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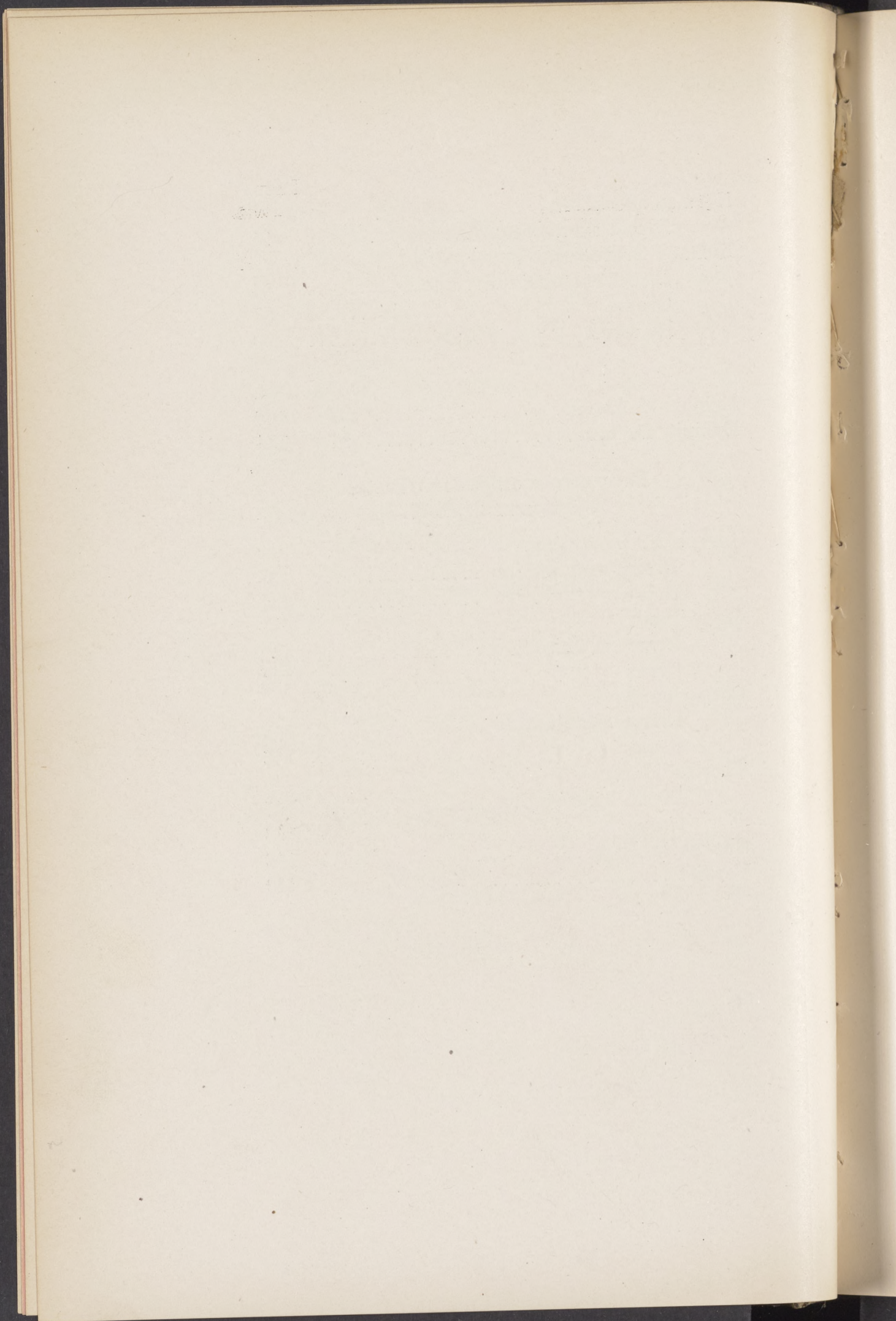
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SEPTEMBER 24, 1917.

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Notice of Appeal.

Notice of Appeal.

Filed October 24, 1917.

New Jersey Supreme Court.

10

HUDSON COUNTY.

MARY DAVIS,

Plaintiff,

vs.

ANNA TALLON, MARY TALLON,
MARGARET TALLON and JAMES
TALLON, as heirs and devisees
of JAMES A. TALLON and
MARY TALLON, deceased,

Defendants.

*Action at
Law.*

*Notice of
Appeal.*

20

TAKE NOTICE that the defendants appeal from the whole of the judgment entered in this cause, including both the judgment entered on November 13, 1916, as to the liability of the defendants, and the judgment entered on September 29, 1917, as to damages only.

30

Yours respectfully,

M. CASEWELL HEINE,
Attorney for Defendants.

TO WELLER & LICHTENSTEIN,
Attorneys for the Plaintiff.

Service acknowledged October 22, 1917.

40

Grounds of Appeal.

Grounds of Appeal.

Filed November 21, 1917.

New Jersey Court of Errors and Appeals

10

MARY DAVIS,
Plaintiff-Appellee,

vs.

ANNA TALLON, MARY TALLON,
MARGARET TALLON, and JAMES
TALLON, as heirs and devisees
of JAMES A. TALLON and
MARY TALLON, deceased,
Defendants-Appellants.

20

On Appeal.

*Grounds of
Appeal.*

The appellants state the following Grounds of Appeal:

1. Because the Court refused to grant defendants' motion to non-suit the plaintiff.

2. Because the Court refused to grant defendants' motion to direct a verdict in favor of the defendants, against the plaintiff.

30

3. Because the jury found a verdict contrary to the charge of the Judge of the trial court.

4. Because the jury found a verdict contrary to the law and weight of the evidence.

5. Because the damages awarded by the jury, in the trial for damages only, were excessive.

Dated November 19, 1917.

M. CASEWELL HEINE,
Attorney of Defendants-Appellants.

40

Rule to Show Cause.

**Rule to Show Cause Why New Trial Should
Not be Granted as to Damages.**

Filed November 25, 1916.

New Jersey Supreme Court.

10

HUDSON COUNTY.

MARY DAVIS,

Plaintiff,

vs.

ANNA TALLON, MARY TALLON,
MARGARET TALLON and JAMES
TALLON, as heirs and devisees
of JAMES A. TALLON and
MARY TALLON, deceased,
Defendants.

*Action at
Law.*

*Rule to Show
Cause.*

20

A verdict having been rendered in favor of the plaintiff in the above-entitled cause, and application having been made in due course by the plaintiff for a rule to show cause why so much of said verdict should not be set aside as relates to damages, because she contends that the damages awarded by the jury are inadequate and do not compensate the plaintiff for the injuries sustained by her;

30

IT IS THEREUPON, on this seventeenth day of November, 1916, on motion of Weller & Lichtenstein, attorneys for the plaintiff, ORDERED, that the defendants, Anna Tallon, Mary Tallon, Margaret Tallon, and James Tallon, as the heirs and devisees of James A. Tallon and Mary Tallon,

40

Summons.

deceased, show cause before the Supreme Court at the State House in the City of Trenton, on the twentieth day of February next, why said verdict, so far as it relates to damages, should not be set aside and a new trial as to said damages be granted.

10 Let this rule be entered in the minutes.

WM. S. SPEER,
Judge.

Summons.

Issued January 27, 1916.

20 [L. s.] The State of New Jersey to Anna Tallon, Mary Tallon, Margaret Tallon, and James Tallon, as heirs and devisees of James A. Tallon and Mary Tallon, owners, and Richard Schreiber, lessee:

30 You are summoned to answer the annexed complaint of Mary Davis in an action at law in the Supreme Court. And take notice that unless you file your answer to said complaint with the Clerk of the Supreme Court, at Trenton, within twenty days after service upon you of this writ and the annexed complaint, the plaintiff may proceed in the suit and judgment may be entered against you.

WITNESS, William S. Gummere, Chief Justice of the Supreme Court, at Trenton, this 27th day of January, nineteen hundred and sixteen.

WM. C. GEBHARDT,
Clerk.

40 WELLER & LICHTENSTEIN,
Attorneys.

*Amended Complaint.***Amended Complaint.**

Filed April 29, 1916.

Plaintiff, Mary Davis, residing at 931 Willow Avenue, in the City of Hoboken, Hudson County, New Jersey, complaining of the defendants, says that: 10

FIRST CAUSE OF ACTION.

1. At all times hereinafter mentioned and on March 22nd A. D., 1914, the above named defendants, Anna Tallon, Mary Tallon, Margaret Tallon, and James Tallon, as the heirs and next of kin of James Tallon and Mary Tallon, deceased, were the owners of a certain lot and parcel of land and premises known as Nos. 603-605 Willow Avenue, in the City of Hoboken aforesaid. 20

2. Said defendants leased and rented said premises to the defendant, Richard Schreiber.

3. At the time above mentioned said premises consisted of a vacant lot with a high board fence erected thereon, enclosing it and preventing access thereto from Willow Avenue, aforesaid, except through a large doorway or opening constructed in said fence, which doorway or opening was about ten feet wide and extended to the top of said fence; that in front of said fence, and running parallel with said Willow Avenue, was a public sidewalk covered by flagstone and abutted by said public street known as Willow Avenue. 30

4. Defendants, Anna Tallon, Mary Tallon, Margaret Tallon, and James Tallon, by their agents and servants, negligently, carelessly and 40

Amended Complaint.

unskillfully constructed, laid, and maintained a certain cobble or brick passage or roadway, from said Willow Avenue to said lot over said public sidewalk, and, by their agents, lessees, and assigns, caused horses and heavy wagons to pass to and fro upon said passage or roadway from
10 said Willow Avenue into and out of said lot in such a negligent and careless manner that said public sidewalk became and remained broken, and out of repair and dangerous, and was so permitted to remain by the defendants herein for a long space of time.

5. At about nine o'clock in the forenoon of March 22, A. D. 1914, the plaintiff, while lawfully walking in a southerly direction on said public sidewalk in front of said premises, and
20 while exercising due care and without negligence on her part, was thrown to and upon the sidewalk by the reason of the broken, dangerous, and unsafe condition thereof, caused, as aforesaid, by the negligent, careless, and reckless conduct of the defendants, their agents and servants.

6. By reason of being thrown, as aforesaid, plaintiff sustained a broken left ankle and was otherwise badly injured and bruised in and about
30 her body, and has, in addition thereto, suffered from the time of said accident to the date hereof from nervous breakdown.

7. By reason of said injuries received, as aforesaid, plaintiff was obliged to lay out and expend a large sum of money in and about endeavoring to be cured of her said wounds and injuries.

Amended Complaint.

SECOND CAUSE OF ACTION.

1. Paragraph one of the first cause of action is made a part of this cause of action.

2. Paragraph two of the first cause of action is made a part of this cause of action.

3. Paragraph three of the first cause of action is made a part of this cause of action. 10

4. Defendants, Anna Tallon, Mary Tallon, Margaret Tallon, and James Tallon, by their agents and servants, for their own convenience and convenience of their lessees, maintained and constructed across said sidewalk and leading from said street into said lot a certain road or passageway intended for the use of horses and wagons, and other heavy vehicles, and was so used by said defendants, their agents, servants and lessees. 20

5. That said passage or roadway was so carelessly, negligently, and recklessly used and maintained by said defendants, their agents and servants, that it became broken, insecure and dilapidated, dangerous and unsafe, and said defendants knowingly and wrongfully permitted said passage or roadway so to become and remain.

6. At about nine o'clock in the forenoon of March 22, A. D. 1914, the plaintiff, while lawfully walking in a southerly direction on said sidewalk in front of said premises and while exercising due care and without negligence on her part, was thrown to and upon the sidewalk by reason of the said condition and the conduct of the defendants, their agents and servants. 30

7. Paragraphs six and seven of the first cause of action are made a part of this cause of action. 40

Amended Complaint.

THIRD CAUSE OF ACTION.

1. Paragraphs one, two, and three of the first cause of action are made a part of this cause of action.

10 2. Paragraph four of the second cause of action is made a part of this cause of action.

20 3. Defendants, Anna Tallon, Mary Tallon, Margaret Tallon, and James Tallon, rented and leased said premises mentioned in the first cause of action to the defendant, Richard Schreiber, to be used for the purpose of storing wagons, trucks and other vehicles or materials, intending that said Richard Schreiber, should drive horses and vehicles attached thereto, to, upon and over said sidewalk; and said Richard Schreiber did, on March 22, A. D. 1914, and on many occasions prior thereto, drive horses and wagons to, upon, and over said sidewalk and into said vacant lot.

4. That by reason of his driving said horses and wagons to, upon and over said sidewalk, it became broken and out of repair, and in a dangerous and unsafe condition.

30 5. Paragraphs five, six, seven of the first cause of action are made a part of this cause.

Plaintiff will demand as damages for the first cause of action \$10,000.00; second cause of action, \$10,000.00; third cause of action, \$10,000.00, and costs of suit.

WELLER & LICHTENSTEIN,
Attorneys for Plaintiff.

Answer of Anna Tallon, et. al.

**Answer of Anna Tallon, Margaret Tallon,
Mary Tallon and James Tallon to
Amended Complaint.**

Filed May 6, 1916.

The defendants, Anna Tallon, Margaret Tallon, Mary Tallon and James Tallon make the following answer to the amended complaint herein: 10

ANSWER TO FIRST CAUSE OF ACTION.

1. They admit paragraph 1 in the first cause of action.

2. They deny that at all the times mentioned in the complaint and on March 22, A. D. 1914, they leased and rented the premises known as 603-605 Willow avenue in the City of Hoboken to the defendant, Richard Schreiber. 20

3. They admit the allegations contained in paragraph 3 in the first cause of action.

4. They deny each and every allegation in paragraph 4 of the first cause of action.

5. As to the allegations contained in paragraphs 5, 6 and 7 of the first cause of action, plaintiffs have no knowledge or information sufficient to form a belief. 30

DEFENSES TO THE FIRST CAUSE OF ACTION.

1. That the injuries alleged in the complaint to have been sustained by plaintiff were, if suffered by her, the result of her own negligence which contributed thereto in that she failed to take reasonable care while walking along the public streets under conditions of weather then 40

Answer of Anna Tallon, et. al.

prevailing and failed to keep a proper lookout in proceeding along the said street, and failed to conduct herself in a reasonably prudent manner on the said sidewalk at the time and place alleged in the complaint and under the weather conditions then prevailing.

10 2. Defendants will object at the trial that the complaint does not contain and set forth facts sufficient to constitute a cause of action against these defendants.

3. The plaintiff did not suffer the injuries or sustain the damages alleged in the complaint.

4. Plaintiff suffered no injuries and sustained no damages by reason of any negligence of these defendants, their agents or servants.

20

ANSWER TO SECOND CAUSE OF ACTION.

1. They deny each and every allegation contained in paragraphs 4 and 5 of the second cause of action.

2. As to the allegations contained in paragraph 6 of the said second cause of action, defendants have no knowledge or information sufficient to form a belief.

30

DEFENSES TO THE SECOND CAUSE OF ACTION.

1. That the injuries alleged in the complaint to have been suffered by plaintiff, were, if suffered by her, the result of her own negligence, which contributed thereto in that she failed to take reasonable care while walking along the public streets under conditions of weather then prevailing and failed to keep a proper lookout in proceeding along the said street, and failed

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Answer of Anna Tallon, et. al.

to conduct herself in a reasonably prudent manner on the said sidewalk at the time and place alleged in the complaint and under the weather conditions then prevailing.

2. Defendants will object at the trial that the complaint does not contain and set forth facts sufficient to constitute a cause of action against these defendants.

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3. The plaintiff did not suffer the injuries or sustain the damages alleged in the complaint.

4. Plaintiff suffered no injuries and sustained no damages by reason of any negligence of these defendants, their agents or servants.

ANSWER TO THIRD CAUSE OF ACTION.

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1. They deny each and every allegation contained in paragraphs 3 and 4 of the third cause of action.

DEFENSES TO THE THIRD CAUSE OF ACTION.

1. That the injuries alleged in the complaint to have been suffered by plaintiff, were, if suffered by her, the result of her own negligence, which contributed thereto in that she failed to take reasonable care while walking along the public streets under conditions of weather then prevailing and failed to keep a proper lookout in proceeding along the said street, and failed to conduct herself in a reasonably prudent manner on the said sidewalk at the time and place alleged in the complaint and under the weather conditions then prevailing.

30

2. Defendants will object at the trial that the complaint does not contain and set forth facts

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Answer of Anna Tallon, et. al.

sufficient to constitute a cause of action against these defendants.

3. The plaintiff did not suffer the injuries or sustain the damages alleged in the complaint.

10 4. Plaintiff suffered no injuries and sustained no damages by reason of any negligence of these defendants, their agents or servants.

M. CASEWELL HEINE,
*Attorney for Defendants Anna
Tallon, Mary Tallon, Margaret
Tallon and James Tallon.*

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30

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Reply to Answer of Anna Tallon, et al.

Reply to Answer of Anna Tallon, Margaret Tallon, Mary Tallon and James Tallon to Amended Complaint.

Filed May 9, 1916.

FIRST CAUSE OF ACTION. 10

1. She denies paragraph one of the defenses to the first cause of action.
2. She denies paragraph three of the defenses to the first cause of action.
3. She denies paragraph four of the defenses to the first cause of action.

SECOND CAUSE OF ACTION.

1. She denies paragraph one of the defenses to the second cause of action. 20
2. She denies paragraph three of the defenses to the second cause of action.
3. She denies paragraph four of the defenses to the second cause of action.

THIRD CAUSE OF ACTION.

1. She denies paragraph one of the defenses to the third cause of action. 30
2. She denies paragraph three of the defenses to the third cause of action.
3. She denies paragraph four of the defenses to the third cause of action.

WELLER & LICHTENSTEIN,
Attorneys for Plaintiff.

Answer of Richard Schreiber.

**Answer of Richard Schreiber to Amended
Complaint.**

Filed May 5, 1916.

Defendant, Richard Schreiber, residing at 618
Park avenue, Hoboken, Hudson County, New
10 Jersey, answering the amended complaint says
that:

ANSWER TO FIRST CAUSE OF ACTION.

1. He denies all of the matters contained in
the complaint under the first paragraph.
2. He denies that at the time the alleged
accident happened that he rented the premises
from his co-defendants, Anna Tallon *et al.*
- 20 3. He denies the allegations contained in
par. 3.
4. He denies the allegations contained in
par. 4.
5. He denies the allegations contained in
par 5.
6. He denies the allegations contained in
par. 6.
- 30 7. He denies the allegations contained in
par. 7.

ANSWER TO SECOND CAUSE OF ACTION.

1. He denies the allegations contained in
par. 1.
2. He denies the allegations contained in
par 2.
3. He denies the allegations contained in
40 par. 3.

Answer of Richard Schreiber.

4. He denies the allegations contained in par. 4.

5. He denies the allegations contained in par. 5.

6. He denies the allegations contained in par. 6.

101

7. He denies the allegations contained in par. 7.

ANSWER TO THIRD CAUSE OF ACTION.

1. He denies the allegations contained in par. 1.

2. He denies the allegations contained in par. 2.

3. He denies the allegations in paragraph third and says that he did not lease the premises on March 22, 1914, but leased the premises a long time after and subsequent to said date.

202

4. He denies the allegations contained in par. 4.

5. He denies the allegations contained in par. 5.

FIRST DEFENSE.

302

If the alleged injuries happened to plaintiff they were the result of her own negligence in that she failed to take reasonable care while walking along the public street under conditions of weather then prevailing and failed to keep a proper lookout in proceeding along the street, and failed to conduct herself in a reasonably prudent manner on the said sidewalk at the time and place alleged in the complaint and weather conditions then prevailing.

402

Answer of Richard Schreiber.

SECOND DEFENSE.

Defendant, Richard Schreiber will object at the trial that the complaint does not contain and set forth matter sufficient to constitute a cause of action.

10

THIRD DEFENSE.

Said defendant, Richard Schreiber says that if the alleged injuries happened, he was in no-wise legally responsible for the leased premises a long time after said alleged injuries happened.

EDWARD B. STOVER,
Attorney of Defendant,
Richard Schreiber.

20

30

40

Verdict.

**Reply to Answer of Richard Schreiber to
Amended Complaint.**

Filed May 9, 1916.

1. She denies the allegations of the first defense.

10

2. She denies the allegations of the third defense.

WELLER & LICHTENSTEIN,
Attorneys for the Plaintiff.

Verdict.

Rendered Nov. 13, 1916.

20

The jury returned a verdict for the plaintiff, Mary Davis, for One Hundred Dollars against the defendants, Anna Tallon, Mary Tallon, Margeret Tallon and James Tallon as heirs and devisees of James A. Tallon and Mary Tallon deceased.

30

40

Catherine Davis, direct.

NEW JERSEY SUPREME COURT,
HUDSON CIRCUIT

	MARY DAVIS, <div style="text-align: center;"><i>vs.</i></div> ANNA TALLON, <i>et al.</i> , etc., and RICHARD SCHREIBER, etc.	}	<i>At Law.</i>
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Tried November 13, 1916, before Speer, *J.*, and a jury.

WELLER AND LICHTENSTEIN (Mr. Tiffany), for the plaintiff.

MR. STOVER, MR. HEINE and MR. JONES, for the defendants.

20 Counsel opened their respective cases to the jury.

CATHERINE DAVIS, sworn.

Direct examination by Mr. Tiffany.

Q You are the daughter of Mary Davis? A Yes.

Q The plaintiff in this case? A Yes.

30 Q And you live at 931 Willow Avenue? A Yes.

Q Hoboken, New Jersey? A Yes.

Q Do you recall the morning of the 22nd of March, 1914? A I do.

Q Where were you on that morning about nine o'clock? A Right in front of that lot on my way to mass.

Q Who was with you? A My mother.

Q Where were you going? A To mass, to Our Lady of Grace.

40 Q Were you on your way there? A Yes.

Catherine Davis, direct.

Q Walking? A Yes.

Q Whereabouts were you walking? A Walking from my house down to church and we were right in front of that empty lot.

Q On what street? A Near Sixth street.

Q On what street were you walking?
A Willow avenue. 10

Q And what happened? A Well, when we passed as far as that in front of that empty lot the stone was broken, the flag was broken, and my mother's heel caught in the flag and she didn't slip, but she fell and pulled me down with her and she had a hard time to get her foot out of the flag and I helped her to get it out.

Q How were you walking, in back of each other or in front of each other? A No; I had my mother by the arm, which I always done. 20

Q How old is your mother? A Sixty-two years old.

Q Do you always walk with her holding her arm? A Always; I always go to mass with my mother.

Q After she fell what happened? A After she fell there was a man came across the street by the name of Mr. Corcoran. He helped my mother up and some other gentleman came over from Mr. Keeney's office and gave her a chair and put her on and carried her into Mr. Keeney's stable—into the office at least; and of course she fainted, and there was a woman by the name of Mrs. Feeney went for Father Dufferin; they thought my mother was going to die. 30

Q Never mind what they thought.

Mr. Stover. I object to that and ask that it be stricken out. 40

Catherine Davis, direct.

Q Just tell us what you saw; not what they thought. Then what happened? A After that the ambulance came and they brought Mama home.

Q Then she was treated? A Yes; by Doctor Callery.

10 Q Just tell what is in front of this lot, if anything? A Well, they have changed the condition of that place since.

Q What was there that morning? A The morning Mama fell?

Q Yes. A The flagstone had broken and there was very little snow, because it only had started to snow a few minutes before.

20 Q Was there anything between the sidewalk and the lot? A Between the sidewalk and the lot?

Q Yes. A There was dirt.

Q And anything built on there? A No; nothing built on it at all; no driveway.

Q Was there anything to obstruct your view of the entire lot? A There was a board fence.

Q How high was this fence, about? A Well pretty high.

30 Q Could you see over it? A No.

Q Was there anything in the fence? A There was a doorway cut in the fence.

Q About how wide was that doorway; have you any idea? A Well, wide enough for a wagon to go through.

Q Was it high enough for a wagon to go through? A Yes.

40 Q Where did you go immediately after the accident? A After the accident I went in with my mother while the doctor was setting her leg.

Catherine Davis, direct.

Q Before you went with your mother did you go anywhere? A Yes, they brought me over to the lot and gave me a seat.

Q Where was it they gave you a seat? A Over where those wagons were, over in the lot; they got a chair and sat me down and Doctor Callery put a needle in my arm. 100

Q You say in the lot. Do you mean the place in front of which your mother fell? A In front of which my mother fell; they set me over there.

Q Were you in a position to see anything of the lot? A I don't remember much about the lot, but I remember seeing wagons in it; I was too excited to take notice of what wagons were there.

Q In relation to this doorway in this fence, which side of the doorway as you enter were the broken stones? A The left hand side. 200

Q And in what position as to the curbstone, which side of the flagstone was it, the side nearest or furthest away from it? A The flagstone?

Q The broken part. A It was almost in the middle. I even raised the piece of stone up that same night. I could have brought it home. 300

Q It had broken right in two? A It is there yet; I can prove it. And they have filled in with bricks.

Mr. Stover. I object.

Q Never mind that. Was it broken in half or how? A Not in half, the corner.

Q And was that corner nearest the fence or nearest to the sidewalk? A Nearest to the sidewalk. 400

Catherine Davis, direct.

Q How many flags are there in the width of that sidewalk? A In the width of the sidewalk?

Q Yes. A You mean the width of the sidewalk?

10 Q Yes; how many flagstones? A There is a flagstone, and dirt, and then some flagstones again.

Q Then they took your mother home? A Home, in the ambulance.

Q You say they put a needle in your arm? A Yes; they did.

Q What was the matter with you?

Mr. Stover. I object.

20 *Mr. Tiffany.* Withdraw it; she is not a party. The ownership of the lot is admitted by the pleadings, so I will not prove the ownership.

The Court. All right; you do not have to prove it.

Cross examination by Mr. Stover.

30 *Mr. Stover.* As to the ownership I would like to say the tenant does not admit that he owns the lot in the pleadings.

Mr. Tiffany. I will quote from the answer: "Defendants admit that at the time mentioned in paragraph one of the complaint they were the owners of a certain lot known as 603-5"—

Mr. Stover. If that is so I would like to amend. It was a mistake of my stenographer—

40 *Mr. Tiffany.* Not as to Mr. Schreiber, but as to the Tallons.

Catherine Davis, direct.

Mr. Stover. Well, that is what I would like to have set forth. We do not admit we are the owner or tenant.

Q This happened when? A On the 22nd of March, 1914.

Q Are you sure of that date? A Positive, sure. 10

Q It did not happen after that, did it? A No.

Q What year did it happen? A 1914.

Q You are sure about that year, too? A Yes, sir.

Q When did it happen; what time in the day? A We were on our way to half-past nine mass; I judge it was fifteen after nine.

Q Who do you mean by "we were on our way?" A Mother and I. 20

Q Was anyone else with you? A No; nobody else.

Q And you supported your mother, is that the idea—took her by the hand? A I always did.

Q Why did you do that? A I done that for I think proper courtesy to my mother; I always done that.

Q Yes; she is rather old and feeble, is she not? A Not at all; never was until she met with this accident. 30

Q Hasn't she fallen down in the past—because of her age? A Never.

Q Has she ever fainted before? A No, she has not fainted before, not to my knowledge.

Q What has she done before to your knowledge? A My mother always was in very good health; we never had to have anyone to do our housework before she met with this accident. 40

Catherine Davis, cross.

Q Never before sick? A Never before sick. She might have slight sickness, but nothing of any amount.

Q When was she last sick before this accident? A That is something I cannot recall now.

10 Q You live with your mother? A Yes.

Q And you do not know when she called in the doctor or when she was sick before this? A Not the exact date.

Q Do you know the exact month or year? A That she called in the doctor? To tell the truth, I don't know.

Q Hasn't she had fainting spells and general weakness from old age in the past? A No. My mother is not old.

20 Q She is sixty-two years old, isn't she? A Yes; but up to that time I can prove that my mother never had a wash-woman to do her wash; not that I couldn't take care of her, but she was pretty strong.

Q She is pretty strong and vigorous; is that the idea? A Yes.

Q Where did this happen? A. On Willow Avenue near Sixth Street, in front of the empty lot.

30 Q What was the number of the empty lot? A I do not know.

Q 605? A I don't know the number of the empty lot; I did not look.

Q Why do you say it was 605 or 603 in your pleadings? A I know the very spot. I hear that the number was taken down. Isn't that the number in front of where the empty lot is?

40 Q I cannot answer your questions; it is for me to ask you the questions. Do you know in front of what lot it was? A Yes, I do.

Catherine Davis, cross.

Q Who gave the number to your counsel to put in the papers; did you tell him the number?

A The policeman took that; the officer who helped my mother that morning took the number; that was in the paper without my giving it to him.

Q What was the number? A 605 and 603, I believe. I did not even take note of it. 10

Q You do not know where it happened, whether it was 605 and 603? A I know the very spot where it happened.

Q You do not mean it happened before the very spot 605 and 603? A It could not happen in both places; but I know where it happened.

Q How big was that hole? A It was a broken flag, big enough to catch mother's heel and cause her to turn over. 20

Q Will you show us? A Yes; I can show you the piece. It was broke off about like that; the break is that size, say about one or two feet.

Q How large was the hole? A Well, larger than that; I will just show you; like that is here.

Q About two feet? A More than that.

Q About three feet large? A About—between that. 30

Q And you do not know where it was; whether it was before 605— A I know the very spot.

Q —or 603 Willow avenue? A Well, 603 most likely, because 605 is Keeney's other place.

Q Are you sure it was 603? A Sure I am.

Q Why did you say you were not sure before? A The numbers I never bothered about. It was put in the paper. I never bothered about it. That was what I got the number from. 40

Catherine Davis, cross.

Q You got the number from what you saw in the newspapers? A Yes; where my mother had fallen.

Q You do not know where she fell? A 605 it must be, when the two premises are 603 and 605—or 603.

10 Q Do you know that or are you simply guessing? A Well, 603-605 is the place, those two numbers. Well, the nearest number to Sixth street is the number.

Q You are sure it was 603? A Positive.

Q Wait till I ask the question. You are now sure it was 603? A The nearest lot to Sixth street, whatever that number may be.

Q You do not know that number, do you? A It must be 603, because the numbers go accordingly; they start 601, 3 and 5.

20 Q You are simply guessing then; you are making a pretty safe guess? A I am not guessing; I know.

Q Did you look at the number at the time you fell down? A I did not.

Q And you know about it from the newspapers; is that the idea? A I know the number through my own intelligence now when I come to think where the numbers start from, 601, 30 603 and 605; it must be that.

Q Where do you live? A 931 Willow avenue.

Q And the plaintiff lives in the same place? A My mother lives with me, yes.

Q You have traveled over there in the past, have you not, over that same street? A A number of times, yes.

Q When did you last travel over that same street before this accident happened to your 40 mother? A The day before.

Catherine Davis, cross.

Q Did you look at the premises the day before when you passed there? A I was not looking for anything like that.

Q I did not ask you that. Did you look at the premises? A I do not remember.

Q Don't you remember that you said to Mr. Tieterer, the man here—stand up, Mr. Tieterer—please state if a man called at your mother's house in relation to this place? A Yes. 10

Q Who called at your house? A Mr. Schreiber and some other gentleman; I was not home; I was to business; my other sister met him.

Q It was your other sister? A Yes.

Q And your mother had gone over there the day before? A Yes.

Q How many times the day before? A Well, she had to go there twice; once to go down to church and the other to come back. 20

Q Did she go over there before that, the same premises? A We had to cross every Sunday morning.

Q Did she go over there, the same premises, in the week-days? A Well, maybe on a Saturday she would go over, any time she had occasion to go down that way. 30

Q And did she see that there before? A We often remarked about the condition of the place.

Q To your mother?

Mr. Jones. I object.

A Not to my mother; to other people.

Mr. Jones. I move that that be stricken out, that remark as to the condition of this place. 40

Catherine Davis, cross.

The Court. As against your client I will direct the jury if you request me to that it has no bearing whatever; but of course he has a right to bring it out on behalf of his client if he thinks it is valuable on that account and if the plaintiff does not object.

10 Q When did you remark about the condition of the premises first to your mother? A First to my mother?

Q Yes; how long before this accident? A I could not date when or how long.

Q You say you often told her about the condition, did you? A Well, everybody used to speak of the condition of it.

Q And did your mother speak about the condition of it? A I could not say whether mother
20 spoke about the condition of it, but of course I can say others remarked the condition of that place around there as dangerous for anyone to pass.

Q And your mother knew of that, too; she heard others remark about it, didn't she?

Mr. Tiffany. I object.

The Court. I will sustain the objection to that particular question, but you may
30 show that these remarks were made in her presence, if they were.

Q Were they made in your mother's presence? A Well, I could not say for sure.

Q Did you remark about the defective condition of the premises?

Mr. Tiffany. When?

A When?

Q Any time, to your mother, before this— A
40 Not to my mother, no, I did not. If I would be

Catherine Davis, cross.

passing there, who I would be passing with at times I might say this place would be terrible, but I did not remark it to my mother.

By the Court.

Q Why didn't you remark it to your mother? You would remark it to anybody else with whom you were passing, why didn't you remark it to your mother? A I don't know, Judge, that I didn't. 10

Q How do you know that you didn't if you always remarked it to others when you were passing? A Well, I don't know; I could not even say now whether I remarked it to mother or not, but I remarked it—several people has remarked it to myself, the condition of the place. 20

By Mr. Stover.

Q And your mother was there at times; she sometimes heard it? A Most likely.

Q When was she there, for instance; tell me one time when she was there to hear about the condition of the premises. A I could not tell you; I could not tell you.

Q But you knew that she knew it before this happened? A Anybody would know it that passed there. 30

Q Yes; anybody would know it that would pass there? A Yes, that would pass there; it was in such bad condition.

Q It was so plain you could see it without trying real hard to see it; isn't that the idea; the defective condition was so plain there that anybody could see it; isn't that the truth? A You could see that yourself if you went down there. 40

Catherine Davis, cross.

Q And anybody could see it? A Anybody, yes.

Q And your mother could see it? A Yes.

Q Couldn't she see it if she had looked?

Mr. Tiffany. I object.

10 *The Court.* She has said that anybody could. I guess we will assume she could; she was somebody.

Q Now, you guided mother, you say; you had her by the arms? A Always did; wherever I go I always take my mother's arm.

Q And you warned her just as you passed the Schreiber premises? A No.

Q Why didn't you, when you knew it was so dangerous? A I always took mother's arm.

20 Q Didn't you warn her where she was stepping? A No.

Q And didn't you say, "mother, look out; these sidewalks, these premises are defective?" A No; I didn't that morning.

Q Why did you let her fall down then without warning her? A She could not help falling; when her heel caught in the broken stone; how could she help it?

30 Q Why didn't you tell her just before you came to that place—why didn't you tell her of this condition of the premises just before you came to the place? A I don't know why; I could not answer.

Q You risked your mother's life without giving her any warning? A I wouldn't risk my mother's life. I tried to protect my mother's life.

40 Q Why didn't you go down across the street; you could have done that, couldn't you? A

Catherine Davis, cross.

That is on the same side where we live; we always go that way.

Q Couldn't you have crossed the street and gone to the church just as well? A We always walked on that side.

Q The question is, couldn't you have gone over on the other side and walked down to the church just as well as walking on that side? A We were always used to going down that side; never crossed over until I got to 4th street, and then went over. 10

Q But you could have crossed on that side; there was nothing to stop you? A I did not go down purposely to break my mother's leg and let her suffer; I would not have done that.

Q Answer the question, please. You could have crossed the street; there was nothing to stop you? A I suppose if I had the presence of mind I could have done it. 20

Q And you did not do so because you did not have presence of mind; is that your answer? A I suppose I did not notice it; went right ahead and crossed on that side.

Q How far is the church away from the place where you fell down? A Two blocks.

Q You say there was no sidewalk there? A No what? 30

Q No sidewalk in front of the two lots? A There is sidewalk.

Q Oh, there is? A But no driveway where my mother fell; there is a sidewalk but no portion for a wagon to pass—at that time there was not.

Q Just describe the particular place where she fell. A Right in front of this fence; this board fence. 40

Catherine Davis, cross.

Q The board fence; where was that, before 603 or 605? A 603.

Q And what was at 605? A Well, that is Keeney's office, and the other part there is a driveway there.

10 Q Where did this happen, with reference to what part of 603? A Well, about the middle of the fence where the wagon would pass in; just the moment we touched this here flag that is where it was.

Q The fence is on the right? A Yes; this happened on the left-hand side.

Q How far is the fence from the curb? A The fence from the curbstone?

20 Q Yes. A Well, quite a ways. You can judge how far that is by the houses; I do not know how many feet; I have not measured it; I could not tell you the exact amount of feet.

Q Can you tell me about the amount of feet?

A I would have to measure it; I could not exactly tell.

Q You do not know if it is five, ten or twenty feet, do you? A No; I do not.

Q Please describe just how her foot caught. A Her heel caught.

30 Q How her heel caught? A Her heel caught in this broken sidewalk and she turned over.

Q What sort of heels did she have on that day, do you know? High heels? A No; she had sensible, common sense heels; not high heels.

Q What had she on her shoes, if anything? A What do you mean—she had rubbers on.

Q Oh, she did have rubbers on? A Yes.

Q That is what I was trying to get at. And those rubbers caught; that is the heel caught?

40 A Yes.

Catherine Davis, cross.

Q What heel caught? A The heel of her—

Q Left or right foot? A Wait, now. The heel of—

Q Do you not know exactly, do you?

Mr. Tiffany. Just give her an opportunity.

10

A Let me see; it is her left—her left—well, I don't know if I am making a mistake. I don't want to make a mistake; whichever one of her legs is broken now it was that one that was caught.

Q Stop there. I just ask, do you know what heel caught? A The heel of the leg that was broken; that is the left leg if I am not mistaken.

Q And you may be mistaken for all you know? A Yes; I may be.

20

Q You simply do not know, do you? A Well mother is here; you can ask her.

Q I know she is here, but you do not know, do you? A It is the left.

Q You do not know which leg broke really, do you? A It is the left leg; yes.

Q When she fell down what did she say; did she say anything? A She said to me, she said, "Katie, my leg is broken"; and I said, "Mama, no." And I tried to pick her up and I could not pick her up and Mr. Corcoran came to her assistance and picked her up.

30

Q Have you subpoenaed him; is he here in court? A Yes; he is here.

Q What was done with her? A Then Mrs. Feeney went for the priest, and the policeman telephoned for the ambulance; I had sent for a coach to take her home and they could not get her in the coach.

Q Why? A Because her leg was broken.

40

Catherine Davis, cross.

Q Was she sitting on the chair the whole time? A When they set her leg in the office; yes; she sat on the chair.

Q Did she have her full senses? A When her leg was being set, yes, sir.

Q At the time she fell down? A Yes; when
10 she fell down she had her full senses, when she fell down.

Q Had she her full senses always throughout? A She took a weakness when he went to set her leg. The doctor will tell you that.

Q She knew what was happening all along? A Yes, sir.

Q Why did you say she fainted, to your counsel? A She fainted; I just stated to you.

Q Then, she did not know what happened if
20 she fainted? A She got over her fainting spell.

Q Then she did faint? A Yes; she got over her fainting spell.

Q Where did she faint, and when? A The man that carried her in will tell you that, and Mrs. Feeney.

Q How long was she in the office? A Not very long; I should judge five to seven minutes.

Q What brought her to her senses? A She
30 came to herself.

Q You did not do anything; you did not put water over her? A There was a man went and got some liquor and she refused to take some liquor and she thought she would have strength enough to go down to church; she did not want to break her fast; she was going to communion.

Q Did she take the liquor? A When the priest came he made her take it.

Q That was how much do you know? A Not
40 very much; just a little bit.

Catherine Davis, cross.

Q Was she in the hospital any time, do you know? A Not at all.

Q And she had a doctor; you know that, don't you? A Yes.

Q How often was the doctor there? A Well, the doctor has his number of visits; I don't know; I did not keep account of it; he has the number of visits marked. 10

Q You do not know? A No.

Q Do you know approximately; about? A He has that here; he will tell you.

Q Do you know? A No; I did not keep account of that.

Q You do not know whether he called five or ten times? A No; we left that to the doctor to send in his bill. 20

Q Has he sent in his bill yet? A No.

Q You do not know how much it will be, do you? A Well, the doctor has the bill; I believe the doctor is here, too.

Q When did the doctor call the last time? A I don't know the date.

Q Was there snow on the ground at the time your mother fell? A Yes; very little snow.

Q How little? A Well, it started to snow shortly before we left the house, and the snow was soft and there was not so much snow; it was snowing, though; it was snowing. 30

Q Had freezing set in? A No; not at all.

Q Now, are you sure she did not slip on the snow? A Well, I could not be any surer than what I am that she did not slip; her foot caught; I am so sure of that that I could swear it before God.

Q You are sure it was not the snow that made her slip? A No; it was not the snow. 40

Catherine Davis, cross.

Cross examination by Mr. Jones.

Q It was about 9:15 when you left your house? A Yes—no, it was about ten after nine; it was about nine-fifteen when we got down there, I judge.

10 Q In order to get to church— A At half past nine, we always leave early.

Q How long before that had it begun to snow? A Well, it was not snowing for half past seven mass, so between that time it started to snow; and half past seven mass is out about half past eight, so between half past eight and nine it started to snow.

Q It was not snowing at eight o'clock, was it? A Not to my knowledge it was not snowing at eight.

20 Q What time did you get up that morning? A My sisters were to half-past seven mass; that is how I know it was not snowing when they went to church; when they came out it was not snowing.

Q You are very sure about that? A They are sure of it.

Q Aren't you sure of it? A Yes. It was snowing when I went to mass. It was snowing, I know sure; I had to raise an umbrella; I had an umbrella raised at the time.

Q Had you had an opportunity to observe whether or not it was snowing? A Had I an opportunity to know? The only thing I noticed when we left the house I said, "We will have to bring an umbrella, because it is snowing."

Q How do you know it was snowing? A My sister had told me.

Q That is the only way you know? A That is the only way I know.

40

Catherine Davis, cross.

Q How much snow was there on the ground?

A There was very little snow; very little really; the sun came out after and there was such little snow on the ground that it melted; anybody that can recall the 22nd of March will remember the same thing.

Q Yes; I think anybody that can could. 10
Would you say there were two inches of snow?

A Oh, no.

Q Would you say there was an inch? A
About; maybe not that; very little snow.

Q You are very positive you told Mr. Stover that your mother caught her heel in this hole in the— A The broken sidewalk. Couldn't be any more positive.

Q How are you positive? A Because she had told me her heel caught in the sidewalk. 20

Q That is the only way you know? A I know, because she had all she could do to get her heel out of the sidewalk.

Q Do you know whether she slipped and fell or whether she caught her heel in the hole? A She didn't slip; she went right down.

Q How do you know she didn't slip? A Wouldn't I notice it? I was there.

Q Was there any snow on that flagstone that was broken? A I suppose there must have been, when it was snowing. 30

Q There was snow on that flagstone, then? A If it was snowing, there must have been; but there was not enough snow to prevent my mother's heel catching in this here sidewalk.

Q If you will try to answer the questions we will get along faster. How wide was this break between the two parts of the flagstone? A The piece was broken off wide enough to catch mother's heel in. 40

Catherine Davis, cross.

Q Let us use this blackboard here as an illustration of that flagstone. Was that flagstone about the size of this blackboard? A The flagstone, I judge, was about that size; yes.

Q How big a piece of that corner had broken off? A There was a piece broke like this.
10 There was a piece broken like this, and a piece right up here.

The Court. Do you want to mark that point, Mr. Jones, with a piece of chalk?

Mr. Jones. Yes.

The Court. Let her mark it.

(Witness does so).

Q Indicate, if you please, by what distance the two pieces of the flagstone were separated.
20 A It was broken, kind of crumbled up at that part there, the inside part there. That is where mother's heel—

Q Were the two pieces right up close together? A No; apart.

Q How far apart? A They were broken apart.

Q Indicate on there how it looked. A This here was broken apart big enough to get
30 mother's heel in; it was crumbled.

Q Can you draw it on there? A No, I could not exactly draw it. Mr. Tiffany, I believe, has a diagram of it.

Q Would you say they were two inches apart? A About; maybe not quite that. It was kind of crumbly, just enough to catch the corner of your heel in.

Q And that stone is parallel with the curbstone, is that right? A The narrow part is to
40 the curbstone. This is the inside part.

Catherine Davis, cross.

Q This part here toward the curbstone? A Yes.

Q And this part is toward the fence? A Yes.

Q About that fence, now; you said that was a high board fence out in front of that lot; is that right? A Yes. 10

Q And that there was a door in it? A There was a door cut in the fence.

Q Was that door open or closed as you sat there? A When I passed it was closed; I really did not know there was a door in that fence. It looked like a fence until I found out afterward the door was in it that same night; that same night I saw the door in there; my attention was drawn to it.

Q You said that you sat on a chair in front of the lot? A Not in front of the lot; inside the fence. They gave me a chair to sit on, because I became weak after my mother's leg was broken and the doctor put the needle in my arm. 20

Q What part of the lot did you go in? As I understand it, there was a fence in front of only one part; is that right? A It is not divided inside; it is all in one. When you get inside of the fence, that is all in one. 30

Q Now you spoke of Mr. Keeney's place. What number is he? A His is 605.

Q That would be further away from the corner? A Right next door to 603.

Q But farther from that corner? A Yes.

Q What street is it there? A It is on Willow Avenue, near 6th.

Q Then 605 is further from— A 603.

Q —from 6th street than 608; is that right? A Yes, sure. 40

Catherine Davis, cross.

Q And this fence is in front of 603? A Yes, 603; that's right.

Q In order to get into the lot, did you go through the door in this fence? A No; I did not know there was a door there.

Q You went in through Mr. Keeney's place?
10 A I went in through Mr. Keeney's place, and of course when they set mama's leg, they brought me over in the corner and set me in a chair there.

Q Now, there was a driveway in front of Mr. Keeney's place? A Yes, but not in front of this board fence there.

Q Answer the questions, please. There was a driveway in front of Mr. Keeney's place; is that right? A Yes.

Q And none in front of 603—as long as you
20 want it in? A No.

Q Now, there were wagons on this lot when you went inside there? A Yes.

Q Mr. Keeney has an office there, does he?
A My mother's leg was dressed in Mr. Keeney's office.

Q How far back from the street is that? Or is it right on the street? A It is right like a house; as far back as any of the houses are.

Q Just about parallel with this high board
30 fence? A It is not near the high board fence. It is lot 605. It is not near the high board fence. The high board fence is 603.

Q Now, let us see if we can use this black-board for something beside a flagstone. We will take this as Willow Avenue. We will take this as 6th street. Indicate on there where 601 Willow Avenue. A That is the corner house.

Q Just draw a line which will show the dividing line between 601 and 603. Now, this is
40 601, is it? A Yes.

Catherine Davis, cross.

Q This is 603? A Yes.

Q And this is the lot which was bounded on the front by this high board fence with a door in it? A Yes.

Q And 605 is the place where Mr. Keeney has his office. A Yes.

Q Is there a building on this lot of 601? A 10
There is a house, yes.

Q Does it go right straight up to this line here? A Right up to the board fence.

Q And the board fence continues from there? A Yes.

Q And does that run right over to the line of the lot? A It runs right over to the line of the driveway for Keeney's wagons.

Q How wide is Keeney's driveway? A 20
Wider than this other place was; wide enough for wagons to go through.

Q How many feet would you say? A I did not measure that either.

Q Give us your best idea? A Well, a good, wide truck could go through.

Q Would you say six or eight feet? A Wider than that.

Q Ten feet? A Yes; just enough for a 30
wagon to go through.

Q Indicate on there roughly where the driveway is. A Well, the driveway is—Keeney's—there is Keeney's office and the driveway both on that premises.

Q We will mark this. This is 601, this is 603, this is 605? A Yes.

Q Just mark on there. You say the driveway is between the high board fence— A
No; the high board fence—there is no drive- 40
way there.

Catherine Davis, cross.

Q Mr. Keeney's driveway I am speaking about. A Keeney's driveway is on 605 premises and his office also.

Q Where is Keeney's driveway with relation to that high board fence? A Right next to the high board fence.

10 Q Mark it on the picture. A It is right here.

Q It would not be as wide as that, would it? All right; we will let that go; that is the driveway? A That is Keeney's driveway, and this is the board fence; that had a door in it.

Q So that is Keeney's driveway there? A Yes.

Q And Keeney's office is over here? A Yes.

20 Q Now, this is the sidewalk here? A Yes.

Q Then you saw wagons in this lot? When you sat in there on the chair? A In this lot I saw them.

Q You do not know whether those wagons came in over this driveway or any other way, do you? A No, I do not know that.

30 Q As I understand it, this custom of yours of walking with your mother and holding her by the arm was not because she needed support, but simply as a daughter's mark of affection, I suppose? A Yes; I always do that.

Q It was not that she was feeble or infirm or needed any such help? A No.

Q And she was a perfectly active woman, of course? A I have been doing that for a long time.

Q Your mother is 62 years old? A Yes.

40 Q And remarkably spry for a woman of that age, I suppose? A She was before it had happened.

Catherine Davis, cross.

Q And I suppose she had passed up and down this sidewalk time and time again? A Yes.

Q Where did you live? Let's see; the church was down toward the lower numbered street? A Yes.

Q And you lived somewhere upon— A I 10
lived at Tenth Street.

Q On Willow Avenue? A Yes.

Q On this same side of the street? A Yes.

Q She was regular in her attendance on church? A She went every Saturday.

Q And I suppose she went up and down there to buy her goods? A No; she just went up and down there; we had to pass there to go to church.

Q But I suppose she went up and down Willow Avenue for other purposes, too, besides going to church? A Yes. 20

Q In pretty bad condition there, wasn't it, that sidewalk? A Well, it is not in very good—yes; it is in bad condition all the time.

Q. Bear in mind that we are confining ourselves to the 22nd of Marsh, 1914, and before that; because what happened after that has nothing to do with it. It was the 22nd of March, 1914, you told Mr. Stover, as I recall it, that you were very positive of that date. A Yes. It is the 22nd. 30

Q There can be no question about that date? A It was the 22nd, yes.

Q There is no doubt about that? A Positively no doubt.

Q How long before March 22nd, 1914, had this sidewalk been in such a bad condition? A How long before? 40

Catherine Davis, cross.

Q Yes. A Well I noticed it the day before, and of course quite some time it had been in that condition.

Q You had had a lot of conversation— A Because I had had occasion to go over that sidewalk myself and others when I noticed it.

10 Q With your mother? A With and without mother.

Q Did you go to church with her every Sunday morning? A Every Sunday I always walked with my mother.

Q And you always walked on this sidewalk? A Always.

Q And I suppose as you would go by you would say, "This is a pretty bad place?" A
20 That is something to my knowledge that I do not remember remarking when I passed the sidewalk with my mother, whether the place was in bad condition, but I had remarked it, but I cannot say for sure whether I remarked it to mother; I want to be candid what I am talking about.

Q You had spoken of it at home, of the bad condition of this sidewalk here? A I cannot say at home, but I would remark it with
30 people I would see when passing. If I passed with any girls I would say, "This sidewalk is in terrible condition."

Q It was so bad that every time you passed, no matter with whom you were— A I would be walking with.

Q No matter with whom you were walking, you would remark it, and as I understand it you said to Mr. Stover everybody would speak about the condition of that sidewalk. A Yes.
40

Catherine Davis, cross.

Q How long before March 22, 1914, did everybody speak about the condition of this sidewalk? A What do you mean by that?

Q Was it a month or a year or six months before the accident that people used to speak about the condition of the sidewalk? A We are only living up that way seven years and for the past year or so I would hear people remark about it. 10

Q. So that for about a year that sidewalk had been in this same condition? A It might have been longer, but I can remember that.

Q That is a year before March 22, 1914? A I judge about that, yes.

Q So that during the year 1913, from March on, that sidewalk was in that bad condition? A Well, I am only saying I think it was because I remarked it; I have remarked it within that year. 20

Q So that if you remarked it during that year it must have been in that bad condition? A I suppose so.

Q Well, do you know, or don't you know? A It was in a bad condition. Everybody used to remark it. That is all I can say; different people would remark it. 30

Q And it was so bad everybody used to say it was bad; is that right? A Not every—I can't say everybody. How can I say everybody? How can I say such a thing? I want to be truthful about it.

Q And, without any desire to repeat, the way that you know that your mother did not slip on the snow— A Positively.

Q —was that she told you her heel was caught in the stone? A I know that she caught, whether she told me or not. I could 40

Joseph F. Londrigan, direct.

see it was caught because I had a hard time to pull her foot out from under it.

Q Did you see any snow around the heel?

A I did not take notice; there was very little snow on the sidewalk.

10 *Re-direct examination by Mr. Tiffany.*

Q When you say there was no driveway in front of 603 do you mean by that there was no cobblestone driveway? A There was no driveway in front of 603, positively. It was fixed after.

Q I did not ask you that. Do you mean that there was no cobblestone— A No; no cobblestone.

Q No cement driveway—cobblestone? A No.

20 *The Court.* Why don't you let her tell you what she means?

Q What do you mean when you say there was no driveway there? A There was a sidewalk; a passageway.

Q What was on each side of the sidewalk? A Dirt.

Q Then came the fence with the gate in it?

A Yes.
30

JOSEPH F. LONDRIGAN, sworn.

Mr. Tiffany. Do you admit the doctor's qualifications?

Mr. Stover. I do for Mr. Schreiber.

Mr. Jones. Oh, yes.

Direct examination by Mr. Tiffany.

Q Doctor, you practice in Hoboken? A
40 Yes.

Joseph F. Londrigan, direct.

Q Do you know Mary Davis? A I do.

Q The plaintiff in this case. And did you attend her on or about March 22nd for an injury? A I did.

Q Just tell the jury what the occasion of treatment was and what the nature of the treatment, what you found. A On Sunday, the 22nd of March, I was called to the home of Mrs. Davis. When I got there I found that she was suffering with a fracture of the left leg, commonly called a Potts fracture, which had been previously attended to by Doctor Callery, who was then the ambulance doctor at St. Mary's Hospital. I removed the splints that he had on her leg to determine the nature of the injury, and found as I have stated a Potts fracture of the left leg. I reapplied the bandages and splints. 10 20

Q Were there any other injuries? A No other injuries.

Q How long after that did you continue to treat her for Potts fracture? A Those splints remained on for two weeks; then I applied a cast which remained on for about five weeks, and all told she had her leg in splints or cast for about eight weeks. 30

Q After that she was able to use it? A No; she was not able to use it other than to get around with the use of a chair or crutch around the house.

Q Did you know her condition physically prior to that time? A I did.

Q What was her condition physically? A She was in a good condition physically prior to the accident.

Q And able to get around all right? A Yes. 40

Joseph F. Londrigan, direct.

Q Do you know how long she continued to use crutches? A For about two weeks.

Q How many visits did you make, doctor, altogether, do you recall? A Just the exact number of visits I cannot recall. I saw her perhaps up till about the latter part of June.

10 Q You say a Potts fracture; is that a fracture that is more severe or less severe than an ordinary fracture? A The ordinary Potts fracture is a fracture of the smaller bone of the leg, called the fibula, right above the ankle joint, and it was of the ordinary type. There were absolutely no complications.

Q The one bone, the fibula, being the only bone broken? A That is all.

20 Q Has that interfered with the mobility of the ankle joint. A It has not.

Q The union was a good one? A Yes.

Q Are fractures of that kind, doctor, usually attended with pain? A Yes.

Q In this case would you say that there was pain? A Considerable pain during the time of the healing of the bone.

Q How long did that take? A From six to eight weeks.

30 Q Would you say, doctor, that she could use the left leg now as well as she did prior to the accident? A I would.

Q How long has that condition existed that she has been able to use it as well as prior to the accident? A From the latter part of June, I understand.

Q Nineteen hundred and— A Fourteen.

Q Have you rendered or made up your bill for services in this matter? A I have.

40 Q What was the amount of your bill? A Forty dollars.

Mary Davis, direct.

Q Is that a reasonable value, doctor? A Yes.

Q Were there any other conditions brought on by reason of this injury? A No, sir.

NO CROSS EXAMINATION.

MARY DAVIS, sworn.

10

Direct examination by Mr. Tiffany.

Q You are the plaintiff in this case, Mrs. Davis? A Yes, sir.

Q And a widow? A Yes.

Q Living with your daughters at 931 Willow Avenue? A Yes, sir.

Q On March 22, 1914, you were accompanied by your daughter Catherine? A Yes.

20

Q Where were you going? A I was going to church.

Q And on your way something happened? A Yes. At the corner of—

Q Speak out loud and tell us just what happened. A As I was going to church at half past nine o'clock mass, and Catherine was going along, and generally when she would be going she would catch hold of my arm you know because I am very nervous, very nervous, and we came along to this place, of course, I used to be always careful myself of it, and it was a little snow you know, it was not so much, and my foot, my heel caught in this place, in this flag—

30

Q In which place? A In this flag which Katie, my girl, was telling you about.

Q You tell us. A Yes; and the flag was there opposite this driveway place and my foot caught in it you know, and when I did that I

40

Mary Davis, direct.

thought to pull it you know and this foot went from me and I couldn't get this out and down I went; that's the way I went. I fell down on it, down—

Q You say you could not get this out? A My left foot.

10 Q What was the matter that you could not get it out; where was it? A Well, it was caught there.

Q "Caught" where? A In the place, in the broken street, the broken sidewalk.

Q The flags of what? A The flags on the sidewalk.

Q And what did you do then, you fell down?

A I fell over and then she had hold of me by the arm and of course had the weight of me; she
20 came after me, fell too and went around and she said to me "Oh, Mamma, what happened? Get up."

Q Never mind what she said. A I said "Oh, God. My foot is"—

Q Never mind what you said. A So that is what happened, and then of course a couple of men came along and I did not know any of them, only one man, Mr. Corcoran.

30 Q Had you ever had any injuries to that leg before? A Never; never. I have never fell down in my life before till then.

Q You say there was snow on the ground? A Snow; it was snowing a little, not much.

Q About how much? A Not hardly. There was just enough that you could not choose your steps, you know.

Q Could you see the flagstone? A No, no, no.

Mary Davis, direct.

Q Enough to cover the flagstone? A Yes; just enough; it wasn't frozen neither. It was soft snow.

Q What kind of shoes did you have on that morning? A I had good shoes.

Q Were the heels turned over or were they straight? A No. And I had rubbers on me. 10

Q How old are you? A I am sixty-two now past; I was going on sixty-one then.

Q After they took you up from there they took you home? A Yes.

Q How long were you confined to your bed, if any time? A I lay in bed for four weeks.

Q And after that? A Then, of course, there was plaster cast put on my foot, and that was on six weeks I think, between five and six weeks; it wanted a couple of days of six weeks. 20

Q Doing what? A With that plaster cast on my foot.

Q Could you walk around? A No; I could not. All I could do was take a chair when I would get out of bed and put my knee on a chair and push it before me and I would walk to the window and sit there all day long.

Q How long did that condition persist? A I was six weeks.

Q After that what did you do? A Well, I had to try to limp around on a stick and crutches and I could not walk. 30

Q How long were you obliged to use the stick and the crutches? A Well, the whole summer after.

Q The whole summer? A Yes.

Q Did you have pain? A Yes; I have pain in it and I will have pain while I live.

Q You have pain yet? A I have pain yet. I never can lay on that side in bed and I never 40

Mary Davis, cross.

could sleep since. I am so nervous over it. Of course, we have got along very good, that is I can walk, but I never can get along without someone with me.

10 Q Did you do your own work before that? A I always done the work in the house. It was a big house; I used to do all the work in the house, the washing and ironing and everything there was to be done in the house.

Q After that accident— A I never could do anything since; never.

Q Have you employed someone or how have you had it done? A My girl stays home. She had to give up her position and stay home.

Q You do not pay her anything? A No; I do not pay her anything.

20 *Cross examination by Mr. Stover.*

Q When did this happen? A In 1914, the 22nd of March.

Q And you are sure about that date, are you? A I am sure; sure.

Q Where did you live at that time? A 931 Willow avenue.

30 Q How many blocks is that away from the place of the scene of the accident? A Well, I walked from 10th street down to there; that is between Sixth and Seventh I think there, but I never counted the blocks as long as I am up there. I just come along my way.

Q I see; it is about one or two blocks, isn't it? A It is a little more than that.

40 Q Where did you live, on what side of the street, the east or the west side? A I come down on the same side, on the left-hand side; I went on the same side where I always—where we lived.

Mary Davis, cross.

Q Do you mean the left-hand side or the right-hand side? A The left-hand side.

Q The left-hand side? A Yes.

Q And this house is on the left-hand side going down towards the church? A Yes; yes.

Q Where is the church, by the way? A Between 4th and 5th. 10

Q Don't you mean the right-hand side as you go down? A The church is on the right-hand side as I would go down; I would have to cross over.

Q You knew the condition of these premises before it happened? A Well, I knew they weren't in very good condition, but of course if the—

Q Stop there. When did you first know that it was not in very good condition, before the accident? A Yes. 20

Q When before the accident? A I walked there the day before coming from church.

Q You walked there the day before and you saw it was in very bad condition? A No; it was in a way; I could choose my steps; you would have to keep away from the inside of the path and walk out toward the curbstone before you could lay your foot in a safe place.

Q Still it was bad the day before that you went over it? A Yes. 30

Q You want to tell us about that; you are sure about that? A Yes.

Q How do you mean, bad? What was the matter the day before? A Well, the sidewalk was rough and broken, the whole of the block was broken.

Q And it was in the same condition it was at the time you fell down, wasn't it? A I don't know. 40

Mary Davis, cross.

Q What is that? A I don't know; it was always in a bad condition.

Q It was always in a bad condition? A Yes.

Q And always in the same condition actually, wasn't it? A It was getting worse every day because there was such traffic on it.

10 Q Was it snowy weather that day? A It started to snow a little bit that morning, and there was not much—

Q Had it rained the night before? A No; it was very fine.

Q Had it snowed the night before? A No.

Q When had it last snowed before the date of the occurrence? A There was not a bit of snow to be seen at the day before, not a bit.

20 Q When did it begin to snow? A It begun to snow about eight or nine o'clock in the morning.

Q In the evening before? A No; in the morning.

Q In the morning before; and you fell down about an hour after the snow had fallen, or started to fall? A No; it was not an hour, I don't think; I left the house about quarter after nine, I think; we should be in church at half-past nine.

30 Q And you say the snow started at eight o'clock, did you say? A No; between eight and nine.

Q It had been snowing about an hour? A I could not tell you; there was not much snow anyhow, only just commencing to snow, and we had an umbrella around us.

Q How were the sidewalks, in slippery condition? A No; they were not slippery at all; there was no ice or nothing that day.

40 Q Didn't you slip— A No; I did not slip.

Mary Davis, cross.

Q —before you fell down? A I did not slip at all.

Q Why didn't you cross the street and go on the other side when you came down— A Well, I—

Q To that place? A I thought it was not necessary to cross the street. 10

Q Well, now, you knew it was in bad condition, did you not? A I never thought that I—

Q What is your answer? (Answer repeated.)

Q You knew it was in bad condition just before you went down, did you not? A Of course it was always a rough kind of sidewalk, but I never knew I would break my foot—if I did I would cross the street.

Q But you knew before you went down it was in bad condition? A I wasn't thinking that morning it was in bad condition. 20

Q You simply forgot to think of it? A I was thinking about church and to be in time.

Q You had your mind on affairs of church? A Yes.

Q If you had thought about it you would have crossed the street, would you not? A Sure I would if I thought I was going to break my foot; sure enough.

Q I mean if you had thought about the condition of the premises you would have crossed the street that morning, would you not? A I don't know. I did not think I would break my— 30

Q You did not know? A I did not think I would break my foot.

Q If you had thought of it, would you have risked going down on those premises knowing they were in bad condition? A I was not the only one that went that way. There was hundreds of people going that way. 40

Mary Davis, cross.

Q Oh! And if you had thought of it you might still have gone down, might you not?

A No; if I thought I was going to break my foot I would not have gone down, that is sure enough.

10 Q But you knew it was in bad condition, did you not? Yes or no? A I did not think it was in such bad condition I could break my foot; I thought I could go along that time the same as I did every other time that I passed there.

Q But it was in the same condition on that day when you broke your foot as it was the day before? A It was in bad condition; it is not in good condition yet.

20 Q And in the same condition as on the day before, was it not? A Well, the day before it was dry weather and it was fine and of course you could see where you walked then.

Q Did you look where you went as you passed by this broken stone? A I did not look down; I was walking along like you or anyone else would be walking.

30 Q Why didn't you look when you knew the premises were in a defective condition? A Well, I was looking before and I thought that was enough.

Q You were careless, were you not, and negligent? A Perhaps I was.

Mr. Tiffany. I object to the question.

Mr. Stover. She has answered that before the objection.

A No, I wasn't.

40 *The Court.* I will permit the answer: "Perhaps I was" careless, to stand. The negligent part I will strike out.

Mary Davis, cross.

Now she modifies her answer and says she was not.

Q Why do you change your answers? A Well I am answering it just the best way I can. I don't think it is right for you to ask me such questions because my foot got broken on the broken sidewalk and that's all about it. 10

Q You changed your answer because you now know it will harm you, isn't that the reason? A No; I don't think it will harm me; I don't care if it does or not.

Q Did you look or did you not look before you fell? A I looked as I was going along, like you would look or anyone else; I was not looking down at the ground, so I wasn't.

Q I see; and you were careless then; is that the idea? A No; I never was careless; I am always careful of my steps. 20

Q Why didn't you look down on the ground, knowing the premises were in bad condition? A Many a slippery sidewalk I walked on and never fell before.

Q That is not quite an answer. Why didn't you look down where you walked when you knew the premises were in bad condition? A If I had thought I would break my foot I would look down at that bad place. 30

Q I see; you simply took the risk and were satisfied to risk it? (No answer.)

Q Then you fell. You say your heel caught; is that the idea? A Yes; my heel caught in it.

Q Where did your heel catch; in a crack between the stones? A In the broken stones; it caught anyhow; I don't know what kind of stones.

Q In the crack, wasn't it? A Yes; in the crack in the stones. 40

Mary Davis, cross.

Q Do you know it was the crack? A I suppose it must be.

Q But you do not know positively, do you; you only suppose? A Well, something held me down that it broke my foot.

10 Q You really do not know whether your heel caught in the crack or not, do you? A It must have caught. If I wasn't caught in there I would not fall.

Q But you do not know of your own knowledge? A I only know I could not get my foot out.

Q Something caught and you do not know what; isn't that the idea? A My heel caught.

Q What heels did you have on your shoes at the time? A I had low common-sense shoes.

20 Q The same heels you have today? A I have the same shoes.

Q Were they a new pair of shoes, a Sunday pair of shoes? A They were a sensible pair of shoes.

Q Don't you know they were high-heeled shoes? A No; I never wear a high-heel shoe.

By the Court.

30 Q You had your rubbers on, didn't you? A Yes; and I was always careful in walking.

By Mr. Stover.

40 Q When you fell down, what happened? A When I fell down of course Katie had to lift me up and she couldn't and I told her "I can't get up; my foot is broke;" and she said "Oh, no, it isn't;" and I said "Yes." Then, of course, there was a couple of men, I didn't know any of them, only one, they came along and picked me up and I thought—when they lifted me up and pulled my foot it fell over that way—

Mary Davis, cross.

Mr. Stover. I object to that.

Mr. Tiffany. She answered the question how her foot fell.

Mr. Stover. She said "I thought."

The Court. I suppose that is the only way she could get knowledge.

10

A I said, "If you pull my foot maybe I can walk;" it fell that way; and of course the men pulled my foot and told me to try to step on it, and I couldn't, and I fainted away. Then the men brought over a chair out of that Keeney's place and they put me in the chair.

Q Did you see men bringing the chair? A I seen the chair, but I couldn't—

Q And you saw where the men brought the chair from? A They brought it out of the moving man's place.

20

Q You saw that? A Yes.

Q And yet you say you were in a faint? A I was in a faint; I would fall if they did not keep lifting me up.

Q Don't you know if you were in a faint you could not see those things? A Let me tell you now. I'll tell you and you can take what you like out of it. Sure they took me in and they put me sitting on the chair; they carried me into the stable or office or whatever it was.

30

Q Just stop there. You saw all these things; you saw them coming when you fell down, did you, you saw them coming into Keeney's when you fell down? A They carried me in on a chair.

Q You saw them carry you in and felt them carrying you in? A I wasn't in such a terrible dead faint. I could not move, I could not talk;

40

Mary Davis, cross.

I went off in a faint and they thought I was dead and they went for a priest.

Q But you saw all these things and felt all these things, how they carried you in? A I felt them carry me in.

10 Q Then you were not in a faint, as you testified to your counsel in a direct examination, were you? A Of course I was in a faint.

Q Don't you know if that had been the case you could not have seen this or felt this? A Not a dead faint. I don't know the men or who they were or what they were, only, of course, they brought me a chair.

Q Have you fainted in the past before this? A No; I never did before.

20 Q Do you know the meaning of faint; do you know what it is? A I know as well as anyone else; it is a weakness.

Q Don't you mean that you just felt weak and that you did not lose consciousness? A Oh, well—

The Court. Don't you think that we know that that is what she means if she means what she said just now?

30 A Sure, Judge, I am so nervous over it I can't understand—

Mr. Stover. I will not question further on that line.

A I am sorry it ever happened, because I'll never be the same.

The Court. Never mind telling us about that.

40 Q I did not ask you that. Then after they had you sitting on a chair how far away was the chair from where the occurrence happened? A

Mary Davis, cross.

It was out on the sidewalk it happened and they took me down into the man's place; it was a good distance; five or six yards, I think.

Q And you sat there how long? A I was so weak—I was there until the doctor set my foot.

Q And that was how long? A I don't know what time it took him to set it. 10

Q Did you walk home then? A How could I? Walk home? H'm!

The Court. Did you? You can say you did or you did not.

A I did not walk home. How could I walk home?

Q I did not ask you how you could. How did you get home? A They put me in an ambulance and brought me home, carried me upstairs from the ambulance and put me to bed. 20

Q How long were you in bed? A Four weeks.

Q Were you steadily in bed or did you get up sometimes and sit down or lie down? A No; I was in bed all the time for four long weeks.

Q Did you feel any pain during those four weeks? A Yes, I could not stir.

Q Did you faint any during those four weeks? A No; I didn't faint. 30

Q Did you read the papers in bed? A No.

Q You got up after the four weeks; isn't that so? A I didn't get up; when he put my foot in plaster cast I thought myself—

Q I did not ask you what you thought. When did he put your foot in a plaster of paris cast? A Well, it was four weeks.

Q At the end of four weeks? A At the end of four weeks. 40

Mary Davis, cross.

Q Then how long was the leg in the plaster cast? A It was in it I think six weeks. Six weeks I think it was in it.

Q Did you do any washing in that time? A No; I never done a bit of washing since.

10 Q Or do any sewing? A No; I did not do anything.

Q Did you read the papers any during that time? A I might read the papers.

Q Don't you know you read the papers every day—

Mr. Tiffany. Might I ask the Court what bearing this has, or materiality?

20 *The Court.* I suppose the bearing is that he wants to show just how badly off she was. If she were in excruciating pain she would not be likely to read the paper.

A Not every day; very seldom I read the papers, because I did not feel like reading them. I did not do anything all day, only get up, take a chair, and put it this way; some woman told me how; they got crutches for me.

Mr. Stover. I object to what the woman told her.

30 *The Court.* Objection sustained.

Q You were in a cast for six weeks, you say, and then you got up and started to do your washing and your sewing and your mending? A No; I never have done it since, my washing.

Q What did you do since? A Nothing at all. I just set around the house.

Q The same as before? A No; I used to work before; I used always to work.

40

Mary Davis, cross.

Q Did you work in the house or outside? A I never worked outside; I always used to do my own housework. I would go to the store.

Q And you are 62 years old? A Yes.

Q Had you been sick in the past, before this accident? A No; I never was sick.

Q Always been spry and healthy? A Yes; I was always in good health. 10

By Mr. Heine.

Q Just one little question. These shoes you had were good common-sense shoes? A They were good shoes.

Q None of this fancy high heel business? A No, indeed.

Q That the girls wear nowadays. You know better than that? A I do; I wouldn't wear them. 20

Q And you had three or four blocks to walk down— A Yes.

Q —toward the church before you got to this place? A Yes.

Q And you had a good pair of rubbers, a good common-sense pair of rubbers that went right over your heels? A Yes.

Q And covered the sole and heel and kept the rain all out? A Yes; yes; yes. 30

Q When you went down to church there ordinarily mornings you were pretty spry for your age; you walked alone; I mean when you would go to church you and your daughter would walk along side by side and talk? A Yes.

Q You found no difficulty in walking before this? A No.

Q You were good and spry on your feet? A I was always. 40

Mary Davis, cross.

Q So on this morning you had hold of your daughter's arm? A Yes—she had hold of mine.

Q You were both kind of watching on account of the sidewalk having a little bit of snow on it? A Yes; the snow.

10 Q There being a little bit of snow on the sidewalk? A Yes.

Q And you were kind of hanging on to each other? A Yes.

Q And you went along holding onto each other, sort of for protection, for two or three blocks? A Yes.

Q And there was just about enough snow, wasn't there, to cover the sidewalk, or could you see the flagstones? A Just a little bit of snow.

20 Q Were the flagstones covered? A Some of them was and some of them wasn't.

Q I see. If one flagstone would be all covered with snow the next one might be uncovered? A Yes.

Q Did you notice that? A Well, just going along I was watching out for—

Q Well, you saw ahead of you as you walked along, didn't you? A Yes; walked along.

30 Q And as you came down near this Keeney's place you came down there—did you notice whether any of these cracks were filled in with snow; had the snow all filled in the crack, where they were broken? A Well, I did not notice it much; I did not notice it.

Q But you noticed about how much snow there was on the ground? A I did not notice anything until my foot caught in a crack.

40 Q But you just told me you noticed some of the flagstones were covered with snow and some were not? A Yes.

Mary Davis, cross.

Q And you saw that as you walked along?

A There was people—crowds of people walked to church that morning; and of course the snow was tramped up.

Q And as you came along on this block you were watching ahead of you? A Yes.

Q Kind of looking out and holding onto your daughter's arm? A Yes; I was always careful for fear I would trip. 10

Q And you were a little extra careful that morning on account of the snow? A Yes.

Q And didn't you notice whether or not some of the snow had filled in where you saw this crack? A No.

Q You knew those cracks were there; you had seen them lots of times? A I was not thinking of them cracks. 20

Q But you often saw them as you passed along? A Yes.

Q You knew they were not on the other block above? A Yes.

Q You know you were down where the cracks were in the sidewalk? A Well—

Q You knew you were about where the cracks were in the broken sidewalk? A Yes.

Q You knew that and your daughter knew that? 30

Mr. Tiffany. I object to what her daughter knew.

The Court. It is out.

Q As you came along you were not going to walk into anybody; you were looking ahead of you? A Yes.

Q You are not able to remember whether the heel of your shoe went into this crack or not? A Yes; it was the heel of my shoe. 40

Mary Davis, cross.

Q Isn't the heel of your rubber perfectly flat; when it goes over your shoe isn't the heel perfectly flat between the heel and the toe? A Sure.

Q How could your heel get down into anything? A It got down into it.

10 Q How wide was the place your heel got down in? A Wide enough for my heel to get in.

Q Now, your heel would not go in if it was perfectly flat, would it? A My whole foot, no.

Q Did it cut the rubber? A No.

Q Your rubbers were not cut at all? A No.

Q You had gone up and down there over that sidewalk for—you lived there seven years, you say? A Not quite.

20 Q And you had gone up and down there all that time? A Of course.

Q And I think your daughter said for about a year back you knew this place was kind of bad and broken there? A Sure I did.

Q And you had been a little careful as you walked over it? A Well I usen't to go down that sidewalk all the time. There was another sidewalk. The only reason I used to go down this sidewalk was it was on the same side we lived to get to the market.

30 Q But during most of the time you lived there you knew this place was broken down there by Keeney's driveway? A Yes; and I wasn't the only one that got hurted there, but I was the only one that got their leg broke.

Q I see. And that day as you sank down did you just sink right down like that or did you kind of skid? A No; I didn't slip at all; my foot caught.

40

Mary Davis, cross.

Q You were taking a step with your left foot like that? A Yes.

Q And when you went to take a step with your right foot your left did not come along after you; then what did you do? A I fell and my daughter fell on me.

Q What did she do? A She just slipped; she fell but she didn't fall on me. 10

Q What caused her to fall?

Mr. Tiffany. I object. It may call for a conclusion as to what caused the fall.

The Court. I will permit it.

A She had hold of me by the arm and that was the cause; she had hold of me by the arm, and the weight of me—

Q Which side of you was she on? A She was on this side, on the right side, and I was on the left. 20

Q And you fell toward the right? A No; I fell toward the left.

Q What made you fall toward the left? A That is the thing that I caught in, the flags.

Q But you were going ahead? A I was, but I had to stop when my foot was caught.

Q Just watch me and see if you can remember what happened. Of course that happened in a minute, but your left foot you say was stuck and you started ahead on your right foot; wouldn't that throw you down this way? A I fell— 30

Q You were going in this direction, forward, you say? A I fell down on my left foot.

Q Isn't that because your left foot skidded and you fell that way? A It didn't skid at all; it caught. 40

Mary Davis, cross.

Q Why didn't you fall on your right; if you were going on the left foot you would fall to the right, would you? A I fell over like this.

Q But you were going in a direction forward, this way? A This foot went from me.

10 Q Yes; your foot went from you like that and that is why you fell to the left? A No; I fell right over on the left foot. I'll never forget it.

Q You do not really remember anything that happened except that you fell down, and then you figured out afterwards what must have caused you to fall? A I didn't have to figure it.

Q You did not know until afterward what had happened except that you fell? A I know my foot was broke on the spot.

20 Q And just how it happened you do not know? A I know well. I fell over. Wasn't my weight enough to break it?

By Mr. Tiffany.

Q The rubbers you had, how were they made? A They were a very heavy rubber, and they had a good, strong heel on it.

Q Was the heel separated from the sole or not? A No.

30 Q I mean—

Mr. Heine. I object to what counsel means.

Mr. Tiffany. I will change the question.

Q Can you show us how the heel was made? A The heel was made a wide heel.

Q Just tell us how it was made, how it was connected to the sole. A The sole of my shoe?

40 Q No; the sole of the rubber. A Oh, it was all in one; the heel and the toe was all in one like

Bernard J. Decking, direct.

any rubbers, and they were a safety rubber, too, what they call a safety rubber, too.

Q What do you mean by safety rubber?

Mr. Heine. I object as a conclusion.

A They are rough, you know, to keep you from slipping.

10

Mr. Heine. I object.

Q That is all.

By Mr. Heine.

Q Did your foot come out of the rubber, or did it stay in the rubber? A My foot stayed in the rubber.

BERNARD J. DECKING, sworn.

20

Direct examination by Mr. Tiffany.

Q You had charge of the premises 603 Willow avenue? A Yes, sir.

Q You know the condition of these premises, what they consist of, do you not? A The condition?

Q Do you or don't you? A Good condition.

Q I did not ask you that. I did not mean in that relation. Is there anything built on that lot?

A A vacant lot.

30

Q What separates it from the street? A What do you mean?

By the Court.

Q Is there a fence or a ditch or what? A Yes; a fence.

Q About how high? A Six feet high.

Q Six feet high? How high do you say six feet is, in your view? A It might be eight feet; six to eight feet.

40

Bernard J. Decking, direct.

Q Is there a doorway or an opening in that fence? A Opening, yes.

Q How large? Is it built for a horse and wagon to go through? A Yes.

Q Do you know what the premises were rented for? A They were not rented at the
10 time.

Q Do you know what they had been used for, what the gate was constructed there for? A They used to run wagons in there.

Q What kind of wagons? A Butcher wagons.

Q How many means of getting in and out of this yard were there? A Just one.

Q Through this fence? A Through this entrance.

20 Q And this entrance here leads out to Willow Avenue? A Willow Avenue.

Q What is there from this entrance way to the public street? A The walk.

Q What is it made of? A Flagstones.

Q The entire width from the fence to the street? A Well, the walk is about four feet wide.

30 Q How wide is the distance from the fence to the street? A To the street about eight feet—to the curb.

Q Then there is about four feet of dirt; and is that dirt on one side of the flagstone or some of it on each side of the flagstone? A On each side of the flagstone.

Q Then comes the stone curbing; after the dirt, then the stone curbing along the street? A Yes.

Q And 605 is Keeney's stable? A. Yes.

40 Q Who did you rent it to just prior to March 22, 1914? A Who I rented it to?

Bernard J. Decking, direct.

Q Who was it rented to? A Prior to what?

Q March 22, 1914. A It was not rented.

Q Have you your books here? A I have my books here.

Q Do they show who rented it? A They will show that.

Q Who did you collect the rents for when you did rent it? A The Tallon estate.

Q Are they the owners? A They are the owners.

Q You rented it for the purpose of storing wagons in there?

Mr. Jones. I object to what purpose. He has testified it was not rented before March 22, 1914.

Q Is that your answer to my question, that these premises were never rented before March 22, 1914? A They were not rented before that time.

Q Never? A Well; I won't say never, because I only had charge—

Q How long have you been the agent? A Since 1913.

Q Do you know Mr. Whalen? A Yes, sir.

Q Did he ever have possession of the premises? A Not when I had it.

Q Do you know whether he ever had possession or not? A I only heard that.

Q Do you know Mr. Richard Mooney? A No, sir.

Q You do not know him? A No.

Q How far back do these books go? A 1913.

Q Have you any books prior to that time?

A I did not have charge of the property at the time.

Richard Mooney, direct.

Q What were the premises used for in 1914, on March 22? A 1914?

Q Yes. A March 22?

Q Yes. A They were vacant.

Q They were not used by anybody? A By nobody.

10 Q When were they used last?

Mr. Stover. Last before when?

Q Before March 22, 1914? A I guess it was around February—I did not have charge of it then, you know, when they were used; I only took charge of it the first of January, 1913, and they were vacant at the time when I took charge of the property.

20 Q Do you know Richard Schreiber? A Yes, sir.

Q Do you know whether or not his wagons were ever in there before March 22, 1914? A They were not in there.

Q Who kept the key to that place? A I had the key to that place.

Q Always? A Always.

Q Is that the only key? A So far as I know.

NO CROSS EXAMINATION.

30

RICHARD MOONEY, sworn.

Direct examination by Mr. Tiffany.

Q You are a contractor and builder in the City of Hoboken? A I am not. I am in the butcher business.

Q Do you know the premises 603 Willow avenue? A Yes, sir.

40 Q In your butcher business do you employ horses and wagons? A I do.

Richard Mooney, direct.

Q Did you ever keep those horses and wagons at 603 Willow avenue? A I kept no horse there; I just put my wagons in there.

Q How did you get your wagon in there?
A Through the gate.

Mr. Heine. I object unless the time is fixed. 10

The Court. You have to fix the time.

Q When was it? A Shortly after Mr. Whalen—

Q When was that; what year? A I cannot tell you the dates.

Q Can you tell me about what year; how many years ago? A I think two years; it might have been—I don't know; it might be two years before this thing happened; I have no record. 20

Q Two years before 1914? A Probably.

Q How did you get your horse and wagon in there, or your wagon in there?

Mr. Stover. I object.

The Court. I will permit it.

A Through the gateway on Willow avenue.

Q From Willow avenue? A Yes. 30

Q Over the sidewalk? A Yes, sir.

Q How many wagons do you keep? A One.

Q How often did you take it in and out of there? A Probably once a day.

Q That is you would bring it out and put it in? A Yes, sir.

Q Did you pay rent for these premises? A Yes.

Q Whom did you rent them from? A Miss Tallon. 40

James Whalen, direct.

Q How long did you continue to put your wagon in and out there? A I do not know whether it was a year and a half or two years; I am not certain.

Q Do you know who had it after you had it?

A I do not.

10

NO CROSS EXAMINATION.

JAMES WHALEN, sworn.

Direct examination by Mr. Tiffany.

Q Mr. Whalen, you are a contractor and builder? A Yes, sir; I am a contractor and builder.

Q In Hoboken? A In Hoboken.

20 Q Do you know the premises 603 Willow avenue? A Yes, I do.

Q Did you ever rent them? A I rented them.

Q From whom? A From Anna Tallon.

Q When? A For myself I rented them in 1906, but I had used that yard years before I was superintendent for Michael Foley, the contractor.

30 Q What did you use the yard for? A For just storing material.

Q How did you get the material in there? A I backed the wagon up to the curb and carried stuff across the curb.

Q Did you ever take your wagons in there? A I never took my wagons in there; that is a twenty-five foot lot.

Q You are in the contracting business? A Yes.

40 Q What kind of materials? A Scaffolding, planks and poles; things like that.

Anna Tallon, direct.

Q Carried them across the sidewalk? A Yes.

Q Dragged them across? A Carried them.

NO CROSS EXAMINATION.

ANNA TALLON, sworn.

10

Direct examination by Mr. Tiffany.

Q You are one of the heirs of James Tallon and Mary Tallon? A Yes.

Q Who are your sisters? A Mary and Margaret.

Q And your brother? A James.

Q Are you at present the owners of 603 Willow avenue? A Yes.

Q And that is a vacant lot? A Yes.

Q Do you know who rented that to Mr. Whalen? A To Mr. Whalen, my sister did. 20

Q Was she acting for you— A Wait a minute. Maybe my father did; I don't know; when he was living.

Q If your sister did, was she acting for you and your sisters and brother?

Mr. Heine. I object to that.

A Yes.

30

Mr. Heine. It seems to me that is purely speculative.

The Court. I do not think there is anything speculative about it.

A It is so far, you know; I did not look for those facts.

Q After Mr. Mooney—do you know when he had it? A When Mr. Mooney had it?

Q Yes. A I don't know; about a year or two.

40

Mary Tallon, direct.

Q Ago? A Ago.

Q After he had it do you know who had it?

A Nobody.

Q When did you have the high board fence erected there? A That I do not know. I hadn't care of it.

10 Q Mr. Decking was the agent? A My sister took care of it.

Q Which sister? A Mary. But Mr. Decking always transacted any business we had, too; but Mary took care of it and rented it up to the time Mr. Decking took it. I think that was to the last—to Mr. Schreiber; that was some time in April, 1914.

Q Were you present? A Was I present when?

20 Q At the time Mr. Decking took it. A I knew he took it, but I have other duties you know and I trust other people who do my business for me.

NO CROSS EXAMINATION.

MARY TALLON, sworn.

Direct examination by Mr. Tiffany.

30 Q Do you know when that high board fence that is now on the premises was erected? A It was always there.

Q That was always there. Let me direct your attention to a picket fence; do you recall that? A A picket fence?

Q Yes. A No picket fence there.

40 Q You do not recall it; all right. Now, Mr. Decking was the agent to take care of the premises? A At that time—that lot was idle for a whole year. Mr. Decking has taken charge

Robert Joseph Ward, direct.

of the property about three or four years, and that time it was vacant when he had it.

Q Who had charge of it before Mr. Decking?

A I did.

Q Did you lease it to Mr. Mooney? A Mr. Mooney had no lease; he paid monthly payments.

Q Did you rent it or let the privilege of using it for the monthly payments? A Yes. 10

Q Did you know what he was using it for?

A Yes; I knew he had it for his wagon to go on.

Q To keep his wagon in; is that right? A Yes.

Q Do you know how many entrances there were to that lot? A One.

Q That was on Willow avenue? A Yes.

Q Over the sidewalk to the street? A Yes. 20

ROBERT JOSEPH WARD, sworn.

Direct examination by Mr. Tiffany.

Q Where do you live? A 920 Willow avenue, Hoboken, New Jersey.

Q Are you familiar with the premises down around 603 Willow avenue? A Yes, sir.

Q How long have you lived at 920? A Six years. 30

Q Do you remember ever seeing any wagons driven in and out of the yard at 603 Willow avenue? A Yes, sir.

Q About when? A The latter part of February and—

Q What year? A 1914.

Q Latter part of February, 1914? A Yes; and during March.

Q Do you know whose wagons they were? A Yes. 40

Robert Joseph Ward, cross.

Q How do you know? A By the name of the wagon—Richard Schreiber.

Q You saw the name on the wagon, Richard Schreiber? A Yes.

Q In 1914? A Yes.

10 Q How did it get into this lot? A It crossed the sidewalk.

Q From Willow avenue? A Yes.

Q And then through the gate in the fence? A Yes, sir.

Q About how many times did you see these wagons of Richard Schreiber's go in and out?

A Two and three times a week.

Q What kind of a wagon was it? A It was more of a cart, a four-wheeled cart, with a team of horses on it—a brown team.

20 Q You mean by a team how many? A Two.

Cross examination by Mr. Stover.

Q When did you see Schreiber's wagon move into the premises? A The latter part of February and the early part of March, 1914.

Q Do you know exactly when? A I could not give you the exact date.

30 Q Are you sure it was not toward the end of March? A Yes; it was in the latter part of February.

Q And it may have been the end of March, too, may it not? A Well, it was the early part; I could not say if it was the latter part of March or not.

40 Q No; you do not know when he started to put his wagon in, do you, whether it was the latter part of March or April? A I can tell you when he put the wagon in there; it was right after Mr. Mooney had his wagon out of there;

Robert Joseph Ward, cross.

it was a new fence put up and building material brought in.

Q But you do not know exactly when, if it was the end of March or the beginning of March or April, do you? A His wagons were going in there the latter part of February, I noticed, and the early part of March. 10

Q Why did you say you did not know whether it went in the early part of March or the latter part of March? A I was not quite sure, but it was in—

Q No— A But his wagon went in the latter part of March.

Q You do not know when his wagon went in exactly? A I am exact about the first part of March and the latter part of February.

Q It was in March, you think? A Positive. 20

Q And you do not know when, in March? A The early part; positively sure.

Q Do you know the date about, of March? A Well, it was between—a little after the first week of March.

Q Don't you know he leased the premises March the 28th and that was the first time he went in? A I saw wagons going in the latter part of February. That was right after Mr. Mooney had his wagon off, there was a new board fence put up. 30

By the Court.

Q What did these wagons do to the sidewalk; did you see them do anything? A Yes.

Q What? A They had a load of building material in the wagon and the weight of the building material in the wagon caused the stone to break.

Q Did you see that done? A Yes. 40

John Wendt, direct.

Q And you say that was done by Schreiber's wagon? A Yes, sir; positively.

CATHERINE FEENEY, sworn.

Direct examination by Mr. Tiffany.

10 Q You live at 26 Willow Terrace, Hoboken?
A Yes.

Q Are you familiar with the premises at 603 Willow avenue? A Well, I generally pass on this side, you know; that is on the opposite side of it, but I know where they are.

Q Do you remember the morning that something happened over there in 1914? A Yes, sir; I was walking up to church.

20 Q You were walking up to church; and who did it happen to and what was it? A Mrs. Davis coming along—she fell and I says to a gentleman that was standing by the—

Q Never mind what you said. A No; and I went over and I said "Oh! That old lady fell"; and I went over and I lifted her up.

Q You say you saw her fall and went over there? A Yes; and helped to pick her up.

30 Q What was the condition of the sidewalk at that time? A I could not really say; I did not much notice the sidewalk. It was the old lady I was frightened over; I saw her, and I says—

Q Did you look at the sidewalk? A No, sir; not very well.

NO CROSS EXAMINATION.

JOHN WENDT, sworn.

Direct examination by Mr. Tiffany.

40 Q Where do you live? A 926 Willow avenue.

Michael Corcoran, direct.

Q Did you live there in 1914? A I did.

Q Do you know the premises 603 Willow avenue? A I do, sir.

Q Do you know what they are used for? A I do.

Q What? A Stabling wagons in there.

Q Do you know how long they have been used for that? A I do not. 10

Q Were you there on Sunday morning, March 22, 1914? A Yes, sir; and I picked her up.

Q What happened? A I was shoveling snow out of my father's premises right across the way at 606, and it was snowing pretty hard at the time, and I seen this lady fall, and I took my shovel and stuck it into the snow into the gutter and I went over and picked this lady up, which the man isn't here that helped me carry—walk her into Keeney's house. 20

Q Who is that? A Mr. Bruce. And it was he and I carried Mrs. Davis into Mr. Keeney's office—at least we did not carry her; she walked in.

Q Which Mrs. Davis was that? A The lady here; the old lady, Mrs. Davis.

Q And that was about what time in the morning? A About, I should judge it was around ten o'clock. 30

Q As late as that? A As late as that.

Q You are quite positive? A Yes.

NO CROSS EXAMINATION.

MICHAEL CORCORAN, sworn.

Direct examination by Mr. Tiffany.

Q Do you live in Hoboken? A Yes.

Q Whereabouts? A 807 Washington street.

Q Were you down in the neighborhood of 603 Willow avenue on March 22, 1915? A I remem- 40

Michael Corcoran, direct.

ber being there and helping Mrs. Davis to get on her feet where she fell.

Q Did you observe the condition of the sidewalk? A Well, the first thing I observed was to help the woman to get up.

Q Yes; and after that what did you observe?

10 A Well, there was a piece of a stone here and a piece of a stone there and a flag and flat stone and a round stone and so on.

Q Do you mean the full size stones or were they broken? A Pieces.

Q Broken? A Yes; pieces.

Q Where was this broken stone near which she fell? A Oh, well, there was so many pieces around there I could not tell that.

Q A flagstone sidewalk? A Some of them flags and—

20 Q Was the flagstone sidewalk a little above or below the dirt on each side? A Well, I wouldn't take so much notice as that at all. I didn't measure it. Good gracious!

Q Do you know whether or not the flagstone were set down in the dirt or whether they were up on the dirt? A Some of them was half way that way.

Q Show the jury? A Half like that—sidewalks—bits—that's the kind of a spot it was.

30 Q What was the condition of the sidewalk? A Just the same as I am telling you.

Q Broken? A Yes.

By the Court.

Q Where was this broken sidewalk with respect to where you picked the woman up? A All around the same as between you and me like.

Q Was she near it or up to it or where was she with respect to it, where it was broken? A
40 Well, she fell.

William T. Callery, direct.

Q It was broken where she fell? A I don't know about that.

Q That is the very point I want to find out. Did she fall where it was broken or where it was not broken? A Well, around that neighborhood where it was broken she fell.

Q Was there any snow on the sidewalk that day? A There was very little. 10

Q Did you see the mark of where she fell after you had gotten her up on the snow that was on the sidewalk? A I did not look just at the spot she fell on.

Q Do you know as a matter of fact whether the spot that she fell on the sidewalk was broken or sound? A It was broken all around there; I could not tell one spot from the other mostly.

RECESS.

20

WILLIAM T. CALLERY, sworn.

Direct examination by Mr. Tiffany.

Mr. Tiffany. Do you admit the doctor's qualifications?

Mr. Heine. Yes.

Q Doctor, your qualifications are admitted. Were you on the ambulance of St. Mary's Hospital on the 22nd of March, 1914? A Yes. 30

Q Did you call at 603 Willow avenue on that morning? A I do not remember the number; I called on Willow avenue.

Q To Mrs. Mary Davis? A Yes.

Q What was her condition? A She had sustained a Potts fracture.

Q Of which leg? A I do not remember the leg.

40

William T. Callery, cross.

Q What did you do for her? A I reduced the fracture, put it up in splints, took her home in the ambulance.

Q Where was she when you saw her? A I think at some sort of a little office, connected with a machine shop.

10 Q On Willow avenue? A Yes.

Q Near Sixth street? A I do not remember the street.

Q Were there any other injuries other than the Potts fracture? A No.

Cross examination by Mr. Stover.

Q Now, you were down there when, doctor? When did this happen, by the way? A What do you mean; the date?

20 Q The date when you saw this accident, or rather saw this lady here injured? A It was a Sunday morning in March of 1914; I do not remember the exact date.

Q What makes you think it was in March, doctor? A Because I was riding ambulance at that particular time.

Q And the year; do you remember the year? A Yes; 1914.

30 Q And did you treat her after that or just for that one day? A That is all. I just reduced the fracture and took her home immediately.

Q What was the matter with her? A She had a Potts fracture.

Q Will you explain briefly what a Potts fracture is to myself and the jury? A Am I obliged to do that?

Q What say? A Am I obliged to do that?

40 *Mr. Tiffany.* If he wants to know—

William T. Callery, cross.

Q You are obliged to tell me what a Potts fracture is, if you please. Just tell us in a friendly way? A It is a fracture of one of the bones, the lower extremity of the fibula, with a dislocation of the tibia, so that you have a combination of a dislocation and a fracture.

Q Just tell us what you mean by the tibia and fibula? A They are the two bones of the leg. 10

Q On what leg was it, left or right? A I don't remember the leg.

Q All right. A These two bones come down and join with the bones of the foot and of the ankle joint and a Potts fracture is a dislocation of one of those bones with a fractured tip of the other.

Q I see. Now, will you just tell us with reference to your leg where the Potts fracture was, where the break was? A It would be right down here. 20

Q Above or below the ankle? A It would be above the ankle.

Q Would it be above the ankle nearer the toe or above the ankle away from the toe? A One of the prominences of the ankle would be fractured, you see, in a Potts fracture; so it would be really in the ankle joint. 30

Q The question is if that is below the ankle, a Potts fracture, or above the ankle. A Well, it depends on just what part you call the ankle.

Q Where was this fracture? Show us on your own leg. Show us the place where was this fracture of this lady and show us on your own leg, just where the fracture of this lady was? A Well, I do not believe I could do that. That is I did not examine her thoroughly enough to form a distinct line of demarcation. 40

Edward W. McCuskey, direct.

Q I see; and you cannot say where it was really, can you? A I know the bone was broken and that she had a Potts fracture; but I could not say whether it was quarter of an inch above or below.

Q And your memory is rather faint on that
10 at this present time? A Yes.

EDWARD W. McCUSKEY, sworn.

Direct examination by Mr. Tiffany.

Q Where do you live? A 832 Willow avenue, Hoboken.

Q Do you know where 603 Willow avenue is? A Yes.

Q Do you know what there is at 603 Willow
20 avenue?

Mr. Stover. I would like the time stated.
(Question withdrawn.)

Q Were you familiar with these premises about March, 1914? A Yes, passing, going back and forth to work.

Q Do you know what there was there at that time in 603? A What do you mean?

Q Was there a fence there? A Yes, there
30 was a fence.

Q Was there any opening in the fence? A Just a gate.

Q What kind of a gate, for what purpose, do you know? A For a wagon or so to go through.

Q Did you ever see any go through there? A Yes, sir.

Q What kind of wagons? A Contractors'
40 wagons.

Emil Von Brook, direct—cross.

Q Did they go over the sidewalk when they went through? A Yes.

NO CROSS EXAMINATION.

EMIL VON BROOK, sworn.

Direct examination by Mr. Tiffany.

10

Q You keep the candy store directly across the street from Sixth street and Willow avenue?

A I do.

Q Did you ever see any horses and wagons go into that lot? A Yes, sir.

Q Over the sidewalk? A Yes, sir.

Q About when? When did you start to keep this candy store? A Six years ago.

Q And since that time you have seen them? A Yes.

20

Q And did you know what the condition of the sidewalk was there? A Yes, sir.

Q Did you ever walk over it during 1914, the early part of 1914? A Occasionally.

Q Did you ever notice the condition of the sidewalk? A I did not take any special notice.

Q Did you ever fall there? A No, sir.

Q It seemed to be in fairly good condition?

30

Mr. Heine. I object to that.

A I did not take any particular notice to it.

Q Was it in such condition that it would attract your attention? A I could not say.

Cross examination by Mr. Stover.

Q You say you saw the wagons go over there; is that so? A Yes, sir.

Q Whose wagons were they? A They would be different wagons. Mr. Mooney's wagon used

40

James Keeney, direct.

to go over there and Mr. Whalen's wagon went through there.

Q Have you seen Mr. Schreiber's wagon go there? A Mr. Schreiber's wagon crossed over there, yes.

10 Q Just tell us when you saw Mr. Schreiber's wagon go over there. A I could not say exactly when, but since I have been looking out of the window I have seen the wagons passing up and down, that's all.

Q That is when since you have been in the place there, what month, do you remember? A I judge I have seen Mr. Schreiber's wagon going in there the last year that I have taken notice to it.

Q During 1915? A About that.

20 Q Have you seen his wagons there previously in the year 1914? A I can't say positively.

Q Did you see his wagons in the month of March, 1914, pass over there? A I cannot say.

Re-direct examination by Mr. Tiffany.

Q You are not sure when the first time was? A No, sir.

JAMES KEENEY, sworn.

30 *Direct examination by Mr. Tiffany.*

Q You occupy the premises 605 Willow avenue, is that right? A What is that?

Q You occupy the premises at 605 Willow avenue, Hoboken? A Yes, sir.

Q And are you familiar with the condition of the sidewalk? A Yes.

Q And what the condition of the sidewalk in front of 603 was in 1914? A I don't know—in
40 good order, I think.

James Keeney, cross.

Q Fairly good order? A Yes.

Q Did you ever see any horses and wagons go over that sidewalk? A Yes.

Q Whose were they, do you know? A Mr. Whalen's.

Q Any others? A Only Mr.—

Q You never saw any wagons? A Only Mr. Mooney's and Mr. Whalen's. 10

Q Never saw any others at any time? A At any time, not until way long after that time.

Cross examination by Mr. Stover.

Q When did you see the sidewalk? You stated to him you saw the sidewalk and it was in fairly good condition, did you? A It was.

Q When was that; what date have you reference to? A On from 1905 I got the stable next door and the office. It was always in good condition. 20

Q From 1905 you lived three doors away, you say? A No; right next door, 605 and 607.

Q What did you observe the condition of this sidewalk to be in 1905? A It was in good order. There was wagons going at that time out and in when the sidewalks were all right.

Mr. Tiffany. In 1905? 30

A Yes.

Mr. Stover. He has testified to 1905 on direct examination.

The Witness. Yes.

Q Did you see the sidewalk after that in 1914? A Yes.

Q What was the condition of the sidewalk then in 1914? A I could not see anything wrong with it. 40

James Keeney, cross.

Q Did you see the sidewalk? A Yes.

Q Did you look at it in 1914? A Yes; I walked on it every day.

Q How did you find it in 1914? A I found it in good condition. Anybody could walk on it. At the time the accident happened it was snow; rain and snow, at the time the accident happened, and she was carried into my office.

Q That snow was how deep? A About three inches deep and it was snowing at the same time.

Q And it was not just a little as she said; had it been snowing that night? A No; it started that morning.

Q Do you know when it started? A A little after eight o'clock.

Q When did the accident happen; when did the occurrence happen? A About 9:15, as I came out of the stable.

Q And did this lady faint? A No.

Q You are sure about that? A I am sure of it. I was the man that took care of her.

Mr. Tiffany. I will object to any further examination along that line.

The Court. If any further comes I will sustain the objection.

Q When did she fall down; what month? A Which?

Q When did this lady fall down, Mrs. Davis; what month was it that she fell down? A In the month of March.

Q Do you know what date in the month of March? A I could not tell you what date, but some time in the middle of March; it was the last—

Herman Stockhoff, direct.

Q Was Schreiber there at that time? A No, Schreiber wasn't there. That's the whole thing—Schreiber wasn't there.

Q You are sure he was not there? A Absolutely he was not there; he did not have a wagon in the place at that time.

Q Has the counsel for the other side subpoenaed you? A I don't know who subpoenaed me, but I am subpoenaed. 10

Q Have you got that subpoena here? A Yes (produces it).

Q All right; now read that subpoena and just tell us who subpoenaed you.

Mr. Tiffany. I object. What is the use of that? I called him; he is my witness.

Q And you say it was all right at the time she fell—the sidewalk? A Certainly it was all right; and it is all right yet. My own sidewalk is worse. 20

Q What is that? A I say the sidewalk in front of my stable was the worse one.

Q I see. Did you see her fall? A I did not, but I seen her in the office. One of my men opened the office door and Mr. Wendt and another gentleman carried her in and she walked properly into the office. 30

HERMAN STOCKHOFF, sworn.

Direct examination by Mr. Tiffany.

Q What is your business? A Pharmacist.

Q You have a place in Hoboken? A Yes, sir.

Q Did you have an account with Mrs. Tallon from March 22, 1914? A Yes, sir. 40

Herman Stockhoff, direct.

Q Have you got the books? A No; the books were destroyed.

Q I show you a number of slips, and ask you if you recognize those slips as having come from your store? A They have.

Q Were they taken from the books before
10 they were destroyed? A Yes, sir.

Q These slips were made out on the days that appear—after the stuff was furnished? A After the stuff was furnished.

Mr. Tiffany. I will offer these.

Mr. Stover. I would like to ask a few questions about them.

Mr. Tiffany. It shows each day the alcohol, etc., there was furnished; \$7.25 that
20 week, and \$5.45, \$4.25, \$3.75, etc.

Mr. Heine. Was the alcohol furnished on the 22nd?

Mr. Tiffany. Alcohol on the 22nd., 1914. That is the first day.

Mr. Jones. External or internal?

Q This alcohol, what was it used for, what was it? A Pure grain alcohol.

Q Used for what purpose usually? A
30 Usually for external use.

Mr. Tiffany. Have you any objection to these?

Mr. Jones. No.

Slips offered and marked P. 1.

PLAINTIFF RESTS.

Motions for Non-suit.

Mr. Stover. I move for a non-suit for the defendant Schreiber, on the ground, first, that the plaintiff knew of the defect, if there was any. She testified and her daughter testified she had gone over these premises again and again; that she knew the condition of the sidewalk all the time and knew it was defective; that she had gone over there for six or seven months, and that it was in the same condition at the time she fell as when she saw it. On the further ground, that they have not connected Schreiber with the accident. One of the witnesses said his wagon went there; that is, his name was on the wagon. They have not proved who was on the wagon and they have not proved it was done with Schreiber's consent. They have not brought the defect home to him; they have not proved the *scienter* of Schreiber. It may have been his servant who was on there; it may have been a lessee who was on there.

10

20

Motion denied. Exception.

Mr. Jones. On behalf of the plaintiffs Tallon, I ask for a non-suit, on the ground, that there is no evidence in the case connecting them with this accident; and on the further ground, that there is no evidence that the broken condition of this sidewalk was the cause of this woman's accident.

30

Motion denied. Exception.

40

Richard Schreiber, direct.

DEFENDANT'S CASE.

RICHARD SCHREIBER, sworn.

Direct examination by Mr. Stover.

10 Q Where do you live? A 618 Park avenue, Hoboken.

Q What is your business? A Mason and builder.

Q Do you know the Tallons? A Yes, sir.

Q Did you lease the premises 603 Willow avenue, Hoboken? A Yes, sir.

Q When did you lease them? A On the 28th of March, 1914.

Q Is this the lease here that I show you? A Yes, sir; that is my signature.

20 Q And who is the witness on that— A I am the witness.

Mr. Stover. Will you allow that in evidence without proof of the witness?

No objection.

Marked D. 1.

Q Did you see the premises before you leased them? A Yes.

30 Q What was their condition—603 Willow avenue? A Good condition.

Q And did you see the premises after the accident? A I don't know whether there is an accident.

Q When did you move in, by the way? A First of April.

Q What year? A 1914.

Q And how were the premises then, the sidewalk? A Pretty good condition.

40 Q Have you repaired the premises ever? A Yes, sir.

Richard Schreiber, direct.

Q When did you repair these premises? A I have been working for Tallon several times; I think I repaired that sidewalk 1913, the first week in December.

Q And when did you next repair the sidewalk? A I repaired the sidewalk last—

Q No; I say next, not last. When did you next after that repair the sidewalk? A The next was I think 1915, in the fall. 10

Q In the fall. Did you repair it the year previous, 1914? A 1914. Yes, sir. After I had it.

Q After you had it? A Yes.

Q And when did you first move in? A The first of April.

Q And did you look at the premises? A Yes. 20

Q And the sidewalk? A Yes, sir.

Q And what was their condition; speak out loud? A Pretty good condition.

Q Now, did you see any crack there, or hole? A No, sir.

Q Sure about that? A No, sir.

Q Did you see the plaintiff after the accident? (No answer.)

Q Did you see her after the accident, the plaintiff? A Yes, sir. 30

Q Did you call at her house? A Yes, sir.

Q Do you remember when you called at her house? A Sir?

Q Do you remember when you called at her house? A Last year.

Q What is that? A Last year.

Q Do you remember the month? A No, sir; I do not.

Q What did she say to you and what did you say to her? A Well— 40

Richard Schreiber, direct.

Q Now speak out loud. A I said "Mrs. Davis, I was surprised that I got served with a subpoena—that I got subpoenaed to the court."

Q Start again. A I said "Mrs. Davis, I was surprised to get a subpoena with the court," that I didn't know anything about this accident.

10 Q Now, continue. Don't let me ask you questions. Tell us what was said.

The Court. You had better ask him questions because the other side may want to object to them.

Q Tell us the whole conversation you had with Mrs. Davis from beginning to the end. A That is all I said to her—Mrs. Davis thought I was coming there to make a settlement with her.

20 *Mr. Tiffany.* I object to what she thought.

A She told me.

The Court. Objection sustained. It will be stricken out.

Q Did she say anything to you? Tell us what you said and what she said. A Well, I asked Mrs. Davis how it happened, and she told me that she went to church Sunday morning and she slipped on the sidewalk and fell.

30 Q What else, if anything? A Well, she had been taken up and brought in Mr. Keeney's office; that the doctor was there from the hospital; that they brought her home to her house in the ambulance.

Q What else if anything did she say? A Not—I can't remember anything else; I can't remember anything more.

40

Richard Schreiber, cross.

Q Who was with you at the time? A Mr.—
that man over there, Mr. Tieter.

Q And what did you say to her then? A
Well, I told her that I was taken by surprise
and I didn't know anything about the accident.

Q Then what did she say to you? A Well,
she told me that she thought I was coming there
to make a settlement with her. 10

By the Court.

Q Well, what did you say? A I said no, I
haven't got anything to settle.

Q And what was said then; what did she say
to that? A She says I will have to give it to
a lawyer to fight it out.

Q And did she say anything about the law-
yer, about her case, or about the lawyer, or— 20
A That I didn't—

Mr. Stover (Interrupting): Cross exam-
ine.

Cross examination by Mr. Tiffany.

Q You had then retained counsel in that case,
hadn't you? A No, sir.

Q You went over there with a man who took
a statement in writing? A Yes, sir. 30

Q And wanted this old lady to sign it, didn't
you? A Yes.

Q And she would not do it? A Yes, sir.

Q She did sign it? A Yes, sir.

Q Then you went away and you came back or
had Tieter go back with another statement to
have her sign? A No, sir.

Q You do not know about that? A Yes.

Q Do you know what Tieter's business is?
A No, sir. 40

Richard Schreiber, cross.

Q Do you know that he is a detective? A Yes.

Q In the employ of Mr. Stover? A I know now, yes, sir.

Q How long have you known Tieter? A About three years.

10 Q Just tell us again what she said happened on that morning. Give us the exact words that she said. A She told me that she went to church that morning.

Q Are you giving us the exact language now? A Well I do not know; as much as I possibly can.

Q I want the exact words of the conversation.

20 *The Court.* Probably you won't get them, from him or any other man, unless he memorized them. The substance of them is what you are entitled to.

Q All right; tell me the substance if you can do that. A Mrs. Davis told me that she was going to church in the morning and when she got down there in that Willow avenue, 605 or 3—she did not know which was right—she slipped and fell.

30 Q Did she use the word slipped? A Yes.

Q You are positive of that? A Yes.

Q Are you positive of that? A I am.

Q This was in nineteen hundred and fourteen when you talked to her? A Last year.

Q This statement was reduced to writing, wasn't it? A No, sir.

Q Didn't Mr. Tieter put it in writing? A Oh, yes, yes, yes, sir.

40 Q And he used his own words in putting it in writing? A Yes.

Richard Schreiber, cross.

Q Then you read it to her and she signed it?

A No, sir.

Q But she signed it afterwards? A She signed it, yes, sir.

Q And when you say slipped, you take that word from the statement, do you not? A Well, that is what she said right in my presence. 10

Q You are very positive that she used the word slip? A She said she sl—she slipped and got caught and fell.

Q Yes; she got caught and fell? A Slipped and got caught and fell.

Q Didn't she say she got caught and fell? Didn't she? A She slipped, got caught and fell.

Q Was there anything else that she said? A Well, I do not know. 20

Q Did she say she got caught, or slipped and fell—which? A She got caught, slipped and fell.

Q You are sure of that? A Yes.

Q What is your business? A Mason builder.

Q How many wagons have you got? A Two.

Q Have your name on them? A Yes, sir. 30

Q Do you employ drivers? A Yes.

Q How many men? A One.

The Court. Are they one-horse or two-horse wagons?

A It is only single wagons now.

The Court. Now, but what were they in March, 1914?

A One team and one single. 40

Richard Schreiber, re-direct.

Re-direct examination by Mr. Stover.

Q Did you have wagons over there or drive wagons over there or have your men driven wagons over there before you took the premises?

A No, sir.

10 Q Did you have wagons drive over there before the date of this lease, March 28th? Did you have a wagon drive over there before March 28th, 1914? A No, sir.

Q You are sure about that? A Yes, sir.

Q When did you first have wagons drive over there? A About the 3rd of April.

Q After which you had the premises? A After which I had possession of it.

By the Court.

20 Q Won't you tell us which sidewalk this was you were talking about that you repaired each year? A I repaired the sidewalk in 1913, and

Q What sidewalk; the sidewalk in front of 603 Willow Avenue? A 601 and 603.

Q You repaired that sidewalk? A Yes, sir.

30 Q Won't you tell us why you repaired it if it was in good condition? A Well there was some receiving basin on the corner, the cement was eaten around, and all inside of the receiving basin, I had to take those flags out, fill it up, and cement them up again.

Q Why did you have to do that if you did not rent the premises at that time? A I got the order off of Mr. Decking to go ahead and do that.

Mr. Heine. The witness is a contractor.

40 Q You got the contract from Decking? A Yes, sir.

Richard Schreiber, re-direct.

Q Why did you repair it way up in front of 603, because flags had sunken there? A Yes; it was out of shape, one high and the other one low there.

Q That was in 1913? A Yes.

Q Why did you repair it in 1914? A After I got possession I did.

10

Q Why did you repair it then if it was in good condition? A Because from the curbstone up to the flags there is a space there of about two feet wide, was only filled in with ashes, then was a row of flags four feet wide, and from the flags up to the fence line there is filled in with ashes again. Now, I went to work from the curb up to the flagstone; it was two feet wide; I filled that in between with paving blocks. Then there is a four foot flagstone; then I filled it in with paving blocks—

20

Q You made a driveway? A Yes.

Q You don't call that repairing the flags, do you? A Not in 1914.

Q You told us a minute ago what you did was to repair the flags in 1914; I wanted to know what you meant by repairing them. A No; I meant repairing to drive into.

Q You know of course, I suppose, that driving a wagon and a horse over flags would be apt to break the flags, wouldn't it? A Apt to crack it, yes, sir.

30

By Mr. Tiffany.

Q In repairing these flags you filled in the two foot space of dirt from the curb to the flag with cobblestones the way it is today? A From the sidewalk to the fence.

The Court. Do you think anybody misunderstands that?

40

Richard Schreiber, re-direct.

Mr. Tiffany. I want to show what I mean.

Q This flagstone here (indicating) has a long broken part like that, has it not? A Yes, sir.

Q And you filled that in with cobblestones?

A Yes, sir.

10 *The Court.* That is not a flagstone.

Mr. Tiffany. The flagstone in the sidewalk.

The Court. That is not the sidewalk where you put the mark.

Q This, here. This is the way I understand the diagram. This is the sidewalk.

The Court. That is the sidewalk.

Mr. Tiffany. There.

20 *The Court.* That is a different proposition. You put the mark where there was not any flagstone.

Q You filled that in with cobblestones? A Yes.

Mr. Stover. When?

Q And isn't it filled in to-day with cobblestones? A Afterwards.

30 Q Where the flag was broken off you have now filled in with cobblestones? A No, sir; there was no flags broken; the same flags are there at present yet.

By the Court.

Q Are they broken? A No, sir.

Q Why don't you tell us that? That is what we want to find out. A No, sir.

Q And there are no cobblestones where there was a piece of flagstone broken off a corner?

40 A No, sir.

Richard Schreiber, re-direct.

Q You are positive of that? A Yes, sir.

By Mr. Heine.

Q When you in December, 1913, found that the catch-basin there had sunk and the flagstones had sunk down, the Tallon people through Mr. Decking came to you and wanted you to level up these flagstones? A Yes, sir; yes, sir. 10

Q And you took the flagstone up and put in the cement and relaid the flag? A Yes, sir.

Q Now, were any of those flags that you relaid in front of 603 or 601 in December, 1913, broken in any way? A No, sir.

Q They were all good flagstones? A Yes, sir.

Q And you relaid them just as you took them up? A I laid them and cemented them. 20

Q Only set on a proper level? A Cemented them up.

Q Yes; and when you got through that repair job, that sidewalk in front of 603 and 601 was all in first-class condition? A Yes.

Q Did you observe the condition of that sidewalk down to the time that you took your lease on March 28th, 1914; did you observe the condition of that sidewalk? A Yes. 30

Q Did those flagstones remain in the same condition or not? A In the same condition.

Q Were any of them broken? A No, sir.

Q Between the time you did that—relaid them—and the time you took your lease on March 28, 1914? A No, sir.

Q And then the cobblestones were put in after you took your lease? A Yes, sir.

Q So as to go over this place where there had been ashes between the curb and the side- 40

Richard Schreiber, re-direct.

walk, and then between the lot line and the sidewalk? A Yes, sir.

Q Did you at any time, before you took your lease from the Tallon estate, beginning March 28th, 1914, have any key or any access to that lot? A No, sir.

10 Q And your wagons did not go in and out there until after you took the lease? A No, sir.

Q You said the first time was about April? A Yes, sir; April.

Q Some time early in April, if I remember your testimony. You do not just remember that. Do you remember the morning when this accident happened how much snow had fallen by ten o'clock? A No, sir; I don't know anything of it.

20 Q You don't remember anything about it? A (No answer.)

By Mr. Tiffany.

Q Do you want us to believe that there are no cobblestones now in the line of flagstones on that sidewalk?

Mr. Heine. I object to the relevancy of that.

30 *Mr. Tiffany.* Simply to test his credibility.

The Court. I will permit that, because he has already testified that it has never been changed.

A No, sir. There is cobblestones in front of the sidewalk, in the front of the flags, two feet wide; then there is four feet sidewalk, and then there is cobblestones on the other side of the flag.

40

Robert Joseph Ward, recalled, cross.

Q But you say on your oath, and you are quite positive, that there are none in the line of the flagstones? A No, sir.

Q When was the last time that you looked at that sidewalk? A This morning.

Q And you did not see any there this morning, sir? A No, sir. 10

Q And you realize you are under oath? A Yes, sir.

Q And that is just as correct as the rest of your testimony here today? A Yes.

Mr. Tiffany. I think, if the Court please at this time, I will ask that the jury view these premises.

The Court. Well, I think I will not grant it. 20

Mr. Tiffany. I want to show them the conditions as they exist.

The Court. There is not any difficulty in getting plenty of witnesses to establish the fact.

ROBERT JOSEPH WARD, recalled.

Further cross examination by Mr. Stover.

Q You said you saw a wagon pass over the premises; is that correct? A Yes, sir. 30

Q Do you know if it was before March the 28th or after March 28th? A Before March 28th.

Q And what was the name on that wagon? A Richard Schreiber, 620 Park Avenue, Hoboken.

Q Who was on that wagon? A A driver; he was kind of a short fellow, he was about five feet. 40

Robert Joseph Ward, recalled, cross.

Q Was Schreiber on that wagon? A No, sir.

Q What did that wagon do to the curbstone or to the flagstone? A Why, the wagon had building material in it, and the weight of the wagon was too heavy for this flag; the flag wasn't
10 heavy enough to hold the wagon, so it caused the flag to break.

Q Can you describe to us the break? A The break?

Q Yes; can you tell us what sort of a break it was? A It was more of an angle, a flat angle.

Q Well, it cracked the stone; is that the idea? A A three-cornered break.

Q And the crack was how thick? A Well, it
20 was the full length of the flag.

Q How deep was the crack; do you know? A Why, the flag was broke entirely in half.

Q How wide was the crack? A How wide?

Q Yes. A Why, the crack must have been about a foot and a half or so.

Q I see.

By the Court.

30 Q Was it in the centre of the flag or in the corner or where? A Why, it was exactly in the centre.

Q Exactly in the centre? A Yes.

Q Then, if this book were the flag, it was a break across the centre of that flag? A Well, you wouldn't say exactly; it was more of a quarter of a break.

Q Just take that book and show the jury where on the flag the break was. A The break
40 in the flag was about quarter of the flag.

Robert Joseph Ward, recalled, cross.

Q That does not mean anything. Put your finger on the book? A It was more of a break like this (illustrating).

By Mr. Heine.

Q A foot and a half wide? A Yes.

By Mr. Stover.

10

Q What makes you sure about the date; that happened on March 20? A The accident was on March 20, and I passed there about a week or so before the accident, and I noticed the wagon going over. I was out of work at the time and I happened to pass it, and I was stopped by the wagon going over into the lots, and through the fence, and I took notice of that.

By the Court.

20

Q You are sure the accident was on March 20, are you? A Just before March 20th.

Q The accident was just before March 20; you know that positively? A Yes.

Q Don't you know, as a matter of fact, everybody admits that the accident was on the 22nd of March? A Well, I could swear to that.

Q You have sworn to it; but what I am asking you is, why are you so sure the accident was before March 20, when the other witnesses all say that the accident was on the 22nd of March? A Well, I passed there just about a day or so before the accident, maybe a week ago.

30

Q Let me ask you another question; was the flag broken in any other place? A Yes, sir.

Q Other than the one where you say it broke when this wagon went over it? A Why, there was a small piece off the corner.

40

Robert Joseph Ward, recalled, cross.

Q There was a small piece off the corner? A Yes, sir.

Q That small piece off the corner was not the piece that Mr. Schreiber's wagon took out as you saw it? A No, sir.

Q That had nothing to do with Schreiber's wagon? A No, sir.

Q You are sure of that? A Yes, positively.

Q How big was the piece off the corner? A Out of the corner?

Q Yes. A (Witness indicates.)

Q As I understood you, the first break was something like that (indicating)? A Yes, sir.

Q Now, just take this pencil and show the jury where the other piece was that was broken when you saw it. A The piece was out more on a shape like that, in the corner of the flag.

By a Juror.

Q Does that look like it on the blackboard; anything like that? A Yes, sir.

By the Court.

Q Which does that one there look like; which of those two? A That one is more correct.

Q More correct with which one? A With this one here.

Q Which? A This here one.

Q That is the one that was made by Mr. Schreiber's wagon? A Yes, sir.

Q But the piece off the corner Schreiber's wagon did not make? A No, sir.

Q And that does not look like the one on the board? That is right, is it? A Yes, sir.

Bernard J. Decking, recalled, direct.

BERNARD J. DECKING, recalled.

Direct examination by Mr. Stover.

Q Will you please tell us when you made the lease to Mr. Schreiber, Mr. Decking? Do you remember the date?

Mr. Tiffany. The lease speaks for itself. 10

A We executed the lease the end of March.

Q Of what year? A 1914.

Q Do you know what date in March it was?

A I know it was the last Saturday in March.

Q And did you sign the lease as representative of the estate of Tallon? A I did.

Q Would this help you to remember it (handing witness a paper)? A Yes, sir.

Q Did you sign that the same day the lease was drawn up? A That I cannot remember. 20

Q Do you remember when you leased it to Mr. Schreiber, now? A From the first of April, 1914.

Q When did you sign the lease? A I signed the lease a few days before; I cannot remember—the latter part of March.

Q The latter part of March; you are sure about that? A Quite positive. 30

Q Did you sign the lease on March—the time the accident happened to this lady, the plaintiff, or did you sign it after; do you remember that? A I did not know anything about the accident at that time.

Q If it happened on the 22nd of March, would you say you signed the lease after that or before that or on that day? A That I could not answer. I signed the lease the latter part of the month; it was the last Saturday in March. 40

Bernard J. Decking, recalled, cross.

Q When did Schreiber first drive his wagons over there, if you know?

Mr. Tiffany. I object.

A Schreiber got the key from me to take possession on the first of April; that is all I know of it.

By the Court.

Q Had that key been out of your possession before you gave it to Schreiber? A No, sir.

Q For how long had it been in your possession alone? A Since I took care of the property in 1913. I even had a sign always up on the fence there for the leasing of the property.

By Mr. Stover.

20 Q Had you examined the place in March, 1914, the premises? A Did I examine them?

Q Do you know the condition of the premises in March, 1914? A I always made it a point to keep the walk in good repair.

Q Do you know the condition of the premises in March, 1914? A In good repair as far as I know.

30 Q You went there how often in March? A Well, I would go there to collect rent; I would just pass there maybe twice a month or three times a month, the way the people would give me the rent. Sometimes you would have to go two or three times with a tenant.

Q Were these premises in good condition at the time you went over there? A Yes.

Q You will swear to that? (No answer.)

Cross examination by Mr. Tiffany.

40 Q You want us to believe that these premises were idle prior to the time this lease was exe-

Bernard J. Decking, recalled, cross.

cutted; nobody was using them? A Nobody was using them.

Q You did not keep anything yourself in there, or the estate did not keep anything in there? A No, sir; nothing.

Q You did not allow anybody to keep anything in there? A No, sir. 10

Q And you had the only key? A I had the key of the place.

By Mr. Heine.

Q During March, 1914, in front of the lot 603 where this fence was, did you notice them? A Well, I would walk along there; I would not take particular notice; if they was not in good repair of course I would notify the mason to put them in shape. 20

Q And you had them put in good repair in December, 1913? A Yes, sir.

Q They were all raised up and everything? A Yes; and then we had trouble with the basin there; that was raised and the grade was raised last year again; all those streets down there in Hoboken was raised.

By Mr. Tiffany.

Q What broke these flagstones that necessitated their being repaired. 30

Mr. Stover. I object.

A There was no wagon going in there at that time. How could any wagon go in there? I had the key of the place.

Q I ask again, do you know what broke them?

Mr. Stover. I object to that question on the ground that it misstates the evidence. 40

Bernard J. Decking, recalled, cross.

This witness and the previous witness said the grade was raised.

The Court. I sustain the objection.

Q Were the flagstones raised above the dirt on the street? A The flagstones were raised up to the level of the curb like all streets are. That
10 is the way we raise flagstones.

Q Then between the flagstones and the curb was that on the same level with the flagstones or was it a little bit below? A It was on the same level with the flagstones.

Q You are quite positive of that, are you? A Quite positive.

By the Court.

Q What was the actual date that you gave
20 this man the key? A The first of April he took possession; the first of April.

Q I do not ask you when he took possession; what was the date you gave him the key? A Gave him the key on the first of April.

Q That is the first time we have had that answer. That is what I wanted to find out.

Mr. Heine. He said that.

30 *The Court.* No, he didn't. He said he took possession on April 1st.

By Mr. Heine.

Q Didn't you give him the key the day you made the lease on the 28th of March? A No, sir; I gave him the key on the first of April.

Q Where was the lease signed? A In Stover's office.

40 Q Didn't you give him the key there? A I didn't.

John Wendt, recalled, direct.

Q Why didn't you? A Because he did not ask me for it, and the lease first commenced on the first of April. You do not give a man possession of property until the commencement of the lease, do you?

Q Did you have the key with you? A I don't know if I had the key that day with me. 10

Q Where did you keep the key? A I generally keep it in my desk.

JOHN WENDT, recalled.

Direct examination by Mr. Stover.

Q Where do you live? A 926 Willow street.

Q You have been here before; you have been sworn by the other side. Were you a witness here for the plaintiff? A Yes. 20

Q Do you remember the condition of the place on March 22, 1914? A I do not know what date it was, or I don't know the month, but I know I was shoveling snow that morning myself.

Q Do you remember the condition of the place at the time plaintiff fell? A It was covered with snow.

Q She says there was a very small covering with snow; is that so? A No; there was every bit of three or four inches of snow. 30

Q When had the snow started? A There was snow on the ground when I left my house at eight in the morning to go down and shovel snow off my father's premises across the way.

Q Just tell us what you saw when the plaintiff came along. A I was shoveling snow from my father's place and I seen her fall on the other side of the street, which I dropped my shovel and stuck it in the snow in the gutter and went 40

John Wendt, recalled, direct.

to her assistance, and picked her up. Along comes another fellow and he helped me with her; he helped me carry this Mrs. Davis—this lady out there, Mrs. Davis—and walked her to Mr. Keeney's office.

10 Q She walked to the office, did she? A No; she did not walk herself; I had her on one arm and this other man had her on the other arm; we did not lift her off the ground but we gradually got her to Mr. Keeney's office, where we sat her in a chair, and I goes across the street to my father's 'phone and telephones for the ambulance, and I comes back again and I stayed there for a few minutes and the ambulance came; then the cop came along and put everybody outside.

20 Q What was her condition at that time about fainting, if she fainted in there; did she faint? A She was very weak at the time; she said, "I can't walk; I can't walk."

Q Did she faint at the time? A Not as I know of. The time I was there she didn't faint.

Q And you say the snow was four inches thick? A Three or four inches thick, and it was still snowing that time.

30 Q Could you see broken stones then? A Couldn't see any sign of a stone.

Q Had you seen broken stones in the past, previous to this accident there? A I can't say—to that.

Q Do you know the condition of the premises? A I do not.

By Mr. Heine.

40 Q Your father's house is right across the other side of Willow avenue? A 606.

John Wendt, recalled, direct.

Q Right opposite Keeney's? A Right opposite Keeney's.

Q That is where the driveway goes, is it, into Keeney's place? A Yes, sir.

Q And you were standing shoveling right across, opposite there? A Opposite Keeney's.

Q When she fell she was right opposite you? 10
A No.

Q She was down nearer to the corner? A Nearer to the corner, opposite Mooney's.

Q What is their number? A 604.

Q So that was opposite 603? A No; Mooney's is 602.

Q She had gotten past the driveway of Keeney's when she slipped, or when she fell?

A No; before she got to the driveway of Keeney's. 20

Q I see. She was going toward Keeney's? A She was going north when I seen her.

Q That would be up toward 605, and before she got to the driveway it was where she fell; is that right? A That is right, before she got to the driveway.

By the Court.

Q Do you know where the gateway is in the fence at 603? A Yes; I do, sir. 30

Q Where was she when she fell with reference to that gateway? A Directly in front of the entrance to the gateway.

By Mr. Tiffany.

Q Did you say she was going north? A When I seen her she was going north.

Q Which direction is St. Mary's Church, south or north? A South. 40

John Wendt, recalled, direct.

Q And she was coming from that direction?

A Yes.

Q And you say it was ten o'clock in the morning? A At least; quarter to ten or ten o'clock in the morning.

16 Q Don't you know she was going south on her way to St. Mary's Church at about quarter after nine in the morning? A She (indicating) was on the inside of her mother, by the arm the way I saw them from where I was standing there.

Q You were shoveling snow, weren't you? A Yes, sir.

Q And they were going north? A I seen them coming north.

Q How long before she fell did you see her? A Right near the corner.

Q What attracted your attention to them?

A Well, taking a rest.

Q You were taking a rest? A Taking a rest.

Q You stuck this shovel in the snow in the gutter? A Yes.

Q Snow shovel? A Yes.

Q It stood up, did it, in three inches of snow?

30 A Yes, sir; when I came back the snow shovel was stolen.

Q Didn't you stand the shovel in the snow you had shoveled off the sidewalk into the gutter? A The shovel I was shoveling snow with off the sidewalk in front of my father's place was stuck in the snow, in the curbstone, in the gutter.

Q Isn't it a fact that you did not carry her in on your shoulders at all, that you sat her in a chair and they carried both the lady and the chair into Keeney's place? A No, sir.

40

James Keeney, recalled, direct.

Q That is not a fact? A No, sir.

Q Do you remember testifying here a few moments ago that she walked in? A She walked in?

Q Yes. A With two men, I and another man, on both sides of her; we didn't carry her in.

Q There was not any pressure on her, on her legs; you were carrying her in? A She didn't lift her feet off the floor; she limped along. 10

Q Oh, I think that is all.

JAMES KEENEY, recalled.

Direct examination by Mr. Stover.

Q Were you there at the time of the accident, at the time of the falling? A No, I was not, but I just came there as they carried her into the office. I live next door and I just came out. 20

Q And you escorted her to the chair or you were one of those who did? A No; but I helped. I stayed there while Mr. Wendt went and telephoned for the ambulance.

Q Did you observe the state and condition of the snow on the premises? A There was snow I will say about three or four inches deep and it was snowing at the same time. 30

Q When had this snow started that day, if any? A It was about half past eight I would think.

Q And was it a thick or a thin snowfall? A Nice soft snow.

Q Could you see the sidewalk of the premises at the time? A No; you could not see a stone on the sidewalk.

Q Did you see the place before the falling? A Yes, sir. 40

James Keeney, recalled, direct.

Q On the day previous to the falling? A I seen it every day there.

Q You saw it every day? A Yes; I saw it every day.

Q Just before the snow fell what was the condition of the premises? A The condition
10 was all right; no danger at all.

Q You are sure it was that way? A I am sure because I walked over about ten times a day, and I did not see anything wrong with it.

Q Did you see Schreiber's carts and wagons drive over? A No.

Q On the day, or— A Not until around the 27th or 28th was the first one that I remember. It was me who went and got the place for him. It was me spoke to Mr. Schreiber to take
20 the lease of the place.

Q Do you remember when you got the place for him? A Well, I spoke to him around the 20th.

Q You spoke to whom? A To Mr. Schreiber to look over it, it would be nice and handy for his wagons; and then he got the lease of it I think on the 27th or 28th; but he had no wagon there until then.

Q You are sure he did not drive his wagons
30 in there until then? A He did not drive no wagon over the sidewalk; he was not there until then.

Q You are positive of that? A Positive of that because I have got my wagons next door and I go through all the time.

NO CROSS EXAMINATION.

DEFENDANTS REST.

Motions for Direction of Verdict.

REBUTTAL.

CATHERINE DAVIS, recalled.

Direct examination by Mr. Tiffany.

Q Were you going to or from St. Mary's church? A I was going to church, going south. 10

Q Going south? A Going south.

Q Have you since this accident had occasion to look at this sidewalk? A Since the accident, yes.

Objected to as improper rebuttal. Objection sustained.

NO CROSS EXAMINATION.

TESTIMONY CLOSED.

Mr. Heine moves for a direction of a verdict so far as the estate of Tallon is concerned on the ground that it appears from the testimony that the crack through which the accident is alleged to have taken place was the crack caused by Mr. Schreiber driving over the walk; that the proximate cause of the injury would be Schreiber's act of negligence in breaking the flagstone; that the defendant Tallon estate is not shown to have had knowledge of the defect or that it existed a sufficient time for them to be charged with notice of it; that the renting to Schreiber according to the testimony was subsequent to the breaking and subsequent to the accident. Motion denied. 20
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Mr. Stover moves for a direction of a verdict on behalf of the defendant Schreiber for the reasons previously urged; and also on the ground that the suit is against him as a tenant, whereas there is no evidence that he was a tenant at the time of the happening of the accident. Motion denied. Exception. 40

*Charge to Jury.***Court's Charge to the Jury.**

Gentlemen of the jury:

This suit is brought by Mary Davis against Anna Tallon, Mary Tallon, Margaret Tallon and
10 James Tallon, who are the heirs and next of kin of James Tallon and Mary Tallon, deceased, and who admittedly are, and throughout all the time which is material at all in this controversy were the owners of the premises number 603 and 605 Willow avenue in the City of Hoboken; and also against Richard Schreiber, who, the plaintiff claims, was the tenant of the lot number 603 Willow avenue, leasing it, or renting it as the
20 language of the complaint is, from these representatives of the Tallon estate. The charge that the plaintiff makes is that the Tallons rented the property to Schreiber, the property number 603 Willow avenue, for the express purpose of having this property, that was a vacant lot sheltered by a fence from the public highway, used for the purpose of storing his wagons; and the plaintiff says that the defendants, the Tallons, should have known and anticipated that such
30 use of the premises by the tenant would eventuate in the destruction of the flagstones over which, unless they built a roadway, it would be necessary for the wagons to pass in order to get from the street into the lot, and that Schreiber knew when he drove his wagon over those flagstones, if he did drive it over the flagstones, that such act on his part was accompanied with the likelihood that it would destroy the flagstones, and they claim that such use of the flagstones on the public highway was a negligent use and
40 one which if injury arose from the consequences

Charge to Jury.

of such use would give rise to a right of action on behalf of the person injured.

That is the case the plaintiff alleges against both these defendants and upon which she seeks to recover her damages, because they say that while Mrs. Davis, the plaintiff, on the 22nd of March, 1914, was walking along Willow avenue in company with her daughter, she caught her heel in a crack in the flagstone which they claim had been made there by the wagon of Schreiber prior to the 22nd of March, 1914, and that having caught her foot she was thrown to the ground and sustained a fracture of the fibula, which is the small bone of the leg, a fracture known in medicine as a Potts fracture, and that that laid her up for some weeks in bed; that she had to have the leg in a plaster cast, and Doctor Londrigan says that by the end of June of 1914, she was able to use the leg as good as she ever could have used it before. Now, that is the case that the plaintiff alleges here and upon which she seeks to recover her damages.

You need to know certain rules of law in order to enable you to properly decide this case; and the first rule of law that you need to know, and one that hovers over the whole case and is necessary in the decision of the whole case, is that the burden of establishing by the greater weight of the evidence all the facts that are necessary to bring about a recovery in favor of the plaintiff must be made out by the plaintiff by the greater weight of the evidence. In other words, she must show that both these defendants were negligent, that their negligence was the proximate cause of the injury of which she complains, and that she did suffer injury because of their negligence; and then she must

Charge to Jury.

show its extent; and she can only be allowed damages, of course, if she be given a verdict, to the extent that she has shown herself to have suffered because of such negligence.

Now, what are the legal rights that govern a case of this kind? In order to make them perfectly plain I want to give you a certain historical review. That sounds as though it is going to be long-winded, but it is not a bit. It makes it clearer and more manifest to you what the real legal rights of the parties are; and I say to you that the owner and occupant of premises abutting upon a public street is under no legal duty to keep the sidewalk in front of his property in a state of repair, at least under no legal duty of which a person who travels along that sidewalk and is injured can avail himself, or herself, by bringing a suit to recover damages against such person because of it. Such obligation could only rest upon him in this state by virtue of the requirements of some statute; and there is no statute in this state which given to a traveler upon the highway a right to recover against the abutting owner for damages that have resulted to him because of a state of disrepair of the sidewalk. That is the indubitable law of this state, and it has always been so, and it is so now. Sometimes the municipality passes an ordinance requiring a man to shovel the snow from his sidewalk and to keep the sidewalk in a state of repair, but that does not give a right of action against a person who is injured because there is snow on the sidewalk or who is injured because the sidewalk has gone into a state of disrepair, because the primary duty of keeping the sidewalk in repair rests upon the municipality and when it attempts to shunt it over upon an

Charge to Jury.

owner the only effect that such effort on the part of the municipality has is to make the owner pecuniarily liable for the repair in case he does not make it in accordance with the command of the ordinance, but it does not make him liable for damages which result because the ordinance has not been complied with, in favor of some person who is injured because of the non-compliance with the ordinance. In this case, however, that is not the theory upon which this action is founded. The plaintiff does not say that the Tallons or Mr. Schreiber were under any obligation to keep the sidewalk in repair merely because it was in front of property of which one of the defendants was the owner and the other was the tenant; but they say this: they say that if anybody attempts to interfere with the sidewalk, either by way of erecting an obstruction there or by subjecting the sidewalk to a use that it was not intended and designed to bear and thereby creates a nuisance upon the public highway, that such person thus creating such nuisance is responsible for that active negligence on his part; or to state that rule in the language of our cases, it is this:

“The rule is settled that when an abutting owner, for his private ends, maintains in a public highway anything which if neglected will render the way unsafe for travel, he is bound to exercise due care to prevent its becoming dangerous, and that his failure to do so will render him liable for injuries received by a person along the highway resulting from that neglect.”

In this case the plaintiff claims that these parties actively intervened—the Tallons—by reason of the fact that they were obliged to anticipate, in the exercise of reasonable care on their

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Charge to Jury.

part, that the use to which they had agreed by a lease—for that is the claim made by the plaintiff—that this sidewalk should be subjected to was a use which would in the very nature of it cause the destruction of it and render it dangerous; and they say that Schreiber is to be held responsible because he knew when he sent this man over the sidewalk with a wagon and a horse that such use was not the use that the sidewalk was designed to bear, and that therefore if it was broken while such use was being made of it, such breaking of it was a negligent act on the part of his servant who drove the wagon, and consequently under the rule that the master is responsible for the negligence of the servant which is done in his service and within the scope of the service the master would be equally liable with the servant.

Now, that is the theory upon which in this case the plaintiff seeks to recover; and you will observe that one of the essential facts in this case that the plaintiff must make out by the greater weight of the evidence if she is to recover is that Schreiber was actually the lessee or the tenant of these premises prior to the time of the happening of this accident, and while such lessee that Schreiber drove his wagon in charge of his servant over the flagstone and broke the flagstone as is claimed by the plaintiff, because the only charge is that the defendants leased and rented said premises to the defendant Richard Schreiber. Now, a lease is in effect a conveyance or grant of the possession of property, generally, but not necessarily, land or buildings, to run during the life of a person, or for a term of years, or other fixed period, or at will, and usually with the reservation of a rent. In other

Charge to Jury.

words, there must have been prior to the happening of this accident some grant or lease or renting of this property by the Tallons to Schreiber for the purpose of using it for the storage of his wagons before there could be any recovery at all. If the plaintiff has not made out that there was such a lease or renting of the premises and a possession of the premises in conformity thereto to Schreiber so that he could use them for that purpose and an actual use of the premises by Schreiber for that purpose, there could not be any recovery in this case at all for the very obvious reason that the case now as it has shaped itself up amounts to this; that this break is alleged to have been made by Schreiber—this particular break upon which this woman claims to have received her injury, to have been made by his wagon while he was driving his horse and wagon over that flag, while the wagon was in charge of his servant. If she was injured by some other break there could be no recovery against Schreiber and the Tallons. That is the whole case as it depends upon the testimony of the witness Ward, who swears that some time in the latter part of February or the early part of March, 1914, he actually was there and he saw the wagon make the break on the sidewalk, and that it was a wagon with the name Richard F. Schreiber on it, with the address of that Mr. Schreiber, and he says he could not be mistaken about that thing. Now, it is for you to say whether Mr. Ward is telling the truth about that thing, whether he is accurate or whether he is mistaken. It was perfectly manifest that Mr. Ward could be mistaken about some things because Mr. Ward was mistaken about one thing. He testified to you that this accident happened

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Charge to Jury.

before the 20th of March, whereas, there cannot be a vestige of a doubt that it happened on the 22nd of March. Now, I do not say that at all to discredit Mr. Ward, because I am not passing on the credibility of his testimony at all; I am simply indicating to you by that example that

16 when you come to weigh the evidence you take all the evidence in the case and look at it and say in the light of your best judgment where lies the truth; for after you have taken all the rules that have been laid down for weighing human testimony there is just one great big rule left, and that is, what effect does it make on the human mind, on your mind? How does it square with your observation and experience? How does it approve itself to you from the credibility of the witness himself and of the story that he tells as being likely or unlikely? That is the way you govern all your actions in life, and that is the way you judge all the testimony in all the cases that come before you in all your service here. How does it approve itself to you in the light of your own experience and your own observation and how does he approve himself to you in the way in which he comports himself on the stand, the

20 promptness with which he answers questions, the consistency of his story, the general truthful aspect of it, its conformity to things in life as you have met with them in your experience? And when you have applied those tests then you determine where the truth lies.

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Now, to reduce all that I have been trying to say to you in this little while to a few words, it is this:

Charge to Jury.

Plaintiff must make out by the greater weight of the evidence that the defendants, or one of them, were, or was, negligent. Secondly, that the negligence was a proximate cause of the injury of which the plaintiff complains and for which she seeks to recover damages. If plaintiff has made that out against both or either of these defendants plaintiff is entitled to a verdict against both or one as he shall have made out his case against both or one of them. If he has made out such case then I say he is entitled to a verdict unless defendant shall have made out by the greater weight of evidence that the woman herself was not in the exercise of reasonable care for her safety and that her neglect to use reasonable care was a proximate cause of the injury. Now, on a public highway, gentlemen, reasonable care is the duty of everybody. Nobody has any right to shut his eyes and plunge ahead and charge his consequent damage upon somebody else. He must be careful for his own safety. Now, in this case the defendants say that even if they were negligent this woman should have no recovery because she herself was negligent and contributed by such negligence to the production of the injury of which she complains. They say that she knew the place was dangerous, that she admits she knew the place was dangerous, that its danger was somewhat accentuated by the fact that there was snow upon the ground, and that she said that she did not look where she was walking when she went over the place that she knew was dangerous, and they say that if that is the fact the duty of the jury is to say that she was careless, that she was negligent, and that such negligence precludes her recovery. Now, negligence, gentlemen, has been defined to be the

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Charge to Jury.

neglect to use that degree of care which a reasonably prudent and cautious person would have used for his own safety under the circumstances. If the defendant has made out in this action by the greater weight of the evidence that this woman did not use that care for her safety

10 which a reasonably prudent and cautious person would have used under the circumstances and that her neglect to use that care contributed either in whole or in part to the production of her injury, she cannot have any verdict here no matter how negligent the defendant may have been, because the law has laid down the rule with respect to that in a very few words epigrammatically as follows: that where both

20 parties are negligent neither party can recover anything against the other.

Now, that is all there is about the question of negligence or non-negligence. If you find a verdict in this case you then come to the question of the assessment of damages. A few words in respect to that is all that you need to have in order to enable you to determine that question. The plaintiff is entitled, if she gets a verdict at all, to compensation, or payment, so far as money can be said to pay, for all the injuries which proximately resulted to her from the accident. Enter-

30 ing into the notion of compensation would be, first of all, payment for the pain and suffering, both mental and physical, which she has undergone in the past and in ordinary cases for such as she will probably undergo in the future, for so long in the future as she will probably undergo them. Right in that respect you will remember the testimony of Doctor Londrigan, that the injury was well and the leg was as good from

40 the last part of June, 1914, as it ever was. Then

Exhibit P. 1.

she would be entitled to recover reimbursement for any expenditures to which she has been put by reason of her effort to alleviate her suffering or effect a cure, such as doctor's bills and bills for medicines.

Now, I do not know that there was any other item of damage that she claimed for, and you will take the case under these rules and decide it. 10

EXHIBIT P. 1.

Hoboken, N. J., May 1st, 1914.

To WESP & STOCKHOFF'S Dr.
PHARMACY.

Mrs. Davis.				20
Mar. 22nd, 14	R/ (meaning prescription)	.45		
“ “ “	Alcohol	.50		
“ 24th, “	“	.50		
“ 26th, “	“	.90		
“ 30th, “	“	.90		
Apr. 4th, “	“	.50		
“ 7th, “	“	.50		
“ 10th, “	“	.25		
“ 12th, “	“	.25		
“ 14th, “	“	.50	30	
“ 17th, “	“	.25		
“ 19th, “	“	.50		
“ 22nd, “	“	.50		
“ 25th, “	“	.25		
“ 27th, “	“	.25		
“ 29th, “	“	.25		
		<hr/>		
May 1st, “	“	.25		
“ 3rd, “	“	.25		
“ 5th, “	“	.25	40	

Exhibit P. 1.

	May	7th,	14	Alcohol	.50
	"	10th,	"	"	.50
	"	14th,	"	"	.90
	"	18th,	"	"	.90
	"	23rd,	"	"	.90
	"	28th,	"	"	.50
10	"	31st,	"	"	.50
					<hr/>
	June	2nd,	"	"	.50
	"	5th,	"	"	.25
	"	7th,	"	"	.25
	"	9th,	"	"	.25
	"	11th,	"	"	.25
	"	13th,	"	"	.25
	"	15th,	"	"	.25
	"	17th,	"	"	.25
20	"	19th,	"	"	.50
	"	23rd,	"	"	.50
	"	27th,	"	"	.50
	"	30th,	"	"	.50
					<hr/>
	July	2nd,	"	"	.25
	"	4th,	"	"	.25
	"	6th,	"	"	.25
	"	8th,	"	"	.25
	"	10th,	"	"	.25
30	"	12th,	"	"	.25
	"	14th,	"	"	.50
	"	18th,	"	"	.50
	"	21st,	"	"	.25
	"	23rd,	"	"	.25
	"	25th,	"	"	.25
	"	27th,	"	"	.25
	"	29th,	"	"	.50
					<hr/>

Exhibit P. 1.

Aug.	1st,	14	Alcohol	.50	
"	5th,	"	"	.25	
"	7th,	"	"	.25	
"	9th,	"	"	.25	
"	11th,	"	"	.25	
"	13th,	"	"	.25	
"	15th,	"	"	.25	10
"	17th,	"	"	.25	
"	19th,	"	"	.25	
"	21st,	"	"	.25	
"	23rd,	"	"	.50	
"	27th,	"	"	.25	
"	29th,	"	"	.25	
				<hr/>	
				\$3.75	
Sept.	1st,	"	"	.25	
"	3rd,	"	"	.25	20
"	4th,	"	"	.50	
"	9th,	"	"	.50	
"	12th,	"	"	.25	
"	14th,	"	"	.25	
"	16th,	"	"	.25	
"	18th,	"	"	.25	
"	20th,	"	"	.50	
"	24th,	"	"	.50	
"	28th,	"	"	.50	
				<hr/>	30
				\$4.00	
Oct.	1st,	"	"	.50	
"	5th,	"	"	.50	
"	9th,	"	"	.25	
"	11th,	"	"	.25	
"	14th,	"	"	.25	
"	17th,	"	"	.25	
"	20th,	"	"	.25	
"	23rd,	"	"	.25	

Exhibit P. 1.

	Oct.	26th, 14	Alcohol	.50
	"	31st, "	"	.50
				<hr/>
				\$3.50
	Nov.	4th, "	"	.25
	"	6th, "	"	.25
10	"	8th, "	"	.50
	"	12th, "	"	.50
	"	16th, "	"	.50
	"	20th, "	"	.25
	"	22nd, "	"	.25
	"	25th, "	"	.25
	"	28th, "	"	.25
	"	30th, "	"	.25
				<hr/>
				\$3.25
20	Dec.	2nd, "	"	.25
	"	5th, "	"	.25
	"	8th, "	"	.25
	"	11th, "	"	.25
	"	14th, "	"	.25
	"	17th, "	"	.25
	"	20th, "	"	.25
	"	24th, "	"	.25
	"	28th, "	"	.25
	"	31st, "	"	.25
30				<hr/>
				\$2.50
	Jan.	2nd, 15	Alcohol	.50
	"	6th, "	"	.50
	"	10th, "	"	.25
	"	13th, "	"	.25
	"	17th, "	"	.25
	"	21st, "	"	.25
	"	23rd, "	"	.25
	"	27th, "	"	.25
40	"	30th, "	"	.25
				<hr/>
				\$2.75

Exhibit P. 1.

Feb.	2nd,	15	Alcohol	.50	
"	6th,	"	"	.50	
"	10th,	"	"	.50	
"	14th,	"	"	.50	
"	18th,	"	"	.25	
"	21st,	"	"	.25	
"	23rd,	"	"	.25	10
"	26th,	"	"	.25	
"	28th,	"	"	.25	
				<hr/>	
				\$3.25	
Mar.	3rd,	"	"	.25	
"	5th,	"	"	.25	
"	7th,	"	"	.50	
"	11th,	"	"	.50	
"	15th,	"	"	.50	
"	19th,	"	"	.50	20
"	23rd,	"	"	.50	
"	27th,	"	"	.25	
"	29th,	"	"	.25	
"	31st,	"	"	.25	
				<hr/>	
				\$3.75	

Summary

Total \$47.70 30

Exhibit D. 1.

EXHIBIT D. 1.

THIS AGREEMENT, made this twenty-eighth day of March, 1914, between Estate of James Tallon of the first part, Landlord, and Richard Schreiber of the second part, Tenant, WITNESSETH, that
 10 the said Landlord hath agreed to let, and hereby doth let, and the said tenant hath agreed to take, and hereby does take, ALL that certain vacant lot situate No. 603 Willow Avenue, in the City of Hoboken, in the County of Hudson and State of New Jersey, for the term of five years commencing the first day of April, 1914, and ending the first day of April 1919 at noon of that day, at the yearly rent of fifty (\$50.) dollars, payable in advance on the first day of
 20 April of each year together with all water rent charges.

THIS AGREEMENT is upon the following conditions, all and every of which the tenant agrees to perform and keep. That he will pay the rent at the times aforesaid. That he will not let, sell, underlet or assign the premises, or any part thereof, and that he will not use them, nor permit any part thereof to be used, for any business or purpose extra hazardous, without the
 30 written consent of the Landlord. That he will permit the Landlord or his agent to enter the said premises at reasonable hours in the day time, to examine or to make such repairs and alterations therein as shall be necessary for the preservation thereof; and to exhibit them any day to persons, and to put notices "To Let" or "For Sale" on the walls thereof. If the premises or any part thereof, shall become vacant, or deserted, during the said term, the tenant
 40 authorizes the Landlord or his agent to re-

Exhibit D. 1.

enter, without being liable to any prosecution thereof, and to re-let them, and receive and apply the rent first to the payment of the expense of re-entering, and then to the payment of the rent due by these presents. To preserve the said premises, and surrender them at the time aforesaid, in as good condition as the proper use thereof will admit, damages by the elements excepted. And it is agreed that this instrument, on the breach of any of its conditions, shall, and, at the option of the Landlord, may be rescinded; and that he may recover immediate possession of the premises, "for holding over after the expiration of the term," without any other than this notice of the intention of the Landlord to re-enter. 10

The party of the second part further agrees to keep the sidewalk in front of said premises free from ice and snow. 20

Said tenant is also to have the privilege of erecting temporary sheds on said land, but may remove the same at the end of his term.

ESTATE OF JAMES TALLON.

By BERNARD J. DECKING,
Agent.

RICHARD SCHREIBER. 30

On first page 9 interlined
before execution.

EDWARD STOVER.

STATE OF NEW JERSEY, }
HUDSON COUNTY, } ss.

BE IT REMEMBERED, That on this twenty-eighth day of March in the year one thousand nine hundred and fourteen before me a Master in 40

Reasons.

Chancery of New Jersey personally appeared Richard Schreiber and Bernard J. Decking, who, I am satisfied, are the grantors in the within indenture named; and I having first made known to them the contents thereof, they did to me
 10 acknowledge that they signed, sealed and delivered the same as their voluntary act and deed, for the uses and purposes therein expressed:

EDWARD STOVER,
Master in Chancery of New Jersey.

Reasons for New Trial.

Nov. 27, 1916.

The following is the cause upon which the
 20 plaintiff rests the motion for a new trial of the above stated cause, viz:

1. Because the damages awarded by the jury are inadequate and do not compensate the plaintiff for the injuries sustained by her.

WELLER & LICHTENSTEIN,
Attorneys for Plaintiff.

30 Service of a copy of the above Reason for New Trial is hereby admitted this 27th day of November, 1916.

M. CASEWELL HEINE.
Attorney for Defendants Anna Tallon, etc.

Joseph F. Londrigan, direct.

NEW JERSEY SUPREME COURT.

MARY DAVIS,

vs.

A. TALLON, M. TALLON, J. TALLON,
as heirs, etc. of RICHARD
TALLON.

10

Tried September 24, 1917, before Speer, *J.*,
and a jury.

Weller & Lichtenstein (Mr. Tiffany) for the
plaintiff.

M. Casewell Heine for the defendant.

20

JOSEPH F. LONDRIGAN, sworn.

Direct examination by Mr. Tiffany.

Q Doctor, you are a duly licensed physician
practising in Hoboken? A I am.

Mr. Heine. We admit the doctor's qual-
ifications.

Q Do you know Mrs. Mary Davis, the plain-
tiff in this case? A I do.

30

Q Did you treat her? A I have.

Q On March 22nd, 1914, for an injury? A
I did.

Q Will you just explain to the jury what
you did and what you found so far as you know?

A I was called to the house of Mrs. Davis, who
had met with an injury, and was first attended
by Doctor Callery because she was unable to
get me. When I got to the house I found her
left leg in splints. She had received or sustained

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Joseph F. Londrigan, direct.

10 a fracture of that leg. I removed the splints to see if everything was in good condition, which it was, and I replaced the splints and treated her for a fracture of the left leg. Those splints remained on for a period of about two weeks, after which a cast was placed on the leg, which is usually put on in all cases of a fracture of a bone, the object being to keep the bones from moving; and they were allowed to remain on there for a period of four or five weeks; and all told for about eight weeks her leg was bandaged with splints or a plaster cast.

20 Q During that time, Doctor, was she able to use her leg? A No; she was confined to her bed most of that time. Perhaps the last two weeks she was able to sit up, but not to use her leg. She would have to have her leg supported on another chair—she was not able to move at all.

Q Did you know her condition prior to the 22nd of March? A I did.

Q What was her condition? A She was of normal condition for a woman of her age.

30 Q Was she able to get around and do her work, as far as you know? A Yes; she performed all of her household duties.

Mr. Heine. You are now testifying to before the accident?

A Before her accident, yes.

Q You are her family physician? A Yes.

40 Q Do you know if she used anything, a cane or a chair, that you know of? A She got around the house with the use of a chair or a cane. I advised her to move around on one limb and she perhaps put the knee of her injured leg on a chair and used that as a crutch or a

Joseph F. Londrigan, direct.

cane to enable her to get around the house; but she was not able to go out of the house.

Q How many visits did you make, Doctor, altogether? A I saw her the first week perhaps every day, and then after that when I found that the leg was beginning to mend, every other day.

Q Until what time? A I saw her for probably eight or ten weeks; for the last several weeks perhaps one or two visits a week. 10

Q Would you say up to June? A I would say about that time.

Q And your bill for services, Doctor? A I think roughly it amounted to about fifty dollars, which has been paid.

Q Fifty dollars, which has been paid? A Yes.

Q Are fractures of this kind, Doctor, usually attended with pain or not? A They are always attended with pain. 20

Q How long does that pain continue? A Well, the acute pain is more severe up until the time the fracture and bone are set, after which time—

Q That takes about—? A That depends upon the time the surgeon arrives on the case, that is the severity of the acuteness of the pain; and then that becomes less after the bones have been immobilized. Still there is considerable amount of pain for three or four weeks while the bone is knitting—perhaps for a period of six weeks. Of course as the fracture gets well the pain becomes less. 30

Q Is it or is it not usual, Doctor, in the case of these injuries to change with the course of the weather, dampness and dryness and cold and heat?

Mr. Heine. I object to that. 40

Joseph F. Londrigan, direct.

Q Are you familiar with the symptoms that generally attend a breaking of bones, that is as to pain? A Yes.

Q After they have healed? A Yes, sir.

Q Would you say there would be pain at different times with a change in the elements?

16 *Mr. Heine.* I object.

The Court. Make it in this case, Doctor.

Q In this case.

Mr. Heine. I think in that case the plaintiff is the best witness to tell how long she had the pain and not the doctor.

20 *The Court.* She may be the best witness if you please, but this doctor is a witness, and the cases are uniform on the proposition that such evidence is admissible as tending to corroborate the woman when she states how long it existed.

Mr. Heine. It strikes me as a hypothetical question. He is brought here as a family physician and now he is interrogated as an expert on these bone conditions.

30 *The Court.* I think he is qualified and I think there is evidence enough to qualify him and I decide that he is qualified and against that decision you may have an objection.

A I don't just get the question.

Q I will withdraw the question. Would you say, Doctor, that in the case of Mrs. Davis the place of the injury would cause the bone during a change of the elements—would be likely to cause pain.

40 *Mr. Heine.* I object to that unless time is more definitely specified.

Joseph F. Londrigan, cross.

Q Within a period of two years after the accident? A No, it would not.

Q And bring it down to a point within a year after the accident. A There are no physical changes as a result of the accident that would cause pain.

Q I do not mean physical changes. I mean physical changes so far as they relate to the elements; I mean hot and cold, from a warm day to a cold day, or a damp day to a dry day. 10

Mr. Heine. Your honor will allow me the same objection?

The Court. What do you mean by the same objection?

Mr. Heine. That is merely a speculative, general question. 20

Mr. Tiffany. I will withdraw it.

Q What kind of a fracture would you call this? A Potts fracture, it is technically known as. It is a fracture of the fibula at its lower third—

Q That is the bone near the ankle? A Yes.

Q The two bones of the leg come together?

A They form the ankle joint at that point.

Q It is a fracture at that point? A Yes. 30

Cross examination by Mr. Heine.

Q Would you say, Doctor, that she can use the left leg now as well as she did prior to the accident? A She does.

Q Would that be true of her condition last June? A That would be too soon after the accident. I would not say that.

Q Soon after the cast was taken off? A Yes; I would not say for perhaps a period of two months after the cast was removed. 40

Mary Davis, direct.

(Mr. Tiffany reads to the jury the testimony of Doctor Callery, given at the former trial.)

MARY DAVIS, sworn.

Direct examination by Mr. Tiffany.

10 Q You are the plaintiff in this case? A
Sir?

Q You are the plaintiff in this case? A
Yes, sir.

20 Q Now we do not want to know how the accident happened; just what happened to you after you fell. Just tell the jury what happened on the 22nd of March, 1914, with reference to your leg. A Well, I fell and broke my leg—my ankle—my left foot; and I was attended by Doctor Callery and he—

30 Q Speak out loud. We cannot hear you. A I am very nervous. I was attended by Doctor Callery first—we called for Doctor Londrigan and we could not get him, and Callery set the foot; so they took me home in an ambulance and put me in bed—in splinters that Doctor Callery put on; and then Doctor Londrigan came in and he put splinters on two or three days after, and I was in bed for four weeks with them splints—four weeks with them splints on my foot, laying in bed; and I suffered pain; don't you forget it; and then he took them off and put plaster cast on my foot. Of course Doctor Londrigan did lots of things too, and it was on for six weeks, plaster cast on my foot, and as soon as he put that on it the pain of that it pulled me down so I had pain all the time in that hip and down along and out my toes.

40 Mr. Heine. Hip, did she say?

Mary Davis, direct.

A Yes, in my hip here I have pain all the time and down my ankles whenever the weather is hot or cold, and I have a bad feeling around my foot. So I was there six weeks with that plaster cast, laying in bed, and then when he took that off then I thought I could walk, you know, when I got out of the bed; and I could not of course leave it on the ground, and then they got crutches for me; I could not go on the crutches, but I used to get a chair, you know, put my knee on the chair and push it along, and I would get as far as the window and stay there all day long. I never was able to do a thing since in my house. 10

Q Just answer my questions new. A Yes, sir.

Q Prior to this accident did you do your own housework? A I done all my housework. I done everything that was to be done in it—washing and ironing and cooking and going to the store and bringing in everything for the house; and the girls used to go out working and I had everything ready for them when they came in, but one girl has had to stay home and take care of me ever since, and I have had to have a washwoman in the house, which I never done before. 20 30

Q Do you do your own housework now? A No.

Q Have you done it since the accident? A No, sir; I have not been able to; I have been so nervous; I have Doctor Londrigan attending me frequently; last week I had him.

Q What did they do for you after the accident; did they give you medicine that you would take, or did they give you something to rub on your ankle? A Oh, yes; they rubbed a hole on 40

Mary Davis, cross.

me, rubbing stuff on me when I was in bed, and ever since every day they rub on my whole body and when the plaster cast was taken off my foot Doctor Londrigan bandaged it up with a bandage and when the bandage was taken off he ordered it to be rubbed with alcohol every day
 10 twice a day. My daughter done it.

Q And these bills represent the bills for alcohol that you used during that time? A Yes.

(Bill offered in evidence and marked P. 1.)

Q This accident happened on a Sunday morning? A Yes, on a Sunday morning, going to church, about twenty minutes after nine.

Q Had you ever been injured before? A
 20 No, never; I have never fell down before.

Q How old were you then? A Well, sixty-one I would be the August after.

Mr. Heine. 1914.

Mr. Tiffany. Yes, 1914.

Mr. Heine. August of 1914 she was sixty-one?

Mr. Tiffany. Yes.

30 *Cross examination by Mr. Heine.*

Q You never fell down before, you say? A Never. That was the first fall I ever had, and it was a bad one.

Q That is all. A I'm glad to go. I hope I won't have to come here again. All I want is justice.

Catherine Davis, direct.

CATHERINE DAVIS, sworn.

Direct examination by Mr. Tiffany.

Q You are the daughter of the lady who was just on the stand? A Yes.

Q And you were with her at the time of the accident? A Yes. 10

Q Just explain to the jury what happened. A Well, we were going down to mass about ten after nine on March 22, 1914.

Mr. Heine. I object.

Q I do not mean what happened; I mean what happened to your mother after she fell. I do not care anything about how it happened.

A Do you want me to explain what happened?

Q Your mother fell. Now what happened? She broke her leg and had Potts fracture from the fall. 20

Q What did they do with your mother when she was lying on the sidewalk? A They carried her into Keeney's stable.

Q Then what happened? A They sent for the ambulance and the doctor set her leg.

Q Prior to that time had your mother been well and strong, as to whether she carried on her work at home? A Everything she done; done housework, cooking— 30

Q How large a family have you? A There is four of us girls and my mother.

Q Did she do the washing? A Everything; washing and ironing and everything.

Q After the accident did she do it? A The first time we ever had to have a washwoman was after the accident.

Q Do you live in an apartment? A Yes, in a flat. 40

Catherine Davis, cross.

Q What floor? A Second floor.

Q After the accident how long was she in bed, do you recall? A Well, to my knowledge she must have been in bed about eight to ten weeks, about eight to ten, something like that.

10 Q Do you mean in bed or in the house? A Oh, she was in the house until the first week in July. That was the first she went down to the door—from March.

Q During this time was she able to move about everywhere, as an ordinary person— A With the assistance of a chair.

Q And did you also attend her? A Well, I attended her at night when I came home from work.

20 Q Had your mother been sick prior to this accident? A No.

Cross examination by Mr. Heine.

Q Do your other sisters all go out to business? A There is two besides myself go to business. The four of us used to go to business, but there is one stays home ever since this accident.

30 Q Did your mother do the washing before the—your mother 60 or 61 do the washing for you four girls before the accident? A Everything; everything; yes.

Q And all four of you were earning at that time, were you? A We were going to work, yes.

Q At the time she was doing the washing all four of you girls were earning? A Yes; but that was her own wishes to do that.

Therese Davis, direct.

THERESE DAVIS, sworn.

Direct examination by Mr. Tiffany.

Q You are a daughter of Mary Davis that was on the stand before the last witness? A Yes.

Q Did you take care of her after her accident? A I certainly did. 10

Q For how long? A From when she broke her leg to the present day.

Q During the months of March—after the 22nd of March, April, May and June was she able to get around the house? A No; the first time I took my mother out I took her down as far as the front door; I think it was the first part of July. I rubbed my mother's foot—from when it was broke on the 22nd of March it was in splints and the 7th of April the doctor put the plaster cast on, and that was taken off the 16th of May—and I rubbed my mother's leg from that time until the 9th of September with alcohol and bandaged it. 20

Q Pursuant to the doctor's orders? A Yes; the doctor ordered me, and I used to bandage her foot every day, and in the night take the bandage off until the 9th of September.

Q How did your mother get around the house? A We got crutches from the hospital and she used to go around with one leg on a chair, and I used to rub her, and on the 1st of July I managed to get her as far as the door, that was all; she did not go out at all on the street. 30

Q Prior to this accident had she been well and strong apparently? A Well, she certainly was better than anyone in the house.

*Charge to Jury.**Cross examination by Mr. Heine.*

Q At the time your mother was hurt all of you four daughters were working? A We all worked, yes.

Q And she did all the housework? A Yes; she did all the housework.

10 Q For all of you? A Every one of us. Of course I do it now, but I do not do the washing because I am not able to do it myself; we have a woman to do it.

TESTIMONY CLOSED.

Gentlemen of the Jury:

20 In this case the matter that you have to decide is very simple. The plaintiff in the case claims that she sustained a fracture of the fibula, which is the small bone of the leg, and a dislocation of the tibia, which is the large bone, at the ankle, known as a Potts fracture, and she says that she wants to be compensated for all the pain and suffering that she endured by reason of that injury, and also for all the money that she was obliged to expend in endeavoring to alleviate her suffering or effectuate a cure of the injuries

30 which she says were thus inflicted upon her.

Now with respect to the liability of the defendant there is no question in this case. That has been determined in another suit, and the only thing for you to settle is how much should the defendant pay to the plaintiff to compensate her for the injuries which she has suffered because of the fault of the defendant.

40 The law says that the general rule in admeasuring damages in a case of this kind is that you shall give compensation, or payment, so far as

Verdict.

money can be said to pay, for all the injuries which are proven by the greater weight of the evidence to have proximately resulted to the plaintiff from the accident complained of. Entering into the notion of compensation would be first of all payment for the pain and suffering which she has undergone in the past and for such as she will probably undergo in the future, for so long in the future as she will probably undergo them. Now she is obliged to make out by the greater weight of the evidence the nature and the extent of the pain and suffering for which she seeks to recover compensation or payment. For all that she has thus made out she ought to be paid; for any that she has not thus made out of course she ought not to be paid. And secondly she is entitled to be compensated or paid for all the money that she has proven by the greater weight of the evidence that she has expended in endeavoring to effect a cure of any injuries suffered by her in the accident or to alleviate her suffering from any injuries suffered by her in the accident; and when you have arrived at a sum which represents what will compensate her for those elements you will have arrived at your verdict in this case.

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You will take the case now and decide it.

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VERDICT.

The jury returned a verdict on the second trial, for the sum of six hundred (\$600) dollars.

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New Jersey Court of Errors and Appeals

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MARY DAVIS,
Plaintiff-Respondent,

vs.

ANNA TALLON *et al.*,
Defendant-Appellant.

Action at Law.
On Appeal.

BRIEF OF RESPONDENT, MARY DAVIS.

20

This was an action by Mary Davis, against Anna, Mary, Margaret and James Tallon, owners of the premises known as 603-605 Willow Ave., Hoboken, New Jersey, and Richard Schreiber, lessee of said premises.

The premises consisted of a large vacant lot fronting on Willow Avenue, a public highway in the City of Hoboken, and separated from the highway by a high board fence with an entrance or doorway permitting ingress or egress to the public highway, the door or entrance purposely constructed so as to be of sufficient dimensions to permit the passage of wagons (20-20; 70, 10-15), running parallel with the public highway and between it and the fence was a flagstone sidewalk not embedded in the soil, but raised a little above so that the flagstone was higher than the earth on

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each side (82, 25). The lot was leased by the defendants Tallon for the express purpose of storing wagons in, and the said defendants knew that fact, knew that there was only one entrance and that it was necessary to cross the flagstone sidewalk to get to and from the street to the lot (77, 9-20; 70, 7-35; 73, 1-40).

10 On March 22nd, 1914, at about 9:15 A. M., the plaintiff, Mary Davis, a spry and active old lady although 61 years of age accompanied by her daughter, Catherine, who had hold of her arm, was walking south on the public sidewalk parallel with Willow Ave., in the City of Hoboken, and while passing the premises of the defendants was injured by reason of being thrown to the ground through a defect in the flagstone sidewalk, directly caused by horses and wagons passing over it in
20 going into and from the vacant lot, leased, as we have said, for that purpose.

After deliberation the jury returned a verdict in favor of the plaintiff against the defendants Tallon for \$100.00 and in favor of the defendant, Schreiber.

Plaintiff was allowed a Rule to Show Cause why the verdict, in so far as it related to damages, should not be set aside and the Supreme Court at the February term 1917 set the verdict aside and ordered a new trial as to damages only, with the
30 following comment:

40 "The trial judge granted plaintiff a rule to show cause why the verdict so far as it relates to damages should not be set aside and a new trial as to damages granted. We think the damages awarded were inadequate, and that there must be a new trial, and that it should be limited to the question of damages, and that the verdict should stand good in other respects. The rule will be made absolute."

The cause came on again for trial before Hon. William H. Speer and a jury at the Hudson Circuit on September 24th, 1917, and a verdict was returned in favor of the plaintiff, Mary Davis, for the sum of \$600 and against the said defendants, Tallon, and the said defendants now appeal therefrom, not questioning the verdict as to Schreiber or making him a party to this appeal.

10

Five grounds of appeal are assigned, three of which are evidently abandoned, and the third and fourth reasons combined.

Lewis vs. Lewis, 66 N. J. L., 251;
Com. Roofing Co. vs. Palmer Leather Co.,
67 N. J. L., 566.

The printed case and brief are erroneously titled as to parties and the appellant's brief is signed as that of the respondent.

20

The complaint contained three counts, the first two of which charged negligence to the defendants Tallon only, as follows:

First Cause of Action—Record, page 5, paragraph 4:

"4. Defendants, Anna Tallon, Mary Tallon, Margaret Tallon, and James Tallon, by their agents and servants, negligently, carelessly and unskillfully constructed, laid, and maintained a certain cobble or brick passage or roadway, from said Willow Avenue to said lot over said public sidewalk, and, by their agents, lessees, and assigns, caused horses and heavy wagons to pass to and fro upon said passage or roadway from said Willow Avenue into and out of said lot in such a negligent and careless manner that said public sidewalk became and remained broken, and out of repair and danger-

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ous, and was so permitted to remain by the defendants herein for a long space of time.”

Second Cause of Action—Record, page 7, paragraphs 4 and 5:

10 “4. Defendants, Anna Tallon, Mary Tallon, Margaret Tallon, and James Tallon, by their agents and servants, for their own convenience and convenience of their lessees, maintained and constructed across said sidewalk and leading from said street into said lot a certain road or passageway intended for the use of horses and wagons, and other heavy vehicles, and was so used by said defendants, their agents, servants and lessees.

20 “5. That said passage or roadway was so carelessly, negligently and recklessly used and maintained by said defendants, their agents and servants, that it became broken, insecure and dilapidated, dangerous and unsafe, and said defendants knowingly and wrongfully permitted said passageway or roadway so to become and remain.”

The third cause of action brought in the claim as against the defendant Schreiber.

30 The answers amounted to a denial and averment of contributory negligence.

Appellant’s brief concerns itself entirely with the third cause of action, ignoring the respondent’s right of recovery under either or both of the other causes of action pleaded; the appellant’s contention being summed up at page 4 of their brief as follows:

40 “This defendants Tallon contend to be erroneous on the ground that the jury could not

find in favor of the defendant Schreiber to the effect that there was no break in the sidewalk, and also find that the defendants Tallon were liable because in effect such a finding is impossible. If the jury found there was no break the Tallons cannot be held liable for allowing that to be created or to continue which the jury found did not exist.”

10

POINT I.

The verdict is not erroneous or inconsistent and should not be disturbed.

The evidence as to the relation existing between the defendants Tallon and Schreiber is admittedly conflicting and it was open to the jury to find what the facts are and this Court will not disturb such finding.

20

Churchill vs. Stephens, decided at the present term of this Court;
 Voohrees vs. Terhune, 50 N. J. L., 147;
 Alexander Dye Works vs. Roufosse, 57 N. J. L., 700;
 Nelson vs. Bock, 85 Atl. (N. J.), 1009;
 Richardson vs. Kulp, 81 N. J. L., 123.

30

The defendants Tallons unquestionably knew of the use to which the premises were put,—in fact, they constructed the high board fence enclosing their property in such a manner as to include a large doorway for the very purpose of admitting the passing to and from said lot, of horses and wagons.

Bernard J. Decking, agent of the defendants Tallons for leasing said premises, testified as follows at pages 69-70:

40

"Q. I did not ask you that. I did not mean in that relation. Is there anything built on that lot? A. A vacant lot.

Q. What separates it from the street? A. What do you mean?"

By the Court:

10 "Q. Is there a fence or a ditch or what? A. Yes; a fence.

Q. About how high? A. Six feet high.

Q. Six feet high? How high do you say six feet is, in your view? A. It might be eight feet; six to eight feet.

Q. Is there a doorway or an opening in that fence? A. Opening, yes.

Q. How large? Is it built for a horse and wagon to go through? A. Yes.

20 Q. Do you know what the premises were rented for? A. They were not rented at the time.

Q. Do you know what they had been used for, what the gate was constructed there for? A. They used to run wagons in there.

Q. What kind of wagons? A. Butcher wagons.

Q. How many means of getting in and out of this yard were there? A. Just one.

30 Q. Through this fence? A. Through this entrance.

Q. And this entrance here leads out to Willow Avenue? A. Willow Avenue.

Q. What is there from this entrance way to the public street? A. The walk.

Q. What is it made of? A. Flagstones."

The defendant Mary Tallon testified at page 77 as follows:

40 "Q. Who had charge of it before Mr. Decking? A. I did.

Q. Did you lease it to Mr. Mooney? A. Mr. Mooney had no lease; he paid monthly payments.

Q. Did you rent it or let the privilege of using it for the monthly payments? A. Yes.

Q. Did you know what he was using it for? A. Yes; I knew he had it for his wagon to go on.

Q. To keep his wagon in; is that right? A. Yes. 10

Q. Do you know how many entrances there were to that lot? A. One.

Q. That was on Willow Avenue? A. Yes.

Q. Over the sidewalk to the street? A. Yes."

Mr. Mooney testified he kept his wagons there prior to the accident.

Richard Mooney, page 72, etc.: 20

"You are a contractor and builder in the City of Hoboken? A. I am not. I am in the butcher business.

Q. Do you know the premises 603 Willow Avenue? A. Yes, sir.

Q. In your butcher business do you employ horses and wagons? A. I do.

Q. Did you ever keep those horses and wagons at 603 Willow Avenue? A. I kept no horse there; I just put my wagons in there. 30

Q. How did you get your wagon in there? A. Through the gate. Through the gateway on Willow Avenue.

Q. From Willow avenue? A. Yes.

Q. Over the sidewalk? A. Yes, sir.

Q. How many wagons do you keep? A. One.

Q. How often did you take it in and out of there? A. Probably once a day.

Q. That is you would bring it out and put it in? A. Yes, sir.

Q. Did you pay rent for these premises? A. Yes.

10 Q. Whom did you rent them from? A. Miss Tallon."

James Keeney at page 89:

"Q. Did you ever see any horses and wagons go over that sidewalk? A. Yes.

Q. Whose were they, do you know? A. Mr. Whalen's.

Q. Any others? A. Only Mr.—

20 Q. You never saw any wagons? A. Only Mr. Mooney's and Mr. Whalen's."

At the time of the accident the sidewalk was in a bad condition, the flags being broken and cracked. Catherine Davis at page 43, line 24:

"Q. In pretty bad condition there, wasn't it, that sidewalk? A. Well, it is not in very good—yes; it is in bad condition all the time."

Page 45, line 7:

30 "Q. Was it a month or a year or six months before the accident that people used to speak about the condition of the sidewalk? A. We are only living up that way seven years and for the past year or so I would hear people remark about it."

Page 45, line 26:

"Q. Well, do you know, or don't you know? A. It was in a bad condition. Everybody used

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to remark it. That is all I can say; different people would remark it.

Q. And it was so bad everybody used to say it was bad; is that right? A. Not every—I can't say everybody. How can I say everybody? How can I say such a thing? I want to be truthful about it."

Certainly the appellants are not serious when they contend that they could not have reasonably anticipated such use of the sidewalk would cause the flagstones to break and crack. Any reasonable person would anticipate such result and were this not so, the broken condition had remained such a length of time that the appellants should have known of this condition of affairs.

True, the lease (D-1) is silent as to the use of the land, but we have the testimony as above set out, and as appears by the record, as to the use which the premises were to be put, and it is sufficient to charge the appellants with notice and the jury so find from the evidence.

Can it be maintained then, that the jury should not have found that the breaking of the sidewalk by the agents, servants or lessees, was such a result of the use of the premises as the lessor was bound to know was necessary, contemplated or probable. *Freeholders of Hudson vs. Woodcliff Land Co.*, 74 N. J. L., at page 361.

We say the answer should be an emphatic "No."

Then under the cases last cited and those mentioned therein, the lessor is liable and the verdict should not be disturbed.

The written lease expressly reserves to the Tallons the right to enter and make repairs (Exhibit D-1, page 134, 30). Hence it cannot be argued that the cause of the accident arose after the let-

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ting of the premises and the lessor was not liable because it was the lessee's duty to repair. The Tallons had the legal means of abating the condition; in fact, having leased the property for the specific purpose which caused the break, they should have so constructed the walk that the passing over it of wagons would not cause it to break and become dangerous. The case is clearly distinguishable from that dictum in *Freeholders of Hudson vs. Woodcliff Land Co.*, *supra*, cited by the appellants, and in that very case the Court said:

10 "We can see no distinction in principle between the liability of the lessor who demises premises with an already existing nuisance and the liability of a lessor who demises premises for a purpose the necessary result of which is a nuisance, and the case is much stronger against a lessor who demises

20 premises for the very purpose of creating a nuisance. In such a case he participates in the creation of the nuisance, either by authorizing it or by making the act of the tenant his own. It would be manifestly wrong to allow the lessor to escape liability merely by demising the premises in order the nuisance might be the original act of the lessee only. The authorities sustain this position. One of the early cases is *Fish vs. Dodge*, 4 Den., 311, where Chief Justice Bronson likened the case to that of

30 a man who might be indicted and punished for keeping a bawdy house where he had rented a tenement for that purpose. Other cases to the same effect are *House vs. Metcalf*, 27 Conn., 640; *Jackman vs. Arlington Mills*, 137 Mass., 277; *Samuelson vs. Cleveland Iron Co.*, 49 Mich., 164; *Fow vs. Roberts*, 108 Pa. St., 489. The more recent case is found in the English reports. *Harris vs. James*, 45 L. J., Q. B., 545. It has been held, with equal reason, that where the nuisance is created by

the lessee with the license or consent of the lessor, the later is liable. "Twiss vs. Baldwin, 9 Conn., 291; Riley vs. Simpson, 83 Cal., 217."

POINT II.

The jury could properly find, under the evidence, in favor of the respondent, Mary Davis, and against the Tallons, but not against Schreiber. 10

As we have shown under Point I, the Tallons leased the premises for the express purpose of storing wagons; constructed the fence so that it contained a wagon entrance, in fact, the only entrance, and one which of necessity required the passing over the flagstone sidewalk.

The premises had been used by Whalen and Mooney, and on the very day of the accident, wagons were stored there. 20

Catherine Davis testified that at the time of the accident she was placed on a chair in these very premises and saw wagons stored there on that day.

Pages 20-21:

"Q. Where did you go immediately after the accident? A. After the accident I went in with my mother while the doctor was setting her leg. 30

Q. Before you went with your mother did you go anywhere? A. Yes, they brought me over to the lot and gave me a seat.

Q. Where was it they gave you a seat? A. Over where those wagons were, over in the lot; they got a chair and sat me down and Doctor Callery put a needle in my arm. 40

Q. You say in the lot. Do you mean the place in front of which your mother fell? A. In front of which my mother fell; they set me over there.

10 Q. Were you in a position to see anything of the lot? A. I don't remember much about the lot, but I remember seeing wagons in it; I was too excited to take notice of what wagons were there."

Schreiber's wagon was seen going there eight days before the written lease.

20 The jury found that the sidewalk was defective by reason of the crossing of wagons. That wagons did cross was not disputed, and any sane person knows that wagons driven over a flagstone sidewalk will crack and break it. The walk had been repaired some time in December, 1913 (page 95), and stone walks do not become broken in a short time without such rough and unusual usage.

The finding that the sidewalk was defective cannot be questioned.

30 Schreiber said he didn't go in until April 1st, as a tenant. Whether the jury believed this or not is immaterial to plaintiff's case, for under the pleadings, the jury was justified in finding that the Tallons had caused the premises to be used to store wagons, had reserved the right to enter and repair and that Schreiber should not be held liable for doing the very thing for which the Tallons leased the premises.

It certainly needs no suggestion from us to differentiate this case from that class embodying actions against a railroad company and engineer jointly where it has been held that to absolve the engineer was to discharge the railroad company.

If Schreiber had not been made a defendant, would not the verdict be justified? We think so.

The nature of the cause of the broken sidewalk takes the case out of the usual sidewalk decisions and places it in that class spoken of by *Dixon, J.*, in *Weller vs. McCormick*, 47 N. J. L., at page 398, as follows: "It must be conceded that ordinarily, when a person, for his private ends, places or maintains, in or near a highway, anything which, if neglected, renders the way unsafe for travel, he is bound to exercise due care to keep it from becoming dangerous," and again, in *Rupp vs. Burgess*, 41 Vr., at page 9, Chief Justice Gummere says: "The rule is settled that when an abutting owner, for his private ends, places or maintains, in a public highway anything which, if neglected, will render the way unsafe for travel, he is bound to exercise due care to prevent it becoming dangerous, and that his failure to do so will render him liable for injuries received by a person passing along the highway, resulting from that neglect."

The use to which the sidewalk was put by the very act of the Tallons in renting the abutting premises made incumbent on them to see that the sidewalk was maintained in a safe condition, especially when they retained the right to enter and to repair, and they are liable for such neglect.

"Whenever an owner is bound to repair his building and has control sufficient for that purpose, he, and not the tenants, is liable to a third person for damages arising from a neglect to repair."

Gellvon vs. Reilly, 50 N. J. L., 26;
Siggins vs. McGill, 72 N. J. L., 263;
Littlefeld vs. Maine Cent. R. Co., 71 Atl.,
 656;

Kirby vs. Boylston etc. Asso., 14 Gray
(Mass), 249;

Larue vs. Farren etc. Co., 116 Mass., 67.

The fact that the Tallons were to repair the sidewalk is emphasized by the clause in the lease that Schreiber was to clear it of ice and snow.

10 It is absurd to contend that the Tallons did not know the use to which the land was to be put in face of the testimony of Anna Tallon and Decker, supra.

20 The appellants speak much and often of the charge of the Trial Judge wherein he said in speaking of the break in the sidewalk. "If she was injured by some other break there could be no recovery *against Schreiber and the Tallons*. It seems to us that under the evidence and pleadings that the meaning of this language is perfectly obvious, to wit, that if a verdict was to go *against Schreiber AND the Tallons*, they must find that Schreiber made the break, otherwise Schreiber must be found not guilty. Surely, the Court never meant to charge that if the Tallons had caused this break by using the sidewalk for the passage of the wagons of their agents, servants or lessees, other than Schreiber, that the plaintiff could not recover as against them. If he had, would he not have used the word "or" rather than the conjunction "and"?

30 The tort here was, as to the first two counts, clearly of the Tallons only, and as to the third count, not such as required a verdict against both or neither.

There was ample evidence from which the jury could find that the Tallons were using the property for the storage of wagons before Schreiber's entrance under the lease. Catherine Davis testified as to wagons being there on the day of the ac-

cident, and this statement was undenied or explained.

A verdict should be construed with extreme liberality and, if possible, it should be allowed to stand.

Small vs. Hicks, 81 Ga., 691; 8 S. E., 628;

Weidermann vs. Sandusky, 15 Ill., 59;

Missouri P. R. Co. vs. Kingsbury, Tex. 10

Civ. App., 25 S. W., 322.

POINT III.

The appellants waived their right to appeal from the original judgment by taking no steps in respect thereto until after the second trial.

Upon the return of the verdict in the first instance in favor of the plaintiff and against the appellants herein for \$100, and in favor of the defendant Schreiber, the plaintiff took a rule to show cause why the judgment should not be set aside as to damages only. 20

On the return of the rule the defendants Tallons appeared and argued the rule on brief, and it was made absolute; the cause was then set down for trial again as to damages only and the defendants Tallons appeared and cross-examined plaintiff's witnesses and summed the cause up to the jury. 30

The second trial was on September 24th, 1917 (Record, page 137), and the notice of appeal was served October 22nd, 1917 (Record, page 1).

The appellants are now estopped by their awaiting the result of the rule to show cause and their participation in the new trial as to damages wherein they were the sole defendants, to now raise the 40

question as to whether or not the original judgment was erroneous in view of the fact that the judgment was in favor of Schreiber, or raise any questions as to the first trial.

10 It would be inconsistent for this Court to now allow the appellants to question their liability where they have unquestionably acknowledged their liability by not questioning the original judgment against them until after the second trial. Appellants have seemingly endeavored to take advantage of any change that might have been in their favor with the second verdict as to damages, and then if the verdict was not satisfactory, to ask this Court to set the original verdict aside. We submit by reason of their delay and in taking part in the second trial without having taken any steps whatever to correct the original judgment, if they 20 believed it erroneous, they are now estopped to assign errors on the original trial.

The appellants did not, by rule, motion or otherwise, question the verdict at the Trial Court, and now raise the question for the first time.

30 "A party may not only waive his rights to appeal or maintain proceedings in error by express agreement or stipulation, but a waiver may also be implied from, or he may be estopped by, an act or agreement which is inconsistent with such right."

3 C. J., 664, par. 535.

40 "If a person voluntarily acquiesces in, or recognizes the validity of a judgment, order or decree, or otherwise takes a position which is inconsistent with the right to appeal therefrom, he thereby impliedly waives his right to have such judgment, order or decree reviewed by an appellate Court."

3 C. J., 665, par. 536, and cases cited thereunder.

“As a general rule any act on the part of a party by which he expressly or impliedly recognizes the validity of a judgment, order or decree, against him, operates as a waiver of his right to appeal therefrom, or to bring error to reverse it.” 10

3 C. J., 669, par. 542.

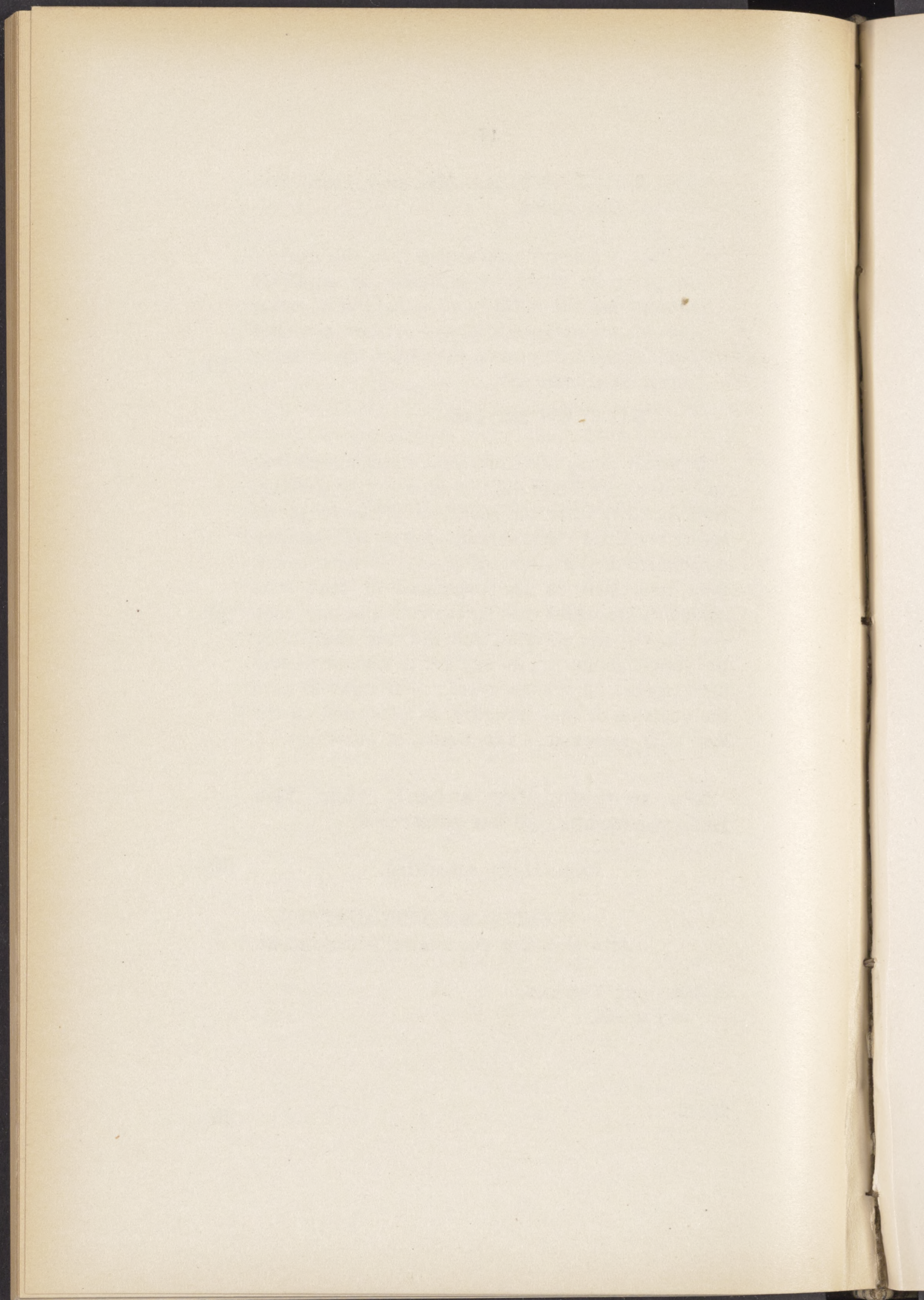
It would seem, therefore, to the respondent that where the appellants did not in any wise question their liability after the rendition of the judgment before the Trial Court and sat quietly by while the respondent herein obtained a rule to show cause, then took part in the argument of that rule, abided by the order making the rule absolute, took part in the second trial, and did not, until after the second judgment, do any act to take or perfect their appeal, they have waived their right to have the question of their liability, as presented on the first trial, reviewed in this Court, or elsewhere. 20

We respectfully submit that the judgment should be affirmed.

Respectfully submitted, 30

WELLER & LICHTENSTEIN,
Attorneys for the Plaintiff-Respondent.

J. RAYMOND TIFFANY,
of counsel.



New Jersey Court of Errors and Appeals

MARY DAVIS,
Plaintiff-Appellant,

vs.

ANNA TALLON, *et al.*,
Defendants-Respondents,

*Action at
Law.*

*On Appeal
from the
Supreme
Court.*

HUDSON COUNTY CIRCUIT, before HONORABLE
WILLIAM H. SPEER, *Circuit Judge.*)

Brief of Respondents.

Abstract of Case.

This action was instituted by the plaintiff in the Supreme Court, Hudson County Circuit, to recover damages for personal injuries against Anna Tallon and others as owners and landlords of certain premises in Hoboken, and against Richard Schreiber, as lessee of said premises, on account of their alleged negligence in breaking a portion of the sidewalk in front of the premises and allowing same to remain in said broken condition. The case came to trial on the plaintiff's amended pleadings and was tried before the Honorable William H. Speer, Circuit Judge, and a jury on November 13, 1916, when the jury returned a verdict for the plaintiff, of One Hundred Dollars against the defendant, Anna Tallon, *et al.*, and a verdict in favor of the tenant, defendant Schreiber.

Plaintiff then took a rule to show cause why the verdict should not be set aside as inadequate to the Supreme Court on the ground that the

said verdict was inadequate, and the case coming on to be heard at the February term the verdict was set aside as inadequate and a new trial ordered as to damages only. This trial came on before Hon. William H. Speer, Circuit Judge, on the 24th day of September, 1917, and resulted in a verdict in favor of the plaintiff and against defendants, Tallon, in the sum of Six Hundred Dollars (\$600), upon which judgment was entered and defendants appealed therefrom.

Grounds of Appeal.

1. Because the Court refused to grant defendants' motion to non-suit the plaintiff.
2. Because the Court refused to grant defendants' motion to direct verdict in favor of the defendants, against the plaintiff.
3. Because the jury found a verdict contrary to the charge of the Judge of the trial court.
4. Because the jury found a verdict contrary to the law and weight of the evidence.
5. Because the damages awarded by the jury, in the trial for damages only, were excessive.

Brief of the Argument.

Defendants Tallon are the owners of a certain building and adjacent lot known as No. 603-605 Willow avenue, in the City of Hoboken, County of Hudson and State of New Jersey.

On the last Saturday in March, 1914, (28th of March), defendants Tallon, representing the estate of James Tallon, made a written lease of said premises to defendant Schreiber (case, pp. 109, 94 and p. 94; Exhibit D. 1) for the term commencing April 1, 1914, and ending on April 1, 1919. The tenant, defendant Schreiber, moved

in and took possession of the premises on April 1, 1914 (Case, p. 94). The business of defendant Schreiber was that of a mason and builder. The accident happened on the 22nd of March, 1914. Plaintiff's testimony was that a wagon of defendant Schreiber's sometime in February or March, 1914, was driven over the sidewalk in front of these premises, and that this wagon, loaded with building material, caused a particular stone in the sidewalk to break (Case, p. 79; ll. 30-40; p. 106, ll. 30-40). The plaintiff's testimony is that she tripped at this broken place in the sidewalk and so received her injuries.

Plaintiff's contention is that although the written lease was March 28th and the accident on March 22nd, the tenant had been allowed to use the premises and that the actual lease had been made before the date of the written instrument. (Case, p. 120).

The break in the sidewalk over which plaintiff fell having been made by the defendant Schreiber's wagon, plaintiff contended for recovery against the landlord, defendants Tallon; that at the time of leasing the premises to Schreiber they must have reasonably anticipated, in the exercise of reasonable care, that the use which Schreiber would make of the demised premises would be likely to cause the break which plaintiff's witness testified was caused by Schreiber's wagon, or that Schreiber's wagon having broken the sidewalk, defendants Tallon allowed this condition to continue.

As the Court says in his charge (Case, p. 125; l. 20): "If she (plaintiff) was injured by some other break (than the special and particular break testified to have been made by Schreiber's wagon) there could be no recovery against Schreiber and the Tallons," and the Court

continued that the entire case depended upon the testimony of plaintiff's witness, Ward, "who swears that sometime in the latter part of February or the early part of March, 1914, he actually was there and he saw the wagon make the break in the sidewalk."

It is obvious that unless the particular break referred to was made by defendant Schreiber's wagon, in which case he would be liable, there could be no recovery against defendants Tallon. The jury found in favor of defendant Schreiber against the plaintiff, which, on the issue of whether or not his wagon made the break in the sidewalk, was a finding that Schreiber's wagon did not make the break, but the jury found in favor of the plaintiff against defendants Tallon—the Tallon estate.

This defendants Tallon contend to be erroneous on the ground that the jury could not find in favor of the defendant Schreiber to the effect that there was no break in the sidewalk, and also find that the defendants Tallon were liable because in effect such a finding is impossible. If the jury found there was no break the Tallons can not be held liable for allowing that to be created or to continue which the jury found did not exist.

Point I.

The verdict is erroneous and inconsistent in that it should have been against both the defendants or in favor of both the defendants, and that the jury cannot properly absolve the tenant from negligence and hold the landlord liable.

The case at bar hinges upon three questions: (1) Was there at the time of the accident a lease between the defendant, Tallon Estate, and the defendant, Schreiber? (2) If there was such a lease of the demised premises, did the

defendant, Schreiber, in the operation of his wagon, break the sidewalk? (3) Should defendants Tallon have reasonably anticipated that the use to which the premises were to be put under the lease by Schreiber would be likely to result in such a break on the sidewalk?

1. WAS THERE AT THE TIME OF THE ACCIDENT A LEASE BETWEEN THE DEFENDANT, TALLON ESTATE, AND THE DEFENDANT, SCHREIBER?

The testimony under this head need not be reviewed in detail. It was conflicting. Defendants, by their agent, witness Decking, testified that the lease was signed the last Saturday in March—March 28th, and that possession and the key were not given to the tenant, Schreiber, until April 1st. (Case p. 112.) Defendant Schreiber testified that he did not go into possession until April 1st. (Case, p. 112; l. 20), and did not until or after that date drive any wagons in or out of said premises. Plaintiff's testimony, by a single witness, Ward (whose testimony is brief and furnishes interesting reading as to his credibility, case, p. 79; ll. 30-40; p. 105, p. 106; ll. 30-40), is that he saw Schreiber's wagon drive across the sidewalk and break it the latter part of February or the latter part of March, or early in March. From this slim inference the Court instructed the jury that they might find that there was a lease in operation before the date of the written instrument.

The jury by their verdict found that on March 22nd—eight days before the written lease—there was a lease of these premises from the Tallon estate to defendant Schreiber, and so far as the case is concerned this must be taken as a fact.

2. IF THERE WAS SUCH A LEASE OF THE DEMISED PREMISES, DID THE DEFENDANT, SCHREIBER, IN THE OPERATION OF HIS WAGON, BREAK THE SIDEWALK?

This is a very narrow question and rests absolutely upon the testimony of one witness—plaintiff's witness, Ward, who testified in answer to questions by the Court:

“Q What did these wagons do to the sidewalk? Did you see them do anything?

A Yes. Q What? A They had a load of building material and the wagon caused the stone to break. Q Did you see that done? A Yes. Q And you saw that was done by Schreiber's wagon? A Yes, sir, positively.” (Case, p. 79; ll. 30-40.)

“Q How deep was the crack, do you know? A Why, the flag was broke entirely in half. Q How wide was the crack? A Why, the crack must have been a foot and a half or so. Q Exactly in the center? A Yes. * * *. Q A foot and a half wide. A Yes.”

This witness also swore that the accident happened on March 27th, although the plaintiff and all the other witnesses fixed it as March 22nd, and his interesting colloquy appears at p. 107.

The case is absolutely devoid of other testimony in regard to the break in the sidewalk on which plaintiff claimed that she fell, and the Court, in its charge (Case, p. 125), says:

“That this break is alleged to have been made by Schreiber—this particular break upon which this woman claims to have received her injury, to have been made by his wagon while he was driving

his horse and wagon over that flag, while the wagon was in charge of his servant. If she was injured by some other break there could be no recovery against Schreiber and the Tallons. That is the whole case, as it depends upon the testimony of the witness, Ward, who swears that sometime in the latter part of February or the early part of March, 1914, he actually was there and he saw the wagon make the break on the sidewalk and that it was a wagon with the name, 'Richard F. Schreiber' on it, with the address of that Mr. Schreiber, and he says he could not be mistaken about that thing. Now it is for you to say whether Mr. Ward is telling the truth about that thing, whether he is accurate or whether he is mistaken. It was perfectly manifest that Mr. Ward could be mistaken about some things, because Mr. Ward was mistaken about one thing."

If Schreiber's wagon made this particular break he was liable. If it did not make this particular break he was not liable. The jury found that Schreiber was not liable, and therefore it must be accepted as an absolute fact in this case, found by the jury, that no such break as was described by the witness, Ward, was made by Schreiber's wagon.

3. SHOULD DEFENDANTS TALLON HAVE REASONABLY ANTICIPATED THAT THE USE TO WHICH THE PREMISES WERE TO BE PUT UNDER THE LEASE BY SCHREIBER WOULD BE LIKELY TO RESULT IN SUCH A BREAK ON THE SIDEWALK?

Whether the defendants Tallon could be expected to have reasonably anticipated that the

use of the demised premises by Schreiber would be likely to cause a break, which is the theory of the plaintiff in this case, or whether, such a break having been made by Schreiber, the defendants unreasonably and carelessly allowed the sidewalk to remain in a broken condition, after notice or during a period long enough to give them constructive notice is academic, in view of the previous finding of fact by the jury that there was no break.

The Court recognizes this in his charge, where he says, as above quoted, that unless Schreiber was found guilty of having made this particular break there could be no recovery "against Schreiber *and* the Tallons." (Case, p. 125; l. 20.) "The essential facts in the case that the plaintiff must make out by the greater weight of the evidence if she is to recover is that Schreiber was actually the lessee or tenant of these premises prior to the time of the happening of this accident, *and* while such lessee that Schreiber drove his wagon, in charge of his servant, over the flagstone and broke the flagstone, as is claimed by the plaintiff, because the only charge is that the defendant leased and rented said premises to the defendant, Richard Schreiber." The jury found, and quite properly, as can be gathered by reading between the lines of the charge (p. 125, l. 30, p. 126) that the witness Ward was a liar, and that Schreiber's wagon never broke the sidewalk, as he testified, and the plaintiff's recovery being predicated upon the proof of this particular break and having failed, there is absolutely no theory of law upon which defendants Tallon can be held, and the verdict is simply cumulative evidence of the passion and prejudice of juries so frequently manifested to the prejudice of defendants.

It is submitted that the jury erroneously found the Tallons liable.

Point II.

Defendant Tallon on the evidence should not be held to have reasonably anticipated that any use would be made of the demised premises by defendant Schreiber which would tend to break the flagstones of the sidewalk.

The lease, Exhibit D. 1, p. 134, discloses no use to which defendant Schreiber, was to put the demised premises. The fact that defendant Schreiber, was a mason and builder and that the demised premises were a vacant lot, with a gateway in the middle, the natural inference that he might wish to use this vacant lot for the storage of materials is insufficient in law to charge defendants Tallon, with any reasonable expectation that the lessee would in any way improperly use the premises.

The plaintiff's witness, Whalen, testified that at one time he had leased these premises and stored material there, and that he "backed the wagon up to the curb and carried stuff across the curb * * *. I never took my wagons in there. That is a 25-foot lot." The small size of the lot would, if anything, indicate to the lessor that it would be unlikely for a tenant to attempt to drive a horse and wagon in.

It is true that plaintiff's witness, Mooney, said that he drove wagons in there when he was lessee of the premises, but no notice of this to the defendants Tallon, is shown, and no damage to the sidewalk by said practice.

Further, there is absolutely no evidence of any notice to defendants Tallon, that Schreiber drove his wagons in over the sidewalk, or that he intended to so use the premises. It is sub-

mitted that a careful examination of the evidence fails to support the finding of the jury that it was within the contemplation of the lessors, defendants Tallon, that Schreiber might so use the premises as to break the sidewalk. Such being the case, under the established rules of law in this State, there can be no liability on the part of the defendant for the act of the lessee. As the Court says in *Freeholders of Hudson v. Woodcliff Land Co.*, 45 Vr., at p. 360, where blasting by a stone company caused the soil of a road adjacent to the property to cave by reason of the blasting, etc., done by the stone company:

“The acts which resulted in that injury were not the acts of the defendant, but of its lessee—the Clinton Point Stone Company.”

“This Court has held in *Ingwersen v. Rankin*, 18 Vr. 18, that if a nuisance is created during a term already existing no liability falls on the landlord pending that term, for the reason that he has no legal means of abating the nuisance, and it seems to be settled in the English courts that where the nuisance arises solely from the act of the tenant during his term the landlord cannot be held liable.”

And this Court has said in *Durant v. Palmer*, 5 Dutcher, p. 544:

“There are cases in which the tenant alone is liable, but it is in those cases in which the nuisance results from some act or negligence of the tenant, and not of the landlord, as if he left open a cellar door or a coal hole, or suffered a nuisance to exist for want of repairs.”

Schreiber, under his lease, agreed “to preserve the said premises and surrender them at

the time aforesaid in as good condition as the proper use thereof will admit, damage by the elements excepted."

In *Union Brass Manfg. Co. v. Lindsay*, 10 Ill. App. 83, where the railing around an area between a sidewalk and a building gave way and caused one who was leaning against it to fall into the area several feet below the sidewalk, the tenant having covenanted to make all repairs, and plaintiff having failed to prove that the railing was defective at the time the lease was made, the landlord was not liable for the injury. This is but an illustration of the application of the law in our own State, and the proof in the case at bar affirmatively shows that the premises were not in a defective condition at the time of the lease, for the plaintiff's case is made to rest on the alleged breaking of the sidewalk by Schreiber after the lease was made.

It has been held that the landlord is not liable where the plaintiff had fallen into a coal hole, which was used only in connection with the basement, and where plaintiff failed to show either that the hole as originally constructed was a nuisance, or that it was in a dangerous condition when the premises were leased, the basement being wholly in the control of the tenant. *West Chicago Masonic Assn. v. Cohen*, 192 Ill. 210.

55 L. R. A. 235.

Johnson v. McMillan, 69 Mich. 36.

Adams v. Fletcher, 17 R. I. 137.

Stewart v. Putmann, 127 Mass. 22.

Frischberg v. Hurter, 173 Mass. 22.

Wolf v. Kilpatrick, 101 N. Y. 146.

Kilroy v. St. Louis, 242 Mo. 79.

Point III.

It is respectfully submitted that the judgment against defendants Tallon, should be reversed and final judgment ordered in their favor, against the plaintiff.

Respectfully submitted,

M. CASEWELL HEINE,
*Attorney for and of Counsel
for Defendants-Respondents.*

