P. DeNicholas, Inc. for a direction of verdict in its favor.

(a) *That there was no proof of actionable negligence on the part of the defendant, P. DeNicholas, Inc.*

(b) *That there was no proof of notice to the defendant, P. DeNicholas, Inc., of any defect in the elevator or that any defect existed for such a long time as charged the defendant with knowledge of any defect in the elevator or any part thereof.*

(c) *That the plaintiff was guilty of contributory negligence.*

Many uncontroverted facts of importance bearing upon the non-existence of legal liability of this appellant were brought out on defendants' case. Chief among those was the introduction in evidence of the lease between The Trustees of the Third Presbyterian Congregation in Newark, and the Southern Candy Co. Inc. (State of Case, p. 368 to p. 379), marked Exhibit Db, by virtue of which instrument this appellant occupied the premises. The most significant fact shown thereby was that the premises demised consisted only of the store or restaurant known as No. 913 Broad Street, and the cellar thereunder. For

convenience, a copy of the first paragraph of the lease is here set forth:

> "WITNESSETH: That the said party of the first part, hereinafter called the lessor, doth hereby demise and lease unto the said party of the second part, called the lessee, and the said lessee do hereby take, and hire, the store numbered 4 in building of the lessor, located in the City of Newark, Essex County, New Jersey, and known as 905-915 Broad Street, being the store at No. 913 Broad St. immediately north of the entrance to the Rialto Theatre, to be used as a sales room for the sale of candy, ice cream, soda water, etc., together with that part of the cellar underneath the store now occupied by them and for no other purpose, for a term to commence on the First day of May 1925, and to end on the first day of May, 1930, at ten o'clock in the forenoon of that day, at the rent of EIGHTY FIVE HUNDRED DOLLARS, per annum, lawful money of the United States, payable as follows: in equal monthly installments of in the sum of 1/12 of the annual rent reserved under this letting, for each year."

The next sentence in the Lease is also important:

> "The party of the second part are to have the use of the sidewalk lift in common with the tenant to the South of the premises hereby rented."

(State of Case, p. 368, l. 37 to p. 369, l. 5.)

Thus this appellant was neither a tenant nor an occupier of the elevator, this appellant having been granted merely the right to use the elevator and not exclusively, but jointly with the Rialto Theatre. The landlord retained control of the elevator and shaft, this appellant having no right in connection therewith except to use it.

Clause 7 of the lease is also significant. It follows verbatim:

> "The lessor, or its agents, shall have the right to enter the demised premises at reasonable hours in the day or night to examine the same, or to run telegraph or other wires or to make such repairs, additions and alterations as it shall deem necessary for the safety, preservation or restoration of the said building, or for the safety or convenience of the occupants thereof, and also exhibit the said premises to be let and put upon them the usual notice "To Let," which said notice shall not be removed or obliterated by any tenant, the party of the first part not being bounden, however, to make any repairs unless it be elsewhere in this lease expressly so agreed."

(State of Case, p. 372, ll. 12 to 27). A copy of Rule I attached to the lease also follows:

> "1. The sidewalk, halls, passageways, *elevators* and stairways shall not be obstructed by any of the tenants or used by them for any other purpose than ingress and egress from and to their respective apartments and for signs on boards erected for that purpose."

(State of Case, p. 376, ll. 5 to 11).

It was, therefore, shown that the landlord, The Trustees of the Third Presbyterian Congregation in Newark, retained entire control of the elevator, treating it merely as something in the premises for the common convenience of the tenants as a common stairway and the like.

It was proved by the witness, Robert G. Bauer, an employee of the Rialto Theatre, that he, in the regular course of his duties as porter, had used this elevator at about 7:00 A. M. of the same morning of the accident (State of Case, p. 269, ll. 18 to 21). He testified that the theatre

used the elevator more than anyone else (State of Case, p. 269, ll. 15 to 17). This testimony was uncontradicted.

It was brought out and even admitted by the defendant, The Trustees of the Third Presbyterian Congregation in Newark, that they always repaired the elevator when repairs were necessary (State of Case, p. 223, l. 34 to l. 40, and p. 227, l. 38 to l. 40; p. 317, l. 37 to p. 318, l. 4); and that they inspected the elevator (State of Case, p. 227, l. 4 to l. 12). It was shown that this appellant had nothing to do with the elevator in this regard (State of Case, p. 277, l. 21 to l. 26). It did, however, report the condition of the elevator to the landlord whenever a defect happened to come to its notice (State of Case, p. 277, l. 23 to l. 26, and p. 287, l. 4 to l. 10). It developed that the elevator had been completely overhauled by an independent contractor employed by The Trustees of the Third Presbyterian Congregation in Newark, about one month before the accident, to wit, on December 6, 1928, the accident occurring on January 10, 1929 (State of Case, p. 225, ll. 21 to 40), and (p. 313, ll. 4 to 12).

This appellant denied that it invited the plaintiff to open the doors covering the elevator shaft (State of Case, p. 273, l. 38 to p. 274, l. 5).

It was testified, on behalf of this appellant, that it had not used the elevator on the day of the accident, before the time of the fall. (State of Case, p. 295, ll. 12 to 20, and p. 277, l. 19 and l. 20.)

This appellant introduced in evidence as Exhibits D. I (State of Case, p. 380) and D. 2 (State of Case, p. 381), original and certified copies of a claim petition filed in the New Jersey Depart-

ment of Labor, Workmen's Compensation Bureau, in a cause wherein Oscar E. Guensch, Jr., the plaintiff herein, was petitioner, and Meyer Marx, was respondent. In that petition, signed and sworn to by Mr. Guensch, in answer to question 17, which was:

> "What was the nature of the accident, and how did it happen,"

answer was made as follows:

> "Had delivery of goods and collection of money. Went into restaurant—received check—asked that elevator be sent up for goods. Went out to elevator lift on sidewalk, covered by two heavy iron doors. Had lifted one door half open and saw that elevator was up. *The sidewalk was wet, as the day was rainy, I slipped, fell on the elevator,* the chain broke and down I went."

(State of Case, p. 381, ll. 36 to p. 382, l. 10.) It was testified to by Mr. Ward, the attorney for the plaintiff herein in the Compensation proceeding, that he read each and every question and answer to Mr. Guensch, and that Mr. Guensch signed it and swore to it in his presence. (State of Case, p. 325, ll. 7 to 16 and p. 326, ll. 10 to 12.) This petition was dated March 20, 1929, and filed at Trenton on March 21, 1929, (State of Case, p. 384, l. 28 and p. 380, l. 20), two months after the accident.

The trial court erred in refusing to grant this appellant's motion for a direction of verdict upon the grounds above mentioned.

At this point, for the sake of brevity, this appellant desires to call the court's attention to the argument set forth in Point I above, to which it hereby refers and makes same part hereof as if again specifically set forth.

Elaborating briefly on certain parts of that argument, however, appellant feels that the facts just mentioned, and which were brought out on defendant's case, conclusively showed that this was not a case wherein this appellant was liable. The lease showed that the demised premises consisted of only the store and part of the cellar under it. Specific mention was made about the elevator, this appellant being given *only a right to use it in common* with its neighbor, the Rialto Theatre. Where a landlord leases a building to various tenants, but retains control of certain portions thereof for the common use of said tenants, it becomes the absolute duty of the landlord to keep those reserved portions of the premises in safe condition. Appellant respectfully refers the court to these cases mentioned in Point I—*Connors* v. *Newton,* 77 N. J. L. 125; *Handlon* v. *Copestone Temple Assn.,* 106 N. J. L. 362; *Gillvon* v. *Reilly,* 50 N. J. L. 26; *Gleason* v. *Boehm,* 58 N. J .L. 475; *Siggins* v. *McGill,* 72 N. J. L. 263; *Kramer* v. *Lehrhoff,* 99 N. J. L. 47; *Weinberger* v. *Kratzenstein,* 75 N. Y. Supp. 537. It is respectfully contended and urged that these cases are dispositive of the point being reviewed, that is, that because this appellant had no right of control over the elevator or shaft, it was un-

der no duty to keep the same in repair, or to properly maintain the same.

Furthermore, as pointed out in the recitation of facts under this point, it was not only proved but admitted by the Trustees that they not only inspected the elevator, but repaired it whenever necessary, and in fact had completely overhauled it approximately one month prior to the accident. (State of Case, p. 222, l. 26 to p. 223, l. 7; p. 223, ll. 35 to 40; p. 227, ll. 9 to 12, and ll. 34 to 40; p. 313, ll. 21 to 30; and p. 317, l. 36 to p. 318, l. 4.) Surely this bears out appellant's defense that not only was the control and duty to control and keep in repair of the elevator and shaft upon the Trustees, but that they, realizing this duty, themselves attended to the repair on all occasions. Therefore, if they were not originally chargeable with the duty to keep the premises safe, they assumed that duty and they alone would be liable for any violation thereof. *Stathos* v. *Bunevich*, 9 N. J. A. R. 97, 153 Atl. 572; *Rhodes* v. *Fuller Land and Improvement Co.*, 92 N. J. L. 569.

The testimony of the witness Bauer is highly significant in that it expressly and cleanly meets the plaintiff's theory of the case, and defeats that theory. It bears out the argument of this appellant urged in Point I herein by showing that the last person to use the elevator before the fall was an employee, not of this appellant, but of the Rialto Theatre, not a party to this action. The plaintiff, having failed to establish who had last operated the elevator, this appellant furnished the proof, which was uncontradicted, and the only proof before the jury. The question asked by the Court of Errors and Appeals in the case of *Rom* v. *Huber, supra,* was there-

fore answered adversely to this plaintiff as far as this appellant is concerned. It was not a servant of this appellant who last operated the elevator.

The court's attention is respectfully called to the petition of the plaintiff filed in the Workmen's Compensation Bureau to recover compensation for the same injuries and arising out of the same accident, for which the judgment here on appeal was recovered. It is only mentioned here because it conclusively bears out the theory of this appellant that the accident was caused solely by the plaintiff, and that in any event, plaintiff in some degree contributed to the accident and the resultant injury to himself. His answer to question 17 of the petition was:

> "Q What was the nature of the accident, and how did it happen?
>
> "A Had delivery of goods and collection of money. Went into restaurant—received check—asked that elevator be sent up for goods. Went out to elevator lift on sidewalk, covered by two heavy iron doors. Had lifted one door half open and saw that elevator was up. The sidewalk was wet, as the day was rainy, I slipped, fell on the elevator, the chain broke and down I went."

(State of Case, p. 381, l. 35 to p. 382, l. 10.)

At this point this appellant desires to call the Court's attention to the argument advanced under Point I with reference to the case of *Price* v. *New York Central R. R. Co.*, 92 N. J. L. 429, wherein it was shown that it was not allowable to base a presumption upon a presumption to establish actionable negligence. The doctrine of that case is equally applicable to the argument advanced now with reference to the trial court's refusal to grant a motion for direction of verdict; and supplementing the argument advanced under

Point I this appellant calls the Court's attention to one sentence found in the *Price* case, in the opinion of the Court of Errors and Appeals (at p. 432):

> "In view of plaintiff's subsequent mental condition, we cannot disregard the possibility that he might have fallen against something on the engine, and produced the injury by some other means than that charged in the complaint, for the exclusion of some causes will not exclude all others."

and in *Cook* v. *American Smelting and Refining Company*, 99 N. J. L. 81, it is said (at p. 85):

> "A plaintiff to succeed must show by evidence, not only such circumstances as would justify the inference of the defendant's negligence, but which would exclude the idea that the accident was due to a cause with which the defendant was unconnected. *McCombe* v. *Public Service Railway Co.*, 95 N. J. L. 187."

In the case of *Price* v. *New York Central R. R. Co., supra,* the Court said in effect that the plaintiff therein had proven merely one out of several possible ways in which the injuries to the plaintiff could have occurred, and failed to exclude the other possibilities, one of which possibilities the Court itself pointed out. In the instant case the plaintiff proved merely one possible way in which the accident could have occurred, said proof being merely in the form of presumptions, one based upon the other, as heretofore argued; there was, however, in the proof another possible way in which the accident could have occurred, this latter possibility having been supplied at the trial by this appellant, and which latter possibility took the form not merely of presumptions based in turn upon other presumptions, but upon a petition filed in the Work-

men's Compensation Bureau of this State, referred to in the foregoing paragraph, subscribed and sworn to by the plaintiff himself, wherein said plaintiff stated that the way in which the accident occurred was that the day had been rainy, the sidewalk was slippery, as a result of which he slipped and fell upon the elevator. Plaintiff, therefore, having proven in his own case merely one possibility, and this appellant on its case having proven another possibility based upon plaintiff's own verified pleading, did not prove such a probability as is required by the doctrine in the case of *Price* v. *New York Central R. R. Co., supra,* and therefore this appellant was entitled upon its motion to a direction of a verdict in its favor.

Appellant therefore respectfully submits that because there was no proof of actionable negligence on the part of this appellant, the plaintiff himself failing to prove that he had been invited to use the elevator in question, and proving in fact that if he had been invited to use it he had exceeded the bounds of the invitation, and the plaintiff having failed to prove affirmatively such a state of facts from which notice of a defective condition would be legally chargeable to this appellant, and because the plaintiff was contributorily negligent, all of which was argued under Point I, and which argument is equally applicable here, reference being made thereto, that the trial court committed reversible error in refusing to grant this appellant's motion for a direction of a verdict in its favor.

POINT III.

The trial court erred in permitting the plaintiff's witness, Albert Pfaff, to testify over objection with reference to the elevator as he found it.

The trial court erred in permitting the witness Albert Pfaff to testify over objection on his direct examination in answer to the following question or questions:

> *"When you arrived there, did you look at the elevator, examine the elevator? In what condition did you find it?"*
> *"In what condition did you find it?"*

This appellant attacks the ruling of the learned trial court with respect to the testimony of the plaintiff's witness, Albert Pfaff. Pfaff was one of the last witnesses called by the plaintiff. Having failed to prove actionable negligence by any of his previous witnesses, plaintiff attempted to establish his case by Pfaff's testimony, which appellant considers improperly admitted. When Pfaff was called to the stand, the previous testimony with regard to any possible defect in the mechanism or operation of the elevator was that given by the plaintiff's witnesses Seelig and Lyons. Costello and Carpenter had merely said that they saw plaintiff suddenly fall down the elevator shaft (State of Case, p. 108, ll. 24 to 32, and p. 128, ll. 28 to 32.) Seelig saw the elevator about between 15 and 30 minutes after the accident, (State of Case, p. 152, ll. 33 to 37), and testified that the platform was half way down the shaft, and tipped at a 45 degree angle (State of Case, p. 152, ll. 24 to 27), but was subsequently asked whether he had seen anything else wrong with the elevator, and he answered that he did not. (State of Case, p. 153, ll. 11 and 12.) Lyons testified that he came upon the scene at about 9:30 A. M., perhaps a half hour after the fall

(State of Case, p. 156, ll. 35 to 37, and p. 160, ll. 26 to 28). He saw the elevator at that time, but testified only to the fact that the platform was somewheres in the middle of the shaft and tipped slightly to the right. (State of Case, p. 159, ll. 4 to 13.)

After this testimony was in the record, Pfaff was called to the stand. He testified that he was employed by the Otis Elevator Company, and that he inspected the elevator on the next day more than 24 hours after the fall. (State of Case, p. 165, l. 8 to p. 166, l. 13.) Objection was made by both the appellants to the testimony of this man upon the ground that plaintiff did not show that the condition of the elevator was the same when Pfaff examined it as it was immediately following the accident. The learned trial court overruled these objections. Exception was taken and allowed. Pfaff then proceeded to describe the condition of the elevator and said that the elevator platform was at about a forty-five degre angle in the shaft (State of Case, p. 166, ll. 15 to 22). Later, after being asked a leading question by plaintiff's counsel, he testified that on one drum the cable was off about three turns, and on the other drum it was off about one turn. (State of Case, p. 167, ll. 21 to 29.) There had been no proof by any of the previous witnesses which was in accord with this finding by Pfaff, and upon which his testimony could have been based. It is respectfully submitted and contended that the testimony of this witness was improper. When he took the stand the facts as proved showed that the elevator immediately after the fall was slightly tipped and half way down the shaft and that nothing else was wrong with the elevator. The presumption could only be that the condition

of the elevator would stay the same for a period thereafter until moved or changed. 22 *Corpus Juris* 92.

Pfaff's testimony showing that something else was wrong with the elevator when he saw it conclusively shows that the position of the elevator must have been changed between the time Seelig and Lyons saw it and the time Pfaff saw it. Therefore, before presenting a basis upon which to offer the testimony of Pfaff, it was encumbent upon the plaintiff first to prove affirmatively that the elevator in fact had not been changed or moved, and that the condition of the elevator and shaft was exactly the same when Pfaff inspected it as it was when the accident occurred, in order to make his testimony competent. This was pointed out to the learned trial court by counsel for this appellant. (State of Case, p. 165, ll. 37 to 40.)

We respectfully contend that the learned trial court's ruling was harmful error in this regard.

POINT IV.

The trial court erred in permitting the witness Roehm to testify over objection in answer to the following questions:

> "Q Assume that in this particular case the plaintiff went into this restaurant, transacted his business, was told to go outside and the elevator would be sent up to him, he went outside, raised one of the doors, saw the elevator up, stepped in on the platform. At that time he weighed 165 or 160 pounds, that he stepped in on the platform with both feet, started to raise the other door up, the elevator went down with him. Afterward when they went to take him off, the platform was between half and two-

thirds of the way down the shaft, testified at a 45 degree angle, and one of the cables was off, what would you say was the cause of that condition, of those three possibilities that you mentioned?"

"Q Assume that on this day, the plaintiff went to the Rialto Restaurant, transacted his business, was instructed to go outside, that the elevator would be sent up to him, assuming that at that time he weighed between 160 and 165 pounds, assuming further that on going outside he raised one of the doors saw the elevator platform was up, stepped on the elevator platform with both feet, started to raise the other door, when said platform went down with him. Assume further that while his body was up on the platform or after it had been taken off or left the platform it was between one-half and two-thirds of the way down the shaft and the platform was tipped at a 45-degree angle to one side, and assume further that Mr. Pfaff, a repairman, or a service man from your establishment made an inspection of the elevator and found one cable off, or found two cables off, which in your opinion—Assume, further, Mr. Pfaff, your service man, made an inspection of this elevator and found the cable on one side considerably off and slightly off on the other side, which of these three possibilities which you have mentioned would you say was the cause that this elevator dropped?

"The Court: Amend the question to that effect. After the other hypothetical question. That he not only raised the door, but then got in on the platform and was raising the second door and got it up about a foot, when the elevator dropped, the platform dropped. With that amendment, what is your answer?"

(State of Case, p. 184, l. 26 to p. 187, l. 15.)

The last witness for the plaintiff was Roehm, whose testimony will be discussed under this point. The plaintiff attempted to qualify Roehm

as an expert, although he himself did not consider that he was one. (State of Case, p. 194, ll. 7 and 8.) Roehm's entire testimony was circumstantial, being based throughout upon hypothetical questions. These hypothetical questions combined in turn the supposed facts brought out by plaintiff's prior witnesses, but chiefly and especially were based upon the testimony of Pfaff, discussed under Point III. Roehm testified that the only way that the elevator could have fallen was if the cables were off, and the only testimony that the cables were off three turns on one drum and one turn on the other was that given by Pfaff. This appellant therefore respectfully refers the Court to the argument set forth under Point 3, and for the sake of brevity asks that it be considered as repeated and set forth at length here.

Therefore, if the testimony elicited from the witness Pfaff was not competent, the above questions asked Roehm based upon testimony of Pfaff were properly objectionable, and the learned trial court committed harmful error in refusing to strike them out upon motion.

POINT V.

The trial court erred in charging the jury in part as set forth in Grounds of Appeal Numbers 7 and 8.

Those portions of the trial court's charge were:

> "There is no question here that the owner of these premises had any actual notice of the fact that the elevator was not in proper condition, that it was not in proper repair, that it was in a dangerous condition or a condition that was out of repair, that I can

recall. And so in the absence of having actual notice the owner can only be held responsible if a sufficient interval of time elapsed from the time when it became out of repair that the landlord by the use of that degree of reasonable care that it was under a duty to exercise should have discovered it."

"What I mean by that is: If for instance there was a part of the premises that became broken, if in a hall in an apartment house, where the landlord had reserved to himself the care and custody of the hall that was used in common by the various tenants, a banister or a rail had become broken or destroyed and someone was hurt by reason of that defect, the landlord would be responsible if he had notice of that defect and then had neglected to correct it, or if it had existed for some length of time that he should have discovered it by the exercise of reasonable inspection."

This appellant respectfully contends that the above stated portions of the learned trial court's charge to the jury are not correct statements of the law of this State, applicable to the facts adduced at the trial. Exception was taken to these portions of the court's charge because appellant contends that the trial court in stating that as the law to the jury, should have completely stated the law, and to show that it failed to state completely the law on this subject reference is made to the case of *Schnatterer* v. *Bamberger,* 81 N. J. L. 558).

In *Schnatterer* v. *Bamberger* the Court of Errors and Appeals, speaking through the late Justice Vredenburgh, said at p. 560:

"When the plaintiff rested her case it had not appeared that the defendant company had been guilty of any want of reasonable care in the keeping of its store safe for her use, for the reason that she had failed to

> show that the defective condition of the brass edging which she said existed on the night of the accident of April 24th had either (a) been in fact brought to the previous notice of the defendant, or, failing in proof of such actual notice, that (b) the defect had existed for such space of time before that occurrence as would have afforded the company sufficient opportunity to make proper inspection of its stairways to ascertain their condition as to safety, *and to repair their defects.* In the absence of proof of either, the legal presumption is that defendant had used reasonable care." (Italics ours.)

In the case at bar, an examination of the portions of the trial court's charge above set forth will show that the trial court confined the time within which an owner of property could be chargeable with constructive notice of a defective condition would be such time during which a landlord should have discovered a defect. The *Schnatterer* case said that in addition to discovering the defect, an owner of property should be allowed a reasonable time to repair the defect after discovery, before being charged with constructive notice.

And in 36 *Corpus Juris,* 221, it is said:

> "After notice, whether actual or constructive, a landlord will not be liable until he has a reasonable time to make repairs."

It is contended that the trial court committed harmful error in charging incorrectly as above set forth, in view of the fact that this appellant had submitted to the trial court before summation of counsel, certain Requests to Charge (State of Case, p. 362, l. 15 to p. 365, l. 10), and No. 14 of said Requests to Charge (State of Case p. 364, ll. 19 to 33) included the rule with respect to actual or constructive notice of defects taken almost verbatim from *Schnatterer* v. *Bamberger,*

supra, in which was included that portion of the *Schnatterer* case which gave sufficient time to repair the defects after discovery.

It is therefore respectfully contended that the learned trial court committed harmful error in charging as above set forth.

POINT VI.

The trial court erred in charging the jury in part as set forth in the Grounds of Appeal Numbers 10 and 11.

Those portions of the Court's charge were:

> "He is responsible because the same rule applies to him that I have just enunciated as applying to the landlord either of actual notice or constructive notice."
>
> "That means that even though the tenant did not know that the elevator was not in proper condition, if a reasonable inspection of it would have disclosed that and he failed to make that inspection or made it negligently, then he is responsible because that would be his negligent act."

The learned trial court in the portions of its charge above set forth, instructed the jury that the rules of law he had stated to in the preceding parts of its charge with respect to the liability of an owner of premises were also applicable to this appellant. In other words, the jury was instructed that this appellant as a tenant of the premises at No. 913 Broad Street, was under the same duty to the plaintiff herein as was the landlord. The appellant contends that this was erroneous, being based upon an apparent misconception of the facts adduced at the trial. It had been proved that this appellant had no control over the elevator and elevator

shaft in which the plaintiff was injured and that the Trustees had the right to enter the premises and make repairs (Exhibit Db, the lease (State of Case, p. 368, l. 10 to p. 369, l. 1). Under the lease, this appellant having been demised no portion of the elevator or shaft, the same having been retained in the absolute control of the owner of the premises, the Trustees of the Church, this appellant was therefore under no duty whatever in connection with that portion of the building to keep the same in safe condition. *Connors* v. *Newton,* 77 N. J. L. 125; *Handlon* v. *Copestone Temple Assn.,* 106 N. J. L. 362; *Gillvon* v. *Reilly,* 50 N. J. L. 26; *Gleason* v. *Boehm,* 58 N. J. L. 475; *Siggins* v. *McGill,* 72 N. J. L. 263; *Kramer* v. *Lehrhoff,* 99 N. J. L. 47; *Weinberger* v. *Kratzenstein,* 75 N. Y. Supp. 537. The court is respectfully referred to the argument advanced in this connection under Point I, which portions of the argument are hereby set forth at length by reference as if the same were fully repeated.

It is therefore respectfully submitted that the trial court committed harmful error in charging the law incorrectly on this point.

POINT VII.

The trial court erred in refusing to charge the jury the Defendant's Third Request to Charge.

That request to charge was as follows:

> "If you find as a fact that the accident was unavoidable, then I charge you that your verdict must be for the defendants."

This appellant contends that this request to charge was peculiarly applicable to the facts adduced at the trial because it was clearly shown

by the plaintiff's own witness Roehm that an occurrence such as the one upon which suit was brought herein was in this case something which could not possibly be anticipated, because even he, an expert, testified that with the car in the condition he had assumed it to be, it was purely conjectural whether or not the platform would fall. Roehm's testimony on this point was:

> "Q I am trying to find out, Mr. Roehm, this: If this condition you said existed, the cables being loose, or being on the flange, either as soon as sufficient pressure, the amount that was testified was used, wouldn't that cause the cable to come off?
>
> "A *Sometimes it does and sometimes it doesn't.*
>
> "Q What is the difference?
>
> "A *It is a mechanical thing that happens; sometimes it does and sometimes it doesn't.*
>
> "Q Explain it to me. Maybe I am intelligent enough to understand it, I don't know. You were a civil engineer for five years.
>
> "A It is just a case, if the cables are twisted on a drum, sometimes they are—*if the cables are twisted on a drum sometimes they will stay there and run for a week; sometimes they will come off the minute any excessive pressure will come on. That is what we find from our experience.*"

(State of Case, p. 193, l. 25 to p. 194, l. 3.)

Plaintiff certainly therefore established that a fall of the elevator under these circumstances could be nothing more than a pure accident.

The cases of *Scott* v. *Mitchell,* 41 N. J. L. 346 and *Garino* v. *Walker,* 7 N. J. Misc. Rep. 903, 147 Atl. 779, expressly state that the language in the above request to charge contains a true statement of the law of this state.

In one portion of the learned trial court's charge, he made mention of unavoidable accident to the jury (State of Case, p. 343, ll. 12 to 30). However, in the paragraph wherein those words appear, the trial court does not specifically state to the jury that as a matter of law he as the trial court charges it that if it should find that this case presented an unavoidable accident, that then their verdict must be for this appellant, as requested in this third request to charge. The court merely stated that the defendants *claimed or said* that the accident was unavoidable. The court did not say that if that claim was determined by the jury to be well founded a verdict for this appellant should have been proper.

In addition, in that portion of the trial court's charge wherein the learned trial court made mention of "unavoidable accident," the learned trial court also charged the jury with respect to contributory negligence, and in the final sentence of that paragraph the trial court charged as follows:

> "If you find that to be so, if you find that the defendants have established that by the clear weight of the testimony, because that is their duty, that being an affirmative defense, then of course there can be no recovery no matter how negligent the two defendants may have been."

(State of Case, p. 343, ll. 24 to 30.)

This appellant respectfully contends that the learned trial court, by co-mingling these propositions of law together, and by charging the jury that they were affirmative defenses, thereby imposed upon this appellant a burden unjustifiable in law, and committed harmful error in that respect.

It is respectfully submitted that the trial court committed harmful error in refusing to charge the jury as requested in this appellant's third request to charge.

POINT VIII.

The trial court erred in refusing to charge the jury the Defendant's Eighth Request to Charge.

That request to charge is as follows:

> "If you find as a fact that it was the landlord who had the duty to repair this elevator, and that the defendant P. DeNicholas, Inc., reported to the landlord whenever the elevator needed repair, then there must be a verdict in favor of the defendant P. DeNicholas, Inc."

This request to charge was based upon certain facts which had been adduced at the trial. At the trial it was shown by the introduction of the lease that the landlord was the only one who could be charged with the duty of making the repairs to the elevator and elevator shaft (State of Case, p. 368, l. 36 to p. 369, l. 4), and it was admitted that the Trustees assumed that duty (State of Case, p. 317, l. 36 to p. 318, l. 4), and it was shown in the testimony that this appellant at various times, examined the elevator and reported any defect it discovered to the landlord (State of Case, p. 280, l. 4 to l. 26, and p. 277, l. 21 to l. 26).

The request to charge, therefore, covered the facts as adduced; and it is respectfully submitted that this request to charge contained a true statement of the law of this state.

It is therefore respectfully submitted that the learned trial court committed harmful error in

refusing to charge this appellant's eighth request to charge.

POINT IX.

The learned trial court erred in refusing to charge the jury this Appellant's Eleventh Request to Charge.

That request to charge is as follows:

> "I charge you that if you find that the plaintiff knew that this was not a passenger, but a freight elevator, he assumed all the risks incident to carriage upon it."

Appellant submits that this request to charge covered the facts of the case inasmuch as the plaintiff in his own testimony admitted that he had on various occasions delivered goods to this appellant's restaurant, and that he had used this elevator only for the purpose of delivering goods, and furthermore, plaintiff, in his complaint, expressly charged that the elevator was a freight elevator (State of Case, p. 16, ll. 15 to 20).

Hall v. *Murdock*, 114 Michigan, 233, 72 N. W. 150, is authority for the statement of law embodied in this request to charge, the request having been taken directly from that case. In that case the Supreme Court of Michigan held that if the plaintiff knew that the elevator was not a passenger but a freight elevator, he assumed all the risks incident to carriage upon it. This case is discussed under Point I of this brief, and the Court is respectfully referred to the argument there, which argument, with the Court's permission, is considered as specifically set forth here.

It is respectfully contended that the refusal to charge this request was harmful to this appellant because its defense throughout was based wholly upon the fact that plaintiff had been contributorily negligent, based upon the case of *Ryerson* v. *Bathgate, supra,* and plaintiff's petition filed in the Workmen's Compensation Court (State of Case, p. 380), and it is respectfully submitted that the refusal to so charge was erroneous.

POINT X.

The trial court erred in refusing to charge the jury this Defendant's Fourteenth and Fifteenth Requests to Charge.

Those requests to charge were as follows:

"14. If you do find that the plaintiff was an invitee, then in order for the plaintiff to recover he must further show that the defective condition, if any there was, was brought to the notice of the defendant, P. DeNicholas, Inc., or failing in proof of such actual notice, the plaintiff must prove that the defect, if any there was, had existed for such a space of time before the occurrence of January 10, 1929, as would have afforded the defendant, P. DeNicholas, Inc., sufficient opportunity to make proper inspection of the elevator and elevator shaft to ascertain their condition as to safety, and repair their defect."

"15. I charge you that in the absence of proof of either actual notice of a defective condition or of proof of its existence for such space of time before the occurrence that the defendant, P. DeNicholas, Inc., should have inspected and repaired the defect, you are to presume that the defendant, P. DeNicholas, Inc., used reasonable care under the circumstances."

Appellant's contention that the learned trial court should have charged the above requests are based on the case of *Schnatterer* v. *L. Bamberger & Co.* (*supra*), and appellant with the court's permission, respectfully refers the court to the argument urged under Points V and I, with respect to actual or constructive notice of a defect.

It is respectfully submitted that the trial court committed harmful error in refusing to charge these requests to charge.

This appellant respectfully contends that the learned trial court committed harmful error in refusing to charge any or all of the stated requests to charge, and committed harmful error in certain portions of its charge to the jury, and further contends that the plaintiff failed to prove a state of facts upon which this appellant could be legally chargeable with liability, and, in addition, that the trial court committed harmful error in refusing to grant this appellant's motion for a non-suit, and its motion for a direction of verdict.

It is respectfully submitted, therefore, that the judgment entered below should be reversed as to this appellant.

Respectfully submitted,

COHEN & KLEIN,
Attorneys and of counsel with for Defendant-Appellant,
P. DeNicholas, Inc.

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New Jersey Court of Errors and Appeals

OSCAR GUENSCH,
Plaintiff-Appellee,

vs.

THE TRUSTEES OF THE THIRD PRESBYTERIAN CONGREGATION IN NEWARK and P. DE NICHOLAS INC.,
Defendant-Appellants.

ACTION AT LAW
ON APPEAL FROM SUPREME COURT ESSEX COUNTY

BRIEF OF PLAINTIFF-APPELLEE.

This action was tried on May 4th, 5th and 6th, 1931, in the New Jersey Supreme Court, Essex County, before the Honorable Newton H. Porter, Judge of the Essex County Circuit Court, and a jury. A verdict was returned in favor of the plaintiff and against both defendants, the Trustees of the Third Presbyterian Congregation of Newark, and P. De Nicholas Inc. in the amount of $17,000. Both defendants have appealed. This brief is in answer to that submitted by the defendant P. De Nicholas Inc.

Statement of Facts.

On January 10, 1929, the defendant, the Trustees of the Third Presbyterian Congregation in Newark, a corporation, was the owner of premises known as 913-915 Broad Street. The ground floor

of the building at 913 Broad Street was occupied by the defendant P. De Nicholas Inc. which corporation operated a restaurant there under the trade name of Rialto Restaurant. This portion of the property had been leased by the church corporation to the Southern Candy Company originally and the lease was either assigned or the premises sublet to the defendant P. De Nicholas Inc.

On the second floor of 913 there were three tenants. (S. C. 161, ll. 32-33). The section of the building known as 915 Broad Street was occupied at the time as a theater by the Rialto Theater. (C. 161, ll. 34-36).

There was an elevator or sidewalk lift on the premises at 913 Broad Street which operated from the basement or cellar to the sidewalk of Broad Street in front of the building. The shaft from the street level to the pit was covered by two iron doors which are flush with the adjoining sidewalk. (C. 41, ll. 26-35).

This elevator, which was about fifteen years old at the time of the accident, is hand operated by means of a crank which is attached to a series of gears. The gears are on a shaft which runs through two drums, from one side of the elevator pit to the other. Around these drums are cables, fitted in grooves, which go up the shaft, around a "sheave" and down to a center point on the guard on both sides. The lift itself is merely a flat platform five feet by five feet which travels up and down between two guides when the handle which is joined to the large gear is cranked. (C. 179-180, ll. 1-30). The depth of the shaft is about nine feet.

The drums referred to are in a pit which is about ten inches below the landing level of the cellar floor. (C. 180, ll. 30-40). The cables are

wound around the drums in grooves. When the lift is at street level, the cables are taut, when at basement level they are wound around the drum and in the grooves.

Under the leases this elevator was used in common by the defendant P. De Nicholas Corp. and the Rialto Theater. (C. 164, ll. 1-25).

On January 10, 1929 the plaintiff, Oscar Guensch was in the employ of Meir Marx as a truck driver. (C. 39, ll. 30-33). About nine o'clock that morning he had some foodstuffs on the truck which were to be delivered to the Rialto Restaurant at 913 Broad Street. He had been instructed by his employer not to make the delivery until he received a check in payment. (C. 40, ll. 1-10).

He drove south along Broad Street accompanied by a helper and stopped in front of the restaurant. After alighting he went into the place and saw there Peter De Nicholas, an officer of the defendant, P. De Nicholas, Inc. with whom all the prior dealings were had. (C. 41, ll. 1-4).

De Nicholas was upstairs at his desk at the time. The check was given to Guensch and then De Nicholas told him to go outside and open the doors, that he would send the elevator up. (C. 41, ll. 3-19).

Guensch had been visiting this restaurant, making deliveries for about a year on an average of once a week. (C. 64, ll. 1-10). On all these occasions he was given the same instructions by De Nicholas, namely to go outside, lift up the doors and the elevator would be sent up to him. (C. 41, ll. 10-15).

Every time during this period of a year when Guensch had goods to turn over to this restaurant, he had gotten on the elevator platform after it had been sent up and placed them thereon. (C.

57, ll. 29-40). As a matter of fact on one visit a short time prior to this accident, he was in a hurry and asked De Nicholas if he couldn't leave them. De Nicholas refused to accept the delivery unless it was put on the elevator. (C. 318, ll. 1-40; 319, ll. 1-13).

In short, the regular procedure followed according to the testimony was Guensch would go into the restaurant and advise De Nicholas that he had foodstuffs on his truck for delivery. (C. 41, ll. 10-15). De Nicholas would tell him to go outside, lift up the doors and he would send the elevator up. Guensch would do this, open one door, and when the elevator came to street level he would step in on the platform, open the other and then place the goods thereon, always getting on the platform himself in doing so. (C. 68, ll. 1-11).

The orders deposited on the platform sometimes weighed as much as six hundred pounds (C. 68, ll. 29-31), sometimes as much as the plaintiff weighed, one hundred and sixty pounds, sometimes the iceman put on three or five feet of ice. (C. 265, ll. 19-21).

On this occasion, after receiving the check, he left De Nicholas's office, went down to the street entrance and as the ink on the check was wet he stood inside the restaurant for some time blowing the check to dry it. Then after folding it he placed it in his pocket and went outside. (C. 41, ll. 20-24; 65, ll. 1-20).

The iron doors covering the elevator shaft were closed. He picked one up, laid it down on the sidewalk and observed that the elevator was then at street level. He stepped in on the platform, started to raise the other door, and had it up about a foot when suddenly the elevator went down with him. (C. 42, ll. 1-15). The next thing

he remembered was finding himself on a table in the hospital.

The helper, Costello (whose deposition was taken before trial), went into the restaurant with Guensch. After the check was turned over he left and waited at the truck for about two minutes before Guensch came out. (C. 136, ll. 34-36).

He observed Guensch come out, go over to the doors, raise one of them, throw it over, get in on the platform, lift the other about a foot and then go down with the elevator. (C. 128, ll. 27-32). On looking into the shaft he saw the elevator "kind of slanting like." (C. 128, ll. 37-38). Guensch was lying in one corner with the blood coming out of his mouth. (C. 129, ll. 22-26).

Henry Seelig, who worked for Guensch's employer as a bookkeeper, received a telephone call from De Nicholas about nine o'clock, informing him of the accident. Ten or fifteen minutes later he was at the scene. (C. 152, ll. 32-36).

Describing the elevator at that time, he said it was more than half way down, tipped at a forty-five degree angle, one side lower than the other. (C. 152, ll. 24-40; 153, ll. 1-3).

The ambulance was called and arrived at the restaurant driven by the witness, William Lyons. Guensch was found lying on a table in the rear of the cellar. Lyons observed the elevator at that time. The platform was tilted, one end was about two or three feet higher than the other; one end was approximately three feet from the ground and the other approximately five. (C. 159, ll. 1-40).

The plaintiff produced Morton C. Noble, who was employed by the defendant Trustees as a rent collector. On the morning of the accident he received a telephone call from De Nicholas and in response thereto he went down to the restaurant

where De Nicholas informed him that "one of the cables was off the elevator." (C. 162, ll. 10-30).

De Nicholas in his examination admitted conversing with Noble this morning, saying that he told him that the elevator was out of order, needed fixing and asked that someone be sent to repair it. (C. 286, ll. 39-40; 287, ll. 1-10).

Albert Pfaff, a repairman in the employ of the Otis Elevator Company was sent to repair the elevator the following morning, January 11, 1929. On examination he found the elevator platform about half way down the shaft (C. 171, ll. 20-24) tipped at an angle of forty-five degrees with one end considerably lower than the other. (C. 166, ll. 14-24). On examination of the drums in the elevator pit he found that on one drum the cable was off about three turns and on the other about one turn. (C. 167, ll. 26-29). He also said there was no guard on the drum to hold the cables on. Further testimony as to this guard was not allowed because there was no charge of improper construction in the pleadings. (C. 168, ll. 11-12).

The angle of the platform was an abnormal condition caused by the cables coming off. (C. 174, ll. 39-40; 175, ll. 1-3).

Charles W. Roehm, Jr. was produced by the plaintiff and after examination was declared by the court competent to testify as an elevator expert. He had been connected with the Otis Elevator Company for seven years. He spent two years constructing elevators for the company and two years inspecting and repairing them. At the time of trial he was engaged in inspecting elevators for Otis customers, determining what was wrong with them and estimating the cost of repair. (C. 178, ll. 1-40).

He was familiar with the type elevator in question and had examined this one on the morning

his testimony was given. (C. 175, ll. 38-40; 176, ll. 1-30). After describing the elevator at 913 Broad St. he was asked hypothetical questions based on the facts testified to as to the cause of the fall of the elevator. He said it had to be caused by two things or possibly three: (1) the cables pulling out of the sockets, (2) the breaking of the cables and (3) the cables coming off the drums. (C. 181, ll. 1-40; 182, ll. 1-25).

He was then asked to assume that on the day of the accident the plaintiff went to the Rialto Restaurant, transacted his business, was instructed to go outside that the elevator would be sent up to him; and to assume further that at the time plaintiff weighed between one hundred and sixty and one hundred and sixty-five pounds; and further that on going outside he raised one of the doors, saw that the elevator platform was up, stepped in on the platform, started to raise the other door and had it up about a foot when the elevator dropped with him; and to assume further that when the plaintiff's body was on the platform or after it had been taken off, the platform was between one-half and two-thirds of the way down the shaft and tipped at a forty-five degree angle to one side; and further that Pfaff, a repairman from his company, made an inspection of the elevator and found the cable on one side considerably off and slightly off on the other, and to give his opinion as to which of the three possible causes he mentioned produced the fall of the elevator. In answer he gave the cables coming off the drums as the cause. (C. 186, 187, ll. 1-20).

In explaining the reason for the cables coming off the drums he said that it could only be caused one way, namely by running the elevator below its landing level and allowing the car platform to

rest on the drums. In this way slack cable is created. (C. 182, ll. 29-35).

When the elevator is allowed to go into the pit below the landing level and to rest on the drums and slack is created in the cables, it may still be operated. However the cables because of the slackness slip a groove or two and on the way up they are running off the drums. When the elevator gets to the top the cables are either off by that time or ready to come off, depending on how many grooves they have slipped. The elevator in this condition will stay in its position at street level until some pressure is applied to force the cables completely off the drums. If they were in that condition (just ready to come off) and a man weighing one hundred sixty or one hundred sixty-five pounds stepped on the platform, they would come off, the elevator would fall and the cables wrap around the shaft until the slack was taken up, then it would stop with a jerk. (C. 182, ll. 28-40; 183, ll. 30-40; 184, ll. 1-25; 190, ll. 8-11).

On cross examination Roehm was asked flatly by the defendant Trustees to give his opinion as to the cause of the fall of this elevator and he replied: "The cables being in a position to come off the drum." (C. 201, ll. 28-40).

The court after examining as to the circumference of the drums asked if the fact that his repairman, Pfaff, on examination found the cable off three turns on one drum and one or two turns on the other would indicate anything to him with respect to the distance the elevator would drop because of the slipping of the cables. He replied that the elevator under those conditions would drop about five feet. (C. 200, ll. 30-40; 201, ll. 1-4). This would be a little over half way down the shaft.

Roehm also said that this condition of slack cable can exist for a long period of time. (C. 197, ll. 20-30); that the cables do not always come off quickly, sometimes they overlap themselves and wind back and forward. (C. 196, ll. 34-38).

When the elevator is being operated with slack cable the condition can be seen because the drum is right in front of the person operating it. (C. 197, ll. 3-20; 188, ll. 37-40). In addition the cables being out of the grooves would interfere with the operation of the car, make it harder to operate. (C. 314, ll. 9-13). Also if one cable is crossed more than the other or to a great extent, it would pull the platform up "cross-cut" and there would be a binding. It then would be hard to pull it up. (C. 198, ll. 30-33).

During the course of the examination of De Nicholas he spoke of a complaint he made about the elevator a few months before the accident and on being asked whether he said anything about the elevator being out of order a few days prior thereto he replied, "It wasn't bad". (C. 278, ll. 34-35).

Then he was asked,

> "Q. What was the condition of the elevator as you noticed it being used by your employees shortly before the accident?"

and he answered:

> "A. It was a very strong elevator, but it was a little hard to handle and we didn't like it much. We wanted a little better elevator all the time". (C. 279, ll. 1-9).

He also said the elevator was kind of stiff and he didn't like it, (C. 279, ll. 20-21) but that as long as it ran up and down he was satisfied that it was all right. (C. 279, ll. 30-33). His statement that the elevator was all right was based on the fact

that whenever he used it it went up and down. That use was the extent of his inspection. (C. 279, ll. 30-40).

According to De Nicholas, the elevator was inspected two weeks before the accident by an expert. (C. 287, ll. 37-40). This expert was not produced at the trial. He said he *complained about the elevator,* prior to this inspection. This was about nineteen or twenty days before the accident. (C. 288, ll. 1-10).

With regard to inspections and repair of the elevator the testimony was that from four to six weeks prior to the accident, the Otis Elevator Company at the request of the church representative, Noble, repaired the platform, some broken brackets, and possibly installed new cables. (C. 225, ll. 1-30). There was no proof of a proper inspection between that time and the date of the accident. Noble said he went down into the cellar about two or three weeks prior to the accident and while walking around he glanced over at the elevator. That was the extent of his inspection. The platform was down at the time. He didn't operate the elevator, nor examine the cables or the hand brake. He simply looked at the platform. In any event, he was not qualified to make an adequate inspection. He never operated an elevator, nor did he ever build one. (C. 224, ll. 10-30).

Noble, the church representative, had charge of ordering the repairs on this property, and whenever any were done, he ordered them. (C. 223, ll. 34-40).

In his testimony, De Nicholas asserted that after after giving the check to Guensch, he simply told him to "Wait a minute, I will go down and send the elevator up and take care of you." (C. 273, ll. 2-10). He said the practice was for

Guensch to place the goods on the sidewalk in front of the elevator, where they would be checked and then placed on the elevator, sometimes by one of his men. He didn't remember whether Guensch helped with this work or not. (C. 282, ll. 1-40; 283, ll. 1-10).

After the conversation with Guensch, he went down to the cellar for the purpose of instructing the cellar man to send the elevator up, but by the time he got down there the accident had already happened. He said that on arriving in the cellar he called to his employee, and not seeing him, walked to the elevator and discovered that the cellar man had already taken Guensch from the platform. (C. 274, ll. 29-40). The cellar man was produced and he denied having sent the elevator up. (C. 296, ll. 19-20).

The defendant, De Nicholas, Inc., offered as a witness an employee of the Rialto Theater in an effort to add a new phase to its defense. This witness, Bauer, said that he had used the elevator about two hours before the accident and after completing his work left it half way down the shaft. (C. 269, ll. 36-40; 270, ll. 1-10).

D. Minor Lake, an elevator manufacturer, was put on the stand in an apparent effort to strengthen this theory of the case. He was advised that there was testimony to the effect that a short time after the accident the platform was midway in the shaft and tilted to the extent of a forty-five degree angle, and that the plaintiff slipped and fell, and asked if the fall of a man, weighing about one hundred and sixty-five pounds, from the sidewalk, a distance of five feet to the platform would tilt the elevator. The answer, instead of helping the defense, lent strength to the plaintiff's case. Lake said such a fall would not tilt the platform unless the cables were off. (C. 250, ll. 30-40; 251, ll. 1-10).

This expert offered further corroboration to the testimony of Roehm produced by the plaintiff. He asserted that the cable should be taut when the elevator is up, because it is what holds the car, and that if the cable gets loose, the car will come down. (C. 247, ll. 36-40).

POINT ONE.

The Trial Court did not err in refusing to grant either the motion of this defendant for a non-suit or for a directed verdict on any of the grounds stated.

The argument of this appellant is seemingly divided into a discussion of three questions: (a) Invitation, (b) Negligence, (c) Contributory negligence. Appellee will argue them in this order.

Invitation.

It is too well settled to admit of dispute or to require citation of authority that on a motion for non-suit or for directed verdict the trial court must consider the proven facts most favorable to the plaintiff. If those facts and the inferences to be drawn therefrom carry any probative force toward establishing negligence, the motions must be denied.

Appellant suggests that there was no proof of an invitation running from it to appellee to step or stand on the elevator platform.

The law recognizes two forms of invitation, both of which impose upon the invitor the same degree of legal duty to the invitee. In one form the invitation is express, in the other implied. It is of course impossible to assert any definite

and fixed rule for determining in all cases whether the latter form of invitation exists. Each case must rest on its own facts and be decided accordingly.

There are however certain well recognized general rules which have been promulgated by the courts as guides in passing judgment upon the question of the existence or non-existence of implied invitation.

A mere toleration or acquiescence of a certain entry or use of property where the owner or occupant has no beneficial interest in such entry, does not make such an invitation. (45 C. J. 821 Sec. 231; *Saunders* v. *Smith Realty Co.,* 84 L. 276.)

However invitation is implied "where the entry on or use of the premises is for a purpose which is, or is supposed to be, beneficial to the owner or occupant, or where the entry or use of the premises is in the mutual interest or for the mutual benefit of the owner or occupant and the person who comes thereon, as where it is for a purpose connected with the business in which the owner or occupant is engaged or which he permits to be carried on there." (45 C. J. 812).

Another invaluable aid in this connection is the recognition by the law of the persuasive weight of testimony establishing a general custom or practice between the parties as to certain acts in connection with the entry on or use of the property. (*Phillips* vs. *Library Co.,* 55 L. 307).

New Jersey courts have expressed themselves so clearly on the subject that the opinions have been taken by the text writers and courts of sister states as the fundamental law. In the above cited case, *Phillips* v. *Library Co.,* 55 L. 307, which is referred to everywhere as the leading authority, Justice Depue, speaking for the Court of Errors and Appeals said:

> "The gist of the liability consists in the fact that the person injured did not act merely on motives of his own, to which no act or sign of the owner or occupier contributed, but that he entered the premises because he was led by the acts or conduct of the owner or occupier to believe that the premises were intended to be used in the manner in which he used them, and that such use was not only acquiesced in, but was in accordance with the intention or design for which the way or place was adapted and prepared or allowed to be used."
>
> *Gibeson* v. *Skidmore,* 99 L. 131.

In another illustrative opinion the Court of Errors and Appeals, through Justice Garrison, said:

> "Implied invitation, therefore, is part of the law of negligence, by which an obligation to use reasonable care arises from the conduct of the parties. Its essence is that the defendant knew or ought to have known that something he was doing or permitting to be done might give rise in an ordinary discerning mind to a natural belief that he intended that to be done which his conduct had led the plaintiff to believe that he intended". (Furey *v.* N. Y. Central Railroad Co., 67 L. 270).

Applying these rules to the present issue, an implied invitation to go upon the elevator platform as Guensch did at the time of the accident, is clearly apparent.

He had been delivering foodstuffs to the restaurant of this appellant for a year on an average of once a week. On each occasion his practice was the same. A visit to the restaurant, word passed to De Nicholas of the load on his truck and then the instructions to go outside, open the doors and the elevator would be sent up. Following this,

Guensch would open one door, step in on the platform and open the other. Then he would place whatever boxes or crates or containers which composed the delivery on the platform, always getting on himself in so doing. He had always handled the situation in this fashion and it was in following this established procedure on the day of the accident that he was injured.

Aside from the question of the imputation of knowledge recognized by the law where practices such as this exist over a long period of time, the proof here indicates actual notice in De Nicholas. On one occasion described in particular, when asked by Guensch if he could leave the load on the sidewalk as he was in a hurry, De Nicholas refused to accept delivery unless it was placed on the elevator. This had happened a number of times. (C. 318, ll. 20-30). In addition De Nicholas himself said he always checked the goods on the sidewalk before they were placed on the elevator but he didn't remember whether Guensch helped put them on. These facts certainly justified a finding that appellant knew of this use of the platform.

Stepping on the platform in making deliveries, when considered, does not seem an unusual or unreasonable act. On the contrary it is what would normally be expected of a person with a load of foodstuffs to deliver. They had to be placed on the lift and unquestionably, arrangement or weight required it.

The case therefore presents as against the charge of lack of invitation, (1) An acquiescence in a course of conduct, (2) A beneficial and mutuality of interest in an established practice and (3) the inculcation in the mind of appellee, through the apparent recognition of the propriety of the practice, of the belief that it was approved.

These circumstances being present, the issue of invitation was clearly one of fact for the jury.

Negligence.

The appellee being an invitee of appellant on the elevator platform (as it was open to the jury to find), the sequential duty to exercise reasonable care for his safety in the operation and management of the elevator when such operation and management were in the hands of appellant or its servants, came into being.

The nature of this duty of reasonable care is somewhat in conflict among the authorities. It is generally held that passenger elevators are common carriers and consequently the law imposes a high degree in their operation. However in the case of freight elevators—and appellee concedes such to be the case here—some jurisdictions do not exact such a high degree, even when carrying passengers; others continue to do so. (9 R. C. L. 1253, Sec. 9). In New Jersey, it has been declared as to freight elevators, that that degree of reasonable care which is commensurate with the risk, is required. (*Cotterall* v. *Otis Elevator Co.*, 4 Misc. 557).

Appellant in its brief misconceives the theory upon which its liability is predicated. It is there urged that since this elevator was provided for use in common by the owner and landlord, the duty to make repairs and keep it reasonably safe for use rested on the landlord and not on the tenant. Cases such as *Siggins* v. *McGill*, 72 L. 263, *Kramer* v. *Lehrhoff*, 99 L. 47, etc. are cited as authority. Appellee does not dispute the legal principles propounded by them but he does deny their applicability to the present situation.

The liability of the appellant simply stated is predicated upon its failure to discharge its duty to exercise reasonable care for the safety of its personal invitee in that it operated this elevator to the injury of appellee with knowledge and notice of its dangerous and defective condition or under such circumstances that it should have had knowledge or notice of its dangerous and defective condition had it or its servant been exercising reasonable care.

Guensch, under the testimony, was a personal invitee of P. De Nicholas Inc. It could not knowingly invite him to use an instrumentality which was in a dangerous and defective condition and which at the particular time was being operated by its employee, and sustain its claim to immunity because it was normally under no duty to remedy the condition.

The facts proven by appellee establish that Guensch went into this restaurant and spoke to De Nicholas about the delivery and check therefor. De Nicholas drew the check and then told Guensch to go outside, open the doors and he would send the elevator up. The ink on the check was wet, so he stood inside the restaurant door for some appreciable time (Costello, the helper fixing it as two minutes; Guensch longer) waiting for it to dry. Then after folding and placing it in his pocket, he went outside.

On opening the first iron door covering the shaft, he saw that the elevator was up. Appellant's case developed two elements which require mention at this point. Its employee who operated the elevator when his employer's business required it, was in the cellar at the time De Nicholas said he would send it up. Bauer, a defense witness and employed as a janitor by the co-user, Rialto Restaurant, used the elevator two hours

before the accident, left it half way down the shaft and did not touch it again. The restaurant employer insisted he had not operated it at all that morning prior to the accident, and denied sending it up then, saying that when De Nicholas called, the accident had already happened. The most logical and reasonable inference from these facts are that this employee of appellant sent the elevator up at De Nicholas' request, and under the circumstances the jury was entitled to arrive at that conclusion.

The situation at this stage of the proceedings then is that this appellant by its servant was operating and controlling the elevator for the invited use by Guensch. If it were negligently operated or negligently used when in a dangerous condition of which the appellant, by its servant had or should have had notice had he been acting with reasonable prudence, unquestionably liability to the invited user arose.

Guensch stepped in on the platform as he was accustomed to do and started to raise the other door when the elevator suddenly went down with him. According to Pfaff and the expert, Roehm, the sudden descent was caused by the cables coming off the drums.

The producing cause of the coming off of the cables was the permitting of the elevator platform at some prior time to go below its normal landing level and to rest on the drums, thus creating slack in the cables which in turn allowed them to drop out of the grooves in which they moved and which ordinarily kept them in place.

When this slack in the cables appeared, they either ran off the ends of the drums the next time the lift was used or instead of coming off immediately, overlapped and started to wind back and forth across the drums. The expert testimony

was that the condition can exist for a long period of time before the slack cables reach a position near enough to the ends of the drums to come off. The probable duration in this case will be discussed later.

In any event this condition of slack cable or cable overlapping and winding back and forth on the drum was perfectly apparent to anyone operating the elevator. As has been said, the operation is by hand by means of a crank and the drums bearing the cables are right in front of the operator. The facts adduced (as has already been pointed out), clearly indicate that the cellar man of this appellant, who customarily operated the lift in connection with his employer's business, sent it up to Guensch at the time of the accident. In view of the expert testimony it must be assumed that he saw the condition of the cables and ignored it or that he carelessly overlooked the perfectly apparent dangerous condition—which the exercise of reasonable prudence for the care of his employer's invitee required him to see. Under the circumstances, he, and derivatively his master, the appellant, were guilty of negligence which resulted in the fall of the elevator and in injury to the appellee to whom they owed this legal duty.

In determining the question of appellant's negligence it is of no moment that the landlord was obliged to make repairs to the lift. That obligation in the landlord did not justify the negligent operation by appellant of an instrumentality known to be in a dangerous condition after extending a personal invitation to appellee to step on the platform. What appellant in effect says is this "I had the right to use this elevator in connection with my business. It doesn't make any difference whether it was defective and dangerous

or not. I had no duty to repair it. Therefore you cannot hold me responsible for your injury resulting from my invitation and my operation of it.'' To state such a proposition is to refute it.

It is urged that De Nicholas Inc. had no notice either actual or constructive of a defective condition. The argument above clearly demonstrates that insofar as this one particular operation is concerned, it had actual notice. In addition there are facts from which the jury could find both actual and constructive notice for a long period of time.

The elevator expert said the condition of slack cable could exist for some time before it arrived at just the position which would permit it to come off the drum. This would be caused by the cable overlapping and winding back and forth on the drum. However if this did occur *it would cause a binding; it would make the operation more difficult, make it harder to pull the elevator up.*

De Nicholas was asked whether he said anything a few days prior to the accident about the elevator being out of order and he replied, ''It wasn't bad''. Then on being asked as to the condition as he noticed the lift in use by his employees, prior to the accident, he said, ''It was a very strong elevator, but it was a little hard to handle, and we didn't like it much. We wanted a little better elevator all the time.'' He also admitted that it was kind of stiff but that as long as it ran up and down he was satisfied.

He complained about it about nineteen or twenty days before the accident. It was inspected by an expert about two weeks prior to the fall, but significantly enough, this man was not produced at the trial and no excuse was offered for his absence. Under our well settled law, where it is within the power of a party to produce testimony to support his contention and he fails to

do so, the jury may infer that such testimony if produced would be unfavorable (*Wratchford* v. *Millburn,* 7 A. R. 751).

These facts certainly reasonably indicate that the condition which caused the fall existed for a considerable period of time.

De Nicholas was satisfied as long as it ran up and down. That was the extent of his inspection. His cellar man didn't inspect it. Noble, the church representative didn't. The church janitor didn't. The only one who did was the expert two weeks before the accident, and he was not produced. The last examination was four to six weeks prior to the fall, when repairs were made by the Otis Elevator Company.

Appellee therefore urges that the case presents ample proof of the defective condition of the elevator and of the negligence of the appellant in operating it.

Contributory Negligence.

The argument of appellant under this point is based upon the asserted failure of appellee to establish an invitation to go upon the elevator platform at the time of the accident. It is urged that since the liability of the invitor is only co-extensive with the nature and limits of the invitation and since the invitation here was not broad enough to justify Guensch in placing himself on the platform he was guilty of contributory negligence.

The question of the nature of the invitation is set forth fully under the first point and need not be again presented. It is apparent that Guensch was an invitee on the platform—or at least it was open to the jury to so find. Clearly therefore he was not guilty of contributory negligence.

POINT TWO.

The Trial Court did not err in allowing the testimony of the witness Pfaff referred to by appellant.

Pfaff, the Otis Elevator Company repairman was sent to the premises where the elevator was located about twenty-four hours after the accident. He found the platform about half way down the shaft, tipped at an angle of forty-five degrees, with one end considerably lower than the other. On examination of the drums in the pit he discovered that on one drum the cable was off about three turns and the other off about one turn.

Appellant contends that this inspecting coming as it did twenty-four hours later, was too remote to be evidential. Aside from the fact that no motion was made to strike the testimony out at the end of the examination, which right was reserved and not exercised, there was ample proof in the case connecting up this testimony and justifying its submission to the jury.

Costello, the helper on Guensch's truck and the first one to get to the elevator shaft, saw the platform "kind of slanting like". Seelig, one of Guensch's fellow employees, arrived at the scene in response to a telephone call from De Nicholas, not more than half an hour after the accident. He saw the platform more than half way down the shaft, tipped at an angle of forty-five degrees, one side lower than the other. Lyons, the ambulance driver, came very shortly after the fall. The platform was then tilted, one end was about two or three feet higher than the other; one end was approximately three feet from the ground and the other approximately five.

Noble, the church representative, was called by De Nicholas on the same morning and asked to send someone to fix the elevator as it was out of order. According to Noble, De Nicholas told him one of the cables was off.

In addition, Roehm said that the cables being in the condition Pfaff found them would indicate to him that the platform had fallen five feet.

This testimony certainly connected up that of Pfaff. The condition described by these witnesses was exactly the same, the only difference being that De Nicholas said one cable was off and Pfaff found both in that condition. However one was off about three turns and the other about one. This may well account for the fact the one cable which was noticeably off the drum. In any event, the Court was certainly justified in receiving Pfaff's testimony and submitting it to the jury.

POINT THREE.

The Trial Court did not err in allowing the hypothetical questions put to the expert witness Roehm.

The only objection offered to the hypothetical questions is that they refer in part to Pfaff's testimony which has been assailed as too remote. As presented above, Pfaff's testimony was entirely competent and therefore this charged error must fail.

POINT FOUR.

The Trial Court did not err in charging the jury as follows:

> "There is no question here that the owner of these premises had any actual notice of the fact that the elevator was not in proper condition, that it was not in proper repair, that it was in a dangerous condition or a condition that was out of repair, that I can recall. And so in the absence of having actual notice the owner can only be held responsible if a sufficient interval of time elapsed from the time when it became out of repair that the landlord by the use of that degree of reasonable care that it was under a duty to exercise should have discovered it.
>
> "What I mean by that is: If for instance there was a part of the premises that became broken, if in a hall in an apartment house, where the landlord had reserved to himself the care and custody of the hall that was used in common by the various tenants, a banister or a rail had become broken or destroyed and someone was hurt by reason of that defect, the landlord would be responsible if he had notice of that defect and then had neglected to correct it, or if it had existed for some length of time that he should have discovered it by the exercise of reasonable inspection."

This portion of the charge relates entirely to the owner of this building. Even assuming that the law was incorrectly stated the error cannot be relied on by the tenant, this appellant, because it was not directed against him and therefore could not prejudice his case. (*Fitzgerald* v. *Gore*, 147 Atl. 369).

In any event no proper exception was taken to this portion of the charge. (C. 356, ll. 1-10). The

language of the exception certainly did not call to the Court's attention that he had made an error in the particular now charged, as the practice requires. (*Doran* v. *Asbury Park,* 91 L. 651; *Bennett* v. *Pillion,* 105 L. 359; *Karzman* v. *Carlo,* 85 L. 636.)

POINT FIVE.

The Trial Court did not err in charging the jury as follows:

> "He is responsible because the same rule applies to him that I have just enunciated as applying to the landlord either of actual notice or constructive notice.
>
> "That means that even though the tenant did not know that the elevator was not in proper condition, if a reasonable inspection of it would have disclosed that and he failed to make that inspection or made it negligently, then he is responsible because that would be his negligent act."

It does not seem necessary to argue the legal propriety of this portion of the charge. The language used is substantially that contained in the fourteenth and fifteenth requests to charge submitted by this appellant. The failure of the Court to charge this request verbatim is also made a ground of appeal and presented in the brief as "Point Ten". The situation then is that appellant asked the Court to charge what is now alleged to be error and further urges the failure to charge its exact language in this regard as error. Certainly this Court is not going to reverse the Trial Court for an alleged error charged as prejudicial when the language and the theory of the charge was given to the Court by the very person now claiming error.

POINT SIX.

The Trial Court did not err in refusing to charge appellant's third request to charge which is as follows:

> "If you find as a fact that the accident was unavoidable, then I charge you that your verdict must be for the defendants."

The Court charged this substantially. He said:

> "The mere happening of an accident isn't sufficient to establish negligence. It must be proved by the preponderating weight of the testimony.
>
> "The defendants not only deny negligence, but they say as far as they were concerned it was either an unavoidable accident or it was due to the negligence of the plaintiff, that by his misconduct, by his own carelessness, by his own negligence, by failing to exercise that degree of care that a reasonably prudent person should have exercised, he brought about the accident himself. He himself did something that a reasonably prudent person should not have done or failed to do something that a reasonably prudent person should not have failed to have done, and that is the reason for the accident. If you find that to be so, if you find that the defendants have established that by the clear weight of the testimony, because that is their duty, that being an affirmative defense, then of course there can be no recovery no matter how negligent the two defendants may have been." (S. C. 343, ll. 10-30).

POINT SEVEN.

The Trial Court did not err in refusing to charge the appellant's eighth request to charge which is as follows:

> "If you find as a fact that it was the landlord who had the duty to repair this elevator, and that the defendant P. De Nicholas, Inc. reported to the landlord whenever the elevator needed repair, then there must be a verdict in favor of the defendant, P. De Nicholas, Inc."

This request did not contain a true statement of the law as it applies to appellant. Such a charge would effect immunity in this tenant, toward a personal invitee, regardless of what use it made of the elevator and regardless of its known dangerous condition.

POINT EIGHT.

The Trial Court did not err in refusing to charge the eleventh request to charge which is as follows:

> "I charge you that if you find that the plaintiff knew that this was not a passenger but a freight elevator, he assumed all the risks incident to carriage upon it."

This request did not state the law as applicable to the case at bar. Guensch was not a licensee, he was an invitee upon the elevator platform and consequently appellant owed him the duty in operating the elevator to use reasonable care for his safety.

POINT NINE.

The Trial Court did not err in refusing to charge the fourteenth and fifteenth requests which are as follows:

> "14. If you do find that the plaintiff was an invitee, then in order for the plaintiff to recover he must further show that the defective condition, if any there was, was brought to the notice of the defendant, P. De Nicholas, Inc. or failing in proof of such actual notice, the plaintiff must prove that the defect, if any there was, had existed for such a space of time before the occurrence of January 10, 1929 as would have afforded the defendant P. De Nicholas, Inc. sufficient opportunity to make proper inspection of the elevator and elevator shaft to ascertain their condition as to safety, and repair their defect."
>
> "15. I charge you that in the absence of proof of either actual notice of a defective condition or of proof of its existence for such space of time before the occurrence that the defendant, P. De Nicholas, Inc. should have inspected and repaired the defect, you are to presume that the defendant, P. De Nicholas, Inc. used reasonable care under the circumstances."

The Court did charge these requests substantially as submitted by appellant, and it is argued under Point Six of its brief that such language constituted error. These inconsistent positions do not seem to be justified. Certainly a trial court cannot be induced to charge certain matter as the law and then have the person making the request urge that matter as error.

It is therefore respectfully submitted that the judgment against this appellant should in all things be affirmed.

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JOHN J. FRANCIS,
Of Counsel.

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New Jersey Court of Errors and Appeals

OSCAR GUENSCH, *Plaintiff-Appellee,* *vs.* THE TRUSTEES OF THE THIRD PRESBYTERIAN CONGREGATION IN NEWARK and P. DE NICHOLAS INC., *Defendant-Appellants.*	ACTION AT LAW ON APPEAL FROM SUPREME COURT ESSEX COUNTY.

BRIEF OF PLAINTIFF-APPELLEE.

This action was tried on May 4th, 5th and 6th, 1931, in the New Jersey Supreme Court, Essex County, before the Honorable Newton H. Porter, Judge of the Essex County Circuit Court, and a jury. A verdict was returned in favor of the plaintiff and against both defendants, the Trustees of the Third Presbyterian Congregation of Newark, and P. De Nicholas Inc. in the amount of $17,000. Both defendants have appealed. This brief is in answer to that submitted by the defendant The Trustees of the Third Presbyterian Congregation in Newark.

Statement of Facts.

On January 10, 1929, the defendant, the Trustees of the Third Presbyterian Congregation in Newark, a corporation, was the owner of premises known as 913-915 Broad St. The ground floor of

the building at 913 Broad St. was occupied by the defendant P. De Nicholas Inc. which corporation operated a restaurant there under the trade name of Rialto Restaurant. This portion of the property had been leased by the church corporation to the Southern Candy Company originally and the lease was either assigned or the premises sublet to the defendant P. De Nocholas Inc.

On the second floor of 913 there were three tenants (S. C., 161, ll. 32-33). The section of the building known as 915 Broad St. was occupied at the time as a theater by the Rialto Theater (C., 161, ll. 34-36).

There was an elevator or sidewalk lift on the premises at 913 Broad St. which operated from the basement or cellar to the sidewalk of Broad Street in front of the building. The shaft from the street level to the pit was covered by two iron doors which are flush with the adjoining sidewalk (C., 41, ll. 26-35).

This elevator which was about fifteen years old at the time of the accident, is hand operated by means of a crank which is attached to a series of gears. The gears are on a shaft which runs through two drums, from one side of the elevator pit to the other. Around these drums are cables, fitted in grooves, which go up the shaft, around a "sheave" and down to a center point on the guard on both sides. The lift itself is merely a flat platform five feet by five feet which travels up and down between two guides when the handle which is joined to the large gear is cranked (C., 179-180, ll. 1-30). The depth of the shaft is about nine feet.

The drums referred to are in a pit which is about ten inches below the landing level of the cellar floor (C., 180, ll. 30-40). The cables are wound around the drums in grooves. When the lift is at

street level, the cables are taut, when at basement level they are wound around the drum and in the grooves.

Under the leases this elevator was used in common by the defendant P. De Nicholas Corp. and the Rialto Theater (C., 164, ll. 1-25).

On January 10, 1929 the plaintiff, Oscar Guensch was in the employ of Meir Marx as a truck driver (C., 39, ll. 30-33). About nine o'clock that morning he had some foodstuffs on the truck which were to be delivered to the Rialto Restaurant at 913 Broad St. He had been instructed by his employer not to make the delivery until he received a check in payment (C., 40, ll. 1-10).

He drove south along Broad St. accompanied by a helper and stopped in front of the restaurant. After alighting he went into the place and saw there Peter De Nicholas, an officer of the defendant, P. De Nicholas, Inc. with whom all the prior dealings were had (C., 41, ll. 1-4).

De Nicholas was upstairs at his desk at the time. The check was given to Guensch and then De Nicholas told him to go outside and open the doors, that he would send the elevator up (C., 41, ll. 3-19).

Guensch had been visiting this restaurant, making deliveries for about a year on an average of once a week (C., 64, ll. 1-10). On all these occasions he was given the same instructions by De Nicholas, namely to go outside, lift up the doors and the elevator would be sent up to him (C., 41, ll. 10-15).

Every time during this period of a year when Guensch had goods to turn over to this restaurant, he had gotten on the elevator platform after it had been sent up and placed them thereon (C., 57, ll. 29-40). As a matter of fact on one visit a short time prior to this accident, he was in a hurry and

asked De Nicholas if he couldn't leave them. De Nicholas refused to accept the delivery unless it was put on the elevator (C., 318, ll. 1-40; 319, ll. 1-13).

In short, the regular procedure followed according to the testimony was Guensch would go into the restaurant and advise De Nicholas that he had foodstuffs on his truck for delivery (C., 41, ll. 10-15). De Nicholas would tell him to go outside, lift up the doors and he would send the elevator up. Guensch would do this, open one door, and when the elevator came to street level he would step in on the platform, open the other and then place the goods thereon, always getting on the platform himself in doing so (C., 68, ll. 1-11).

The orders deposited on the platform sometimes weighed as much as six hundred pounds (C., 68, ll. 29-31), sometimes as much as the plaintiff weighed, one hundred and sixty pounds, sometimes the iceman put on three or five feet of ice (C., 265, ll. 19-21).

On this occasion, after receiving the check, he left De Nicholas's office, went down to the street entrance and as the ink on the check was wet he stood inside the restaurant for some time blowing the check to dry it. Then after folding it he placed it in his pocket and went outside (C., 41, ll. 20-24; 65, ll. 1-20).

The iron doors covering the elevator shaft were closed. He picked one up, laid it down on the sidewalk and observed that the elevator was then at street level. He stepped in on the platform, started to raise the other door, and had it up about a foot when suddenly the elevator went down with him (C., 42, ll. 1-15). The next thing he remembered was finding himself on a table in the hospital.

The helper, Costello (whose deposition was taken before trial), went into the restaurant with

Guensch. After the check was turned over he left and waited at the truck for about two minutes before Guensch came out (C., 136, ll. 34-36).

He observed Guensch come out, go over to the doors, raise one of them, throw it over, get in on the platform, lift the other about a foot and then go down with the elevator (C., 128, ll. 27-32). On looking into the shaft he saw the elevator "kind of slanting like" (C., 128, ll. 37-38). Guensch was lying in one corner with the blood coming out of his mouth (C., 129, ll. 22-26).

Henry Seelig, who worked for Guensch's employer as a bookkeeper, received a telephone call from De Nicholas about nine o'clock, informing him of the accident. Ten or fifteen minutes later he was at the scene (C., 152, ll. 32-36).

Describing the elevator at that time, he said it was more than half way down, tipped at a forty-five degree angle, one side lower than the other (C., 152, ll. 24-40; 153, ll. 1-3).

The ambulance was called and arrived at the restaurant driven by the witness, William Lyons. Guensch was found lying on a table in the rear of the cellar. Lyons observed the elevator at that time. The platform was tilted, one end was about two or three feet higher than the other; one end was approximately three feet from the ground and the other approximately five (C., 159, ll. 1-40).

The plaintiff produced Morton C. Noble who was employed by the defendant Trustees as a rent collector. On the morning of the accident he received a telephone call from De Nicholas and in response thereto he went down to the restaurant where De Nicholas informed him that "one of the cables was off the elevator" (C., 162, ll. 10-30).

De Nicholas in his examination admitted conversing with Noble this morning, saying that he told him that the elevator was out of order, needed

fixing and asked that someone be sent to repair it (C., 286, ll. 39-40; 287, ll. 1-10).

Albert Pfaff, a repairman in the employ of the Otis Elevator Company was sent to repair the elevator the following morning, January 11, 1929. On examination he found the elevator platform about half way down the shaft (C., 171, ll. 20-24) tipped at an angle of forty-five degrees with one end considerably lower than the other (C., 166, ll. 14-24). On examination of the drums in the elevator pit he found that on one drum the cable was off about three turns and on the other about one turn (C., 167, ll. 26-29). He also said there was no guard on the drum to hold the cables on. Further testimony as to this guard was not allowed because there was no charge of improper construction in the pleadings. (C., 168, ll. 11-12).

The angle of the platform was an abnormal condition caused by the cables coming off (C., 174, ll. 39-40; 175, ll. 1-3).

Charles W. Roehm Jr. was produced by the plaintiff and after examination was declared by the court competent to testify as an elevator expert. He had been connected with the Otis Elevator company for seven years. He spent two years constructing elevators for the company and two years inspecting and repairing them. At the time of trial he was engaged in inspecting elevators for Otis customers, determining what was wrong with them and estimating the cost of repair (C., 178, ll. 1-40).

He was familiar with the type elevator in question and had examined this one on the morning his testimony was given (C., 175, ll. 38-40; 176, ll. 1-30). After describing the elevator at 913 Broad St. he was asked hypothetical questions based on the facts testified to as to the cause of the fall of the elevator. He said it had to be caused

by two things or possibly three: (1) the cables pulling out of the sockets (2) the breaking of the cables and (3) the cables coming off the drums (C., 181, ll. 1-40; 182, ll. 1-25).

He was then asked to assume that on the day of the accident the plaintiff went to the Rialto Restaurant, transacted his business, was instructed to go outside that the elevator would be sent up to him; and to assume further that at the time plaintiff weighed between one hundred and sixty and one hundred and sixty-five pounds; and further that on going outside he raised one of the doors, saw that the elevator platform was up, stepped in on the platform, started to raise the other door and had it up about a foot when the elevator dropped with him; and to assume further that when the plaintiff's body was on the platform or after it had been taken off, the platform was between one-half and two-thirds of the way down the shaft and tipped at a forty-five degree angle to one side; and further that Pfaff, a repairman from his company made an inspection of the elevator and found the cable on one side considerably off and slightly off on the other, and to give his opinion as to which of the three possible causes he mentioned produced the fall of the elevator. In answer he gave the cables coming off the drums as the cause (C., 186, 187, ll. 1-20).

In explaining the reason for the cables coming off the drums he said that it could only be caused one way, namely by running the elevator below its landing level and allowing the car platform to rest on the drums. In this way slack cable is created (C., 182, ll. 29-35).

When the elevator is allowed to go into the pit below the landing level and to rest on the drums and slack is created in the cables, it may still be operated. However the cables because of the slack-

ness slip a groove or two and on the way up they are running off the drums. When the elevator gets to the top the cables are either off by that time or ready to come off, depending on how many grooves they have slipped. The elevator in this condition will stay in its position at street level until some pressure is applied to force the cables completely off the drums. If they were in that condition (just ready to come off) and a man weighing one hundred sixty or one hundred sixty-five pounds stepped on the platform, they would come off, the elevator would fall and the cables wrap around the shaft until the slack was taken up, then it would stop with a jerk (C., 182, ll. 28-40; 183, ll. 30-40; 184, ll. 1-25; 190, ll. 8-11).

On cross-examination Roehm was asked flatly by the defendant Trustees to give his opinion as to the cause of the fall of this elevator and he replied: "The cables being in a position to come off the drum." (C., 201, ll. 28-40).

The court after examining as to the circumference of the drums asked if the fact that his repairman, Pfaff, on examination found the cable off three turns on one drum and one or two turns on the other would indicate anything to him with respect to the distance the elevator would drop because of the slipping of the cables. He replied that the elevator under those conditions would drop about five feet (C., 200, ll. 30-40; 201, ll. 1-4). This would be a little over half way down the shaft.

Roehm also said that this condition of slack cable can exist for a long period of time (C., 197, ll. 20-30); that the cables do not always come off quickly, sometimes they overlap themselves and wind back or forward (C., 196, ll. 34-38).

When the elevator is being operated with slack cable the condition can be seen because the drum is right in front of the person operating it (C., 197,

ll. 3-20; 188, ll. 37-40). In addition the cables being out of the grooves would interfere with the operation of the car, make it harder to operate (C., 314, ll. 9-13). Also if one cable is crossed more than the other or to a great extent, it would pull the platform up "cross-cut" and there would be a binding. It then would be hard to pull it up (C., 198, ll. 30-33).

During the course of the examination of De Nicholas he spoke of a complaint he made about the elevator a few months before the accident and on being asked whether he said anything about the elevator being out of order a few days prior thereto he replied, "It wasn't bad" (C., 278, ll. 34-35).

Then he was asked,

> "Q. What was the condition of the elevator as you noticed it being used by your employees shortly before the accident?"

and he answered:

> "A. It was a very strong elevator, but it was a little hard to handle and we didn't like it much. We wanted a little better elevator all the time" (C., 279, ll. 1-9).

He also said the elevator was kind of stiff and he didn't like it (C. 279, ll. 20-21), but that as long as it ran up and down he was satisfied that it was all right (C., 279, ll. 30-33). His statement that the elevator was all right was based on the fact that whenever he used it it went up and down. That use was the extent of his inspection (C., 279, ll. 30-40).

According to DeNicholas, the elevator was inspected two weeks before the accident by an expert (C., 287, ll. 37-40). This expert was not produced at the trial. He said he *complained about the elevator,* prior to this inspection. This was

about nineteen or twenty days before the accident (C., 288, ll. 1-10).

With regard to inspections and repair of the elevator the testimony was that from four to six weeks prior to the accident, the Otis Elevator Company at the request of the church representative, Noble, repaired the platform, some broken brackets, and possibly installed new cables (C., 225, ll. 1-30). There was no proof of a proper inspection between that time and the date of the accident. Noble said he went down into the cellar about two or three weeks prior to the accident and while walking around he glanced over at the elevator. That was the extent of his inspection. The platform was down at the time. He didn't operate the elevator, nor examine the cables or the hand brake. He simply looked at the platform. In any event, he was not qualified to make an adequate inspection. He never operated an elevator, nor did he ever build one (C., 224, ll. 10-30).

Noble, the church representative, had charge of ordering the repairs on this property, and whenever any were done, he ordered them (C., 223, ll. 34-40).

In his testimony, DeNicholas asserted that after giving the check to Guensch, he simply told him to "Wait a minute, I will go down and send the elevator up and take care of you." (C., 273, ll. 2-10). He said the practice was for Guensch to place the goods on the sidewalk in front of the elevator, where they would be checked and then placed on the elevator, sometimes by one of his men. He didn't remember whether Guensch helped with this work or not (C., 282, ll. 1-40; 283, ll. 1-10).

After the conversation with Guensch, he went down to the cellar for the purpose of instructing the cellar man to send the elevator up, but by the time he got down there the accident had already

happened. He said that on arriving in the cellar he called to his employee, and not seeing him, walked to the elevator and discovered that the cellar man had already taken Guensch from the platform (C., 274, ll. 29-40). The cellar man was produced and he denied having sent the elevator up (C., 296, ll. 19-20).

The defendant, DeNicholas, Inc., offered as a witness an employee of the Rialto Theater in an effort to add a new phase to its defense. This witness, Bauer, said that he had used the elevator about two hours before the accident and after completing his work left it half way down the shaft (C., 269, ll. 36-40; 270, ll. 1-10).

D. Minor Lake, an elevator manufacturer, was put on the stand in an apparent effort to strengthen this theory of the case. He was advised that there was testimony to the effect that a short time after the accident the platform was midway in the shaft and tilted to the extent of a forty-five degree angle, and that the plaintiff slipped and fell, and asked if the fall of a man, weighing about one hundred and sixty-five pounds, from the sidewalk, a distance of five feet to the platform would tilt the elevator. The answer, instead of helping the defense, lent strength to the plaintiff's case. Lake said such a fall would not tilt the platform unless the cables were off (C., 250, ll. 30-40; 251, ll. 1-10).

This expert offered further corroboration to the testimony of Roehm produced by the plaintiff. He asserted that the cable should be taut when the elevator is up, because it is what holds the car, and that if the cable gets loose, the car will come down (C., 247, ll. 36-40).

The lease between the Trustees and the Southern Candy Co. Inc. which was assigned to P. DeNicholas, Inc. provided as follows:

> "The party of the second part are to have the use of the sidewalk lift in common with the tenant to the south of the premises hereby noted." (C., 368, ll. 37-40; 369, ll. 1-5).

One of the rules propounded by the Trustees and made part of the lease is:

> "The sidewalk, halls, passageways, elevators, and stairways shall not be obstructed by any of the tenants or used by them for any other purpose than ingress and egress from and to their respective apartments and for signs or boards erected for that purpose." (C., 376, ll. 5-11).

Further:

> "No safe shall be put or hoisted in any part of said building except through the elevator shafts. Tenants shall arrange with the lessor or its agents, as to time for receiving or delivering safes, furniture, or freight." (S. C., 376, ll. 36-40).

And:

> "No tenant shall employ any person or persons other than the janitor of the lessor for the purpose of cleaning or taking charge of said premises, etc." (C., 377, ll. 15-21).

POINT ONE.

The trial court did not err in refusing to grant either the motion of this defendant for a non-suit or for a directed verdict on any of the grounds stated.

This appellant argues four major grounds in support of its contention that the court erred in refusing to non-suit and to direct a verdict.

They are:

(1) The plaintiff was not an invitee on the elevator platform, (2) There was no proof of any

negligence upon its part and (3) There was no proof that it had control of the elevator and (4) The plaintiff was guilty of contributory negligence.

Appellee will argue them in this sequence, joining the second and third under the general discussion of the question of negligence.

It is too well settled to admit of dispute or to require citation of authority that on a motion for non-suit or for directed verdict the trial court must consider the proven facts most favorably to the plaintiff. If those facts and the inferences to be drawn therefrom carry any probative force towards establishing negligence, the motions must be denied.

Appellant suggests that there was no proof of an invitation running to appellee to step or stand on the elevator platform.

If Guensch was an invitee of P. DeNicholas, Inc. unquestionably he occupied the status of an invitee of the Trustees. As appears in 45 C. J. 818 Sec. 227; "A servant who enters on the premises on the business of his master, in which business the master and the owner or occupant have a mutual interest, occupies the status of an invitee." (*Riley* v. *Jersey Leather Co.,* 100 L. 300, *Sommer* v. *P. S. Railway Co.,* 79 L. 349, *Dettmering* v. *English,* 64 L. 16).

The law recognizes two forms of invitation, both of which impose upon the invitor the same degree of legal duty to the invitee. In one form the invitation is express, in the other implied. It is of course impossible to assert any definite and fixed rule for determining in all cases whether the latter form of invitation exists. Each case must rest on its own facts and be decided accordingly.

There are however certain well recognized general rules which have been promulgated by the

courts as guides in passing judgment upon the question of the existence or non-existence of implied invitation.

A mere toleration or acquiescence of a certain entry or use of property where the owner or occupant has not beneficial interest in such entry, does not make such an invitation (45 C. J. 821, Sec. 231; *Saunders* v. *Smith Realty Co.,* 84 L. 276).

However invitation is implied "where the entry on or use of the premises is for a purpose which is, or is supposed to be, beneficial to the owner or occupant, or where the entry or use of the premises is in the mutual interest or for the mutual benefit of the owner or occupant and the person who comes thereon, as where it is for a purpose connected with the business in which the owner or occupant is engaged or which he permits to be carried on there." (45 C. J. 812).

Another invaluable aid in this connection is the recognition by the law of the persuasive weight of testimony establishing a general custom or practice between the parties as to certain acts in connection with the entry on or use of the property (*Phillips* v. *Library Co.,* 55 L. 307).

New Jersey courts have expressed themselves so clearly on the subject that the opinions have been taken by the text writers and courts of sister states as the fundamental law. In the above cited case, *Phillips* v. *Library Co.,* 55 L. 307, which is referred to everywhere as the leading authority, Justice Depue, speaking for the Court of Errors and Appeals said:

> "The gist of the liability consists in the fact that the person injured did not act merely on motives of his own, to which no act or sign of the owner or occupier contributed, but that he entered the premises because he was led by the acts or conduct of the owner or

> occupier to believe that the premises were intended to be used in the manner in which he used them, and that such use was not only acquiesced in, but was in accordance with the intention or design for which the way or place was adapted and prepared or allowed to be used."
>
> *Gibeson* v. *Skidmore,* 99 L. 131.

In another illustrative opinion the Court of Errors and Appeals, through Justice Garrison, said:

> "Implied invitation, therefore, is part of the law of negligence, by which an obligation to use reasonable care arises from the conduct of the parties. Its essence is that the defendant knew or ought to have known that something he was doing or permitting to be done might give rise in an ordinary discerning mind to a natural belief that he intended that to be done which his conduct had led the plaintiff to believe that he intended". (Furey *v.* N. Y. Central Railroad Co., 67 L. 270).

Applying these rules to the present issue, an implied invitation to go upon the elevator platform as Guensch did at the time of the accident, is clearly apparent.

He had been delivering foodstuffs to the restaurant of P. DeNicholas, Inc. for a year on an average of once a week. On each occasion his practice was the same. A visit to the restaurant, word passed to DeNicholas of the load on his truck and then the instructions to go outside, open the doors and the elevator would be sent up. Following this, Guensch would open one door, step in on the platform and open the other. Then he would place whatever boxes or crates or containers which composed the delivery on the platform, always getting on himself in so doing.

He had always handled the situation in this fashion and it was in following this established procedure on the day of the accident that he was injured.

Aside from the question of the imputation of knowledge recognized by the law where practices such as this exist over a long period of time, the proof here indicates actual notice in DeNicholas. On one occasion described in particular, when asked by Guensch if he could leave the load on the sidewalk as he was in a hurry, DeNicholas refused to accept delivery unless it was placed on the elevator. This had happened a number of times (C., 318, ll. 20-30). In addition DeNicholas himself said he always checked the goods on the sidewalk before they were placed on the elevator but he didn't remember whether Guensch helped put them on. These facts certainly justified a finding that appellant knew of this use of the platform.

Stepping on the platform in making deliveries, when considered, does not seem an unusual or unreasonable act. On the contrary it is what would normally be expected of a person with a load of foodstuffs to deliver. They had to be placed on the lift and unquestionably, arrangement or weight required it.

The case therefore presents as against the charge of lack of invitation, (1) An acquiescence in a course of conduct, (2) A beneficial and mutuality of interest in an established practice and (3) the inculcation in the mind of appellee, through the apparent recognition of the propriety of the practice, of the belief that it was approved. These circumstances being present, the issue of invitation was clearly one of fact for the jury.

Negligence.

The first element to be considered under the subject is that of control of the elevator generally. Appellant urges that no proof was adduced establishing control in it.

The testimony of DeNicholas, Noble and the specific language of the lease between P. DeNicholas, Inc. and The Trustees, are that the sidewalk lift was provided for use in common by P. DeNicholas, Inc. and the Rialto Theater. If nothing further were in the case in connection with this question it would be clear that under the fundamental law the control was in the owner of the property, the Trustees.

It is well settled that where a landlord provides a hallway or a passageway or an instrumentality such as an elevator for use in common by his tenants, he is deemed to have retained control thereof, and the law imposes upon him or it the obligation to maintain it in a reasonably safe condition for use.

In 36 C. J. 212 the rule is set forth generally as follows:

> "Where a landlord has furnished agencies or instrumentalities for the common use of several tenants of a building, he is in general liable for any injuries arising from his neglect to keep the same in proper repair. The duty owed by a landlord extends not only to the tenant himself, but to members of his family, employees, guests and invitees, and in general all coming in under tenant's title." (Gillvon *v.* Riley, 50 L. 26; Gleason *v.* Boehm, 58 L. 475; Siggins *v.* McGill, 72 L. 263; Kramer *v.* Lehrhoff, 99 L. 47.)

In addition to the provisions of the lease and the testimony as to the common use of the eleva-

tor, it appeared in the case affirmatively that the Trustees actually exercised control. Whenever DeNicholas had any complaints to make or requests for repairs, they were made to Noble, this appellant's representative. All the repairs to this property were ordered by Noble and whenever any were made he arranged for them. He ordered and paid for the repairs to this elevator which were done four to six weeks prior to the accident. It is admitted in the appellant's brief that the repairs after this accident were made at the request of the church (brief, p. 14).

The rules and regulations made part of the lease and referred to above, place the elevator in the same category as halls, passageways and stairways and prohibits their obstruction by the tenants or their use for any other purpose than ingress and egress. They also say that "no safe shall be put or hoisted in any part of said building except through the elevator shafts and that "Tenants shall arrange with the lessor or its agent, as to time for receiving or delivering safes, furniture or freight."

These facts would appear to be ample affirmative proof of retention of control over the elevator by this appellant.

The appellee being an invitee of this appellant's tenant on the elevator platform (as it was open to the jury to find), the sequential duty of the Trustees to exercise reasonable care for his safety while there arose.

The nature of this duty of reasonable care is somewhat in conflict among the authorities. It is generally held that passenger elevators are common carriers and consequently the law imposes a high degree in their operation. However in the case of freight elevators—and appellee concedes such to be the case here—some jurisdictions do not exact such a high degree, even when carrying passengers, others continue to do so (9 R. C. L., l.

53, Sec. 9). In New Jersey, it has been declared as to freight elevators, that that degree of reasonable care which is commensurate with the risk, is required (*Cotterall* v. *Otis Elevator Co.*, 4 Misc. 557).

Appellant contends that two elements are necessary in this case in order to establish its liability. These two elements are (1) proof of a defective condition and (2) proof of actual or constructive notice thereof. Without considering whether the doctrine of *res ipsa loquitor* is applicable under the facts (this question being later presented) appellee believes that both of these factors have been established.

With regard to the defective condition, the facts proven by appellee show that Guensch went into this restaurant and spoke to DeNicholas about the delivery and check therefor. DeNicholas drew the check and then told Guensch to go outside, open the doors and he would send the elevator up. The ink on the check was wet, so he stood inside the restaurant door for some appreciable time (Costello, the helper fixing it as two minutes; Guensch longer) waiting for it to dry. Then after folding and placing it in his pocket, he went outside.

On opening the first iron door covering the shaft, he saw that the elevator was up. The tenant's case developed two elements which require mention at this point. Its employee who operated the elevator when his employer's business required it, was in the cellar at the time DeNicholas said he would send it up. Bauer, a defense witness and employed as a janitor by the co-user, Rialto Restaurant, used the elevator two hours before the accident, left it half way down the shaft and did not touch it again. The restaurant employer insisted he had not operated it at all that morning prior to the accident, and denied sending it up then, saying that when DeNicholas called,

the accident had already happened. The most logical and reasonable inference from these facts are that this employee of DeNicholas Inc. sent the elevator up at DeNicholas' request, and under the circumstances the jury was entitled to arrive at that conclusion.

Guensch stepped in on the platform as he was accustomed to do and started to raise the other door when the elevator suddenly went down with him. According to Pfaff and the expert, Roehm, the sudden descent was caused by the cables coming off the drums.

The producing cause of the coming off of the cables was the permitting of the elevator platform at some prior time to go below its normal landing level and to rest on the drums, thus creating slack in the cables which in turn allowed them to drop out of the grooves in which they moved and which ordinarily kept them in place.

When this slack in the cables appeared, they either ran off the ends of the drums the next time the lift was used or instead of coming off immediately, overlapped and started to wind back and forth across the drums. The expert testimony was that the condition can exist for a long period of time before the slack cables reach a position near enough to the ends of the drums to come off. The probable duration in this case will be discussed later.

In any event this condition of slack cable or cable overlapping and winding back and forth on the drum was perfectly apparent to anyone operating the elevator. As has been said, the operation is by hand by means of a crank and the drums bearing the cables are right in front of the operator.

This proof clearly disposes of the claim that there was no proof of a defective condition.

As to notice either actual or constructive of the defect, while the circumstances indicate actual no-

tice to the tenant, they point to constructive notice as to the landlord, this appellant.

The elevator expert said the condition of slack cable could exist for some time before it arrived at just the position which would permit it to come off the drum. This would be caused by the cable overlapping and winding back and forth on the drum. However if this did occur *it would cause a binding: it would make the operation more difficult, make it harder to pull the elevator up.*

DeNicholas was asked whether he said anything a few days prior to the accident about the elevator being out of order and he replied, "It wasn't bad". Then on being asked as to the condition as he noticed the lift in use by his employees, prior to the accident, he said, "It was a very strong elevator, but it was a little hard to handle, and we didn't like it much. We wanted a little better elevator all the time." He also admitted that it was kind of stuff but that as long as it ran up and down he was satisfied.

He complained about it (and all his complaints were made to the church representative Noble) about nineteen or twenty days before the accident. It was inspected by an expert about two weeks prior to the fall, but significantly enough, this man was not produced at the trial and no excuse was offered for his absence. Under our well settled law, where it is within the power of a party to produce testimony to support his contention and he fails to do so, the jury may infer that such testimony, if produced, would be unfavorable (*Wratchford* vs. *Milburn,* 7 A. R. 751).

These facts certainly reasonably indicate that the condition which caused the fall existed for a considerable period of time.

Appellant under the law was obligated to make reasonable inspections at reasonable intervals in order to fulfill its duty of keeping the elevator in a proper condition for use. The testimony demon-

strated that repairs had been made to the lift by the Otis Elevator Company four to six weeks prior to this accident. There was absolutely no proof of a proper inspection between that time and the date of the accident. DeNicholas was satisfied as long as the elevator ran up and down. That was the extent of his inspection. His cellar man didn't inspect it. Noble, the church representative didn't. The church janitor didn't. In any event none of them were qualified to do so. The only one who did inspect it within this four to six weeks period was the expert referred to by DeNicholas and he was not produced. This elevator, when defective, was likely to do damage to freight or injury to persons if used in that condition. The nature of the instrumentality is such that care commensurate with the risk should certainly require inspection more frequently than once in four to six weeks. Under the circumstances whether the requirement of reasonable inspection had been complied with constituted a jury question and the court was accordingly justified in submitting it to the jury for determination.

The Trustees having retained control of this elevator and being consequently under a duty to keep it in a reasonably safe state of repair, appellee urges that the mere fall of the platform when Guensch was standing on it made out a presumption of negligence against the Trustees under the doctrine of *res ipsa loquitor*.

It is recognized generally that the fall of an elevator is within this doctrine. 9 R. C. L. 1259 says on the subject:

> "The rule is peculiarly applicable to an injury arising from the falling of an elevator, and hence such falling raises a presumption of negligence which in the absence of explanation by the proprietor, carries the action for the injuries to the jury."

Research has failed to disclose any case in New Jersey in identity with the present one. The most analogous one discovered is *Smith* vs. *Jackson,* 70 L. 183. There the defendant was the owner of a house and offered to sell it to the plaintiff. He asked the plaintiff to look at it, and gave him the keys so that the inspection might be had. The plaintiff went to the house and while passing from the cellar to the first floor by the stairs, the stairway collapsed and he was injured.

The Court said:

> "The falling of the stairs in ordinary use raised a *prima facie* presumption of lack of ordinary care on the part of the defendant." Rupp *v.* Buttler Newark Bus Line, 103 L. 512; Law *v.* Morris, 102 L. 650; Stark *v.* A. & P. Co., 102 L. 694; Hughes *v.* Atlantic City R. R. Co., 85 L. 212.

The fall of the elevator having given rise to a presumption of negligence, this defendant was called upon to explain that reasonable care had been used in maintaining it for use. Its explanation was limited to proof of some repairs four to six weeks prior to the accident. Whether such testimony sufficiently met and overcame the *prima facie* case especially in view of the complaint nineteen or twenty days prior to the fall, and the inspection by the expert who was not produced, unquestionably was for the jury to say.

Contributory Negligence.

The argument of appellant under the point is based upon the asserted failure of appellee to establish an invitation to go upon the elevator platform at the time of the accident. It is urged that since the liability of the invitor is only co-extensive with the nature and limits of the invitation and

since the invitation here was not broad enough to justify Guensch in placing himself on the platform he was guilty of contributory negligence.

The question of the nature of the invitation is set forth fully under the first point and need not be again presented. It is apparent that Guensch was an invitee on the platform—or at least it was open to the jury to so find. Clearly therefore he was not guilty of contributory negligence.

POINT TWO.

The trial court did not err in allowing the testimony of the witness Pfaff referred to by appellant.

Pfaff, the Otis Elevator Company repairman was sent to the premises where the elevator was located about twenty-four hours after the accident. He found the platform about half way down the shaft, tipped at an angle of forty-five degrees, with one end considerably lower than the other. On examination of the drums in the pit he discovered that on one drum the cable was off about three turns and the other off about one turn.

Appellant contends that this inspection coming as it did twenty-four hours later, was too remote to be evidential. Aside from the fact that no motion was made to strike the testimony out at the end of the examination, which right was reserved and not exercised, there was ample proof in the case connecting up this testimony and justifying its submission to the jury.

Costello, the helper on Guensch's truck and the first one to get to the elevator shaft, saw the platform "kind of slanting like". Seelig, one of Guensch's fellow employees arrived at the scene

in response to a telephone call from DeNicholas, not more than half an hour after the accident. He saw the platform more than half way down the shaft, tipped at an angle of forty-five degrees, one side lower than the other. Lyons, the ambulance driver came very shortly after the fall. The platform was then tilted, one end was about two or three feet higher than the other; one end was approximately three feet from the ground and the other approximately five.

Noble, the church representative was called by DeNicholas on the same morning and asked to send someone to fix the elevator as it was out of order. According to Noble, DeNicholas told him one of the cables was off.

In addition, Roehm said that the cables being in the condition Pfaff found them would indicate to him that the platform had fallen five feet, or about half way down the shaft.

This testimony certainly connected up that of Pfaff. The condition described by these witnesses was exactly the same, the only difference being that DeNicholas said one cable was off and Pfaff found both in that condition. However one was off about three turns and the other about one. This may well account for the fact that DeNicholas only saw the one cable which was noticeably off the drum. In any event, the court was certainly justified in receiving Pfaff's testimony and submitting it to the jury.

It is therefore respectfully urged that the judgment against this appellant be affirmed.

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Of Counsel.

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New Jersey
Court of Errors and Appeals

OSCAR GUENSCH, *Plaintiff-Appellee,* *v.* THE TRUSTEES OF THE THIRD PRESBYTERIAN CONGREGATION IN NEWARK, and P. DENICHOLAS, INC., *Defendants-Appellants.*	Action at Law On Appeal from Supreme Court Essex County

Brief for Defendant-Appellant, The Trustees of the Third Presbyterian Congregation in Newark

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Statement of the Case

This case was tried in the Essex County Circuit of the Supreme Court, on May 4th, 5th and 6th, 1931, before the Honorable NEWTON H. PORTER, Judge of the Essex County Circuit Court, and a jury, and resulted in a verdict in favor of the plaintiff, and against both defendants, in the sum of $17,000.00.

The accident occurred at 913-915 Broad Street, there being on those premises a regular type sidewalk elevator (p. 246, lines 19 to 21), operated by a crank connected with cables with drum at the bottom of the shaft, on which the cables wind to lift and lower the car (p. 246, lines 28-38). The de-

fendant, Trustees, etc., are the owners of the building and rent it to the defendant DeNicholas, doing business as the Rialto Restaurant and to the Rialto Theatre (p. 30, lines 33 to 37, p. 32, lines 20 to 24). The defendant DeNicholas describes the situation by saying, "There is two doors. One door is for me, one door is for the theatre, and the elevator is between the two doors. It is in the middle of the building" (p. 278, lines 14-30), and they are the only ones that have use of the elevator.

It is alleged by the plaintiff that on the day of the accident he went into the Rialto Restaurant to make a delivery (p. 40, lines 5 to 19), and was told to go to the sidewalk elevator (p. 41, lines 16 to 20), where he had been making deliveries for a year or more (p. 64, lines 6 to 7); that he found the elevator at the street level, opened one door, went upon the elevator, took a couple of steps and raised the other door when the elevator fell (p. 41, line 31, to p. 42, line 7). Although it is in evidence that he filed a claim petition with the Workmen's Compensation Bureau, wherein he said under oath that he was the petitioner, and that he had read the petition and was familiar with it, he describes the accident as follows: "The sidewalk was wet as the day was rainy. I slipped, fell on the elevator, the chain broke and down I went" (p. 232, lines 28-40; p. 233, lines 1-12).

The allegation in the complaint is that both defendants maintained and operated the elevator (p. 16, lines 10 to 14). The defendants say that the elevator did not drop, but was part way down the shaft (p. 269, lines 36-40; p. 270, lines 1-10), and the plaintiff did not step on it but, either

"slipped", as he says, or fell down the shaft. Both defendants allege that he was guilty of contributory negligence, as a matter of law, in going upon the freight elevator, it not being for passengers; that he exceeded his invitation to put the goods upon the sidewalk, by going upon the elevator, and attempting to lift the other elevator door, for it was not necessary for him to go upon the elevator to do so, and he thereby took himself out of the protection of the law.

There is a question as to which of the defendants had control of, and operated the elevator.

Both defendants deny that there was any negligence on their part, and say that the accident, if it occurred as alleged, was unavoidable; that if any defect in the mechanism of the elevator existed, they had no previous notice of it; that if it did exist, it had not existed for a sufficient length of time for them to be charged with constructive notice thereof, nor did they have a reasonable time within which to repair it.

There is no allegation or proof of actual notice. The only testimony is that, immediately after the plaintiff was told to put the articles on the sidewalk, and that the elevator would be sent up, he was found on the elevator, part way down the shaft, with nothing wrong about the elevator except that it was tilted. Some 24 hours later the cable was found partly off the drum.

It was attempted, by a hypothetical question, to show that by operating the elevator below the cellar level, the cable became slack and came off the drum, thus allowing the elevator platform to drop when sudden pressure was put upon it.

The defendant, The Trustees, etc., have stated eight grounds of appeal, and will rely upon the first and second only.

POINT I

The trial Court erroneously refused to grant a nonsuit in favor of the defendant-appellant, The Trustees of the Third Presbyterian Congregation in Newark, for the following reasons:

a. There was no evidence of negligence on the part of this defendant.

b. There was no proof that this defendant had notice of the defect, if any, in the elevator.

c. There was no proof that if any defect existed, and this defendant had knowledge thereof, it had an opportunity, or sufficient time in which to repair such defect.

d. There was no evidence that this defendant maintained said elevator.

e. There was no proof that this defendant operated said elevator.

f. The plaintiff was guilty of contributory negligence as a matter of law.

Paragraphs a, b and c, will be considered together.

The complaint merely alleges (p. 16, lines 21 to 27):

> "The defendants and each of them negligently, carelessly and recklessly maintained and operated the aforesaid elevator so as to permit it to fall while the plaintiff was preparing to place certain merchandise on it. As

> a result thereof, plaintiff was precipitated into the basement of the aforesaid premises."

It is to be noted therefore that there is no allegation, claim or proof of any defect in construction, and that the plaintiff alleges "maintained *and* operated," and therefore to recover, he must prove both.

No attempt was made to prove that the defendant, The Trustees. etc.. operated the elevator, but on the contrary the plaintiff proved that the elevator was operated by the defendant De-Nicholas, and further attempted to prove that the accident was caused by the negligence of De-Nicholas in the operation of the elevator.

The law is well settled in this state that it seems there can be no question about it, that in order to hold a defendant liable for a defect in a structure, it must be shown that the defendant either had actual notice thereof or that the defect had existed for a sufficient length of time to enable the defendant, with reasonable diligence, to discover it, and after discovering it he should have a reasonable time in which to correct the defect if any.

The Court of Errors and Appeals, in *Schnatterer* v. *Bamberger,* 81 N. J. L. 558, at page 560, says:

> "When the plaintiff rested her case, it had not appeared that the defendant company had been guilty of any want of reasonable care in the keeping of its store safe for her use, for the reason that she had failed to show that the defective condition of the brass edging which she said existed on the night of the accident of April 24th, had either (a) been in fact brought to the previous notice of the defendant, or, failing in proof of such

> actual notice, that (b) the defect had existed for such space of time before that occurrence as would have afforded the company sufficient opportunity to make proper inspection of its stairways to ascertain their condition as to safety, and to repair their defects. In the absence of proof of either, the legal presumption is that defendant had used reasonable care.
>
> "It need hardly be added that the company was not an insurer of the safety of its customers against accidents happening to them while walking or running up and down its stairways in its store. Its duty to the plaintiff was satisfied when it used reasonable care to maintain them in a condition safe for her proper use."

This decision has been followed down to date and the law reiterated in a number of cases which it seems unnecessary to cite here.

There is no allegation in the present case that actual notice was had by the defendant, and no proof is attempted on that point by the plaintiff. There is no allegation nor is there direct proof that the defect had existed sufficiently long for the defendant to have had a reasonable time in which to obtain knowledge thereof, although some evidence on that point was apparently attempted to be given in answer to a hypothetical question. There was no attempt to prove that if notice had been had, a sufficient length of time had elapsed to give the defendant a reasonable opportunity to repair the condition if it had been discovered.

The testimony of the plaintiff is that on the day of the alleged accident he was the driver of a truck (p. 39, line 38); that he had goods to be delivered at the Rialto Restaurant, on Broad Street (p. 40, lines 4 and 5); that he had delivered goods there about twenty or thirty times prior to

the date of the accident (p. 40, lines 40 and 41); that he always went inside and told them he had goods to deliver, and he was told to go outside and lift up the doors, and they would send up the elevator (p. 41, lines 16 to 19); that there were two iron doors over the area-way, and when he went out, these were down (p. 41, lines 26 to 32); that he picked one up and put it on the sidewalk, and saw that the elevator was even with the sidewalk (p. 41, lines 38 to 40; p. 42, lines 4 and 5); that he stepped on the elevator and raised the one door, and started to raise the other door, and the elevator went down (p. 42, lines 6 to 13).

The only attempt to explain the occurrence of the accident was by one Albert Pfaff, a repair man from the Otis Elevator Company, who testified over objection and exception that when he went there, which was apparently the next day, he found the elevator half way down the shaft, at an angle of forty-five degrees (p. 166, lines 16); that he found nothing wrong with the elevator other than the tilting, except that the cables were off, although he inspected it thoroughly. Even this testimony, if properly admitted, merely shows that the day after the accident, the cables were off.

The witness Roehm, answering a hypothetical question, said that he was familiar with the different types of elevators, but was not a mechanical engineer, and he described the elevator as being operated by a series of gears, one of which is on the shaft in the pit with the two drums, and the drum is curved and the cables rest in grooves and go around a sheave (p. 180, line 7) and down to a center point on the guard on both sides. * * *

"Q. The drums that you spoke of in this

particular case, are they on a level with the cellar floor or are they in a pit? A. There must be a pit in order for the elevator to be constructed. The drums are about ten inches approximately, below the bottom landing level in the cellar."

And on page 181, lines 30 to 36:

"The Witness: In order for that type of elevator to fall, it has to be caused by possibly two things, possibly three. First the cables pulling out of the sockets which did not happen as our man found when he went down there——"

* * * * *

Page 182, lines 12 to 19:

"Q. The second? A. The cables break.

"Q. And the third? A. By the cables coming off the drums."

* * * * *

Page 182, lines 24 to 33:

"Q. Third, cables slipping off the drums, is that it? A. Exactly.

"Q. What causes the cables to slip off the drum? A. If that elevator is run down below its landing level, the car platform is allowed to rest on the drums. You will get slack cable and that is the only way you can get slack cable by releasing the tension of the cables."

And on page 183, lines 30 to 40:

"Q. When that elevator was down below the normal landing surface, the cable becomes loose as they are slack. Will the elevator go up? A. It will.

"Q. On the way up what happens? A.

The cables on being slack have slipped a groove or two and on being cranked up they are running off the drums until they get off at the top. They are either off by that time or ready to come off according to how many grooves they have slipped."

In answer to a long hypothetical question (pp. 186 and 187), he expressed the opinion that the elevator was caused to fall because the cable was off the drum (p. 187, line 21).

"Q. When there is slack on one of these drums, can you see the slack before you start to send it up? A. You can" (p. 188, lines 36 to 39).

And he testified on page 190, lines 35 to 40:

"Q. Mr. Roehm, will the elevator go up when these cables are off? A. It will.

"Q. How do you get it up if the cables are slack? A. As soon as you start to crank the handle you take up the slack."

And at page 191, lines 1 to 21:

"Q. When this elevator was sent up, as it was sent up, and the testimony was that it had gotten to the street level, the slack would have taken up, or it wouldn't have gotten to the street level, is that right? A. If you let slack get into those cables——

"Q. (Interrupting.) Please answer the question. A. With slack cables and you start to crank the elevator up, the cables will jump a groove or two on the drum and as you crank it, the cables are wound on the drum until the drum is filled. Then they either start to jump off on to the shaft or wrap up around the top of the flange on the drum.

"Q. When it was brought up to the street level, as it was, the slack was taken up, wasn't it? A. The cables undoubtedly were

tight, but they were in a position to run off the drum."

And at page 191, lines 36 to 40:

"Q. Now, these drums you say have grooves in them, is that right? A. Exactly.
"Q. And the cable is in all of these grooves, is that right? A. Exactly."

And on being asked, page 193, lines 25 to 34:

"Q. I am trying to find out, Mr. Roehm, this: if this condition you said existed, the cables being loose, or being on the flange, either as soon as sufficient pressure, the amount that was testified was used, wouldn't that cause the cable to come off?"

He answered:

"A. Sometimes it does and sometimes it doesn't.
"Q. What is the difference? A. It is a mechanical thing that happens; sometimes it does and sometimes it doesn't."

And on being asked to explain, he says (p. 193, line 36, to p. 194, line 3):

"A. It is just a case, if the cables are twisted on a drum, sometimes they are—if the cables are twisted on a drum sometimes they will stay there and run for a week; sometimes they will come off the minute any excessive pressure will come on. That is what we find from our experience."

And again he testified, page 195, lines 21 to 31:

"Q. How could it happen; will you explain that? A. You mean the cables to come off this drum?
"Q. No, off the flange. A. By applying pressure. Sometimes it comes off by just

running the elevator up. In other words, if you haven't got your car at the top and other cables have started to come off, sometimes they have skipped the groove and by the time you get the elevator to the top, the cables have reached the edge of the flange, and they come off the shaft."

And at page 196, lines 24 to 29:

"Q. From your experience, how long would you say in an ordinary case, the elevator would operate with the cables in a position where it would come off on account of applying the pressure? A. I can't answer that."

And on being asked by the plaintiff's attorney (p. 197, lines 22 to 35):

"Q. Mr. Roehm, this condition that you have described of slackening of the cable, the various conditions that you found on the drum, may or may not that condition exist over a long period of time before the elevator suddenly drops? A. It can exist for a period of time before they will come off.

"Q. And that is, it may be on that drum with slack over a long period of time, then later roll itself off? A. Not on the drum with slack. It comes down on the drums which allows slack, which allow the cables to cross themselves on the drum and the elevator can be operated with the cables crossed on the drum."

He stated that this condition could be seen.

On cross examination he testified (p. 198, lines 25 to 35):

"Q. Can you tell in the operation of the elevator whether or not that drum—— A. If the cables are crossed at a fairly even amount on both drums it will operate almost as freely

> as if they were in the grooves. If one was crossed more than the other or to a great extent, it will pull the platform up cross-cut and you will get a binding. It will be hard to pull that patform up."

And on page 199, lines 8 to 12:

> "Q. As I understand, you say that these cables would be crossed only because the elevator is sent too far down in the shaft and allows the cables to slacken, is that right? A. Exactly."

It will be seen, therefore, that there is no testimony that is not speculative, there being even a question as to whether the elevator did fall. There is the probably inadmissible testimony that the day after the accident, there was slack cable, and in the opinion of Mr. Roehm this was caused by the elevator being lowered too far below the floor level, into the pit, and nothing else could have caused it, and while he testified that the condition may have existed for some time, neither he nor anyone else attempted to prove that it did. And then, to destroy any effect that this might have had in indicating that the defendant had notice, he says that the elevator may have fallen immediately. He testified that these drums were only ten inches below the bottom landing in the cellar. I think it is common knowledge that the platform would take up a space of several inches, which would leave only a very small distance which the elevator could go below the landing. It would therefore seem impossible for the accident to have been caused in this way, as everyone who rides in elevators knows that they very frequently go below the floor level, and an accident is one of the rarest events in the world.

And certainly Mr. Roehm's attempted explanation, in which he says "sometimes it does and sometimes it doesn't"—stating that it is a mechanical thing that happens, without being able to explain why—does not seem a proper basis on which to sustain a verdict. He states also that this condition could be seen, but this seems hardly probable because he testified: "As soon as you start to crank the handle, you take up the slack." If this were so, it is obvious that it could not be seen.

Of course if the elevator fell immediately, then there would be no liability upon the defendant, because he is not an insurer.

The Court of Errors and Appeals has said in *Price* v. *New York Central Railroad Company,* 92 N. J. L. 430, "To recover for injuries resulting from a negligent act based upon circumstantial evidence, plaintiff must show not only a possibility but a probability that the injuries resulted from the defendant's negligence." And certainly here it is the merest guess—only a possibility.

Referring back again to the question of notice, on the plaintiff's own testimony the elevator might have fallen immediately, and no amount of inspection could have determined that it would fall if it happened immediately.

The Court of Errors and Appeals has said in *Alvino* v. *Public Service Ry. Co.,* 97 N. J. L. 526, citing a number of cases, "When the plaintiff's evidence is as equally consistent with the absence as with the existence of negligence on the part of the defendant, the plaintiff must fail, because there is always a presumption against negligence and in favor of innocence." Therefore, if on their own testimony the elevator may have fallen immediately, there would be an inference of

innocence, and the motion for a nonsuit should have been granted.

d. There was no evidence that this defendant maintained said elevator.

At the end of the plaintiff's case there was no evidence that the defendant maintained the elevator. It is admitted that The Trustees, etc., were the owners, and that both tenants used the elevator, and that after the accident The Trustees, etc., had the repairs made, but the testimony went no further, and this is far from showing that the defendant had control.

The Trustees could have leased to both tenants and have lost control, which seems to be the real fact, and the mere fact that the Trustees ordered repairs to be made, shows nothing, as this might well have been done to protect their own property even though it had passed temporarily from their control, and it was necessary for the plaintiff to prove maintenance as alleged in the complaint to hold the Trustees responsible, and failing to do so, a nonsuit should have been granted.

e. There was no proof that the defendant operated the elevator.

The complaint alleges that the defendant, The Trustees, operated the elevator but no effort was made to prove this, but on the contrary, the plaintiff conclusively proved that the elevator was operated by the defendant, DeNicholas, or someone else, not the defendant, The Trustees.

Plaintiff testified (p. 41, line 16):

"Q. On this occasion you received the

check, what did Mr. De Nicholas say to you? A. He says, 'I will send up the elevator, you go outside and open the door'."

And on page 59, line 38, page 60, line 1:

"Q. Can you remember just the words that Mr. DeNicholas used on that morning with respect to the delivery which you were to make? A. All I remember, he told me he was going down to send up the elevator."

Also, page 63, line 21:

"Q. Mr. Guensch, as I understand the situation, you were in the store and talked to Mr. DeNicholas, and he said he would go down and send up the elevator? A. Yes, sir."

This constitutes the whole testimony with respect to operation, and there is not even a suggestion that the defendant, The Trustees, had anything to do with the operation. The plaintiff, having based his claim upon maintenance and operation by the defendant, The Trustees, in order to recover, must prove both control and operation. This is especially so because the plaintiff has based his claim of negligence upon the theory that the elevator was being operated so as to go below the level of the cellar.

Not having proven maintenance and operation by the defendant, The Trustees, the trial Court should have granted a nonsuit.

f. Plaintiff was guilty of contributory negligence.

At the most, according to the plaintiff's own testimony, the invitation of the defendant DeNicholas, consisted of instructions to open the elevator doors (p. 41, line 16):

"Q. On this occasion you received the check, what did Mr. DeNicholas say to you? A. He says 'I will send up the elevator, you go outside and open the door'."

It was not necessary for the plaintiff to stand upon the elevator platform to open the door (p. 59, line 9), and it was not until he was standing upon the platform and exerting pressure upon it by lifting the second door, that the platform descended (p. 59, lines 10 to 23).

The plaintiff is chargeable with knowledge that the elevator was for freight only (p. 60, lines 29 to 40).

It is therefore the conduct of the plaintiff himself, by exceeding his invitation and exerting additional force upon an elevator which he knew to be for freight, which caused the platform to descend.

It seems hardly necessary to state that where it appears upon the plaintiff's case, that his own negligence contributed to the injury, it becomes the duty of the trial Court to nonsuit the plaintiff; *N. J. Express Co.* v. *Nichols,* 33 N. J. L. 434.

The plaintiff's negligent conduct, having contributed to his injuries, the trial Court should have granted a nonsuit as to the defendant, The Trustees.

POINT II

The trial Court should have granted a direction of the verdict, for the same reasons set forth under Point I, especially in view of the testimony that was brought out during the defendants' case.

If there could be any question at the end of the plaintiff's case as to the fact that if any defect had existed, there was not a sufficiently long time for the defendant-appellant to have discovered it, that question was thoroughly dispelled in the defendants' case.

It is undisputed that neither of the tenants in the building complained of the condition. The witness, Harry Howard, at page 242, lines 4 and 5, and page 243, lines 19 to 30, so testified, and no one questioned his testimony. And the witness, Bauer, employed by the tenant Rialto Theatre, testified in speaking of the accident (p. 269, lines 9 to 40; p. 270, lines 1 to 40):

> "Q. But you, in behalf of the Rialto Theatre, actually used the elevator? A. Used it more so than anyone else.
>
> "Q. Did you use it on the day in question? A. Yes, sir, on the 10th day, I had used it at the early part of the morning, shortly after seven o'clock.
>
> "Q. What did you use it for? A. Brought up a load of scrap iron with a section of a boiler. I had been making a general cleanup on the different scrap around the building."
>
> * * * * *
>
> "Q. Did you bring the stuff up? A. Yes, sir."

* * * * *

"Q. By that you mean, do you not, removed it from the platform? A. Removed it from the platform and gave it to the junk man who helped me with it.

"Q. Did you a short time after having removed the junk from the platform of the elevator go downstairs and bring the elevator down, or at least some distance? A. Left it down about half way, just enough to close the doors up and then release the brake like, and after she was down, I might say three or four feet, I put the brake back on again which we always had occasion to do.

"Cross examination by Mr. Francis:

"Q. What particularly fixes in your mind that you disposed of junk on the morning of this accident? A. How I happened to remember the junk business is because on about a half hour after the accident occurred I heard somebody saying in the house, one of the cleaners said that there must be an accident outside. I went outside and there was the ambulance taking this man away. That is how I happened to remember.

"Q. How long before that time had you used the elevator? A. Used it on an average——

"Q. On the day of this accident, how long before you heard of this accident, had you used the elevator? A. Pretty near two hours.

"Q. Pretty near two hours? A. Pretty near two hours.

"Cross examination by Mr. Gray:

"Q. Mr. Bauer, when you say two or three others, you mean two or three other employees of the Rialto Theatre? A. Yes, sir, including the porters."

So not only do we have the fact that there was no complaint, but we have the further positive testimony that almost immediately before this occurrence, the elevator was operating perfectly.

This defendant, although under no obligation to do so, was merely protecting its property and exercising the right which it had reserved under the lease, when it employed the Otis Elevator Company, the makers of the elevator, to inspect and overhaul it within about a month of the accident. The witness Roehm testified (p. 313, lines 3 to 26):

> "Q. Can you tell us when those repairs were made? A. October 21, 1928, November 27, 1928.
>
> "The Court: I think he meant only the last.
>
> "The Witness: It is all part of the same job, November 27, 1928, and December 6, 1928.
>
> "Q. All the same job? A. Yes, sir.
>
> "Q. Will you tell us just what those repairs consisted of what was done? A. Installed new cables, repaired platform, fastened rail brackets, adjusting and tightening entire machine.
>
> "Q. Could you say from the work that was done—— A. I haven't finished. Getting car into rails, installed new brackets, repaired old brackets and fixed car so it would come to floor level. That means with the sidewalk.
>
> "Q. Would you say from your repairs that you made, to your knowledge of the records, that when your job was finished, that the car was in good shape? A. Yes, I would.
>
> "Q. Thoroughly overhauled? A. I would."

It is to be noted that the accident occurred on January 10th, 1929.

Surely, having the man Howard on the premises and Noble going there very often (having been there three weeks before) (p. 221, line 40), and always in a position to be notified, and having inspection made by the best known elevator com-

pany within a month of the accident, is all that could be expected of a reasonably prudent man, and that was the only duty that the Trustees had, and if the Otis Elevator Company told them that the elevator was in perfect condition a month before the accident, they had a right to rely upon that. Would any reasonably prudent man have sent an inspector more frequently than once a month, when he had a man on the premises and maintained an office which could be notified? Could it be expected that an inspector would be sent once a week, or once a day, or perhaps that a man should be kept there at all times?—because that is what would have been necessary under the proof of the plaintiff, for the accident might have happened, and probably did happen, immediately, without any warning. Surely a property owner is not to be burdened in this way. This is especially so in view of the fact that the tenants apparently took care of the elevator, as the defendant DeNicholas testified (p. 288, lines 18 to 22), that they were cleaning the water out of the elevator pit almost immediately before the accident.

It is respectfully submitted that a verdict for the defendant, The Trustees, should have been directed.

POINT III

The defendant had no control of the elevator and therefore was in no way responsible.

The sidewalk elevator in question was entirely different from the usual elevator found inside a building for the use of a large number of tenants.

The defendant DeNicholas describes it at page 278, lines 15 to 30:

> "Q. Mr. DeNicholas, as I understand the situation, just your restaurant and the theatre were the ones who used that elevator; that is right, isn't it? A. Yes, sir.
>
> "Q. Does it run down to the premises being run by you, or does it run down to the premises running to the Rialto Theatre?"
>
> * * * * *
>
> "A. There is two doors. One door is for me, one door is for the theatre and the elevator is between those two doors. It is in the middle of the building.
>
> "Q. And you two were the only ones who used that elevator? A. And the theatre."

The lease provides (p. 368, lines 38 to 40; p. 369, lines 5 and 6):

> "The party of the second part are to have the use of the sidewalk elevator in common with the tenant to the south of the premises hereby rented on the first day of each month in advance."

This elevator was part of the demised premises as set forth, and the same paragraph applies to the store, cellar and elevator. This makes it clear that it is not an elevator in use by the public, but was restricted to the use of the Rialto Theatre and the defendant DeNicholas, trading as the Rialto Restaurant. It is to be noted that janitor service is to be at the expense of the lessee (p. 371, line 8, etc.).

Paragraph Six of the lease provides what is to be under the control of the owner, the Trustees, and it is made quite clear that this does not include the elevator shaft, as it refers only to the halls and stairways.

Paragraph Seven of the lease reserves the right to enter the demised premises for the purpose of making repairs. If this elevator shaft was common property, for the use of the landlord and the public, why would it be necessary to set forth that the landlord had a right to enter the same? If that were so, he would have the right in any event, and would not have to reserve it. Paragraph Seven also provides that the owner is not bound to make any repairs unless it is elsewhere provided in the lease, and the lease can be searched in vain for any provisions to show where he is bound to make repairs to the elevator. If this were reserved property, the owner would necessarily have to make repairs.

There might be some question about rule 1 under the lease, which is merely a stock printed form for rules regulating tenants in buildings and provides that the sidewalk, elevators, halls, etc., shall not be obstructed. But surely where two tenants have the elevator between them and have control of it, one could not expect that either of them would have the right to interfere with the free use of it by the other, and inspection and repair could not be called an interference.

Greenwald v. *Geller,* 9 N. J. Adv. R. Misc. 525, is a case involving a lease similar to the one between the Trustees and DeNicholas. The provision for repairs was as follows:

> "The lease also contained a provision that the landlord or his representative should have the right to enter into and upon the leased premises for the purpose of examining the same and making such repairs or alterations as might be necessary for the safety and preservation thereof."

The trial Court having directed a verdict in favor of the landlord in an action brought by a guest of the tenant to recover damages for injuries sustained when she was injured on a defective step in the demised premises, the Supreme Court, on appeal, affirmed the judgment in this language:

> "The other provision contained in the lease, and hereinbefore referred to, is a mere right reserved to the landlord, which he may or may not exercise as he sees fit, and imposes no obligation upon him to relieve the tenant from the burden of making repairs to the leased property.
>
> "There being no obligation resting upon the defendant to keep the porch in repair, the trial Court properly directed a verdict in his favor, and the judgment under review will be affirmed with costs."

This is not a case where claim is being made because, although the landlord was not responsible, he undertook to make repairs and made them improperly. There is neither such claim nor such proof, and having called in an expert in a line that needed an expert, the owner was entitled to rely upon his services.

It is respectfully submitted that in the absence of any control of the elevator the defendant, The Trustees of the Third Presbyterian Congregation in Newark, were entitled to a direction of a verdict in its favor.

POINT IV

The Court erred in admitting the testimony of the witness Pfaff.

The whole case of the plaintiff rests entirely upon the testimony of the witness Pfaff, and if his testimony were stricken out, as it seems it should have been, the hypothetical question put to the witness Roehm, on which the case rests, would have fallen, and there would have been nothing to go to the jury.

The plaintiff produced two witnesses, Harry Seelig and William Lyons, who described the condition immediately after the accident and who say there was nothing wrong with the elevator except that the platform was tilted. Then the witness Pfaff was called, and he says he did not go there on January 10th, the day of the accident (p. 165, lines 10 to 16), and it does not appear quite clear just when he did get there, although there was some suggestion that it may have been the day after (p. 165, line 24). He was asked to describe the condition which he found when he got there. This was objected to, and the objection was overruled. And again counsel for the Trustees objected and asked if the testimony would not be stricken out if it was not connected, and the judge said "Yes" (p. 165, lines 28 to 30). And again counsel for the Trustees objected, saying there should be some connection to show that the condition at the time of the examination was the same as it was immediately after the accident, but this objection was overruled and an exception taken (p. 165, lines 35 to 40; p. 166, lines 1 to 10).

And again counsel objected and was told: "Your objection goes to all of this testimony" (p. 167, lines 25 and 26). And despite the fact that no effort was made to connect the testimony with the condition at the time of the accident, and absolutely no effort was made to explain the difference between the testimony given by this witness and the other two witnesses for the plaintiff, who had testified that there was nothing wrong except the platform was tilted, the witness, Pfaff was allowed to testify:

> "On one drum the cable was off about three turns, on the other it was off about one" (p. 167, lines 27 to 29).

It seems fundamental that when a witness is allowed to testify and describe a condition that covers some time at least twenty-four hours or more later, without any effort being made to show that the condition was the same immediately after the accident, error was made in allowing the witness to testify. Having been admitted subject to being stricken out unless connected up, and no attempt having been made to connect it, the testimony should have been stricken out by the Court on its own motion.

This testimony was especially harmful to the defendants, The Trustees, as it was solely on this that the hypothetical question was submitted to the witness, Roehm, and it was upon his testimony alone that responsibility could be placed upon the defendant, The Trustees.

It seems that special consideration should be given to the situation because it appears that it would have been a natural thing for people from the restaurant or theatre, or even others, in taking the injured from the platform or in tinker-

ing with the elevator in an effort to straighten it out, to have gotten the cables off the drums in their efforts to remedy the condition. Evidence that this suggestion is not far-fetched is shown by the testimony of the witness, Lyons that he wanted to take the injured man to the street by operating the elevator (p. 157, lines 26 to 30).

It is respectfully submitted that the refusal of the trial Court to strike out the testimony of the witness, Pfaff was harmful error.

CONCLUSION

It is respectfully submitted that the trial Court committed harmful error in its refusal to strike out the testimony of the witness Pfaff, and in its refusal to grant the motion of The Trustees of the Third Presbyterian Congregation for a nonsuit and for a direction of a verdict, and that the judgment entered in the New Jersey Supreme Court should be reversed.

Respectfully submitted,

CHAS. STOCKDELL GRAY,
Attorney for and of Counsel with Defendant-Appellant, The Trustees of the Third Presbyterian Congregration in Newark.

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