

NOTICE OF APPEAL

Filed December 3, 1918.

HUDSON COUNTY CIRCUIT COURT.

EDWARD J. MANN,
Plaintiff,

vs.

MAX BALENE ET AL.,
Defendants.

Action at Law.

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NOTICE OF APPEAL.

To Alexander Simpson, Esq., Attorney for the
Plaintiff:

Take notice, that the defendant, Harry J. Max, 20
appeals to the Court of Errors and Appeals from
the whole of the judgment entered in this cause on
the following grounds:

1. Because the Court refused the defendant's
motion to non-suit.

2. Because the Court refused defendant's motion
to direct a verdict.

3. Because the following questions were admit-
ted over the objection of the defendant: 30

"Q. Did you take out a policy of insurance to
protect yourself from suits by accidents, which in-
cludes this very scaffolding?"

"Q. Didn't you have such a policy to protect
yourself on this very scaffold?"

"Q. Didn't you have a policy of insurance to
protect yourself upon this very scaffold, from suit?"

RUNYON & AUTENRIETH,

Attorneys for Appellant.

Dated November 29th, 1918.

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EDWARD J. MANN—Direct

TESTIMONY.

HUDSON COUNTY CIRCUIT COURT.

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EDWARD J. MANN,

vs.

MAX BALENE ET AL.

} *At Law.*

Tried October 2, 1918, before CUTLER, J., and a jury.

ALEXANDER SIMPSON, for the plaintiff.

20 RUNYON & AUTENRIETH (Mr. Autenrieth), for the defendants.

EDWARD J. MANN, sworn.

Direct examination by Mr. Simpson.

Q. Where do you live, Mr. Mann? A. 102 Baldwin avenue.

Q. How old are you? A. Forty years.

Q. On the 11th of October, 1915, were you walking along Tonnele avenue? A. I was.

30 Q. About what time of the day or night? A. I was on my way home around midnight.

Q. Did anything happen to you? A. In walking along the street I was struck on the head.

Q. Where? A. On Tonnele avenue, this side of the Pennsylvania cut, between—

Q. About where was it located? About what is the exact location? A. About sixty feet this side—sixty feet toward Broadway on Tonnele avenue.

40 Q. What happened to you when you struck your head? A. That is all I remember is when we came to in the hospital.

EDWARD J. MANN—Direct

Q. Was anybody walking with you? A. I was alone.

Q. What time do you say it was? A. Between eleven and twelve at night I should judge.

Q. What was your condition when you came to? A. Severe pains in head and blindness, and almost blindness and back— 10

Q. How long were you—what else? A. And my back.

Q. How long were you in the City Hospital? A. Two weeks.

Q. And then where did you go? A. I was taken home; I was attended by Dr. Flaherty.

Q. How long did he attend you? A. At least four to six weeks.

Q. What was your business at the time you were hurt? A. I had been in business with my father; in the butcher business. 20

Q. How much did you earn? A. My salary was twenty dollars a week besides the meat my father gave me which amounted to about twenty-eight dollars a week.

Q. That is the meat he gave you? A. Yes, including that.

Q. How long were you away from business, do you say? A. After the accident? 30

Q. Yes. A. I had no business; I went to no business for practically a year.

Q. Why not? A. Because I wasn't capable of doing any business.

Q. Why weren't you capable? A. I was nervous and could not control myself.

Q. In what way couldn't you control yourself? A. Why dizziness and nerves—nervousness.

Q. Had you ever been troubled with dizziness and nervousness before? A. Never before.

Q. As to your eyesight, how was that at the time 40

EDWARD J. MANN—Direct

of the accident? A. Previous to the accident, perfect.

Q. What was it after the accident? A. My glasses proves that. After the accident—

10 MR. AUTENRIETH—I object.

A. It is necessary to go to opticians.

THE COURT—Yes; strike it out.

Q. Do you ever wear glasses before the accident?
A. Never.

Q. Why did you wear glasses after the accident?
A. Because my eyes calls for it.

20 Q. You cannot say that. What was your condition? Describe the condition of your eyes. A. The condition of my eyes was blurriness.

Q. When you put on the glasses is that blurriness taken away? A. It relieves it.

Q. Who was it prescribed the glasses for you? A. Dr. Flaherty.

Q. Did you have any expense for doctor? A. Yes.

Q. What expense did you have for a physician?

30 MR. AUTENRIETH—I object unless the doctor will afterward testify to it; on the ground that it must be shown to be reasonably necessary.

THE COURT—Quite true. But it is one of the elements, and I will allow it.

A. The expense of doctor attending me while I was at home was over \$50 for doctor's expenses.

40 Q. Did you have a nurse? A. I was taken care of by my wife.

EDWARD J. MANN—Cross

Q. Did you have a nurse or did your wife nurse you? A. My wife nursed me.

Q. Did you have any expense for medicines? A. Yes.

Q. How much? A. Well, I didn't keep tabs on them or anything, but it was quite expensive. 10

Q. Then you don't know? A. I told my doctor what it was.

Q. What time of night did this accident happen? A. Between eleven and twelve.

Q. You were walking along Tonnele avenue, you say? A. Yes.

Q. What side? A. On the west side of Tonnele avenue.

Q. Going in which direction? A. Toward Broadway. 20

Q. How far had you proceeded before you were struck? A. I judge about sixty feet.

Q. Along Tonnele avenue? A. Tonnele avenue.

Q. Going towards Broadway? A. Yes.

Q. On the west side? A. Yes.

Q. And the next thing you knew when you came to in the city hospital? A. Yes.

Cross-examination by Mr. Autenrieth.

Q. You say, Mr. Mann, that you were coming home from work? A. No; I wasn't coming home from work; I was coming home from after being out for a walk in the evening. 30

Q. What time in the evening did you start out for a walk? A. Around eight o'clock.

Q. You were out from eight until some time between half-past eleven and twelve? A. Yes, sir.

Q. When the accident happened? A. Yes.

Q. Walking all the time? A. No; not all the time; called on a friend.

Q. Called on a friend? A. A Mr. Berger. 40

EDWARD J. MANN—Cross

Q. Stop anywheres in this period of time? A. Why, yes, I stopped.

Q. Where did you stop? A. Stopped in Berger's, Summit avenue, that is, Summit avenue and Manhattan avenue.

10 Q. What is that place? A. Stopped in and had a glass of beer.

Q. Saloon, isn't it? A. Yes; a saloon.

Q. Why didn't you say so? What time of the night did you stop there? A. It was quarter after—around quarter after—probably half-past nine, after leaving my friend's house.

Q. After leaving your friend's house. Did you stop again before you got back to the place of the accident? A. Yes; walked along the Boulevard.

20 Q. Where did you stop the next time? A. And stopped and had another glass of beer.

Q. Another glass of beer. Where was that? A. That was probably six or seven blocks above Manhattan avenue on the Boulevard.

Q. The first time you stopped did you have only one glass of beer? A. Only one glass of beer.

Q. And how about the second time? A. One glass of beer.

30 Q. Only one. Between the time you stopped in the first place and the time you stopped in the second place were you coming towards home? A. No, sir; I was walking from home.

Q. Walking from home? A. Yes.

Q. About what time of the evening was the second glass? A. Around ten o'clock, ten-fifteen or something like that.

Q. How long were you in this first place? A. Long enough to drink a glass of beer.

Q. Is that all? A. Yes.

40 Q. How long were you in the second place? A. The same.

EDWARD J. MANN—Cross

Q. Just long enough to drink one glass of beer?

A. Yes, sir.

Q. Alone, were you? A. No; I had a friend with me.

Q. Berger was with you? A. Berger was with me.

10

Q. And after you stopped at the second place where did you stop next? A. We walked for home.

Q. You walked for home. Well, I asked you if you were on your way home? A. Well, I answered that question and I walked from the first place, I walked from—yes, from there we started for home.

Q. Well, you left your house, you say, in the evening about eight o'clock? A. Around eight o'clock I should judge, yes.

20

Q. This was what time of the night that you stopped at the second place? A. Around ten, ten-thirty, ten-fifteen, something like that.

Q. Then you started for home. Did you stop again? A. Made one stop after that.

Q. Only one? A. Only one stop, yes.

Q. I say only one? A. One, I said.

Q. Sure it was only one? A. Positively.

Q. Where did you stop then? A. Corner of West Newark avenue and Tonnele.

30

Q. That is another saloon? A. Yes.

Q. This time how long did you stay there? A. Long enough to drink a glass of ginger ale.

Q. This stop was measured by a glass of ginger ale, eh? A. Yes.

Mr. SIMPSON—I object to the form of the question.

THE COURT—Yes; I think the question is objectionable.

40

EDWARD J. MANN—Cross

Mr. AUTENRIETH—Oh, well, it don't make any difference.

Q. This time you had ginger ale? A. Yes.

Q. Sure you didn't have anything else? A. I answered that.

10 Q. I am asking you. A. Ginger ale.

Q. How long were you in there? A. Long enough to drink that.

Q. Long enough to drink that. Now, the distance from that saloon to the place where this accident happened is about two hundred and fifty feet, isn't it? A. Well, it is around that.

Q. Around that? Maybe fifty feet, more or less; isn't that so? A. Yes.

20 Q. You left this place, the last place that you stopped before the Tonnele avenue place, about, you said, ten or quarter past? A. The distance between the place I left quarter after ten was a mile and a half away from it.

Q. I ask that that be stricken out.

(Question repeated by stenographer.) A. Not at Tonnele avenue.

Q. I am not asking you any question. I have a motion before the Court to strike out the answer.

30 THE COURT—Strike out the answer.

Q. Now, will you give me the question?

(Question and answer repeated by the stenographer).

Q. Did you leave this—I will reframe it. Before you stopped at the Tonnele avenue place you stopped at another place, didn't you? A. Yes.

40 Q. Now, at the time you left that place I understood you to say it was ten or quarter past ten; is that correct? A. Exactly.

EDWARD J. MANN—Cross

Q. That is correct. All right. Then you say this accident happened somewhere between half past eleven and twelve? A. Around that time.

Q. Now, you are not sure of the time, are you? A. No, I am not.

Q. Not later than twelve, was it? A. No, I don't think so, not according to what was told me afterwards. 10

Q. You don't think it was later than twelve? A. No, sir.

Q. So altogether you were out from your home from about eight o'clock in the evening until sometime between half past eleven and twelve? A. Yes, sir.

Q. And in that time you stopped in three places with your friend Berger. A. Yes, sir. 20

Q. Is Mr. Berger here to-day? A. Mr. Berger is in California somewhere.

Q. I asked you if he is here? A. He is not.

Q. Was he here at the last trial?

Mr. SIMPSON—I object to it as not proper cross-examination.

THE COURT—No, I don't think it is.

Q. Now, you were living on Broadway at that time, weren't you? A. Yes. 30

Q. Broadway, Jersey City? A. Yes.

Q. That is around the corner from the place where this accident happened? A. Yes, sir.

Q. How far down from the corner of Broadway and Tonnele avenue? A. Did I live?

Q. Yes. A. About two hundred feet.

Q. And this accident occurred how far from the corner of Broadway and Tonnele avenue? A. About fifty or sixty feet.

Q. On Tonnele? A. On Tonnele avenue. 40

EDWARD J. MANN—Cross

Q. How long had you lived on Broadway before the accident? A. Going on a year.

Q. Going on a year. How long had this building been in the course of construction, do you know? A. Several weeks.

10 Q. Several weeks. You used to go back and forth from your home and business every day? A. Yes, sir.

Q. You knew they were in the course of construction? A. I went back and forth to my business every day; my business did not take me past those buildings.

Q. I ask that the answer be stricken out.

(Question repeated by stenographer). A. I knew they were there in course of construction.

20 Q. You did know that. Did you ever before this particular evening, when you were injured, have occasion to walk past the front of them? A. None whatsoever.

Q. Never did? A. No, sir.

Q. Where was your place of business? A. On Boulevard and Lake street.

Q. That was up in the neighborhood that you were on this evening, wasn't it? A. Yes, sir.

30 Q. The same general direction from your house, wasn't it? A. Well, yes, the same direction from the house.

Q. But when you went to business you never came back or went past the buildings? A. No, sir.

Q. But this particular evening, although you were in the same neighborhood, you came back that way? A. Yes, sir.

Mr. SIMPSON—I object on the ground that it is argumentative.

40 A. I did.

EDWARD J. MANN—Cross

THE COURT—I think the question may stand.

Q. Now, as you came along Tonnele avenue—strike that out. You left this saloon on the corner of Tonnele and Newark avenue? A. Uh huh.

Q. Walked south along Tonnele, did you? A. Yes, sir. 10

Q. On the right hand side of the street? A. Right hand side of the street.

Q. On the sidewalk? A. On the sidewalk.

Q. Now, as you approached these buildings—they lie just south of the Marion Bridge there, the bridge at Marion station? A. Yes.

Q. As you approached these buildings did you meet with this bump on the head just you came to the buildings? A. No, I did not. 20

Q. Now, how far along the buildings had you gone before you say you met with this bump? A. Why, over half way.

Q. That is, you went to the center of the buildings? A. Yes.

Q. Or beyond it? A. Yes, beyond the center.

Q. Beyond the center of the buildings. And this scaffold was all across the buildings? A. All across the full length of the buildings.

Q. You passed under half of it? A. Yes. 30

Q. Or little more than half of it before you say you met with this bump on the head? A. Yes, sir

Q. So you don't know what bumped you, do you? A. Don't know what bumped me?

Q. You don't know? A. Something bumped me above my head on the sidewalk as I was walking.

Q. Oh, you don't know what it was of your own knowledge, do you? A. Well, beam projecting out over my head; that is what struck me.

Q. Did you see them? A. No, I did not see them. 40

EDWARD J. MANN—Cross

Q. You were unconscious immediately after it, weren't you? A. Well, I was walking beneath the scaffolding, is the only thing I imagine—

Q. Just a minute.

10 Mr. SIMPSON—I object to the interruption of the answer.

Mr. AUTENRIETH—I move to strike it out.

Mr. SIMPSON—I object to striking it out until it is finished. I can't tell what it is.

THE COURT—Let him answer the question.

(Question repeated by stenographer.) A. Yes, sir.

20 Q. And you did not see the beams any time before you were struck, did you? A. Why, I knew there was a scaffolding there; I seen nothing projecting the scaffolding there, and I was walking along, no lights or anything there, and I strolled and I expect I passed half of it and I expect to pass it all.

Mr. AUTENRIETH—I move to strike it out; I asked him if he saw a beam before he was struck.

30 THE WITNESS—And I answered I seen the scaffolding.

THE COURT—I think I will allow it to stand; it tells us what he saw.

Mr. AUTENRIETH—The question I asked him was, did you see a beam before, and he tells what he expected to do.

THE COURT—No; I think that part which said he saw the scaffold is responsive.

40 Mr. AUTENRIETH—That part is all right, but

EDWARD J. MANN—Cross

he said how he expected to get along there.

THE COURT—No; the last part of the answer may be stricken out, what he expected to do, but what he saw there is competent.

10

Q. Did you see any beam or the beam which struck you before the accident? A. No, I did not.

Q. You did not. You were unconscious afterwards, you say? A. I was.

Q. Then how do you know a beam struck you? A. Walking beneath a scaffolding, the only thing that could strike me.

Q. That is your guess at it? A. It was no guess?

20

Mr. SIMPSON—I object.

Q. As I understand you now, Mr. Mann, you say that you had gotten past the center of the building, walked under half of the scaffolding before you were struck; is that correct? A. Yes, sir.

Q. Now, your occupation at the time was what? A. Butcher.

Q. How long had you been a butcher? A. For sixteen or eighteen years.

Q. Who were you working for? A. My father.

30

Q. Your father. Is he here in Court to-day? A. No, he is not.

Q. You were making, you say, twenty or twenty-two dollars a week besides the meat you took home for your supplies? A. Yes.

Q. How long had you been working for your father? A. Been working for my father between sixteen and eighteen years, off and on.

Q. Well, mostly off or mostly on, which? A. Mostly on.

40

HENRY C. LOCKWOOD—Direct

Q. In the meanwhile what were you doing, butcher's work? A. Butcher's work.

Q. I think that is all.

Mr. SIMPSON—That is all.

10 HENRY C. LOCKWOOD, sworn.

Direct examination by Mr. Simpson.

Q. Sergeant, were you on duty the night of October 11, 1915, in the vicinity of Tonnele avenue where these buildings were? A. Yes, sir; I was on mounted patrol duty.

20 Q. Will you tell the jury just what happened to this plaintiff? A. I was coming along Tonnele avenue with my horse, just the other side of the bridge, between Newark avenue and Tonnele; I got off the horse, I dismounted; walking across the bridge along on the other side of Tonnele avenue, on the west side I see a man walking and suddenly he stopped and reeled and fall down; I started over to him and as I did I met another man running from an opposite direction, and I went into where this man laid on the sidewalk and seen that he was unconscious, or he was not moving, he was laying still, so I rapped the stick, sounded an alarm and
30 rapped with my night stick and I got an answer from the direction of Newark avenue, so Officer Otten came running over from Newark avenue and I sent him over to Madden's saloon to ring up for an ambulance, so he came back and I rapped several times more for the officer who was covering that post in the Seventh Precinct, and Otten came back and said he had sent in a call through the Third Precinct box—

40 Mr. AUTENRIETH—I object to the conversation.

HENRY C. LOCKWOOD—Direct

Q. Go ahead. A. So we waited a little while and the ambulance did not appear, so I went over myself then to Madden's saloon and rung up the police headquarters.

Q. You finally got the ambulance there? A. Finally we got an ambulance.

10

Q. Did you examine the man to see what was the condition of his derby? A. I found his derby a little off the sidewalk, along the side.

Q. How was it in front? A. The crown was crushed in and it had kind of mortar, plaster or something on the crown.

Q. Was there any mark on his forehead? A. He had a kind of bruise or cut here on his forehead.

Q. Right at the point where you saw him suddenly stop and reel and fall did you examine to see whether there was any beam there? A. Why, I did to see what the cause was, and we found a beam projecting out that just touched the tip of the device on my cap as I stood up.

20

Q. That was over the sidewalk? A. Projecting over the sidewalk there was a row of these beams, but this one was lower than the others and the sidewalk was higher.

Q. How tall are you? A. About five feet ten.

Q. The tip of this beam touched your cap? A. Yes; my cap would be about an inch or two above my head.

30

Q. And you at that time made this examination and measured it, did you? A. Well, just by my height; I had nothing to measure it with, or rule.

Q. Did you measure it afterwards? A. No, sir; I did not; and I left a report as to the dangerous condition of it in the Seventh Precinct.

Mr. AUTENRIETH—I object and ask to strike it out.

40

HENRY C. LOCKWOOD—Direct

Mr. SIMPSON—That is not important; strike it out.

10 Q. Was there any light there or anything near the beam, any red light or anything to indicate that this beam was lower than the others? A. Not on the scaffolding, no, sir.

Q. Well, was there any red light near the beam or any light of warning at all at the time the man struck it and fell? A. No, sir.

Mr. AUTENRIETH—I object to that. How can this witness characterize whether a light is a light of warning?

Mr. SIMPSON—Strike out the warning.

20 Q. Was there any light there, red light, blue? A. Not on that scaffolding, no, sir.

Q. What was his condition when you examined him lying on the ground; was he conscious or unconscious? A. He was unconscious.

Q. Was he taken to the city hospital? A. Yes, sir—Well, he was put in the city ambulance and taken to the city hospital in the city ambulance.

30 Q. Was there any watchman along there? A. I went to make inquiries as to who the contractor was, and I went around to Broadway and I found a shanty there, a tool shanty, and after a little trouble I got the watchman out of the shanty.

Q. He was asleep?

Mr. AUTENRIETH—I object to the witness characterizing this man that he found around there as a watchman or who he was.

40 A. I asked him.

HENRY C. LOCKWOOD—Direct

Mr. SIMPSON—Just a minute.

THE COURT—You may tell what you found at that time.

Q. Did you find a man in the shanty asleep? A. I found a man in the shanty asleep. 10

Mr. AUTENRIETH—I object to it unless it is connected.

THE COURT—If it is not connected it is of no value whatever.

Mr. SIMPSON—We will connect him up afterwards.

Q. Was there any physician at your place at all? A. There was a gentleman who examined Mr. Mann while he was lying on the sidewalk. 20

Q. But you don't know who he was? A. I asked him what his name was.

Mr. AUTENRIETH—I object to what the witness asked.

A. He told me he was a doctor.

Mr. AUTENRIETH—I object.

THE COURT—The objection is to telling what the man said? 30

Mr. AUTENRIETH—Yes; I don't know who the man was.

THE COURT—The objection is sustained.

Q. What time did you go on duty this night? A. At nine o'clock I left the stable. My hours are from nine to five in the morning.

Q. Did you go back to the premises the next day 40

HENRY C. LOCKWOOD—Direct

and measure this beam? A. At nine o'clock when I left the stable I took that route back over to the northern part of the city and I found that the beam had been moved.

10 Q. How much had it been raised? A. Possibly eighteen inches or two feet; I didn't measure it.

Q. That was when, the next day? A. The next night.

Q. Now, will you describe this scaffold that was over the sidewalk? What kind of scaffolding was it? A. It was a row of beams or floor planks set on edge.

20 Q. I show you a photograph and ask you if that is practically a correct representation of the scaffolding at the time of the accident? I don't mean as to measurements in inches, but for practical purposes is it a picture of the scaffolding? A. Yes; not where he was hurt.

Q. I didn't ask you that. A. Yes; that is a picture of the corner of Broadway and Tonnele avenue.

Q. Which is Tonnele avenue? A. This here (indicating).

Q. Along here? A. Yes.

Q. Well, look at this one and see whether that is a picture of the kind of scaffolding it was? A. Yes.

30 Mr. SIMPSON—I offer that.

Mr. AUTENRIETH—I haven't any objection.

Q. Then I understand you it was a scaffolding consisting of beams and planks on them? A. Planks across the beams, yes.

Q. And it ran the entire length of Tonnele avenue, did it, with the building? A. Yes.

Q. How far out over the sidewalk? A. Practically out very near the curb line.

40 Q. Was the planking on the street or was it dirt?

HENRY C. LOCKWOOD—Cross

JOHN OTTEN—Direct

A. No, sir; planking was taken up and it was dirt there.

Q. Dirt there? A. Dirt or cinders, I ain't sure which.

Cross-examination by Mr. Autenrieth.

10

Q. Officer, this second time you came back to the building, was that the night after the accident?

A. Yes, sir.

Q. Were you on your horse? A. Yes, sir.

Q. Did you get off? A. Yes, sir.

Q. Did you make any measurements around there? A. I didn't make any measurements; I just looked here and I walked over to see if anything had been done as to the report I turned in.

Q. Didn't make any measurements? A. No, sir; but I know it was all right.

20

Q. You just looked at it, did you? A. Yes; I saw it was safe.

Q. I didn't ask you what you saw. That is all.

JOHN OTTEN, sworn.

Direct-examination by Mr. Simpson.

Q. You are a police officer in Jersey City? A. Yes, sir.

30

Q. And were such on the 11th of October, 1915? A. Yes.

Q. Do you know anything about this accident? A. Why, the night in question I was on post in the neighborhood of Tonnele avenue and Newark avenue when Lieutenant Lockwood rapped his stick and I went over to answer it, and when I got there he told me to go ahead to the box and call up for an ambulance, owing to a man that had just fell and hurt himself, and I done as he told me.

40

JOHN OTTEN—Direct

Q. Did you see the condition of the man's hat on the ground? A. Yes.

Q. What was its condition? A. It was dented in in front.

10 Q. Was there any mortar on it? A. Yes; it was white—mortar on it.

Q. How was the man, conscious or unconscious? A. He was unconscious.

Q. How long was he lying there? A. Well, I guess about twenty or twenty-five minutes.

Q. Was he unconscious all the time that you were there? A. Yes, sir.

Q. Were you there when he was taken away? A. Yes, sir.

20 Q. How was he taken away? A. In the ambulance.

Q. How did his forehead appear to you? Did you examine his forehead? A. I just took and looked at it. It appeared to me to be a bruise on it.

Q. What part, about where? A. Right here (indicating).

Q. What was the condition of the premises; was there any scaffold over the sidewalk? A. Yes; there was a scaffold over the sidewalk.

30 Q. Did you make any examination of the scaffold in company with the sergeant or alone? A. Yes, sir.

Q. What did your examination of the scaffold disclose? A. Why, I couldn't walk under it.

Q. You could not walk under it without striking the beam?

Mr AUTENRIETH—I object to it as leading.

40 Q. What did you mean, you could not walk under it? A. I couldn't walk under it by walking straight. I would have to hurt my head if I walked under it.

Q. Did you make any examination of this particular beam with reference to the others to see whether it was lower than the others? A. There was one beam lower than the others. I could pass the others but not this particular one I couldn't pass.

Q. About where was that one? A. About in the center of the building that was going up at that time. 10

Cross-examination by Mr. Autenrieth.

Q. Is this your post, officer? A. No, sir.

Q. Was it at the time? Had you been on duty there? A. No, sir.

Q. Where is your post, or was it, at that time? A. In that neighborhood. It is over—that is on the Seventh Precinct and I am connected with the Third Precinct. It went about fifty feet or seventy-five feet off my post and off the precinct that I am working in. 20

Q. Well, does your post take you to the corner or did it take you to the corner of Newark avenue and Tonnele avenue? A. Yes.

Q. Where you could look up that street? A. Yes.

Q. How long before the accident had you been on duty; how many days on that post? A. Oh, five years. 30

Q. You had seen this building in the course of construction, hadn't you? A. Yes.

Q. You had seen the scaffold there before the accident? A. Yes, sir.

Q. How long before the accident had you observed this scaffolding? A. Well, I can't recall that. I know the scaffold there. I get the post tonight and I won't get it again for probably a week.

Q. You knew it was there then? A. I knowed it was there. 40

Q. Did you ever observe pedestrians walking up

JOHN OTTEN—Cross

and down that street? A. No, not like that corner here, because it was off my post, and I may have seen people walking up and down that side of the street.

10 Q. When you were on duty at the corner of Tonnele and Newark avenue, did you ever observe people walking up and down in front of that building? A. Oh, I did.

Q. This particular night, as I understand it, you heard a signal, or call, from the other officer? A. Yes.

Q. What time was it? A. About twelve-fifteen.

Q. Twelve-fifteen? A. About that.

20 Q. Anything fix the time in your mind as twelve-fifteen? A. Why, yes, about twelve o'clock, roll-call at the station. I answered twelve o'clock roll-call that night.

Q. You answered that? A. Yes, sir.

Q. That was before the accident? A. That was before the accident, so it would take me about—going right down there to make my relief, about ten minutes.

Q. When you got up to Sergeant Lockwood he said a man fell and hurt himself. Tell us what he said?

30 Mr. SIMPSON—I object to that as not cross-examination.

A. Told me to hurry up and call an ambulance; he says, "A man here fell and hurt himself."

Q. You then left and took care of the getting of the ambulance? A. Yes.

Q. I think that is all.

(Lieutenant Lynch was called by Mr. Simpson, but did not respond).

MAX L. BALENE—Direct and Cross

MAX L. BALENE, sworn.

Direct examination by Mr. Simpson.

Q. Were you the general contractor for the erection of the buildings on the west side of Tonnele avenue on real estate, owned by Harry J. Max, on the 11th of October, 1915? A. Yes, sir. 10

Q. How long had that building been in course of construction on the 11th of October, 1915? A. How long?

Q. How long had it been in course of construction? A. Six weeks.

Q. Had you been there every day? A. Yes.

Q. How long did you stand there? A. Morning until night.

Q. To see how things were going on? A. Yes. 20

Q. You had the general supervision of everything there? A. Yes.

Q. That is all.

Cross-examination by Mr. Autenrieth.

Q. Mr. Balene, I show you what purports to be an agreement dated September 22, 1915, and ask you if the signature of Max Balene is your signature? A. Yes.

Q. Also call your attention to signature "S. Gordano" and ask you if that is the signature of Salvatore Gordano, the other party mentioned in this paper? A. Yes. 30

Q. Did you see him sign it? A. Yes.

Q. As general contractor were you doing the work which had to do with the erection of this scaffolding on this building? A. No, sir.

Q. You were not. Who was doing it? A. This gentleman, Gordano.

Mr. AUTENRIETH—I will have this marked 40
for identification.

MAX L. BALENE—Re-direct

HARRY J. MAX—Direct

Paper marked D 1 for identification.

Q. Whose men were working on it, yours or Gordano's? A. Gordano's.

10 Q. Did you have anything to do with the erection or construction of that scaffold? A. No, sir.

Q. Or did you have anything to do with its maintenance or keeping it there? A. No, sir.

Q. Did not. That is all.

Re-direct examination by Mr. Simpson.

Q. But you were the general contractor who had the contract for the building of the entire building?

A. Yes, sir; I sublet this.

20 Q. You were there every day? A. Yes.

Q. Saw what was going on? A. Yes, sir.

Q. And saw this scaffold in position, didn't you?

A. Yes.

Q. Doing work that you had made a contract for?

A. Yes.

Q. That is all.

HARRY J. MAX, sworn.

Direct examination by Mr. Simpson.

30 Q. Where do you live, Mr. Max? A. 9 Oriental avenue.

Q. Did you work on this building that was being erected on the west side of Tonnele avenue? A. Yes, sir.

Q. How long was it in course of construction and how long had they been building it on the 11th day of October, 1915? A. I think they started the last week in August or the first week in September; about six weeks.

40 Q. How often were you there between the last

HARRY J. MAX—Cross and Re-direct

week in August and the time the building was finished? A. Well, every day.

Q. Every day; saw what was going on? A. Yes, sir.

Q. That is all.

Cross-examination by Mr. Autenrieth.

10

Q. Mr. Max, did you have anything to do with the erection of this scaffold?

Mr. SIMPSON—I object.

A. No, sir.

Mr. SIMPSON—I object, on the ground that it is utterly immaterial if he did. If this was a nuisance, as it was, and he was the owner of the land and let a contract and saw this being done on his property he was responsible for the condition, whether he had anything to do with it or not, under Brady vs. Public Service Railway, 79 Atlantic.

20

After discussion Mr. Simpson withdrew his objection.

(Question and answer repeated by stenographer.)

Q. Did you at any time prior to the time of this accident know of any beams in the scaffold in front of this building being so low that a person six feet tall could not walk under them? A. Well, I had to pass there every day when I left the job at six o'clock and walk under it.

30

Q. Did you walk under it? A. Yes, every day, six o'clock.

Q. Ever strike your head? A. No, sir.

Q. That is all.

Re-direct examination by Mr. Simpson.

Q. But you did not know that there was one

40

MRS. MARY MANN—Direct

beam that was lower than the others, did you? A. I knew it was not, because that is impossible.

Q. You did not know. If it is a fact that there was one beam lower than the others, you did not know it? A. No, it could not be that.

10 Q. If you had nothing to do with the erection of this scaffold, how do you know so much about it? A. Well, my experience.

Q. You had nothing to do with erecting it, you say? A. Experience with other buildings, that one beam can't be lower, because they put several planks on top for the masons to work, and if one beam should be lower you cannot have another plank on it.

Q. You did not examine this scaffolding, did you? A. No, I did not.

20 Q. That is all.

MRS. MARY MANN, sworn.

Direct examination by Mr. Simpson.

Q. You are the wife of the plaintiff? A. Yes, sir.

Q. And did you take care of him at home while he was sick? A. Yes, I did.

Q. How long did you take care of him? A. 30 Well, pretty near a year.

Q. That is, he was home without working a year. What was his condition?

Mr. AUTENRIETH—I object to that. The witness did not say that he was home without work a whole year.

Mr. SIMPSON—Withdraw it.

Q. What is the situation about whether he was 40 home without working a year or not; was he or

MRS. MARY MANN—Cross

wasn't he? A. Well, he went up to help his father in between, that is all.

Q. About how long was it before he went back to work regularly? A. Well, about three months.

Q. Did he work regular after that, every day? A. No; he stayed at home in between once in a while, because he got such dizzy spells, and he couldn't see, and everything got black, everything in front of him. 10

Mr. AUTENRIETH—I object and ask to strike it out.

Mr. SIMPSON—I have no objection to striking it out.

Q. You took good care of him? A. Yes. 20

Q. What did you see when you took care of him? A. Well, he was dizzy and sick to his stomach and his back hurt and I had to rub it.

Q. Who was his doctor? A. Dr. Flaherty.

Q. Did not have any other, any nurse, besides yourself? A. No, sir.

Q. That is all.

Cross-examination by Mr. Autenrieth.

Q. You say your husband went back to work off and on for his father? A. Yes, sir. 30

Q. Did he ever go to work for the Jersey City Ladder Company within that year? A. Within that year? A. No.

Q. You are positive? A. Yes.

Q. Never worked for the Jersey City Ladder Company? A. Yes, sir, he did.

Q. When, how long after the accident? A. Well, that I can't just remember. I couldn't remember.

Q. You remember how your husband felt. Don't you remember? A. No; I can't, because we moved 40

MRS. MARY MANN—Cross

in the meantime and I had other little troubles to take up my time and I can't just remember when he went to work there. He did work there.

10 Q. Do you mean to say that he did not go to work regularly for a full year after the accident? A. Well, I don't mean that he worked steady, no.

Q. When did he first go back to work? A. Well, I just can't recall that. It was about three months after. He went up to work for his father.

Q. Then he worked for his father? A. Yes.

Q. Sure he did not go with the Jersey City Ladder Company? A. No, sir.

Q. Did he ever work for the Jersey City Ladder Company? A. Yes, he did.

20 Q. How long after the accident? A. Well, really I couldn't tell you. That I don't remember, the month or anything when he went.

Q. Your memory is poor on that subject, is it? A. Well, no. I haven't got such a poor memory.

Q. I mean on the subject of when he went to work? A. Is that all?

THE COURT—That is all.

30 Mr. SIMPSON—Now, that is the case with the exception of the doctor. I ask to call him later on if he comes in before Mr. Autenrieth puts on his doctor, because he promised me to be here and I expect him. I will just try to get him on the telephone. So if he comes before the medical proof—

Mr. AUTENRIETH—I have no objection to it, to putting him out of order. Outside of that you rest your case?

Mr. SIMPSON—Yes.

MOTION TO NON-SUIT.

Mr. AUTENRIETH—I move for a non-suit on behalf of the defendant, Max Balene, on the ground that he did not erect or construct this scaffold and that none of these risks or control were in his power and he had nothing to do with it. His testimony being that he is a general contractor—was the general contractor for the entire building but did not erect or construct this particular scaffold, and therefore there is no liability shown as to him. 10

As to the owner, the defendant, I move for a non-suit—that is, the defendant, Harry Max—I move for a non-suit as to him upon the ground that it does not appear that he erected or constructed or exercised any control over this scaffold, but that one Gordano is mentioned by the witness who is the man who had the mason work and erected this scaffold. Nor that the defendant Harry J. Max ever had knowledge or notice that the condition of the scaffold, if it be true, was dangerous, and therefore the opportunity to even make a repair or remedy the danger. Nothing was ever brought home to him. On the contrary, his testimony is that he passed under it quite frequently. Therefore, no negligence has been shown as to the defendant, Harry J. Max, the owner. It further appears that this work was done by Salvatore Gordano, who, Mr. Balene said, had his own men. It was the work of an independent contractor, and therefore neither of the defendants, under the decisions in this State, would be liable. Your Honor knows no doubt of the various cases we have. *Drake vs. Swayze*, 52 New Jersey Law; *Truss vs. Newark Railroad Co.*; *Doughty vs. Business League*, 71 New Jersey Law. 20 30

Therefore, I say in this particular case Balene had nothing to do with it; he was neither the 40

DR. SAMUEL ADAMS—Direct

owner or contractor of it, and Mr. Max was the owner, but it appears the other work was done by another man through his own men, and therefore the proper person to have been sued was Gordano, who was the man who did it, and not either of these
10 defendants.

(Discussion).

THE COURT—It appearing there was a written contract, which you claim takes the work away from the old contractor and puts it in somebody else, how can I, until that document is offered in evidence, grant a non-suit? The trouble in this case is that you have referred to a written contract which fixes the rights between the parties. I will refuse your motion now and you may renew it on
20 motion to direct a verdict.

MR. AUTENRIETH—Your Honor will allow me an exception?

THE COURT—Yes.

DEFENDANT'S TESTIMONY.

MR. AUTENRIETH—I will now offer in evidence Exhibit D 1 for identification.

Paper marked Ex. D 1.

30

MR. AUTENRIETH—I want to call Dr. Adams out of order.

DR. SAMUEL ADAMS, sworn.

Direct examination by Mr. Autenrieth.

Q. Doctor, do you remember an injury to Mr. Mann? A. Well, I don't remember an injury. I remember Mr. Mann having met with an injury.

Q. Where did you first see him? A. Why, in
40 the city hospital.

DR. SAMUEL ADAMS—Direct

Q. Do you know how long it was after the happening of the accident? A. Why, I think it was possibly the next day or within a day or two following the accident.

Q. State what you observed as to his condition at the time? A. Well, I went to the hospital and Mr. Mann was in bed, and I asked him how he felt, and he said he felt a little out of sorts. 10

Q. Did you notice any abrasion or bruise or cut on his head at all? A. I did not.

Q. Did you look for one? A. As I recall now, I did.

Q. Did you look for one? A. Yes.

Q. Did you see him again after that? A. Why, I saw him, well, several times during the time that he was in the hospital.

Q. What did you notice about his condition then? A. Well, for the first possibly two or three times that I saw him he was in bed. After that he was up and walked around the ward. 20

Q. Did you ever notice any indications of dizziness? A. I did not notice any, no, sir.

Q. Did he ever complain of his eyes being bad? A. No, sir.

Q. That he could not see, or everything was blurry before him? A. No, sir.

Q. You talked to him, did you, on these occasions? A. Yes, sir. 30

Q. Do you know how long he was in the hospital? A. Why, I can't tell exactly; possibly ten days or two weeks.

Q. How long after the time he was injured was it that you saw him walking around the hospital? A. Well, I would say, approximately, four or five days.

Q. Are you an eye specialist, doctor? A. No, sir.

Q. Would not be able to say whether this alleged 40

DR. SAMUEL ADAMS—Cross and Re-direct

blow might cause this poor eyesight at this time?

A. No, sir.

Cross-examination by Mr. Simpson.

Q. When was the last time you saw him, doctor?

A. I think it was the day before he went home.

10 Q. That was while he was in the hospital he was under your care? A. No, sir.

Q. Well, how is it you came to see him? A. Mr. Max asked me if I would go in and see a man who had met with an accident at this building.

Q. I see; you went at the request of Mr. Max? A. Yes.

Q. How many times did you go? A. Well, approximately, six or eight; I can't tell offhand exactly.

20 Q. Did you make a complete physical examination of him at all? A. No, sir.

Q. Just looked at him and asked him how he felt? A. Yes.

Q. You don't know what his subsequent condition was or what the result of treatment by Dr. Flaherty was? A. No, sir; I simply know as to the condition from the chart he made in the hospital, which I examined. Personally, I made no examination of him.

30 Q. That is all? A. I noticed no abrasion.

Re direct examination by Mr. Autenrieth.

Q. Did you see him after he came out of the hospital? A. I met him on Bergen avenue one day.

Q. What was he doing? A. Walking.

Q. Notice anything wrong about him, any dizziness or evidence of dizziness he might have? A. I just stopped and spoke to him; that is all. I didn't notice anything.

40 Q. Ask him how he was? A. Why, I don't re-

HARRY J. MAX, recalled—Direct

call whether anything was said about health or not.

Q. That is all?

HARRY J. MAX, recalled.

Direct examination by Mr. Autenrieth.

Q. Mr. Max, you remember this building, do you? A. Yes.

10

Q. Did you ever walk under this scaffolding about the time you heard of this accident? A. Yes, sir.

Q. How tall are you? Got any idea? Stand up; get out where the jury can see your feet. They can't tell how tall you are there. Did you ever bump your head on a beam? A. No, sir.

Q. Well, how often would you say you had walked up and down that scaffold? A. Well, I used to walk there probably seven or eight times during the day because I used the telephone at the Marion station, and it is at the end of the building.

20

Q. You would go down that way? A. Yes; that step at the Marion station.

Q. That brings you under that scaffold, does it? A. Yes; on the same side where the steps is going down to the Marion station.

Q. You would walk along the sidewalk? A. Yes, sir.

30

Q. In going that way? A. Yes.

Q. Did you ever bump your head? A. No, sir.

Q. The day after the accident did you walk up and down the same way? A. Yes.

Q. Did you bump your head? A. No, sir.

Q. Did you, after you heard of this accident, take occasion to measure any of these beams? A. Why, I was there naturally; I think it was a legal holiday, Columbus day; I think it was seven o'clock in the morning, perhaps a quarter of an hour earlier,

40

HARRY J. MAX, recalled—Direct

and I passed there and there was no change since I left at six o'clock on the 11th.

Q. The day before? A. The day before, yes.

Q. Did you hear there had been an accident? A. Yes.

10 Q. Did you, that morning, have occasion to walk under the scaffold? A. Why, yes, I went right under, standing alongside of it.

Q. Did you hit your head? A. No, sir.

Q. Officer Lockwood or Otten says a beam was moved. Did you move any beam? A. I didn't move any beams at all.

Q. Did you ever know there was any beam low enough to strike anyone's head? A. No, sir.

Q. Before the accident or after? A. No, sir; I did not.

20 Q. Who did the work that had to do with the building of that scaffold? A. There was a sub-contractor by the name of Salvatore Gordano.

Q. Did Mr. Balene do the work? A. No; Gordano done the work. Mr. Balene contracted with him.

Q. Do you know whether he had Balene's men or his own men? A. He employed his own men.

Q. Did you have anything to do with the hiring of his men? A. No, sir.

30 Q. You had nothing to do with that? A. Absolutely.

Q. Did you have any business dealings directly at all with Gordano? A. No, sir, except making payments to Mr. Balene.

Q. You would give the money to Mr. Balene? A. Mr. Balene, and Mr. Balene would turn over payments to him.

Q. That was pursuant to your arrangement or contract with Balene? A. Yes; I used to pay Mr.

40

HARRY J. MAX, recalled—Cross

Balene, the general contractor, and he used to pay those men.

Cross-examination by Mr. Simpson.

Q. Did you have a watchman on this job? A. Yes.

Q. Who was he? A. I can't recollect his name. 10

Q. You paid him? A. Sir?

Q. Who paid him? A. Well, I used to pay him.

Q. You paid him. What was his duty around there? What would he do?

Mr. AUTENRIETH—I object. I do not see the materiality of it. I object because it is not cross-examination. No evidence as to the watchman was brought out at all from this witness on the direct examination. Certainly it is not a proper subject for examination now. 20

Mr. SIMPSON—This is the defendant. He is going on the stand to exculpate himself. He is testifying. He asked what he knew about the conditions, what he saw? I have a right to find out what his source of knowledge was. He is trying to exculpate himself. 30

Q. You had a watchman there that you paid? A. I had a watchman employed by the year.

Q. Did he have any lights there? Did you give him any lanterns to hang up? A. It was not my business to give him his instructions.

Q. Who gave him instructions? A. That was up to the general contractor.

Q. Although you paid the man. Did you tell the man he would get instructions from the general contractor? A. Well, that was his duty. 40

HARRY J. MAX, recalled—Cross

Q. Did you tell him that, that you paid him, but he would get his instructions from the general contractor? A. Well, that was his routine work all along the line.

10 Q. Did you give him the lanterns to hang up there at all? A. Any what?

Q. Lights? A. That wasn't up to me.

Mr. AUTENRIETH—I object; that has no bearing on notice, whether he gave him lanterns or lights.

Mr. SIMPSON—I am examining the defendant. He is trying to exculpate himself.

THE COURT—I do not think whether he gave any lanterns is material.

20

Q. You were there every day, were you? A. Yes, sir.

Q. What were you there for? A. Well, we have several buildings complete and I used to take care of all the others.

Q. What were you at this building for? A. Well, just come over and see other people, how they got on with their work.

30 Q. How long had this scaffolding been up over the sidewalk on the 11th of October, 1915? A. To my recollection it was—I would say two weeks.

Q. Been there two weeks. You had seen it every day? A. Yes.

Q. You had never noticed this beam lower than the other? A. I did not.

Q. Had you measured the beam? A. I never had occasion.

Q. Did you measure the beam? A. I did not.

40 Q. You don't know now how high they were? A. No.

HARRY_J. MAX, recalled—Re-direct

Q. Your main interest around there was to see that the building got up right; wasn't it? A. Yes.

Q. And you knew of this condition of the scaffolding for two weeks before the date of this accident, didn't you?

10

Mr. AUTENRIETH—I object. What condition?

Mr. SIMPSON—As he has described, whatever it was that was there.

Q. You saw it? A. There was scaffolds for two weeks. The people were working for two weeks.

Q. Whatever it was you saw. If these other witnesses are telling the truth, you saw that condition, didn't you? You saw that? You were there?

20

Mr. AUTENRIETH—What condition?

Q. Whatever it was.

THE COURT—You saw the scaffold there two weeks?

Q. You saw the scaffold there for two weeks? A. Yes.

Q. Anybody change that scaffold? A. I don't know about that. I never done any work around the scaffolding.

30

Q. You saw the scaffolding? A. I saw them building scaffolds up.

Q. It was there for two weeks, and you were there every day for two weeks? A. Yes.

Re direct examination by Mr. Autenrieth.

Q. Were you there all day long? A. No, sir.

Q. How long were you there on the job in the morning? A. I used to come there in the morning. I used to get my mail in some of the other buildings

40

MAX BALENE, recalled—Direct

we had building, and I come back at twelve o'clock. I had a renting office about two blocks away, where people came and rent apartments.

10 Q. Is that the only building that you were building in this neighborhood? A. No, sir; we put up twenty-four or twenty-five buildings in that neighborhood.

Q. In that neighborhood? A. Yes; same side of the street, on Broadway.

Q. That is all.

MAX BALENE, recalled.

Direct examination by Mr. Autenrieth.

20 Q. Mr. Balene, I show you Ex. D 1, which purports to be an agreement between Max L. Balene of Jersey City, and Salvatore Gordano of the same place, dated September 22, 1915, and ask you if the premises designated as 2, 4, 6 and 8 Broadway, Jersey City, include the house where this scaffold was? A. Yes.

Q. Which one? A. 2.

Q. No. 2. I just want to call the jury's attention to one section.

30 Mr. SIMPSON—Oh, read the contract. Do not call attention.

Mr. AUTENRIETH—I will read the whole business, if you want me to. (Reads contract).

Q. The work referred to in that contract, which I have just read, did that include the erection of this scaffold?

40 Mr. SIMPSON—I object on the ground that the contract speaks for itself. You cannot modify or alter this contract.

MAX BALENE, recalled—Direct

THE COURT—No; I think the contract must speak for itself.

Mr. AUTENRIETH—I am not asking the contract to speak. I am asking the witness to say whether that work comprehended the work on which the scaffold was done. 10

Mr. SIMPSON—That is my objection.

THE COURT—Yes, the contract speaks for itself.

Mr. AUTENRIETH—The contract does not show whether the scaffold was put up in pursuance of that. The mason work may mean scaffold work. 20

THE COURT—Find out who put it up.

Q. Do you know who put the scaffold up? A. Yes.

Q. Who put it up? A. Sub-contractor, Gordano.

Q. The man mentioned in the contract, Exhibit D 1? A. Yes; he furnished all the tools and the scaffold is part of the tools.

Q. For what work? A. For mason work.

Q. Did you have anything to do with building the scaffold or maintaining it? A. No, sir. 30

Q. Absolutely nothing? A. No, sir.

Q. How long was this scaffold up, do you know, before the accident? A. Around two weeks.

Q. Were you around the job right along? A. Yes.

Q. On other work or— A. On other work, yes.

Q. Did you notice whether people passed up and down the sidewalk where this scaffold was? A. Yes, sir; walked—hundreds of people every day. 40

Q. Did you walk under it yourself? A. Yes.

MAX BALENE, recalled—Cross

Q. Bump your head? A. No.

Q. Ever know of anyone bumping their head before Mann bumped his head? A. Wasn't low enough to bunk your head.

Cross-examination by Mr. Simpson.

10

Q. Your general contract with Balene called for this mason work, didn't it?

Mr. AUTENRIETH—I object. It speaks for itself.

Mr. SIMPSON—He has already proved as to the existence of a general contract, and as to this sub-contractor, and I want to find out what his general contract was.

20

Mr. AUTENRIETH—If you want to produce the terms, produce them.

Mr. SIMPSON—You have it.

THE COURT—Does it appear the contract was in writing?

Q. This general contract of yours was for this mason work, wasn't it, and you sub-contracted it?

30

Mr. AUTENRIETH—I object until it is first shown it was in writing or whether the evidence is material or competent.

Mr. SIMPSON—I will withdraw it.

Q. What was it you made the sub-contract for? What right did you have to make this sub-contract? A. For the labor of the mason work.

Q. Well, to build this building for Max, was that what you were doing? Were you building the building? A. I was building the building for Max,

40 yes.

MAX BALENE, recalled—Cross

Q. You hired this man under this contract to do the work? A. I sublet part of the mason work to this man, yes.

Q. Who was paying you for this mason work? A. Mr. Max. He paid me for the whole work—not exactly the mason work, but I had a general contract. 10

Q. The whole work, and he was paying you? A. Yes.

Q. You had no interest in this scaffold? A. To build this scaffold, no, sir.

Q. Did you take out a policy of insurance to protect yourself from suits by accidents, which included this very scaffolding?

Mr. AUTENRIETH—I object to the question on the ground that it is incompetent, irrelevant and immaterial and only asked for one purpose, and that to inject into the case an issue that is not here, and I think the objection of it requires that a mistrial be ordered, and I so move your Honor to grant a mistrial. 20

Mr. SIMPSON—That is an old case that your boss tried against me where the Court of Errors— 30

Mr. AUTENRIETH—I make a motion to withdraw a juror on the ground he has simply injected into the case something that does not belong here.

Mr. SIMPSON—That is not true.

THE COURT—The motion is refused.

Mr. AUTENRIETH—Exception.

Q. Didn't you have such a policy to protect yourself on this very scaffold? 40

MAX BALENE, recalled—Cross

Mr. AUTENRIETH—I object. I repeat my objection to the last question, and I make the same motion for a mistrial on the ground that this evidence is brought in to affect the jury.

10 THE COURT—Motion refused.

Mr. AUTENRIETH—Exception, your Honor.

THE COURT—Take it.

Q. Didn't you have a policy to protect yourself upon this very scaffold from suit? A. On this scaffold?

Q. Yes, on this very scaffold?

Mr. AUTENRIETH—I object and I repeat my objection.

20 THE COURT—You have made it once.

Mr. AUTENRIETH—I do not want to lose my objection.

A. I had a policy in general for the whole work, not for this only.

Q. But did it include this very work?

Mr. AUTENRIETH—I object on the same grounds.

30 THE COURT—Yes.

A. It included all the work.

Q. All the work. That is all.

DEFENDANT RESTS.

(The trial was interrupted while Mr. Simpson endeavored to reach his doctor on the telephone, but he was unsuccessful.)

40 Mr. SIMPSON—I want to recall the plaintiff while I am waiting for the doctor.

EDWARD J. MANN, recalled—Direct

PLAINTIFF'S TESTIMONY IN REBUTTAL.

EDWARD J. MANN, recalled.

Direct examination by Mr. Simpson.

Q. Are you still under Dr. Flaherty's care? A. Yes, sir.

Q. How often do you see him? A. An average of once or twice in a week. 10

Q. What is the condition he is treating you for?

Mr. AUTENRIETH—I object.

Q. How do you feel? What are the symptoms that you tell him?

Mr. AUTENRIETH—I object.

A. Vertigo and nervousness— 20

Mr. AUTENRIETH—I object.

Q. Just describe what your condition is. I will withdraw that question. Just describe what your condition is when you go to see him?

Mr. AUTENRIETH—I object on the ground that here is a man three and a half years after the happening of the accident, or three years, and unless it appears by some medical—only competent testimony can be medical—that whatever he is being treated for now is a result of the accident, the testimony is not material. 30

Mr. SIMPSON—I will withdraw the question.

Q. Will you please describe your condition from the date of the accident and how long you have been treated by the doctor, how often, and what 40

EDWARD J. MANN, recalled—Direct

your condition has been from the day of the accident right on to the present day?

Mr. AUTENRIETH—I object to the witness stating his physical condition.

10 THE COURT—He may state what his condition is when he knows himself.

A. My condition is nervousness and blurring of the eyes.

Q. Just describe it as it exists and has existed from the day of the accident? A. From the day of the accident, in walking along the street I have spells come on me where I have to stop, I get a dizziness and feel as if I was turning around.

20 Q. Has that continued ever since the date of the accident? A. Ever since.

Q. With what frequency, how often have these spells come on? A. Why, at intervals, at times; it may go along for three or four days and won't bother me and then again for a week I will be troubled mostly every day with it.

Q. What was your condition before the accident; did you have any of these spells? A. Never.

30 Q. Have they continued right from the date of the accident down to the present time?

Mr. AUTENRIETH—I object.

A. From the time I received the injury I have been doctoring.

Q. How much, if any, time have you lost at work since the accident by reason of the condition? How much time, if any, have you lost from your work?

Mr. AUTENRIETH—I object.

40 A. I have lost from the night of the accident.

EDWARD J. MANN, recalled—Cross

Mr. AUTENRIETH—I object to it unless it appears that his condition is the result of the accident.

Mr. SIMPSON—That is for the jury to say.

THE COURT—I will allow it.

10

Mr. AUTENRIETH—Exception.

THE COURT—Take your exception.

(Question repeated by the stenographer). A. Fully a year and a half.

Q. Out of the practically three years you have been a year and a half unemployed? A. Yes, sir.

Cross-examination by Mr. Autenrieth.

Q. Why? A. Because my condition did not allow me to work. 20

Q. You worked for the Ladder Company? A. Yes, sir.

Q. How soon after the accident did you go to work for the Jersey City Ladder Company? A. About a year and a half.

Q. Say a year and a half afterwards? (No answer).

Q. Say a year and a half afterwards? A. As near as I can judge about a year and a half. 30

Q. That is the first time you went to work for the Ladder Company? A. Yes, sir.

Q. You are positive, are you? Can you answer that or can't you answer it? I say you are positive, are you? A. Why, to my recollection, yes.

Q. You remember testifying in this case the last time it was tried, don't you? A. I do.

Q. Remember what you testified then about when you went to work for the Ladder Company?

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Mr. SIMPSON—I object on the ground that

EDWARD J. MANN, recalled—Cross

the question is improper in form; he is entitled to have pointed out to him what it is alleged he said.

THE COURT—Yes.

10 Q. I will point it out to him. Do you remember when this case was tried the last time? A. No, I do not.

Q. Do you know now long after the accident it was that it was tried? A. No, I do not.

Q. Where are you working now? A. Armour—Armour Company.

Q. How long have you been working with them? A. Armour Company?

Q. Yes. A. 1917.

20 Q. Well, when? The front or last part of 1917? A. Why, around June, I believe, of 1917.

Q. And before then where did you work? A. Previous to then I think it was the Jersey City Ladder Company.

Q. How long did you work with the Jersey City Ladder Company? A. A short while.

Q. Well, how long, a minute or a year? A. Matter of a month or so.

30 Q. Before then, who did you work for? A. That was the first work I took, from the time of the accident, was the Jersey City Ladder Company.

Q. Didn't you go back to work for your father? A. On Saturdays I walked in—tried to assist him, yes, and I wasn't capable of doing it.

Q. You heard your wife testify? A. Yes.

Q. You heard her testify you worked with your father a while? A. I tried to assist him on Saturdays, yes.

Q. Did you hear her tell that? A. Yes.

40 Q. Does that work just consist of Saturday work? A. Saturday work only.

EDWARD J. MANN, recalled—Re-direct

Q. What are you making with Armour's now, per week? A. Twenty-one dollars.

Q. How much? A. Twenty-one dollars.

Q. What department do you work in? A. Provisions.

Q. Butcher work? A. No, clerk,

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Q. You have had that job since about June, 1917? A. Yes, little over a year.

Q. What kind of a clerk are you, shipping clerk? A. Billing.

Q. You make out the bills? A. Not making out bills. More of an order clerk.

Q. What do you do? A. Put up orders?

Q. Put up orders? A. Yes.

Q. Where do you get the information to put up orders? A. From a bill.

20

Q. From a bill that is given to you by whom? A. By a salesman that makes them out.

Q. Do you make up or check up these bills as you make up the orders? A. Just look them over and check them off and see if they get the stuff.

Q. Make sure the order made up is in accordance with the bill you have? A. Yes.

Q. You have been doing that since June, 1917? A. Yes, been working up there.

Q. That is all.

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Re-direct examination by Mr. Simpson.

Q. Were you examined by any physician for the defendant, or by the defendants, or either of them? A. I was.

Q. Who? A. Doctor, corner Jersey avenue and York street, I believe it is.

Q. Dr. Rector? A. Yes.

Q. He examined you for the defendants, didn't he? A. Yes.

Q. When was that? A. A matter of a month or

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EDWARD J. MANN, recalled—Re-direct

six weeks, I should judge; I am not sure; after the accident.

Q. He is not here to-day? A. He is not.

Q. Although Mr.—

Mr. AUTENRIETH—He is in France.

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Mr. SIMPSON—You did not take his testimony, did you?

Mr. AUTENRIETH—No, it is impossible now. You know that.

Mr. SIMPSON—I don't know that anything is impossible, do you? That is all.

Mr. AUTENRIETH—Are you through?

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Mr. SIMPSON—The doctor is not here. I will not ask your Honor to wait for him any longer. I telephoned him an hour ago.

Mr. AUTENRIETH—I am willing to wait for the doctor as long as you want to wait. I would like to get him. In fact, if your Honor wants to adjourn over the noon hour—

THE COURT—I do not think we ought to do that.

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Mr. SIMPSON—Then I will close without the doctor.

Mr. AUTENRIETH—I do not want to stop him.

PLAINTIFF RESTS.

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MOTION TO DIRECT A VERDICT.

Mr. AUTENRIETH—I renew my motion for a non-suit in the form of a direction of verdict and simply add to that that it appears this work now was done by an independent contractor over whom neither party had any supervision or control. The contract is in evidence, and the scaffold work was done pursuant to it, and certainly neither defendant—with respect to Balene I would say that he was merely the general contractor. This work was not under his supervision and control as to erection, construction and maintenance, and I cannot see any liability as to him. As to the other defendant, the owner, the only theory that they could work it on against him is to raise that elusive nuisance theory, and just what is a nuisance is a nice question, but this would have to be a nuisance per se, and if that is true and that is so, they must show the land owner, who was not in possession of the land, not in occupation of the land, had had an opportunity to apprise himself of the condition or the conditions existing for such a length of time that he should have known it, none of which appears here, and had an opportunity to remedy it or to remove it. All that appears here is that people walked up and down there for days, and even the owner did himself; that the following day people went on walking there; there was never any change made in the place except this officer thinks a beam was moved, but that is not brought home to the owner, and even if you want to call it a nuisance you cannot charge a negligent act to the owner when the sub-contractor put it there, if it was there, without the owner's knowledge, without the owner having an opportunity to remedy the nuisance, if it ever existed. I think there is no negligence shown by either party,

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MOTION TO DIRECT A VERDICT

and therefore I move for a direction of verdict as to both defendants. (Discussion.)

10 THE COURT—I am rather inclined to think, as the evidence stands now, there is nothing by which I could hold the sub contractor. The only question is whether or not the owner knew of this nuisance. That is for the jury to say. I shall refuse the motion to direct a verdict so far as the owner is concerned, and grant your motion as far as the contractor is concerned.

Mr. AUTENRIETH—Your Honor will note an objection to the ruling refusing to grant the motion?

20 THE COURT—Yes, and Mr. Simpson can take an exception to my granting it, and that will bring you both in it.

Mr. AUTENRIETH—Your doctor is not here?

Mr. SIMPSON—No.

Mr. AUTENRIETH—I presume we might as well sum up.

THE COURT—Yes.

THE FOREMAN OF THE JURY—Excuse me; can I ask a question? Did this accident happen before the water and sewer was tapped?

30 Mr. AUTENRIETH—I can't answer that.

Mr. SIMPSON—Ask Max. Did this accident happen before the water and sewer was tapped?

Mr. MAX—To the other building. The sewer and water was tapped about six weeks before this building was ever built.

THE FOREMAN—Because they generally raise the ground, from my experience. It happened right where—

40 Mr. MAX—That sewer is about one hundred or

CHARGE

seventy-five feet from the place where the scaffold was erected.

(Counsel summed up to the jury.)

COURT'S CHARGE TO THE JURY.

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GENTLEMEN OF THE JURY.

This case has been tried in such a short space of time it would be useless for me to call your attention to any portion of the evidence, especially as counsel learned in the law have fully and ably commented upon it.

The plaintiff in this case claims that he was injured by striking his head against a piece of a scaffold in front of a property owned by this defendant, the only defendant now before you, and it is for you to say whether or not the plaintiff was injured in the way and manner in which he says he was; was he injured on this night in question, the 11th day of October, 1915, by striking his head against a piece of the scaffold when walking along the sidewalk in front of the defendant's property? If he was, then, gentlemen, you are to say whether or not the scaffold as erected was a nuisance. He had a right under the law to use the whole sidewalk, the whole width of the sidewalk, and he had a right to presume that the sidewalk was safe for the passage of an individual along that sidewalk, and you have heard the condition of this scaffold, the way it was built, the height it was built, the length of time it had been there, and you are to say whether under all the circumstances of the case the scaffold as erected, erected for a lawful purpose to construct the building, was a nuisance. If it was a nuisance, then the plaintiff under certain circumstances and under cer-

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CHARGE

tain conditions may recover for the injury which he sustained. It is a well settled rule, now firmly established, that where the owner of lands undertakes to do a work which in the ordinary mode of doing it is a nuisance, he is liable for any injury which may result from it to third persons though
10 the work be done by a contractor exercising an independent employment, and employing his own servants, but when the work is not in itself a nuisance and the injury results from a neglect of such contractor or his servants in the execution of it, the contractor is alone liable, unless the owner is in default in employing an unskillful or improper person as a contractor. So you see in this case, unless another element entered into this case there
20 would be no liability on the part of the owner of the property for the maintenance and erection of this scaffold, if you gentlemen believe from the evidence that it was erected by the man Gordano; but the defendant in this case was the owner of the property, and if it had been called to his attention that a nuisance existed it was his duty to remedy and remove that nuisance, or if it had existed for such a length of time that he was supposed to have notice, and reasonably should have known that such a nuisance
30 existed, and he had a sufficient length of time to remedy the evil, then in that case he would be liable and a verdict would run against him. So, gentlemen, you are to determine in the first place, was the scaffold a nuisance, and if it was a nuisance, then had it been brought to the attention of the owner, or had it existed for such a length of time that the owner should have known of its existence and had a reasonable length of time to remedy it. Now, if you find that the defendant was not liable,
40 and the plaintiff must establish his case by a fair

CHARGE

preponderance of the testimony, then your verdict should be a verdict in favor of the defendant. But if on the contrary you find that this was a nuisance and that it had been called to the attention of the owner, or that it had existed for such a length of time that he should have known it and had a reasonable length of time to remedy it, then your verdict should be for the plaintiff. If you find for the plaintiff, it is your duty then to determine the amount of money that you should award him, because the plaintiff is entitled to have his damages computed in dollars and cents by you, and that would be your province if you find in favor of the plaintiff. In this case there can be no exemplary damages, that is, smart money or money to punish the defendant, but the plaintiff is entitled to a sum that will compensate him for the injury which he received, and in computing it you should take into consideration the pain and suffering that he has endured, and you, as sensible men, have to determine that, after considering the extent of his injury and the length of time it existed, and whether, in your opinion, it will exist in the future—probably exist in the future. You cannot guess at that. There must be some evidence on that point before you can take that into consideration. If he has lost wages by reason of this accident, he is entitled to be compensated for the length of time he has been deprived from earning and carrying on his usual occupation and business, and if he has spent any money for doctors or medicine, he is entitled to that sum. Then you may consider, gentlemen, whether there is any permanent injury, and if there is any permanent injury he is entitled to be compensated for that. In other words, he is entitled to such a sum as will compensate him for the injury and damage which was done by reason of this accident, if he can

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DEFENDANT'S EXCEPTIONS

EXHIBIT D 1

recover at all. If you find that there is no liability, then your verdict should be a verdict for the defendant. If for the plaintiff, then for such sum as you find would compensate him for his injury.
10 Swear an officer.

The jury retired.

DEFENDANT'S EXCEPTIONS.

Mr. AUTENREITH—I want to except to that portion of your Honor's charge which says that it is for the jury to say that the scaffold as it existed was or was not a nuisance.

20 THE COURT—Yes.

Mr. AUTENRIETH—I do not remember the phraseology, but that is the point.

THE COURT—Yes.

EXHIBIT D 1.

AGREEMENT made and entered into this 22d day of September, 1915, between Max L. Balene, of the City of Jersey City, Hudson County, New Jersey,
30 party of the first part, and Salvatore Giordano, of the same place, party of the second part;

WITNESSETH, that the party of the second part does promise and agree to furnish and supply all the necessary and proper labor and help required in and about the performance and completion of the mason work required on certain four buildings known as premises 2-4-6-8 Broadway, Jersey City, N. J., being the northwesterly corner of Broadway and Tonnele avenue, for the agreed sum of \$3,300,
40 to be paid and satisfied as hereinafter mentioned;

EXHIBIT D 1

all said labor to be in accordance with the plans and specifications for said buildings made by Nathan Welitoff, architect.

The party of the second part agrees to complete said work in not more than 28 working days from September 16, 1915, and for each and every day which he may delay said work beyond such time, the parties hereto do fix and agree upon the sum of \$25 per day to be paid to the party of the first part by the party of the second part as and for liquidated damages for such delay. 10

It is further understood and agreed between the parties hereto, that in the event that the party of the second part shall not perform such work as required by the terms of this contract, or shall unnecessarily delay such performance, as and when directed to proceed by the party of the first part, that then and in that event the party of the first part shall have the privilege, upon two days' written notice to the party of the second part, to supply the necessary labor and charge the same to the party of the second part, or to rescind this contract and have the work completed by others, and charge the cost thereof to the party of the second part. 20

It is further understood between the parties hereto, that no extra work is to be performed by the party of the second part, unless upon the written order of the party of the first part first had and obtained therefor, and that in the event that such extra work should be ordered, it is understood and agreed between the parties hereto, that the amount of such extra work is to be measured and charged for at the rate of \$5.25 per thousand bricks. 30

It is further understood and agreed that the party of the second part is to complete said work in good, substantial and workmanlike manner to the entire satisfaction of the party of the first part; and 40

EXHIBIT D 1

all tools necessary to be used in said work are to be supplied by the party of the second part.

The party of the first part for and in consideration of the foregoing, does promise and agree to pay to the party of the second part the sum of \$3,300 as follows:

10	When the cellars are completed the sum of	\$300
	“ “ buildings are complete up to the first story, the sum of	450
	“ buildings are complete up to the second story, the sum of	450
	“ the first and second story fronts of buildings are complete the sum of	200
	“ “ third stories on said buildings are completed the sum of	500
20	“ “ third story fronts on said buildings are complete the sum of	300
	“ “ roofs are on said buildings and fronts washed	200
	Ten days after completion of outside work the sum of	500
	Balance when all work is satisfactorily completed	400

30 This agreement to bind the heirs, executors, administrators and assigns of the respective parties hereto.

IN WITNESS WHEREOF the parties hereto have hereunto set their hands and seals the day and year first above written.

Signed, sealed and delivered }
in the presence of }

MAX L. BALENE, [L.S.]
S. GIORDANO, [L.S.]

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New Jersey Court of Errors and Appeals

EDWARD J. MANN,
Plaintiff-Appellee,

v.

HARRY J. MAX
Defendant-Appellant.

Action at
Law.
On Appeal.

BRIEF OF APPELLEE.

This case is before the Court of Errors and Appeals, on an appeal from the Hudson County Circuit Court, on an exception to the ruling of the Trial Court in refusing to grant a non-suit and a refusal to direct a verdict. The appellant, Harry J. Max, was the owner of a building at No. 2 Broadway, Jersey City, New Jersey, upon which a scaffold was erected, and from which scaffold a beam extended in such a position, that a pedestrian walking along the public sidewalk was injured through the negligence of the defendant. It is the insistment of the appellee that the appellant, the owner of the land, was responsible for negligence by reason of the fact that, with his knowledge, he permitted a negligent obstruction which, in legal contemplation, was a nuisance to exist and to be maintained upon the premises of which he was an owner, and that the legal nuisance was of such a character, that the mere employment of an independent contractor does not exempt him from liability to a person injured, by reason of his passiveness in permitting a nuisance to exist and to be maintained to the knowledge of the appellant.

POINT I.

There was no error in the refusal of the Court to non-suit the plaintiff.

An inspection of the state of the case, will show that the defendant maintained a watchman on the premises in question, and that the appellant and his watchman were in charge of the entire property, and that during the course of construction, and while the watchman was there, the defendant exercised a supervisory direction of the operations of the general construction of the building. It is not the intention of the appellee to contest the general proposition that where one employs a contractor who is independent, and who employs his own servants to do the work, the contractor alone is responsible. This principle of law is so salutary, and its foundations are so embedded in our decision and in the course of everyday existence, that nobody can doubt its validity when applied to a proper case, but the case at bar is not one of those circumstances to which this rule can be applied, as the erection and the projection of a beam which is permitted to exist, whereby a party, *rightfully* on a public sidewalk, may be and is injured by reason of this projection. Certainly it cannot be denied that the projection over that part of the thoroughfare is not a nuisance, where there is an interference with the free and uninterrupted passage of persons lawfully on the public sidewalk. On page 6 of the appellant's brief, the following notation appears:

“That the scaffold, as it had been erected by the sub-contractor, with a beam projecting over the sidewalk, low enough to interfere with pedestrians passing underneath, constituted a nuisance, and that, therefore, the appellant would be liable. This proposition is illogical, and is not the law of this State.”

The brief of the appellant does not indicate, or point out in any way what it means by the statement that the proposition is illogical, but it does attempt to bring this case within the general rule. Appellant refers with reliance to the case of *Redstrake v. Swayze*, in regard to an owner employing an independent contractor, and on page 7 of his brief, says, that "*Trial Court evidently adopted an erroneous idea of the nuisance question in the situation at bar, for it is not a nuisance to erect mason work in the construction of a building, and if this work is done in the ordinary manner, it does not in itself constitute a nuisance.*"

Of course, neither court nor jury or any other person will say that it is a nuisance to erect mason work in the construction of a building, nor stone or steel work or any other kind of work, if the work is done in the ordinary manner. The statement of the proposition shows quite plainly that the appellant has mistaken the legal theory upon which the case was submitted to the jury. The Court did not say, nor does the appellee insist, that it is a nuisance to use masonry work to erect a building, nor if this work is done in an ordinary manner, is it a nuisance, but the appellant does insist that a party who installs masonry work in the construction of a building, and for the purpose of facilitating the work of his masonry, constructs something outside of the building which interferes with the passage of pedestrians on the sidewalk, and is of such negligent construction as to interfere with the progress of passersby, is an interference with the rights of the public and those particularly injured have a right to claim damages, and that the obstruction can be legally and logically deemed a nuisance. When the owner maintains a supervisory direction over the operation of the independent contractor, and

a constant daily observation of the operations of the independent contractor, and maintains a watchman on the premises which contains obstruction to public passage, it certainly presents a situation which under the law gives notice to the owner of the rights of the public where a building under construction has a projection over the sidewalk, and is a menace to third persons, and an interruption to public passage of such a character as the law deems a nuisance, the rule as to independent contractor does not apply. The appellant in his brief says that:

“In order to hold the owner of lands in a situation of this kind, it must appear that from the very nature of the contract, when entered into, the independent contractor must perform work which will create a nuisance and a menace to third persons.”

The accuracy of this legal proposition is emphatically denied by the appellee because of the fact that an independent contract when entered into, may provide for accomplishment of an object entirely legitimate, but through its negligent performance by an independent contractor and the knowledge thereof, which the law imputes to the appellant, the law will immediately cast a burden upon the appellant to keep his eyes open and to use such care to prevent injury as an ordinary person would do under the circumstances of the particular case. A *criticism* is made of the charge of the Trial Court, because of the fact that the Court said that the appellant should have removed the nuisance after its negligent and dangerous character became known to him. This criticism, however, is answered by the fact that a reading of the charge will disclose that the elementary rule governing this class of cases was fairly and clearly stated to the jury, and there is no reason

for doubting, and no authority for questioning the legal soundness of the Court's construction and imputation of the knowledge to appellant in this case. The appellee takes exception to the underlying basis which the appellant claims is the ground of the legal notion whereby the land owner is liable in doing the work which is a nuisance, even though an independent contractor is employed. It is no more than the application of the general rule of law which prescribes punishment for violation of legal duty. It was the duty of the appellant to provide safe *passage* in front of the building which he was erecting, to have a safe and uninterrupted passage way, and upon his knowledge of any projection either constructed by any person who is employed by the contractor or under contract with him, to immediately remove the same. The appellant had knowledge of the unusual and defective character of this scaffold. He had been in the vicinity of this building every day for about two weeks and says on page 9 of the plaintiff's brief: "He had seen it every day, walked under it, and to his knowledge prior to the accident, no beam was low enough to have struck a passing pedestrian," page 44. In addition to these facts, he maintained a watchman at the building, and in general exercised a control of an executive or supervisory character. Under all these circumstances it is respectfully submitted that the questions of law involved in this case were properly stated by the Trial Court and that the law upon which the case was submitted to the jury was an accurate and sound exposition of the decisions relating to independent contractors and their manifold operations. The proof of the nuisance of that, is the projection, whether it was a nuisance, whether

the appellant maintained it, whether the appellant had knowledge of its existence, were certainly question for the jury under our cases. It was purely and simply a jury case, to say whether or not the defendant was liable under the cases cited by the appellant of *Schnatterer v. Bamberger*, 81 Law, 558; *Timlan v. Dillworth*, 47 Vr. 568; *Johnson v. Brewing Co.*, 46 Vr., 282. As stated in the brief of the appellant at page 11, which the appellee does not contest, the following citation may be found:

“This is a well settled principle of the law of negligence; that the owner of lands and buildings is liable for the negligent condition if he has had an opportunity to know of the condition and to have remedied it.”

It is respectfully insisted that the appellant who was the owner of the lands in this case is liable for the negligent condition which was the cause of the injury to the appellee, because he had every opportunity to know of this negligent condition and abundant time to have remedied its dangerous condition. It is respectfully insisted that the judgment of the Hudson County Circuit Court be affirmed.

ALEXANDER SIMPSON,
Attorney of and of Counsel with Appellee.

New Jersey
Court of Errors and Appeals.

EDWARD J. MANN,
Plaintiff-Appellee,

vs.

HARRY J. MAX,
Defendant-Appellant.

Action at Law.

On Appeal.

BRIEF OF APPELLANT.

This case is before the Court on appeal from a judgment in the Hudson County Circuit Court entered herein on the 25th day of November, 1918. The case was tried before Judge Willard W. Cutler and a jury in the Hudson County Circuit Court and resulted in a verdict for the plaintiff in the sum of \$2,750, and that a rule to show cause was afterwards issued (p. 5) by the Trial Court, and after argument the Court made an order directing that the verdict be reduced to \$1,250 on the ground that the same was excessive (p. 7).

There was reserved to the defendant in the rule to show cause the objections to the rulings of the Trial Court in refusing to grant a non-suit and the refusal to direct a verdict, and also all other objections made to the Court's ruling during the trial.

FACTS.

That on or about October 11, 1915, the defendant, Harry J. Max, was the owner of a building which was in the course of construction at No. 2 Broadway, Jersey City, which building had its depth fronting on Tonnele avenue, where the accident occurred.

On the night of October 11, 1915, the plaintiff, while walking along the street, struck his head upon a beam which extended from over head and was part of the scaffolding used by the masons in constructing the mason work on the building (pp. 10 and 11). At the time the accident happened the plaintiff was alone. It appears that the plaintiff claims that after the accident he suffered dizziness and nervousness, and since the accident claims he has to wear glasses (pp. 11 and 12). His doctor bill was \$50 (p. 12).

On the evening of the accident plaintiff left his home, which was in the vicinity of the place of the accident, around 8 o'clock (p. 13), called on a friend and stopped at several saloons on his way home (pp. 14 and 15). It appeared, in the plaintiff's case, that the beam which held up the scaffolding was low enough to strike the plaintiff's head as he walked under it (pp. 22 and 23).

The appellant before this Court (Harry J. Max), was the owner of the land. This fact is admitted by the answer to the complaint, and that he had made a general contract for the erection of this building with the other defendant, Max L. Balene (p. 31). This general contract included the mason-work, which necessitated the erection of this scaffold (p. 31). Max L. Balene, the general contractor, sub let the mason work to one S. Gordano by written contract (p. 31, Exhibit D 1, p. 62) and had

nothing to do with the mason work or the erection and construction of the scaffold (p. 32), and the men who erected the scaffold and who were working on the scaffold were men in the employ of Gordano, the sub-contractor (p. 32).

The appellant here, Harry J. Max, did not erect the scaffold, nor did he have anything to do with its erection or construction (p. 33). According to the evidence one beam of the scaffold projected over the sidewalk at a height of about six feet from the level of the sidewalk (p. 23).

At the end of the plaintiff's case a motion was made to non-suit as to the defendant, Max Balene, because the evidence did not show that he had erected the scaffold, nor had any control or jurisdiction over its maintenance or construction; and as to the defendant, Harry J. Max, the appellant in this Court, on the ground that it appeared in the plaintiff's own case that the scaffold was erected by S. Gordano, who was an independent contractor, with respect to whom Harry J. Max, the owner of the land, had no connection or control over his work or servants in performing the mason work in the erection of the scaffold. This motion was denied (p. 37).

At the end of the entire case a motion was made on behalf of both defendants to direct a verdict upon the same ground as stated in the motion for non suit, and also upon the ground that the contract (Exhibit D 1, p. 62) showed conclusively that the work of erection and construction of the scaffolding was done by an independent contractor, over whom neither of the defendants had any control (p. 57).

The Court directed a verdict in favor of the defendant, Max L. Balene, because it appeared that

he had nothing whatever to do with the work, he being a general contractor, and having sub-let this portion of the contract, but refused to direct a verdict in favor of the defendant, Harry J. Max, on the ground that the condition of the scaffold, having a beam low enough over the sidewalk for a pedestrian to strike his head upon it, was a nuisance, for which the owner would be liable. The case, therefore, went to the jury as to defendant, Harry J. Max, with the result aforesaid.

This case is now before this Court upon the objections to the Court's ruling in refusing the motion to non-suit and in refusing the direction of a verdict in favor of the defendant, Harry J. Max.

The questions raised by the motions aforesaid show that the defendant, Harry J. Max, was the owner of the land; that the scaffold was erected by one Gordano, who was an independent contractor, over whom Max had no supervision or control whatever; and that therefore he was not liable for acts of negligence committed by the servants or employees of the independent contractor in the erection and construction of this scaffold.

I.

Where one employs a contractor exercising an independent employment and hiring his own servants to do a work not in itself a nuisance, the contractor alone is liable for an injury resulting from the negligence of himself or his servants, unless the employer was negligent in engaging an unskillful contractor.

In the case at bar it will be noticed that the appellant contracted with the other defendant, Max

L. Balene, as general contractor, for the erection of the buildings on the property owned by this appellant (p. 31), and that the general contractor sub-let the mason work to S. Gordano (p. 31, Ex. D 1, p. 62). That under the terms of the agreement between the general contractor and the sub-contractor the said sub-contractor agreed to supply all of the labor and complete all of the work on the buildings situated on Broadway, Jersey City, one of which had the alleged defective scaffold in front of it; that as the work progressed payments were to be made to the said contractor according to the schedules set forth in the contract. For the erection and construction of the mason work the said sub-contractor was to receive the sum of \$3,300 (Ex. D 1, p. 62, &c.).

It will be noted, therefore, that the appellant, who is the owner of the land, did not make the contract with the person who had in charge the erection and construction of the work, and incidentally the scaffold, and therefore any question of the selection of a skillful person is out of the case.

The scaffold used in putting up the mason work was constructed by the sub-contractor, who employed his own men; that the appellant had nothing whatever to do with the hiring of the sub-contractor's men; in fact had no business dealings whatever with the sub-contractor (p. 42).

The rule of law is well settled in this case that, where one employs a contractor exercising an independent employment and hiring his own servants to do a work which is negligently done by such contractor or his servants, the contractor alone is liable for the negligence of himself or his servants. *Redstrake vs. Swayze*, 52 N. J. L., 129; *Cuff vs. Newark & N. Y. R. Co.*, 35 N. J. L., 17; *Doughty vs. Atlantic City Business League*, 80 Atl., 473 (Ct.

of *E. & A.*); 26 Cyc., 1553; *Schutte vs. United Electric Co.*, 68 N. J. L., 435.

The case is entirely barren of any evidence indicating that the owner had any supervision or control over the servants of this sub-contractor, or in anywise participating in the carrying on of the work that the said contractor was doing. In fact, the only evidence on the point is the evidence given by the appellant herein, in which he says:

“Q. Did you have anything to do with the hiring of his men? A. No, sir.

“Q. Did you have any business dealings, directly, at all, with Gordano? A. No, sir, except making payments to Mr. Balene” (p. 42).

It is undisputed that the scaffold work was performed by the sub-contractor and his employees, and if done in a negligent manner the negligence was entirely that of the sub contractor or his employees.

Under the rule of law, therefore, as above stated, there can be no liability on the part of the appellant herein for the negligent manner in the doing of this work, nor for the alleged injuries sustained by the plaintiff.

However, at the trial the following question was raised: That the scaffold, as it had been erected by the sub-contractor, with a beam projecting over the sidewalk, low enough to interfere with pedestrians passing underneath, constituted a nuisance, and that therefore the appellant would be liable. This proposition is illogical and is not the law of this State.

The case of *Redstrake v. Swayze*, *supra*, in laying down the rule of law as to the liability of an owner

employing an independent contractor, states the rule as follows:

“Where one employs a contractor exercising an independent employment and hiring his own servants to do a work *not in itself a nuisance*, the contractor alone is liable, etc.”

The case of *Cuff vs. Newark & N. Y. R. Co.*, *supra*, the rule is again set forth as follows:

“The rule is now firmly established that where the owner of lands undertakes to do a work which, in the *ordinary mode of doing it is a nuisance*, he is liable for any injuries which may result from it to third persons, though the work is done by a contractor exercising an independent employment and employing his own servants. *But when the work is not in itself a nuisance* and the injury results from the negligence of such contractor or his servants, in the execution of it, the contractor alone is liable unless the owner is in default in employing an unskillful or improper person as the contractor.”

The Trial Court evidently adopted an erroneous idea of the nuisance question in the situation at bar, for it is not a nuisance to erect mason work in the construction of a building, and if this work is done in the ordinary manner it does not in itself constitute a nuisance. It is quite true that the negligence of the independent contractor's servants may create a nuisance in the doing of the work, but their negligence will not make liable the owner

of the land, for it is that very thing that the law absolved the owner of liability therefor.

In order to hold the owner of lands in a situation of this kind, it must appear that from the very nature of the contract, when entered into, the independent contractor must perform work which will create a nuisance and a menace to third persons.

In *Doughty vs. Atlantic City Business League, supra*, it was held that an independent contractor who undertook to set off fireworks contracted to do that which in itself would be a nuisance, and the Court there held as follows:

“Since in the present case the exhibition was a nuisance, the doctrine that exempts one from liability for the act of an independent contractor does not apply.”

The Trial Court in its charge to the jury set forth the rule that if the independent contractor created a nuisance by the negligent manner in which he performed the work, that the defendant-appellant should have removed the nuisance, or otherwise he would be liable therefor. There is, however, a decided difference between contracting to do a work which, if done properly, will not be a nuisance, and a work which, because of the negligent manner in which the sub-contractor performed it, became a nuisance.

The theory of the law which makes the landowner liable where the doing of the work is in itself a nuisance is undoubtedly based upon presumption that the land owner and the independent contractor are both parties to the creation of a nuisance, for, by the terms of the contract, the land owner engages the independent contractor to

do an illegal act, to wit, create a nuisance. But if he engages him to do a legitimate work, which can only become a nuisance because of the contractor's negligence, why, then, the rule of law applies, to wit, that for the contractor's negligence the land-owner is not liable.

The appellant testified that he was erecting other buildings nearby to the one in question (p. 44), and that this scaffolding, to his recollection, had been up for about two weeks; that he had seen it every day, walked under it, and, to his knowledge, prior to the accident, no beam was low enough to have struck a passing pedestrian (p. 44); that the appellant never did any work on the scaffolding, nor did he change them, nor did he have anything to do with them (p. 45).

Appellant's principal occupation in the neighborhood of this building was the renting of apartments and buildings which had been completed (p. 45, 46). Of course the mere fact that he was present cannot be the basis of any liability for the negligence of the sub-contractor. *Cullum vs. McKelvey*, 49 N. Y. Supp., 669. But it would have to be shown that the appellant actually participated in the work. *Slingerland vs. East Jersey Water Co.*, 58 N. J. L., 411.

If, therefore, it should be assumed that the appellant was under a duty to abate this nuisance when it came into existence, we are then confronted with the next proposition of law.

II.

The defendant did not know of the existence of a nuisance nor did he have an opportunity to remedy the defect.

If there was any obligation on the part of the appellant to have remedied the nuisance, of course his liability would be predicated upon the fact that he had knowledge of its existence and permitted it to remain or did not use reasonable care in remedying the defect. In our judgment this proposition has no foundation in law, but we call it to the Court's attention merely by way of anticipating the appellee's views as expressed at the trial. In the first place, if such was the duty of the appellant, it would mean that he would have to interfere with the work of the sub-contractor; he would have to employ men to tear down the scaffold or to remove the beam and re-arrange the scaffold, and thereby would make him a direct party or participant in this work. In the second place the appellant would have no legal right to interfere with the work of the sub contractor, for he had contracted for the work with a general contractor, and if he attempted to interfere, he would be liable then as a participant for any of the negligent acts of the sub-contractor's servants and would be interfering with the performance of the terms and conditions of the contract as it existed between the sub-contractor and the general contractor. It would be quite illogical, therefore, to say that he was under any duty to step in and attempt to remedy a nuisance which is created by the performance of an independent contract over which, as a matter of law, he could not exercise any control. If, however, such were his duty, the evidence must indicate the appellant had knowledge that the nuisance existed and had also

a reasonable time within which to remedy it, or that the nuisance existed for such a length of time that, by reasonable inspection, the appellant would have discovered it.

This is a well-settled principle of the law of negligence; that the owner of lands and buildings is liable for the negligent condition if he has had an opportunity to know of the condition and to have remedied it. *Schnatterer vs. Bamberger*, 81 Law, 558; *Timlan vs. Dillworth*, 47 Vr., 568; *Johnson vs. Brewing Co.*, 46 Vr., 282.

In the case at bar the evidence does not disclose just when this projecting beam was placed so as to become a menace to pedestrians; and if we bear in mind that the sub contractor was putting up mason work which constantly changed the height of the scaffold, it will be apparent that the appellant would have an arduous task to constantly watch its change and alteration so that a nuisance would not be created. At any rate, the only evidence as to its condition prior to the accident is by the appellant, who says that the day before he walked under the scaffold there were no beams low enough to strike anyone, and therefore the defective condition must have arisen afterwards. It does not appear that the appellant had an opportunity to know of its defective condition, nor an opportunity to have remedied the defect, if he was under any obligation at all to have done so.

However, this theory of law is not logical or sound, for it is contrary to the principles laid down in *Redstrake vs. Swayze* and *Cuff vs. Newark & N. Y. R. Co.*, *supra*, which state that there is no liability on "anyone" but the contractor, unless the doing of the work itself is a nuisance.

The motions to non suit and direct a verdict

therefor should have prevailed, for the evidence did not disclose any liability on the part of the appellant.

It is respectfully submitted, therefore, that the judgment of the Hudson County Circuit Court be reversed.

RUNYON & AUTENRIETH,

Of Counsel with Appellant.

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therefore should have proceeded for the recovery of the
 and likewise any liability on the part of the agent
 him.

It is respectfully submitted therefore that the
 judgment of the United States Circuit Court be
 reversed.

ALFRED A. BUTLER

(McLuskey vs. Appellant)