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Summons.

Filed November 25, 1925.

10

The State of New Jersey:

To Loew Inc. a corporation,
You are summoned to answer the
annexed complaint of Carmela Del
(L.S.) Pomo and Michael Del Pomo, her
husband, in an action at law in the
Supreme Court. And take notice
that unless you file your answer to said complaint
with the Clerk of the Supreme Court at Trenton, 20
within twenty days after service upon you of this
writ, and the annexed complaint, the plaintiff may
proceed in the suit and judgment may be entered
against you.

Witness, WILLIAM S. GUMMERE, Chief Justice of
the Supreme Court at Trenton, this twenty third
day of November, A. D. 1925.

EDWARD J. KELLEHER,

Clerk. 30

FELIX FORLENZA,
Attorney.

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Complaint.

Filed November 25, 1925.

NEW JERSEY SUPREME COURT,

ESSEX COUNTY.

10	CARMELA DEL POMO and MI- CHAEL DEL POMO, her husband, Plaintiffs,	}	Action at Law.
	vs.		Complaint.
	LOEW, INC., a corporation, Defendant.		

20 Plaintiff, Carmela Del Pomo, residing at #361
 Clifton Avenue, in the City of Newark, County of
 Essex and State of New Jersey, says that:

1. The defendant is a corporation.

30 2. The plaintiff on the twenty-second day of
 February, 1925, at the City of Newark, was by the
 defendant invited into a certain close or premises
 known as Loew's State Theatre, at #635 Broad
 Street, Newark, New Jersey, used by the defend-
 40 ant as a place of amusement, into which place of
 amusement the plaintiff was invited to go by the
 defendant upon the payment of a sum of money,
 which she paid and then entered the said place of
 amusement, and while she was in the said place
 of amusement, upon said invitation of defendant
 as aforesaid, and while endeavoring to obtain a
 seat, and while using due care for her safety, by
 reason of the negligence of the defendant she was
 hurt by falling down and injured, as hereinafter
 set forth.

Complaint.

3. The said sum of money paid by the plaintiff entitled her to a seat in the orchestra, but as she was about to enter that part of the premises or building known as the orchestra she was told, instructed and ordered by the defendant or his agent to ascend that part of the building and premises known as the balcony, because there were no seats available in the orchestra. 10

4. In pursuance to the said instruction and order of the defendant, the plaintiff ascended to said balcony by means of certain stairs provided and maintained for that purpose by the defendant, which stairs were covered with a dark colored carpet.

5. The negligence of the defendant consists in this: that although it maintained a moving picture and vaudeville theatre which was kept dark, and although there was a stairway in the place which it was necessary for the plaintiff to use to ascend and leave the said place and balcony, yet the defendant did not use reasonable care to supply a person to direct the plaintiff how to ascend or leave the premises and balcony, although it was necessary in the exercise of reasonable care that it should do so, but on the contrary did not afford the plaintiff any assistance in endeavoring to leave the said balcony, and while attempting to leave the said balcony, and descending said stairway, by reason of the darkness and by reason of the fact that the stairway was constructed in such a manner that it was extremely steep and was so maintained in darkness by the defendant at all times mentioned herein, and by reason of the fact that the carpet on said stairs was worn and torn, 20
30
40

Complaint.

and by reason of the fact that no person had instructed or warned her of the danger and she was unaware of the said danger and by reason of the fact above set forth without fault on her part, she fell and received injuries to her right arm and shoulder.

- 10 The plaintiff demands of the defendant the sum of \$10,000. as damages.

SECOND COUNT.

Plaintiff, Michael Del Pomo, husband of the plaintiff, Carmela Del Pomo, residing at #361 Clifton Avenue, in the City of Newark, County of Essex and State of New Jersey, says that:

- 20 1. He here repeats and re-alleges each of the paragraphs of the First Count numbered "One to Five" inclusive with the same force and effect as though fully set forth herein.

- 30 6. By means of the premises the plaintiff was and is and for a long time will be deprived of the aid, comfort and society of his wife and was forced and obliged to pay out large sums of money for medicines, and doctor bills in an endeavor to have her healed and cured of her injuries as aforesaid and will be obliged in the future to spend large sums in an endeavor to have her cured of her injuries.

Plaintiff, Michael Del Pomo, demands of the defendant the sum of \$5000. as damages.

FELIX FORLENZA,
Attorney of Plaintiffs.

Answer.

Filed Dec. 14, 1925.

NEW JERSEY SUPREME COURT,

ESSEX COUNTY.

CARMELA DEL POMO and MI-
CHAEL DEL POMO, her husband,
Plaintiffs,

vs.

LOEW, INC., a corporation,
Defendant.

10

Action at Law.

Answer.

Defendant, a corporation organized and existing
under the laws of the State of New York and duly
authorized to do business in the State of New Jer-
sey, in answer to the Complaint of the Plaintiffs,
says: 20

ANSWER TO FIRST COUNT.

1. Paragraph One is admitted.
2. The defendant Corporation admits that it
operated Loew's State Theatre at the time and
place mentioned in Paragraph Two, but has no
knowledge or information from which to form a
belief as to whether or not the plaintiff, Carmela
Del Pomo, was a patron on the premises at the
time and place mentioned. Each and every other
allegation in Paragraph Two is denied. 30
3. Defendant has no knowledge or information
from which to form a belief as to the allegations
contained in Paragraph Three and therefore leaves
the plaintiffs to their proof. 40

Answer.

4. Defendant has no knowledge or information from which to form a belief as to the allegations contained in Paragraph Four of the Complaint, except that the defendant denies that the balcony stairways were covered with carpet.

10 5. Paragraph Five of the Complaint is denied.

ANSWER TO SECOND COUNT.

1. Defendant repeats paragraphs one, two, three, four and five of the First Count as though the same were herein specifically set forth.

2. Paragraph Six of the Second Count is denied.

20 Defendant reserves the right to move at or before the trial to strike out the first count on the ground that the same does not allege facts sufficient to sustain a cause of action against this defendant.

30 Defendant reserves the right to move at or before the trial to strike out the second count on the ground that the same does not allege facts sufficient to sustain a cause of action against this defendant.

FIRST SEPARATE DEFENSE TO THE FIRST COUNT.

Defendant was not guilty of any negligence which was the proximate cause of the injuries complained of.

Answer.

SECOND SEPARATE DEFENSE TO THE
FIRST COUNT.

Plaintiff, Carmela Del Pomo, was guilty of contributory negligence.

FIRST SEPARATE DEFENSE TO THE
SECOND COUNT.

10

Defendant was not guilty of any negligence which was the proximate cause of the injuries complained of.

SECOND SEPARATE DEFENSE TO THE
SECOND COUNT.

Plaintiff, Carmela Del Pomo, was guilty of contributory negligence.

WILLIAM P. BRAUN,
Attorney of Defendant.

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Reply.

Filed Dec. 16, 1925.

NEW JERSEY SUPREME COURT,

ESSEX COUNTY.

10 CARMELA DEL POMO and MI-
CHAEL DEL POMO, her husband,
Plaintiffs,

vs.

LOEW, INC., a corporation,
Defendant.

Action at Law.

Reply.

20 Plaintiffs deny the allegations in the defendant's
answer and especially deny that the plaintiff, Car-
mela Del Pomo, was in any way guilty of contrib-
utory negligence or in any way by her acts con-
tributed to the injuries which she sustained, as is
alleged in defendant's answer.

FELIX FORLENZA,
Attorney for Plaintiffs.

30

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Stipulation.

NEW JERSEY SUPREME COURT,

ESSEX COUNTY.

CARMELA DEL POMO and MI-
CHAEL DEL POMO, her husband,
Plaintiffs,

vs.

LOEW, INC., a corporation,
Defendant.

10

Action at Law.

Stipulation.

It is hereby stipulated, agreed and consented by
and between Felix Forlenza, attorney for the plain-
tiffs and Heine & Laird, Attorneys for the defend-
ant, that Heine & Laird be substituted as attorneys
for the defendant in the place of William P. Braun.

20

FELIX FORLENZA,
Attorney of Plaintiffs.

HEINE & LAIRD,
Attorneys of Defendant.

30

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Postea.

Filed April 27, 1929.

NEW JERSEY SUPREME COURT,

ESSEX COUNTY.

10	CARMELA DEL POMO and MI- CHAEL DEL POMO, her husband, Plaintiffs, vs. LOEW, INC., a corporation, Defendant.	}	Action at Law. Postea.
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20 This action was tried before Judge Nelson Y. Dungan with a jury, to whom same was referred for trial, at the Essex County Circuit, April 25, 1929.

This cause having been heard and submitted to the jury, they returned their verdict as follows:

30 The jury rendered a verdict against the defendant, Loew, Inc., a corporation, and in favor of the plaintiff, Carmela Del Pomo, for One Thousand Dollars (\$1,000.); and a verdict against the defendant, Loew, Inc., a corporation, and in favor of the plaintiff, Michael Del Pomo for Seven Hundred Dollars (\$700.)

NELSON Y. DUNGAN,
 Judge.

Notice of Appeal.

Filed Aug. 30, 1929.

NEW JERSEY SUPREME COURT,
ESSEX COUNTY.

CARMELA DEL POMO and MI-
CHAEL DEL POMO, her husband,
Plaintiffs,

vs.

LOEW, INC., a corporation,
Defendant.

10
Action at Law.
Notice
of Appeal.

To FELIX FORLENZA, 60 Park Pl., Newark, N. J.,
attorney for plaintiffs: 20

Please Take Notice that the defendant hereby
appeals from the judgment entered in the above
entitled cause to the New Jersey Court of Errors
and Appeals, the court of last resort in all causes.

Respectfully yours,

HEINE & LAIRD,
Attorneys for Defendant.

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Grounds of Appeal.

Filed Aug. 30, 1929.

**NEW JERSEY COURT OF ERRORS AND
APPEALS.**

10	<p>CARMELA DEL POMO and MI- CHAEL DEL POMO, her husband, Plaintiffs-Respondents,</p> <p style="text-align: center;">vs.</p> <p>LOEW, INC., a corporation, Defendant-Appellant.</p>	}	<p>On Appeal from New Jersey Supreme Court. Essex Circuit.</p> <p>Grounds of Appeal.</p>
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20 To FELIX FORLENZA, 60 Park Pl., Newark, N. J.,
attorney for plaintiffs-respondents:

Please Take Notice that the following is the
ground of appeal which the defendant-appellant
hereby assigns upon which it will rely:

1. That the trial court erroneously refused to
grant the defendant's motion for a non-suit.

HEINE & LAIRD,
Attorneys for Defendant-Appellant.

30

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Testimony.

NEW JERSEY SUPREME COURT,

ESSEX CIRCUIT.

April 24, 1929.

CARMELA DEL POMO and MI-
CHAEL DEL POMO, her husband,
Plaintiffs,

vs.

LOEW, INC., a corporation,
Defendant

10

Action at Law.

Before HON. NELSON Y. DUNGAN, J., and a Jury.

20

APPEARANCES.

For the plaintiffs appear FORLENZA AND
HARRINGTON (by HUBERT J. HARRING-
TON).

For the defendant appear HEINE AND
LAIRD (by JOHN A. LAIRD).

A jury is called and sworn.

Mr. Harrington opens the case in behalf of the 30
plaintiffs.

Mr. Laird opens the case in behalf of the de-
fendant.

CARMELO DEL POMO, one of the plaintiffs,
sworn in her own behalf.

Direct-examination by Mr. Harrington:

Q. Where do you live, Mrs. Del Pomo? A. At 40
361 Clifton Avenue.

Carmelo Del Pomo—Direct.

Q. Did you live there at the time of this accident? A. Yes, sir.

Q. On February 22, 1925 you had an accident? A. Yes.

10 Q. I want you to tell the jury and the court in your own words what happened just from the time you went into the theatre to the time this accident happened, how it happened. A. Well, we went to Loew's.

20 Q. Who went to Loew's? A. Me and my two daughters; and we purchased orchestra tickets. We never thought that we had to wait so long. We were standing there quite a while—we were rather tired—until some attendant came out and said, "Any one wishes seats, there are seats in the balcony." So we decided we would take them and we were shown to the balcony by ushers that were standing on the stairways.

Q. What stairs did you go up? A. I went on the right, turned to my right.

30 Q. As you faced the theatre, you went in to your right? A. Yes, I turned to the right and I went up to the second landing. There there were ushers that had roped off that you couldn't go in the first balcony, and they let us on to the second balcony. So we went upstairs. Now, there were other people coming up, too, I suppose.

Q. Were there other people coming up? Not what you suppose. A. Well, there were, yes. So there was no usher there to tell us where there were any seats.

Q. Where was this now that you are talking of? A. This was up at the second balcony.

40 Q. At the landing? A. At the landing, yes. So we walked up the aisle into the first aisle; we went up the stairs.

Carmelo Del Pomo—Direct.

Q. Is this the first aisle on your left? A. The first aisle on the left, yes, and we went up the stairs to look for seats, because you know you can't very well see.

Q. What was the condition of the theatre at that time? A. Well, it was very dim, very dim, so we were looking, trying to find some seats, and we got almost to about the third row from the last and we saw there wasn't any; so we turned about to come down, and my oldest daughter said— 10

Q. Never mind what she said. What did she do? A. Well, she said to me, "Mother"—

Q. Never mind what she said to you. What did she do, if anything? A. She went ahead of us to look for seats. So my youngest and I went down, followed, but I had only descended about one or two steps when something caught my heel and I fell to the first landing. 20

Q. You say the theatre was dim? A. Very dim.

Q. What do you mean by that? A. Well, it was dark.

Q. Were there any lights along the side seats? A. No, sir.

Q. Was there an usher who accompanied you to the seat? A. No, sir.

Q. What happened after you fell? A. Well, two gentlemen came over and picked me up and brought me downstairs to the ladies' room. 30

Q. Do you remember which foot caught as you have stated? A. My right.

Q. What part of your foot? A. The heel.

Q. What kind of heel did you have on your shoe? A. A Cuban heel.

Q. The gentlemen of the jury do not know what that is. A. It is a flat heel, a rubber heel with rubber on the end. 40

Carmelo Del Pomo—Direct.

Q. So after the accident you were taken down to the ladies' room? A. Yes.

Q. All right. Proceed. What happened after that? A. Well, an usher took me and laid me on the lounge in there, and the matron was there, too.

Q. They gave you some treatment down there?
 10 A. They gave me something to revive me because I was half stunned. They gave me something to smell and a drink of water, and I laid there for quite a while in pain. My youngest daughter was with me, but my oldest daughter had gone ahead to get seats and she did not know where we had stopped, because she went down to the first balcony. So naturally she was alone and she had no pocketbook with her, so that it being it was
 20 the last show, I thought, "Well, I will have to wait for her, for Esther, otherwise she would have to walk home."

Q. You waited for your other daughter? A. I waited for my other daughter. I had to wait.

Q. Then where did you go? Where did the three of you go then? A. Well, then we went home.

Q. After you got home what happened? A. Well, when I got home I was crying with pain, and my husband said, "Do you want"—

30 Q. Never mind what your husband said. Just what did he do. A. Of course I went to bed, and all night long I didn't find any rest at all, so that finally in the morning the first thing was to get the doctor.

Q. Did you get the doctor? A. Yes.

Q. Who was the doctor? A. Doctor Elviro Mancusi, and he took care of me.

Q. What did he do? A. Well, finally he used
 40 some massages and some treatments, and he

Carmelo Del Pomo—Direct.

thought that it wasn't so serious, being that I am rather stout, he said, "Well, we will try this," and he tried different things to see if that would relieve the pain.

Q. And did it? A. No. I suffered for quite a while.

Q. What did he do after that? A. Then he decided that I should have an X-ray taken, and that showed that Doctor Devlin— 10

Q. You had an X-ray taken? A. Yes.

Q. Do you know what the X-ray indicated? A. Yes.

Q. After the X-ray was taken what did the doctor do? What did he do with your shoulder? A. Which doctor do you mean?

Q. Your doctor? A. My doctor— 20

By the Court:

Q. Which shoulder was it? A. My right. He got notice from the doctor—

By Mr. Harrington:

Q. Never mind. He had the X-ray taken. A. Yes, and he was told the condition my shoulder was in and he strapped me all up.

Q. How long did you have this arm strapped up? A. Well, for three months. 30

Q. You weren't able to take it down? A. I wasn't able to do a thing. I couldn't wash myself. I couldn't rest myself; nothing at all.

Q. Before this accident who took care of your home? A. I did.

Q. Did you do everything? A. I did everything; yes, sir.

Q. Now, after this accident how did you man- 40

Carmelo Del Pomo—Direct.

age? A. Well, my daughter took care of the house during the week, and then my wash—I give my wash out, and I had a girl call at the house on week ends to do general cleaning.

Q. Now, were you put to an additional expense because of this? A. Well, of course I was, because I had to have my washing and ironing done.

10 Q. What did this cost you? A. This cost me on an average of about, between the girl and the wash, about \$5 a week.

Q. How long did you pay her? A. I still have to have a girl come, because I do the sweeping and dusting, but I cannot do the scrubbing or ironing, because it seems to bother my shoulder.

Q. You had a doctor's bill? A. Yes.

20 Q. How much was that? A. It was \$250, because he came three months.

Q. Did you have a bill for medicine? A. Yes, about \$88.

Q. Your husband knows the amount of that? A. Yes.

Q. Did you have any other expense? A. I had one of those visiting nurses come to bathe me.

30 Q. How often did she come? A. Well, she came in the beginning, she came about a couple of times a week, and then once.

Q. How much did you have to pay her? A. It cost me about \$12.

Q. Altogether? A. Yes, sir.

Q. Now, did you have any other occupation besides that of housewife? A. Well, I always took a little home work.

40 Q. What kind of home work? A. Embroidery on babies' dresses, and I used to make about, sometimes more and sometimes less, the average of five dollars a week.

Carmelo Del Pomo—Cross.

Q. After this accident were you able to continue this work? A. Not for about a couple of years after, but I cannot go as fast as I could then.

Cross-examination by Mr. Laird:

Q. After the accident it was two years before you could do any embroidery? A. Any embroidery, yes, sir. Any embroidery—of course if I had to do a little sewing at home, but of course this here work that I had to return in a certain length of time, and I took some for awhile, but then when they saw I took so long to do it, they refused to give it to me. 10

Q. How long after the accident was it that you took up this embroidery work again? A. About two years. 20

Q. Then it was two years before you tried? A. Two years afterwards.

Q. Now, Mrs. Del Pomo, about what time was it that you arrived at the theatre? A. Well, it was between about eight o'clock, between half past seven and eight.

Q. And as I understood it, when you went inside you stood downstairs for a while? A. Yes, sir.

Q. And while you were standing downstairs, what kind of performance was going on in the theatre? Was it a motion picture or a vaudeville act, or what? A. Well, they have both. I didn't see it. 30

Q. You don't know what was going on? A. I know there was an advertisement for the Siamese Twins then, but I don't remember what else was going on.

Q. I am not interested particularly in knowing 40

Carmelo Del Pomo—Cross.

what performances were billed that week, but while you were downstairs were you in a position to see the stage or the screen? A. No, we were way out.

Q. When you went upstairs I understood you to say you took the stairway on the right hand side, is that correct? A. Yes.

10 *By the Court:*

Q. Right hand side? A. Yes.

Q. I understood you said extreme left.

Mr. Harrington: When she got to the top she went to the left.

Q. To go to the balcony you took the right hand stairway? A. To go to the balcony; yes, sir.

20 *By Mr. Laird:*

Q. Well, now, as you faced the stage after you got upstairs, what aisle were you on? Were you on the right aisle or the left aisle? A. What do you mean?

Q. As I understand your testimony you went up the balcony aisle, is that right? A. Yes.

Q. You got within three or four rows of the top, is that correct? A. Yes.

30 Q. And then after being there a little while you started to come down, is that correct? A. No, I didn't stay there a little while. I just went up to look for seats and turned right about and came down.

Q. When you were on your way down you were facing the stage, were you not? A. Yes.

By the Court:

Q. Is this entrance to the second balcony at the

Carmelo Del Pomo—Cross.

low part of the balcony? A. This entrance is to the last balcony.

Q. To the last balcony, but is it on the level of the bottom seats of the balcony toward the front of the balcony Is the entrance at the front of the balcony? A. Well, the front of these seats, you mean, your Honor? There is a landing in the front of the seats or up above. 10

By Mr. Laird:

Q. As you were descending the steps and were facing the stage, were you on the right aisle or on the left aisle? A. I was on the left aisle. It was the first aisle from the entrance.

By the Court:

Q. I think what Mr. Laird means, as you turned to go up the stairs, although he put it the other way, faced up, the aisle which you climbed up—was that the left aisle or the right aisle? A. It was the right side of the theatre. 20

Q. As you went up? A. Yes, sir.

Q. So as you turned to come down it was the left aisle? A. Yes, your Honor.

Q. And you had gone almost to the top, had you? A. Yes, sir. 30

Q. Looking for a seat? A. Yes.

Q. And had turned to come down? A. Yes.

By Mr. Laird:

Q. Now, you are very sure of that, are you? A. I am rather.

Q. You are rather. A. Well, I am.

Q. Now, this accident happened in February, 1925, didn't it? A. Yes, sir. 40

Carmelo Del Pomo—Cross.

Q. Is your recollection still clear as to all the facts? A. Well, yes.

Q. At any rate, you are clear as to what aisle the accident happened in? A. Yes.

10 Q. Now, do you remember back in February, 1926, being asked this question and having sworn to the answer as being correct: "Question: Which aisle of the balcony did you fall on as alleged in your complaint? Describe by saying left, center or right, as the case may be." Did you not at that time swear to this answer: "Right aisle facing the stage."? A. The right aisle facing the stage.

Q. Well, it was the left aisle facing the stage or the right aisle facing the stage; which was it? A. Facing the stage it was the right aisle.

20 *By the Court:*

Q. So it wasn't the right aisle as you looked up the aisle of the balcony? A. Going up? No. Going up there is two aisles, and this is the center of the theatre. Now this aisle nearest to that exit is the aisle that I went up. Going up I don't know what you would—

Q. You see you are not answering the question. Was it the right aisle facing the stage? A. Yes.

30 Q. Or was it the right aisle as you were walking up the balcony, which would be away from the stage, wouldn't it? A. No, it was the left going up.

By Mr. Laird:

Q. Do you now say, Mrs. Del Pomo, that because you remember having answered the questions that I have indicated to you back in 1926 by saying that it was the right aisle facing the stage, or are you

40

Carmelo Del Pomo—Cross.

giving us your present recollection? A. No, I remember that well.

Q. Well, you remembered it very well a few moments ago when you said it was the left aisle, didn't you? A. Not facing the stage.

Q. Now, when you first came out on to the balcony, do you recall what was going on on the stage at that time? A. No, I do not. 10

Q. Do you recall whether it was a vaudeville act or whether it was a motion picture? A. No, I do not.

Q. So that you don't recall whether the theatre was light or whether it was dark at the time? A. Yes, I do. I remember it was dark.

Q. Do they ever have the theatre dark while vaudeville acts are going on, do you know? A. Well, no, as a rule they do not. 20

Q. How frequently had you been to this theatre prior to the accident? Had you ever been there before? A. Yes, sir.

(The court takes a recess until tomorrow morning, Thursday, April 25, 1929, at ten o'clock a. m.)

30

40

Elviro Mancusi Ungaro—Direct.

SECOND DAY.

Thursday, April 25, 1929.

Met pursuant to adjournment.
Appearances, counsel as before stated.

10

ELVIRO MANCUSI UNGARO, sworn in behalf of the plaintiff.

Direct-examination by Mr. Harrington:

Mr. Harrington: At this point, your Honor, I would like to offer in evidence this X-ray. There is no objection.

20 (The same is received in evidence and marked Exhibit P-1.)

Q. Doctor, you are a practicing physician in the State of New Jersey? A. Yes.

Mr. Laird: Qualifications admitted.

Q. Doctor, you took care of Mrs. Carmelo Del Pomo, the plaintiff in this case? A. Yes.

30 Q. Do you recall the date she came to see you or you came to see her? A. I went to see her the 23rd of February.

Q. 1925? A. Yes.

Q. You made an examination of her at that time? A. Yes.

Q. What was the result of that examination? A. I suspected a fracture. I didn't know exactly where.

40 Q. Fracture of what? A. I couldn't tell at the time, so I decided to have an X-ray to prove where it was, and it proved to be of the scapula.

Elviro Mancusi Ungaro—Direct.

Q. You can examine and read an X-ray, Doctor?

A. I think I could.

Q. I show you Exhibit P-1 and ask you if that is the X-ray taken. A. Yes, sir.

Q. By reference to that X-ray, what did you find the injury to be? A. It was a linear fracture of the scapula; that is, the shoulder blade. 10

By the Court:

Q. Which one? A. Right.

Q. By scapula you mean the shoulder blade? A. The shoulder blade.

By Mr. Harrington:

Q. Just where did the fracture occur, Doctor?

A. It extended from the outer— 20

By the Court:

Q. As you are telling it, can you show it to the jury? A. I think I could.

Q. Just go down in front of them and hold it up to the light and show them. A. You see this line here. That indicates the fracture (illustrating).

By a Juror:

Q. How can you determine the fracture? A. The bone is one mass. It is always the same. Any time you have a line of separation, that is a fracture. 30

By Mr. Harrington:

Q. Can you indicate on this X-ray just the point of the fracture? A. Yes. The arrows are pointing to it. There are two arrows there, the top and the bottom. That is the extent of the fracture. 40

Elviro Mancusi Ungaro—Direct.

By a Juror:

Q. I see a slight dark marking. A. That is right. That is the fracture.

A Juror: It is slight, of course. I can't determine the nature of it, but I can determine the line there.

10

By Mr. Harrington:

Q. Now, Doctor, did you treat her for this injury? A. Yes.

Q. What treatment did you give her? A. Immobilization.

Q. Just what does that mean? A. That means strapping of the chest so that she can't move the fragments of the bone, to hold them in place so they will knit.

20

Q. What was the position of the fragments? A. It was a linear fracture. They weren't out of position. They were in good position.

Q. You treated her by strapping her? A. Strapping her and changing the strapping every week or so, because it is very uncomfortable, very, very uncomfortable.

Q. How long did this treatment continue, this strapping treatment? A. I strapped her for about eight weeks, then I allowed her to start moving around a bit.

30

Q. At the end of eight weeks did you entirely remove the strapping? A. Yes, because I wanted to get the point to move so she wouldn't have stiff joints.

Q. In an accident of this nature, Doctor, how long would you say that a patient of the age of Mrs. Del Pomo, how long a time would pass before she

40

Elviro Mancusi Ungaro—Cross.

would be able to use that arm normally again? A. Anywheres between three months and five months.

Q. During that time of course she couldn't use that arm at all? A. No.

Q. At the end of five months could she use that arm just as well as she could before this accident?

A. I think so.

10

Q. Would you say, Doctor, there will be any permanent injury there? A. No. That was a very good result she had.

Q. It was a very good recovery. What was the amount of your bill, Doctor? You were paid. A. Yes.

Q. What was the amount of your bill? A. About \$250.

Cross-examination by Mr. Laird:

20

Q. Doctor, I understand that you saw this patient on February 23, 1925. A. Yes.

Q. As the result of an accident; and on that day you strapped her. A. No.

Q. Then on that day you suspected a fracture? A. That is right, sir.

Q. And that thereafter you had X-rays taken which confirmed your preliminary diagnosis. A. That is right.

Q. Now, how long after February 23rd was that, if you recall? Approximately, I mean. A. That was a long while ago.

Q. That is right. This was back in 1925.

By the Court:

Q. Is there any date on the X-ray plate? A. There ought to be. That was taken on March 11, 1925.

40

Elviro Mancusi Ungaro—Cross.

By Mr. Laird:

Q. So on the 11th of March, or shortly thereafter, when it was ascertained that there was a linear fracture, you strapped the patient? A. That is right.

10 Q. And that strapping, as I think you have explained, was to keep the bone in position so that the two broken parts would not rub against one another? A. That is right.

Q. That is about the common way of expressing it, isn't it? A. Yes.

Q. You kept that strapping on for approximately eight weeks? A. Yes, sir.

20 Q. And when you removed it, of course you removed it because there was no further fear of the bones rubbing together? In other words, the two bones had by that time united, that is correct. A. Yes.

Q. And you think that in a case of this sort there should be a return to a normal condition in from three to five months? A. Yes, sir.

Q. I think you also said that you replaced the strapping about once every week. A. About that.

30 Q. Did you see her in addition to the times when you strapped her? A. It was quite a bit of pain, quite painful.

Q. Now, this was a linear fracture, Doctor? A. Yes.

Q. That means what? A. It means that the bones are cut through. There is a separation, but not entirely.

Q. In other words, the fracture does not go across the bones? A. No, not entirely through.

40 Q. You attended her up to what date? What was the last date you saw her with reference to

Carmelo Del Pomo—Recalled—Cross.

the fracture? A. I don't recall the exact date. It must have been about three months after. That means about the end of May.

Q. About the end of May? A. Yes.

Q. That would be about three months after. What was her condition then? A. Fair condition. The pain was all gone, and I wanted to use the arm so she could not have a stiff shoulder joint.

10

CARMELO DEL POMO, recalled.

Cross-examination (continued) by Mr. Laird:

(The last question and answer are read by the stenographer: "Question: How frequently had you been to this theatre prior to the accident? Had you ever been there before? Answer: "Yes, sir.")

20

By the Court:

Q. With reference to that question, to what part of the theatre had you been before? A. The orchestra seats and up in the first balcony.

Q. About how many times had you been to the second balcony before? A. That was about the second time.

30

By Mr. Laird:

Q. Now, you have spoken, Mrs. Del Pomo, about a second and a first balcony. A. Yes, sir.

Q. Will you describe to us the relationship of the first to the second balcony? A. I don't know what you mean.

Q. Well, where is the first balcony and where is the second balcony? A. Well, there is a way of

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Carmelo Del Pomo—Recalled—Cross.

getting to the first balcony when you go up the first flight, and there is a corridor that leads to the first balcony. To get to the second balcony you go around this floor to the next stairs that leads up to the second balcony.

10 Q. Now, is the second balcony a separate place above the first balcony in the same manner that the first balcony is above the orchestra? A. No. There is a platform between the first and second balcony.

By the Court:

Q. Oh, then it is really a continuous balcony from the front all the way up? A. Just this platform.

20 Q. With a platform between? A. Yes, your Honor.

Q. That is the only way the second balcony is above the first balcony? A. That is all.

Q. That is, below this platform is the first balcony and above it is the second balcony? A. Yes, your Honor.

By Mr. Laird:

30 Q. Now, as I understand it, you got within three or four steps of the top and found that there were no vacant seats there, is that correct? A. Yes, sir.

Q. Then your elder daughter went on down looking for seats, did she? A. Yes, sir.

Q. How long would you say you stayed within three or four steps of the top and stood still? A. I didn't stay still. I thought there was no seats, so I turned around and started going down.

40 Q. I want to see if I understand you. When

Carmelo Del Pomo—Recalled—Cross.

you went up towards the rear, towards the top of the balcony, you were accompanied by your two daughters, were you? A. Yes.

Q. And when you got somewheres near the top, one of your daughters, the elder I think you said, went down looking for seats. A. Yes.

Q. Now, what I want to know is this. How long did you stand there after she left you? A. Well, she just kept going down to the next balcony, and I was going down slowly. When I had gone about a couple of steps, when I fell. 10

Q. But I understand you to say that your elder daughter did not know anything about your having fallen. A. No, because she continued going down to look for seats.

Q. How far away was she when you fell? Had she already found a seat? A. Not that I know of, no. 20

Q. How many seats would you say she was away from you when you fell? A. Ahead of me?

Q. Yes. A. Well, she must have been about—

Q. Now, do you remember how far she was? A. I don't know exactly, no, but she went ahead of us—she didn't see me fall.

Q. But you say you didn't stand there any length of time? You followed her right on down? A. No, but I had to go on down slowly because it was dark. I had to feel my way down. 30

Q. Was it any darker for you than it was for her? A. Well, I don't know about that. I know it was dark.

Q. Now, with reference to the darkness, have you any recollection whether there was a motion picture being shown at the time, or whether there were vaudeville acts on? A. No, I don't. 40

Carmelo Del Pomo—Recalled—Cross.

Q. Now, can you describe to us just where the lights were that were on at the time? Do you remember that? A. The lights. There were no lights.

Q. No lights at all? A. No, it was dark. Of course the theatre is never in extreme darkness.

10 Q. Now, was it in the same condition that it had been in when you were there on other occasions? A. Yes, they put the lights on and off accordingly what is going on.

Q. Yes, they have dim lights when the vaudeville acts are on, haven't they, as well as the side lights, and when the moving picture comes on they turn off the big dome lights and leave on the side lights? That is the way it always was when you were there before? A. Yes, it was dark.

20 Q. And you know when you are going to a moving picture theatre, it has to be somewhat dark, don't you? A. Yes.

Q. Can you recollect where the side lights were, where any lights were in the theatre at the time? A. There were no lights at all.

30 Q. You don't mean, Mrs. Del Pomo, that the theatre was in total darkness? A. Well, no. Up at the ceiling, and I think, I don't know whether it is about the center of the theatre, that there is a dome, but they dim those lights.

Q. And there were also side lights, were there not? A. Where? No side lights in the aisles.

Q. Are there any lights along the walls at all? A. I didn't see any lights at all.

Q. But as I understand you, the theatre was in the same condition that day as it had been on the other days when you were there, approximately?

40 A. Well, according to what goes on.

*Carmelo Del Pomo—Recalled—Redirect.**Redirect-examination by Mr. Harrington:*

Q. Mrs. Del Pomo, as you got up to the top of this second stairs, you turned to your left, is that right? A. Yes, that is right.

Q. Now, how did you proceed as to that? How wide is this platform that you speak of that you walked along? A. Oh, it is not wide. It must be possibly about three or four feet. 10

Q. Now, what aisle did you go up as you proceeded along this platform? Was the aisle to your left or to your right? A. You mean going up?

Q. The aisle that you went up, the steps that you went up toward the seats. A. It was the first aisle I came to, but it is the second aisle in the theatre to the right, right side of the theatre. So I turned to my left going up the stairs. 20

By the Court:

Q. Now, let us see. You went up the steps? A. Yes, sir.

Q. And as you went up the steps you turned to the left on this platform? A. That is right.

Q. Then you went straight ahead on the platform? A. Yes.

Q. Now, when you turned to go up the steps, did you turn to your left again or to your right? A. To my left. 30

By Mr. Harrington:

Q. Now, that aisle that you went up—is it nearer to the right side of the theatre as you face the stage, or is it nearer to the center of the theatre as you face the stage? A. No, it is nearer to the center. 40

Carmelo Del Pomo—Recalled—Recross.

Q. Looking towards the stage? A. It was on my right.

Q. Looking towards the stage, is it the first or the second aisle from your right? A. It is the second aisle.

10 *Recross-examination by Mr. Laird:*

Q. Didn't you tell us yesterday that it was on the aisle the furthest to the right as you face the stage? A. The furthest? No, because I didn't pass that aisle. That was on the other side of the door. That is why I said the first, because that was the first aisle I came to.

(Counsel argue.)

20 Q. Mrs. Del Pomo, now I show you a photograph which is supposed to represent the aisle the furthest to the right of the theatre as you face the stage showing the complete balcony that you call the first and second balcony, and I ask if you recognize that. A. Which balcony is this? I don't know.

Q. This would be the loge seats down here. A. Loge?

30 Q. Yes.

The Court: That is the platform, Mr. Laird?

Mr. Laird: Yes.

The Court: Between the two.

Mr. Laird: Yes, leading up to this platform.

The Witness: Yes.

40 Q. That indicates the railing on the aisle going

Carmelo Del Pomo—Recalled—Recross.

all the way to the top of the theatre. Do you recognize that? A. Yes. The top of the theatre is a small—well I don't know what you would call it.

Q. Suppose I show you another photograph which is supposed to represent the very top of the theatre. Do you recognize that? A. This is the railing in front and here the platform. 10

Q. That is the platform? A. Well, now, there is a few seats on that side, but I turned on this side where there was more seats. That is nearer to the center. So the first aisle I came to from this side of the door is the aisle that I went up, (indicating)

Mr. Laird: I ask to have these two photographs marked for identification. 20

(The same are marked Exhibits D-1 and D-2 for identification.)

Mr. Harrington: Your Honor, I have a sketch here that was made right after the accident, but I cannot introduce it in evidence because it is just a sketch.

The Court: Show it to Mr. Laird. There may be no objection to it.

Mr. Laird: I think that may prove of possible assistance. I have no objection to it. Do you want to offer it in evidence? 30

Mr. Harrington: Yes, I would like to.

Mr. Laird: Well, you may introduce that.

By Mr. Harrington:

Q. Mrs. Del Pomo, I show you a sketch which is supposed to indicate, which does indicate the entire balcony in the theatre now. A. See, now, this is the entrance that I came in. 40

Carmelo Del Pomo—Recalled—Recross.

By the Court:

Q. Oh, that is the orchestra? A. That is the orchestra.

By Mr. Harrington:

Q. Here is facing the stage. This is the stage.
10 This is the whole balcony. Here are the loges. Here is the first balcony. Here is the second balcony. Along here is the platform. The entrance is in here.

By the Court:

Q. Show us where the entrance is. A. I came in this way and turned over this way and came up this aisle, almost about the third or the fourth
20 from the last.

Q. Then that is the right center aisle as you face the stage. A. That is right.

By Mr. Harrington:

Q. The entrance is right under the seats, or the door? A. The door, yes. There is a platform that you come out here on this platform that separates the first balcony from the last, so this is the platform that I walked on and came to the first
30 aisle to my left, and I went up.

The Court: Just a minute. Does this represent stairs?

Mr. Harrington: These are the stairs going up to these seats, some of them.

The Court: They are not so marked.

Mr. Harrington: Well, they are.

By the Court:

Q. How many aisles were there, Mrs. Del Pomo?
40 A. Well, you see—

Carmelo Del Pomo—Recalled—Recross.

Q. How many aisles were there? That is the question. How many sets of steps go up this second balcony? A. I know just about. There must have been about seven or eight rows.

By Mr. Harrington:

Q. How many aisles are there in the second balcony? A. In the second balcony there is four aisles, two to the right and two to the left. 10

By the Court:

Q. And as you face the stage it was the right center one that you ascended, was it, as you went up? A. It was the second, yes, because see, I didn't pass that one aisle.

Q. The second from the right as you went up? A. As I went up. 20

Q. As you face the stage? A. As I face the stage it was the left going up.

Mr. Laird: You see, according to that, if the Court please, these photographs that I have do not show the place she claims to have fallen at all. I have been guided by these interrogatories.

The Court: I will permit you the time to take that other aisle, if you desire it, in view of the error. 30

(Counsel argue.)

A Juror: May I ask a question that may be of some help?

The Court: Yes.

By a Juror:

Q. Were these aisles close to the New Street or close to the West Park Street side, that you walk- 40

Carmelo Del Pomo—Recalled—Recross.

ed up? Now, you know the theatre is on the corner of New Street and Broad? A. It isn't on the corner, is it?

Q. Well, yes ma'am, it is. You know that. The entrance is one door from the jewelry store? A. Yes.

10 Q. The aisles that you went up—were they close to New Street, or were they close to West Park Street? A. Well, see, I think they were close to New Street, because when I went in I turned to my right.

Q. Then it was actually the second aisle from the corner of New Street, is that correct? A. Second aisle from the right center facing the stage.

By Mr. Harrington:

20 Q. As you walked upstairs you took the extreme landing to New Street, is that right? A. Well, that is the—

Q. To your right going up? A. To the right.

Q. Going up? A. Yes, as I went up.

By Juror No. 3:

30 Q. And when you reached the first level on the landing, you were practically on the corner of New Street, at New Street there, and you took the second aisle from the corner, is that right? I am familiar with that theatre and that is why I would like to understand it very clearly myself. A. Going up to the first landing, of course I turned to my right. Going up to the second landing I turned to my left, because there is two stairs that lead this way. So then I took the left stairway and went up, which led me to the right side facing the stage.

40

Carmelo Del Pomo—Recalled—Recross.

Q. To the right side? A. Yes.

Q. Facing the stage. A. Facing the stage.

Q. Then, if that is true, then you took the other turn that was close to West Park Street, is that right? A. Now, you see I am in the theatre and I don't know just how it is situated inside.

Q. Could I look at the sketch? A. This sketch here? 10

Q. Pardon me. This is the stage here. A. Yes.

Q. Now, when you come up from the entrance on Broad Street, you took this row, is that correct? A. Yes. No, not down there. I entered here somewhere and that led me to this platform. I didn't turn that way. I turned this way to the first aisle.

Q. You are on the ground floor now, is that right? A. Now, you see I am in the theatre and balcony. 20

The Court: Perhaps the juror can tell us whether the stage is on the Broad Street side or furthest away from Broad Street.

The Juror: Why, in my opinion the stage is at New Street behind Broad Street.

The Court: On the New Street side?

A Juror: I believe so.

The Court: I thought you knew. I thought you were entirely familiar with it so you could tell us. Don't guess at it. 30

A Juror: I am not guessing, your Honor. The stage would be directly behind Broad Street, and it is practically at New Street side. I believe that is correct.

By Mr. Harrington:

Q. Now, Mrs. Del Pomo, as you got up to that platform on your right hand side was New Street, 40

Carmelo Del Pomo—Recalled—Recross.

on your left hand side of the theatre was West Park Street. Now, what aisle did you go up from your right hand side? Was it the first or the second? A. From the right hand side?

Q. Yes, as you face the stage. A. It was the second aisle.

10 The Court: Now, you may recall Mrs. Del Pomo when that photograph comes, if you desire to do so. That is all now, Mrs. Del Pomo.

Mr. Laird: If your Honor please, I think the juror is correct as to the location of this stage. I think perhaps we might stipulate it on the record.

20 Mr. Harrington: The stage as you go in the theatre is directly back of Broad Street. You walk right into the stage, and on the right is New and on the left West Park Street.

The Court: All right. Everybody seems to agree to that.

(The sketch referred to is received in evidence and marked Exhibit P-2.)

30 ESTHER DEL POMO sworn in behalf of the plaintiff.

Direct-examination by Mr. Harrington:

Q. You were with your mother and your sister on February 22, 1925 when you went to Loew's theatre? A. I was.

By the Court:

40 Q. Are you the elder or the younger daughter?
A. I am the elder.

Esther Del Pomo—Direct.

By Mr. Harrington:

Q. Will you tell us, Esther, in your own words just what happened from the time you went into the theatre to the time you left it? A. Well, we went to the theatre and bought our tickets, orchestra tickets, and we were waiting in the crowd in line there.

10

Q. Where? A. Out in the vestibule. We were waiting quite a while, and finally one of the ushers announced that there were seats up in the balcony. So we came out from the crowd and went up the stairs to the right and at the first landing there was a roping there so you could not pass to go to the first balcony, and there was an usher there who told us to go up to the second balcony. We turned around—coming up the stairs we turned to the left, and there—

20

Q. When you got to the top of the stairs, of the second stairs, what did you do then? A. When we got to the second pair of stairs—

The Court: No, after you were all the way up.

Q. After you were up those stairs and got to the top of that second pair of stairs. A. We came out on this platform and we turned to our left and took the very first aisle we came to.

30

Q. On the left? A. On the left. We proceeded up the stairs to the rear of the balcony, the second balcony, about three or four rows of seats from the rear. We discovered there were no seats, so we turned around, and I said to my mother at that point—

Q. Never mind what you said. A. Well, I went ahead of my mother to look for seats.

40

Esther Del Pomo—Direct.

Q. Now, what was the condition of the theatre at that time? A. It was very dark. It wasn't extremely dark, but it was dark enough so that I had to feel my way along cautiously.

Q. Were there any ushers on that platform? A. There were no ushers beyond the second flight of steps.

Q. Do you know what was going on on the stage at that time? A. I do not, but it must have been a moving picture because it was dark.

Q. Well, you don't know. A. I don't know.

Q. You went down to look for seats. Did you find any? A. Yes.

Q. What did you do? A. I found seats about five rows from the front of the first balcony, and there I reserved two besides my own. I placed my hat and coat on them and reserved them for my mother and sister, and I waited, but they did not come and I took it for granted they had found seats behind me somewhere. So other people came and claimed the seats and I had to give them up. So I was waiting there until my sister found me practically at the end of the show, and then we went home.

Q. Miss Del Pomo, as you were up on this platform, the platform that you came to after you went up that second stairs facing the stage, what aisle from your right was it that you went up? A. From the extreme right it was two aisles.

By the Court:

Q. You mean the second aisle? A. Yes.

Cross-examination by Mr. Laird:

Q. When you first came inside the theatre you were obliged to wait a considerable length of time

Esther Del Pomo—Cross.

before you could find any seats; that is so, isn't it? A. Yes. We waited quite a while.

Q. And then you went up the stairs leading to what has been called a second balcony; that is right, isn't it? A. Yes.

Q. When you first came out on the platform of this second balcony, do you recollect what was going on on the stage at the time? A. I do not. 10

Q. Do you remember what the lighting conditions were then when you first came out on the platform? A. They were very dim. It was quite dark.

Q. How often had you been to this theatre before? A. I had been there quite often.

Q. Were the conditions on this particular day about the same as you had seen them there before? A. Yes, I would say they were. 20

Q. Then you turned to your left after you reached this platform and went up the first aisle that you came to on your left? A. Yes, sir.

Q. And you went up within a few rows of the top and saw that there were no seats there, is that correct? A. Yes, sir.

Q. And then you yourself turned and came down? A. Yes, sir.

Q. And your mother and your sister stayed where they were, as far as you know? A. Well, I wouldn't say that they stayed. I left them at that point to go ahead. 30

Q. And you don't know what happened then or how long they stayed there or anything of that sort? A. No, sir, I just told them to come after me; I would find the seats.

Q. You didn't hear the sound of any fall or any commotion or anything of that sort? A. No, I did not. 40

Esther Del Pomo—Cross.

Q. And of course had you been within a few feet of this occurrence you would have heard it, wouldn't you?

Objected to.

Objection sustained.

10 Q. You don't know how long you had been away from your mother and your sister at the time she says she had this fall? A. No. I do not.

Q. How far away were the seats that you did find, from the top of the theatre? A. The seats that I found?

Q. Yes. A. They were down in the first balcony I should say about five rows from the front.

20 Q. About how many rows of seats would that be away from where you had started to come down? A. From the top of the first balcony? I don't know how many seats there are in the first balcony.

Q. Do you recall where the side bracket lights are in the theatre, the side wall lights? A. You mean against the wall?

Q. Yes. A. No, I do not, but I know they have red lights there to show that there is an exit, up against the wall, near the ceiling somewhere, in the top of the door.

30 Q. Do you remember where the amber colored lights are? A. No, I do not.

Redirect-examination by Mr. Harrington:

Q. Do you recall the top of the steps in this second balcony? A. There is an irregular stepping, a long step for the seat and a short step for the raising.

By the Court:

40 Q. By a long step, what do you mean by that?

Esther Del Pomo—Recross.

A. Well, I should say it was at least two feet wide, or two and a half feet wide, and then a short step of just about a foot, and that long step is where the rows are placed, and the short steps are where you either rise or descend.

Q. That is, you mean for each row of seats there are two steps? A. Yes, one to go up and one on a small landing. 10

Recross-examination by Mr. Laird:

Q. Are these the kind of steps? A. What do you mean the kind?

Q. Is that a picture of the steps on the second balcony, if you know, as they were at that time?

A. By the kind do you mean are they the steps of the balcony? 20

Q. Yes, are those the balcony steps?

The Court: As they were at that time Mr. Laird means, of course.

Mr. Laird: Yes, certainly.

A. I know for a fact they are not the steps we went up.

Q. Regardless of that, is that the type of steps that were there in the second balcony at the time of this accident? A. I can't distinguish whether this is a long or short step or not. I cannot tell from the picture. 30

Q. So you don't know whether that correctly represents the type of step or not, is that your answer? A. No, I am not sure.

Mr. Harrington: I think this picture will show it better.

Mr. Laird: Yes, I think perhaps it does. 40

Adele Del Pomo—Direct.

The Witness: Yes, that is the way it is, the irregular stepping, a long for the place where you sit and a short for the rising.

Mr. Laird: I ask that that be marked.

(The same is marked Exhibit D-3 for identification).

10

ADELE DEL POMO, sworn in behalf of the plaintiff.

Direct-examination by Mr. Harrington:

Q. Adele, you were with your mother and your sister on the day this accident happened in Loew's theatre? A. I was.

20

Q. Tell us exactly what happened from the time you went there until this accident happened. A. We bought three tickets for the orchestra seats and we had to wait outside of the lobby for quite a while, and some one came out of the door and told us that if we wanted seats in the balcony we could get them. So we didn't want to wait any longer, so we went in. Some other people came in with us, and as we entered the door we took the first stairs to our right, and we went up to the second balcony and there was an usher on the second floor standing in front of the ropes. The entrance was roped off, and she told us to go to the second floor, to the second balcony, and we turned to our left and took the stairs leading to the second balcony.

30

Q. When you got to the top of those stairs and reached that platform which goes along the second balcony, what happened? What did you do? A.

40

Well, the theatre was very dark and we had to feel

Adele Del Pomo—Direct.

our way along very carefully, and we took the first aisle leading up to the second balcony on our left. Facing the stage is the second aisle from the right of the wall, from the right wall; and we went up to the balcony to see if there were seats in it, because we couldn't tell from below, and as we got up to about the—well, a few aisles from the back of the theatre, we saw that there were no seats. So my sister went ahead to get the seats, and we turned around and began to come down, and we had taken a few steps when my mother fell. 10

Q. Were there any lights in the aisle to indicate the seats? A. There were no lights.

Q. Were there any ushers to show the way? A. There were no ushers at all. The last usher we left was at the foot of the stairs leading to the second balcony. That is on the second floor. 20

Q. What happened after your mother fell? A. She fell down from the —well, about three rows and she landed in the aisle, in the platform that divides the first balcony from the second, and two men picked her up and helped her to the ladies' room.

Q. Were there any ushers who helped you up to that point? A. There were no ushers until we reached the outside of the ladies' room, and they were speaking to each other. 30

Q. What happened after that? A. My mother was brought into the ladies' room by the two ushers, and she was put under the matron's care.

Q. And after that? A. We were in there a while and some man came in and asked my mother if she wanted a doctor.

Q. Do you know who the man is? A. No, I do not. 40

Adele Del Pomo—Cross.

Q. Do you know whether he was connected with the theatre or not? A. I think he was.

Q. Do you know? A. I don't know.

Q. Then after that what did your mother and you do? A. My mother stayed in the room. She was in great pain. She was crying from the pain, and they were trying to help her out. She was half
10 stunned. They were giving her water, and I stayed with her for quite a while, and part of the time, in between I went back to see if I could find my sister, because I didn't know where she was seated, but I couldn't find her until almost the end of the show, and then we went right home.

Q. Do you know the type of steps from the second balcony down to that platform? A. The step
20 was very hard to walk on. It must have been irregular.

Q. Do you know whether it was or not?

The Court: I think we will have to strike it out, what it must have been.

Mr. Harrington: Yes, I will consent to that.

A. I won't say.

30 *Cross-examination by Mr. Laird:*

Q. Had you yourself ever been to the theatre before, that particular theatre? A. I have a number of times.

Q. And the steps that you went up and down were the same on the other occasions when you were as they were this time that you have described?

Mr. Harrington: I think counsel ought to

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Michael Del Pomo—Direct.

ask her if she means the steps in the balcony, if she was there.

The Court: These particular steps he means, of course.

A. I don't think I was ever in the second balcony.

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MICHAEL DEL POMO, one of the plaintiffs, sworn in his own behalf.

Direct-examination by Mr. Harrington:

Q. Mr. Del Pomo, you are the husband of Mrs. Del Pomo. A. Yes.

Q. Do you recall the accident Mrs. Del Pomo had? A. I do.

20

Q. Was it necessary for you to assist her in any way in her duties at home after the accident? A. Certainly.

Q. In what way? A. Financially, and time I lost when I had to help my wife during the night, when I had to get up and try to make hot bag or pad to help her out, because she had very hard pain all the time, and she has yet present time.

Q. Did you have a doctor's bill to pay? A. Certainly.

30

Q. What was the amount of it? A. \$250.

Q. You paid it? A. Yes, sir.

Q. Did you have any other bills? A. Yes, sir.

Q. What are they? A. I had a bill for an X-ray about ten dollars.

Q. About? It is ten dollars, isn't it? A. It is ten dollars. That is correct. And I had to pay for a nurse, eleven so much. I don't remember how many cents.

40

Michael Del Pomo—Direct.

Q. Eleven dollars? A. Eleven dollars and so much cents, eighty or something like that.

Q. Who was this nurse? A. I don't know the name.

The Court: A visiting nurse, Mrs. Dei Pomo said.

10 Q. Eleven dollars you paid her? A. Yes.

Q. Did you have any other expenses? A. I had eighty-eight dollars and some cents with medicine, and I had extra expense for laundry, a woman to tend to the house, scrubbing and cleaning.

Q. How much did you pay her? A. Well, average didn't come exactly all the time, but over five or six, less than six, sometimes a little over six.

20 Q. What was your average? A. It was about a little over five, something like that.

Q. How long did you have to pay this average of \$5 and a little over? A. For four years until now I am pay yet.

Q. You still pay? A. Still pay. And of course I had lost—she was doing some embroidery home.

Q. You mean she did some extra work? A. She used to do some embroidery at home. Now she can't do no more.

30 Q. Did she turn this money over to you? A. Well, she didn't turn it over to me, but it was in the family together.

Cross-examination by Mr. Laird:

Q. What were the medicines that cost \$88? A. Bandage, liniment.

40 Q. How much did they cost? A. I don't know. The question is this, the pharmacy brought me the bill at cost price and that is what I pay for it.

Motion for Non-Suit.

Q. So you spent \$88 for medicines at cost, is that it? A. Yes.

Q. Besides the bandage, what else was there? A. Well, I didn't have the bill myself, but I suppose my lawyer had the bill.

Mr. Harrington: Do you want the bill?

Q. Did Dr. Ungaro recommend cold cream, eleven jars of cold cream, as part of the treatment?

A. I guess so.

Q. Do I understand that you also had to have a laundress as the result of this accident for over four years now? A. Yes, sir.

Q. Although the doctor says your wife's condition was normal in from three to five months after the accident? A. Yes.

Plaintiffs Rest.

Defendant's counsel moves that the plaintiffs be non-suited on the ground that no negligence has been shown on the part of the defendant.

Motion denied.

Defendant's counsel prays an exception to this ruling of the court.

Exception noted as ground of appeal.

LARRY BOEHM sworn in behalf of the defendant.

Direct-examination by Mr. Laird:

Q. Mr. Boehm, you are employed at the Loew Theatre? A. Yes.

Q. You have been for how long? A. Oh, in the neighborhood of about six years.

Larry Boehm—Direct.

Q. What is your position there? A. I am a motion picture operator.

Q. And you were employed at that theatre during the month of February, 1925? A. I was.

10 Q. Now, when a picture is in progress, where are you located in the theatre? A. Up in the booth at the rear of the balcony.

Q. And that is the rear of what has been referred to as the second balcony? A. That is the extreme rear of the theatre.

By the Court:

Q. The question is: Is that the rear of the second balcony? A. Absolutely.

By Mr. Laird:

20 Q. From your projection room did you have a full view of the theatre with the exception of the rear wall? A. That is, the balcony; nothing in the orchestra excepting the first two rows.

Q. Now, can you tell us where the lights are on the second balcony that are used during the showing of a picture?

Mr. Harrington: Now, I think the lights that were there at the time of the accident.

30 The Court: Yes.

Q. Has there been any change in the side bracket lights since February, 1925? A. No, sir.

Q. I show you a picture, Defendant's Exhibit 3 for identification, and ask you if you can tell us what that photograph represents. A. That is the extreme right hand corner facing the stage on the second balcony.

40 Q. Are the lights as indicated in that picture the same lights that were there in 1925? A. Yes,

Larry Boehm—Direct.

sir; with the exception of these lights here.

Mr. Laird: I offer this picture in evidence.

Mr. Harrington: I object to the picture because it does not show the second balcony and because the same condition does not exist there as at the time this picture was taken. 10

The Court: He says it did. He says there was no change. Of course you cannot take a picture in the darkness. Everybody knows you have to turn on the lights to take a picture.

Mr. Harrington: Of course he is showing the aisle there and there is a radical change in the aisle now from what was there at the time this accident happened. 20

By the Court:

Q. Is that so? A. I say with the exception of these lights here.

Q. Indicating at the ends. A. At the end of the row, the sides. They have them approximately every row of seats. They just put them in there just recently. They redecorated the theatre.

Mr. Harrington: That is what my objection is based on. 30

The Court: That is understood. The witness says that the lights at the ends of the seats were not there at the time.

(The photograph previously marked Exhibit D-3 for identification is received in evidence and marked Exhibit D-3.)

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Larry Boehm—Direct.

By Mr. Laird:

Q. Now, Mr. Boehm, during the showing of a picture are these side bracket lights as indicated in this photograph lit? A. The two central lamps are lit and the two outer ones are dead.

10 *By the Court:*

Q. I see these lights which are at the end of the seats, the row of seats, seem to be on every other row; that is, on alternate rows, is that right? A. Yes, sir, and the opposite side on the other row, and here is your stairway here.

Q. Opposite the one where there is none here it will be on the other row? A. Yes.

20 Q. So that there is a light at each seat? A. Practically each on account of this small step right here.

Mr. Harrington: There is another change there, your Honor, which I feel should be pointed out.

Mr. Laird: Well, you can point it out on cross-examination.

Mr. Harrington: The covering is not the same either.

30 *By Mr. Laird:*

Q. I show you another photograph marked Defendant's Exhibit 2 for identification, and ask you if the side bracket lights as shown on that photograph were in the same position in February, 1925. A. Yes, all with the exception of those three seats.

Q. I am asking you about the side bracket lights on the wall. A. These here?

40 Q. Yes. A. Just exactly as they were when the house opened.

Larry Boehm—Direct.

Q. And when a picture is shown are those side bracket lights kept lit? A. Two of them. Two on each bracket.

Q. Now, Mr. Boehm, I want you to give us a description as best you can of this balcony as far as the lighting conditions were concerned in February, 1925, when the picture was on. In other words, what I want you to do is to describe to us how many lights were there and how light or how dark it was when a picture was being shown. A. Well, in that particular corner there was burning at the time that the pictures was showing five lamps. 10

Q. And where were those lamps located? A. There were two on each bracket, each side of the exit door, and there was one burning at the head of this second aisle right up against the back wall. 20

Q. And by the second aisle you mean the second aisle upon the right hand side of the theatre as you face the stage, do you? A. Yes, sir.

By the Court:

Q. What color lights were they? A. Amber.

By Mr. Laird:

Q. I show you another photograph and ask you to tell us what that represents? A. This is the entire first balcony, loges and boxes. This picture was taken from the landing between the first and second balcony. 30

Q. So that it does not show the second balcony, does it? A. It does not.

Q. Do you know, Mr. Boehm, when that picture was taken, approximately when? A. Well, I couldn't tell you exactly. I should say about probably a year after the house was opened. 40

Larry Boehm—Direct.

Q. And the house was opened in what year? A. 1922 I believe.

Q. Did that in general represent the conditions or the condition of the theatre in February, 1925?

A. Yes, sir.

10 Mr. Laird: I offer that photograph in evidence.

Mr. Harrington: I object.

The Court: It will be admitted just as showing the general conditions.

Mr. Harrington: It does not show the whole theatre, if the Court please.

20 The Court: Oh, no. It does not show the second balcony. We understand that. But as I understand it, the second balcony is a continuation right up of the first balcony.

By the Court:

Q. Is that right? A. Just a little landing between the two.

Q. The second balcony is not over the first balcony? A. No, sir.

30 (The photograph is received in evidence and marked Exhibit D-4.)

Mr. Laird: I offer Exhibit D-2 for identification in evidence.

The Court: It will be admitted.

(The photograph heretofore marked Exhibit D-2 for identification is received in evidence and marked Exhibit D-2.)

By Mr. Laird:

40 Q. Now, Mr. Boehm, I show you Defendant's Exhibit 2 and ask you if you can show us, or if

there appears in that photograph the wall bracket light you have described as being over the second aisle on the right of the second balcony. A. The light there.

The Court: Indicating the extreme upper right hand corner of the picture.

Cross-examination by Mr. Harrington:

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Q. Mr. Boehm, your duty of course was to operate the machine? A. Yes.

Q. You had no obligation to see or to examine these lights in any way in connection with their maintenance or anything? You had nothing to do with their maintenance? A. No, I am not the electrician.

Q. That is absolutely outside of your duties? A. Yes.

20

Q. Your testimony regarding them is given because of your connection with the theatre and your familiarity with them, is that right? A. Well, I don't know what you mean.

Q. Well, you have been with the theatre six years and in that time you have become familiar with that theatre. A. That is it.

Q. And your testimony on these lights is based on that familiarity and experience, isn't that a fact? A. I think so.

30

Q. What kind of lamps are in these lights? What color are they? A. Amber.

By the Court:

Q. What candle power? Do you know? A. I don't know. I should judge about 25 watt. I don't know whether that is so or not. It is about that I guess.

40

Larry Boehm—Direct.

By Mr. Harrington:

Q. Are any of these lights red? A. There are no red lights.

Q. Isn't there a red light over the exit? A. There is no red light over the exit.

10 Q. There is no red light over the exit. These lights that you speak about are over in the extreme right hand corner of the second balcony. A. They are not in the extreme right hand corner. One is on either side of that aisle there that goes across the whole theatre.

Q. On your direct-examination you said that these lights were over in the corner, the right hand corner. A. That one light is up in the upper right hand corner in that picture.

20 Q. This represents the aisle nearest to New Street on the second balcony? A. That is it. This is the first balcony.

Q. I see it goes all the way up to the second. A. Yes.

Q. Over here is the second, from this point on (indicating)? A. Yes.

Q. And that is the first aisle nearest to New Street? A. Yes.

30 Q. These lights are where? A. Those lights are to the right—

Q. Show me on the picture where these lights are. A. Which lights do you want to know about?

Q. The lights that you spoke about on your examination by Mr. Laird. A. This is the light that is over the second aisle from the right of New Street. These two brackets here are on the left and right of the exit there which leads out to a fire exit going down the side of the theatre.

40 Q. Indicating these lights on either side of the

Larry Boehm—Cross.

exit here. Now, these lights are of an amber color?

A. Two in each bracket, yes.

Q. Were they lit on this night? A. Well, that is something that I cannot answer.

Q. You don't know whether they were or not?

A. Because I don't work every night.

Q. Were you working this night? A. It is so far back I didn't keep a diary. I don't know whether I was on that night or off that night. 10

Q. Do you know whether the light at the top of the second aisle where this accident happened was lit on this night? A. I can't answer that, no.

Q. Is this light directly on the aisle? A. Not on the aisle. It is on this walk.

Q. I mean, does the pathway of the aisle run right into the light? A. Approximately, maybe six inches this way or six inches that way, or something. 20

Q. But it is as far as you can recollect? A. I don't know. I won't say for sure, but it is practically in the center of that aisle.

Q. You are not very positive about any of these lights, are you, Mr. Boehm? A. Why not?

Q. I asked you that. A. Certainly I am positive about that.

Q. As you said before, you had no jurisdiction over that? A. I have no jurisdiction over the lamps. 30

Q. You say there were three lights on this bracket, and two of them were lit? A. I said there were four on each bracket, two were lit.

Q. What was the color of the other lights? A. They are all amber.

Q. All amber, the four of them? A. But when the picture goes on they take off two on each bracket and leave two burning. 40

Larry Boehm—Redirect.

Q. And these lights are over near the exit. A. Yes, those four lights.

Q. There is no other light anywhere near this second aisle except this one light at the top of the aisle? A. That is all.

10 Q. Do you know whether or not that carpeting that is on this aisle was the same that was on the night of the accident? A. Why, that carpet has been changed; just exactly when I don't know, because I didn't pay any attention to that.

Redirect-examination by Mr. Laird:

Q. Mr. Boehm, as I understand it, you have no way of knowing whether you were actually in the theatre or not the night that Mrs. Del Pomo alleged she fell? A. No, I don't know.

20

Q. During your five or six years experience at this particular theatre, have you ever seen wall bracket lights out during a performance?

Objected to.

The Court: I think the question should be limited to the time prior to the date when the plaintiff fell, which was the 22nd of February, 1925.

30 Q. During the time, Mr. Boehm, that you have been employed at the theatre and prior to the 22nd of February, 1925, did you ever know of an occasion when these wall brackets were out during the showing of a picture?

Objected to.

Objection overruled.

40 A. Well, I will tell you. The electrician to the

Larry Boehm—Redirect.

theatre and myself, when I come in to open up--

The Court: No. Just repeat the question.

(The last question is read by the stenographer.)

A. No.

Q. Do you know what, if any, inspection is made of lighting equipment there by yourself or by the house electrician? A. Yes. We have what is known as a remote control system there that in the event that the power should go off it automatically throws over on a storage battery system which we have in the theatre. That is the red lights that you see over the exit doors. They are not lit during a performance. That is only an emergency outlet. 10

Q. So that as I understand you, if anything should happen to the city power and the lights in the theatre go off, the red bulbs above the exits which are not lit automatically light from a storage battery system, is that correct? A. That is it, yes, sir. 20

Q. I am going to ask you, Mr. Boehm, to take this pen and run a line from the light which you say was almost over this second aisle and mark the end of your line on this white with your initial, if you will, please. A. (The witness marks the exhibit). 30

Recross-examination by Mr. Harrington:

Q. Mr. Boehm, these lights could be out without you knowing it, couldn't they? A. Well, not those lights right there because— 40

Larry Boehm—Recross.

Q. You are not there every night? A. When I am off, that is possible.

Q. They might have been out some night when you weren't there? A. It is possible when I was away.

10 Q. A bulb might be out, mightn't it? A. In a case like that.

Q. Answer the question. A bulb might be out, mightn't it? A. Bulbs do burn out.

20 Q. And if a bulb burned out, what would you do? A. Why, that is between the electrician and myself that I always inform them of those lights on the side. That saves him a trip in the morning of going all the way up to that second balcony. He will give me a bulb and I will turn it in. This day if I was off, if I had come in to open the matinee, if there had been any lights in there, they surely would have been replaced, but I cannot say whether I was on that night.

By Juror No. 3:

Q. I notice in this photograph of the carpet that I see the inscription right through here "Metro-Goldwin Pictures." You said before the carpet was changed and you didn't know when? A. No.

30 Q. Would it refresh your mind any to know when this combination was formed so that it could possibly identify the time of possible change in this carpet, prior or since? A. No, I couldn't say a thing.

Mr. Harrington: I think it is agreed that it was after the accident.

The Court: What is that?

Mr. Harrington: This change was made after.

40

Larry Boehm—Recross.

The Court: Are you willing to accept the testimony of Mr. Harrington?

Mr. Laird: Not unless he takes the stand and is sworn.

The Court: I think we will have to strike that out.

Mr. Harrington: He said so when he was on the stand before. He said it was done afterwards. 10

By the Court:

Q. But you say this carpet was changed after February? A. I am not sure. I didn't see it. I know absolutely nothing about the carpet.

Mr. Harrington: He said the lights were in there some time after. 20

The Court: Oh, yes, the lights. You were talking about the carpet, weren't you?

Juror No. 3: Yes, I am speaking about the carpet, because he has not stated that he knew that the carpet was changed, whether it was prior or since. But the thing that I would like to call his attention to is that this carpet was marked "Metro-Goldwin Pictures, Loew." Now, if this combination has been formed after this accident, then it is readily assumed that the carpet has been changed since the accident. 30

The Court: He says he does not know.

Mr. Laird: If the Court please, at this time I am going to move to strike out Exhibit P-2, this diagram, because it now appears that this diagram does not correctly represent this balcony, as I understand. 40

Larry Boehm—Recross.

The Court: In what respect? Because it does not show the lights, you mean?

Mr. Laird: No, I did not mean that. I mean with regard to the aisles. Perhaps I can show you what I mean. There are only two aisles shown here, whereas there are four.

10

The Court: She says these two are aisles also.

Mr. Laird: Well, this mark was four.

Mr. Harrington: I offered it for what it is worth. I did not intend it to be a correct diagram.

The Court: It may remain.

20

Mr. Laird: If the Court please, I think I will offer this other exhibit, D-1 for identification. I really do not think it shows anything in connection with this matter. It is the wrong aisle. But I do not want to be put in the position of not having the jury see everything that we have.

(The photograph previously marked Exhibit D-1 for identification is received in evidence and marked Exhibit D-1).

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(Mr. Laird sums up the case in behalf of the defendant).

Mr. Harrington sums up the case on behalf of the plaintiffs).

40

CHARGE OF THE COURT.

The Court charges the jury as follows :

DUNGAN, *J.* :

Gentlemen: One of the plaintiffs in this case, Carmelo Del Pomo, with her two daughters, went on Washington's Birthday, 1925, to Loew's Theatre at Broad and New Streets in this city, and in attempting to find a seat on the second balcony under circumstances which she and her daughters have detailed, she caught her foot and fell and received the injuries for which she brings this suit, alleging that her fall was due to the negligence of those in charge of the theatre in failing to provide safeguards which reasonable prudence would suggest to them they should provide for the patrons of their theatre.

A great deal has been said about the length of time since this accident happened before this suit has been brought to trial. I doubt if that has anything to do with the proper decision in this case, particularly if you understand the condition of the list here in Essex County where we have three thousand cases every term on the list, or between nine and ten thousand cases a year for three Circuit Court Judges to try. If we had to try them all it could not be done in ten years. Fortunately we do not, but it takes about a year to reach a case on the list when we consider those that are settled and those that go off and some other adjustments beside the trial of them made, so that if a case for any reason goes off for the term to the bottom of the list it takes another year before it comes back. These remarks are not intended to be a criticism of the Legislature for failure to provide more judges, because I am told that in near-by States the con-

Charge of the Court.

gestion of the calendar is such that it takes sometimes two or three years before a case is reached for the first time.

10 I am only going into this matter in such detail to indicate to you that you should not take into consideration at all in your decision of this case the length of time that it has taken to reach it since it was started, which was on the 23rd day of November, 1925. The suit was started with reasonable promptness, even though it has not been reached for trial.

20 As has been suggested to you by what has already been said and what was stated to you in the argument, this plaintiff can recover in this case only upon the proof to you that there was as to her some negligence on the part of the theatre, that they failed to perform some duty which they owed to the patrons of the theatre for their safety and which they neglected to provide. Neglect of duty toward a patron means negligence.

30 The mere fact that she fell in that theatre is not negligence. It does not require the instruction of the judge to tell a reasonably intelligent jury that fact. A theatre is not an insurer of the safety of its patrons. They do not insure that a patron going up and down the stairs will not fall. It may have been the fault of the person who fell for failing to take reasonable care for his own safety. So before a patron is entitled to recover it must appear that the theatre neglected some duty which they owed, as I have already told you, for the safety of its patrons. They have no obligation to see to it that patrons do not fall in finding and leaving their seats, particularly where it has not been shown, as it has not in this case, that there

40

Charge of the Court.

was any defect in the stairways or the covering of the stairways. The mere fact that a foot caught in the carpet without showing that there was a defect in the carpet does not prove any neglect of duty on the part of the theatre.

But it is the duty of the proprietor of a theatre to use ordinary, not extraordinary, but only ordinary care to make the premises of which the patron is invited, either expressly or impliedly, to go and to occupy, as reasonably safe as is consistent with the practical operation of the theatre. The lack of safety urged on the part of the plaintiff is that the theatre was provided with insufficient lights and because of the fact that insufficient attention was given to her upon the part of the ushers. 10

Of course every body knows, and it must be assumed that Mrs. Del Pomo knew when she went into the theatre after the show had commenced, that moving pictures cannot be shown successfully in a fully lighted theatre. But where the patron of a theatre is specifically invited by the ushers or employes, or directed, to go to a particular part of the theatre, the theatre proprietor does owe to such patron the duty to provide such lights as are reasonably necessary to permit them to safely find their seats and as are consistent with the practical presentation of the entertainment which is then being produced. Now, these are the principles upon which you are to consider the evidence in this case. 20 30

It appears that this plaintiff purchased orchestra seats for herself and her daughters, or they were purchased by one of them for the three, that they waited a considerable time in line and then were told by an usher that there were seats in the balcony. One of the daughters said that they were 40

Charge of the Court.

told to go there, but the mother and the other daughter say that they were told that they might go there if they wanted seats. They ascended the first flight of stairs, which it appears is to the first balcony, and found that roped off and an usher there who told them that they should go to the second balcony. So they went up the second flight of stairs and came out upon a platform, which is the division line between the first and second balconies, turned to the left and took the first aisle to which they came to the left, which took them to the top of the second balcony or within three or four rows, they say, of the top of the second balcony, and found no seats there. The elder daughter, Esther, started down to endeavor to find seats. Mrs. Del Pomo says that she turned and went slowly down two or three steps when her foot caught and she fell. She claims that there were no lights there. That is, they do not claim that the theatre was in what is called pitch darkness. Mrs. Del Pomo says it was very dim. The daughter Esther says that it was quite dark, "So I had to feel my way along," and Miss Adele says that there were no lights in the aisle and no usher, and it is an undisputed fact in this case that there was no usher to accompany them or direct them or who did accompany them or direct them to this second balcony. They say that the last usher they saw was at the head of the first stairs at the entrance to the first balcony.

It is an admitted fact that there were no aisle lights such as now appear in one of these photographs at the ends of the seats, but the fact that lights have since been provided at the ends of the seats for the purpose of lighting the aisles you

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should not consider as evidence of negligence; that is, you should not consider the fact that they since have been installed as evidence of negligence at a time when they were not installed, because other lights sufficient for the purpose of guiding patrons may have been there, and it is insisted on the part of the defendant that there were such lights there. That is presented by the testimony of Mr. Boehm, who testified to the conditions at that time. 10

As I have said, a theatre cannot be brilliantly lighted for a moving picture show. We all know that, but Mr. Boehm says that there were in this corner of this second balcony five lights. He said that there were two brackets, one on each side of the entrance I think he said; that is as I understand the stairs. I do not know whether those two lights are shown on the photographs or not. One light is, and he says that there was one light directly over this aisle which is shown at the upper right hand corner of one of the photographs. He says that these were not white lights. Neither were they red lights such as one of the plaintiff's witnesses say were at the exits, but he says they were amber lights; and although he will not say he was there that particular night and knows that they were lighted, he says that it is the practice for them to be lighted and he has never known a time when they were not lighted when he was there. Of course if they were not lighted at all that night, even though they are usually lighted, that would not excuse the defendant from its obligation to furnish lights, as the Court has already indicated, reasonably sufficient to enable patrons to safely find their seats. 20 30

So from all the evidence in the case it is for you to say whether or not there was any negligence on 40

the part of the theatre company to provide such safeguards in the way of lights or ushers for this plaintiff as might be reasonable under the circumstances and as would be consistent with the proper presentation of the show which they were then presenting. If they failed in that duty that was negligence, and if the plaintiff herself was in the exercise of due care for her own safety, then she would be entitled to your verdict. If the greater weight of the evidence does not show the negligence of the defendant company, your verdict should be against the plaintiffs and in favor of the defendant.

Now, it was the duty of Mrs. Del Pomo to take reasonable care for her own safety. She had been in that theatre before. She knew or is presumed to have known that a moving picture show cannot be conducted in a brilliantly lighted room. The testimony is that they had to grope their way along the aisles in order to find seats, that there was no usher there upon whom they could call to make a light, and yet under those circumstances she proceeded not only to climb these stairs, but to go down these stairs. She said she proceeded slowly and carefully. Now, did she take such reasonable care for her own safety as a person under those circumstances ordinarily takes? If she did not, then even though the theatre failed to provide such safeguards as they were bound to for her safety, she cannot recover. In other words, if there was any negligence upon her part she cannot recover, even though you should find that the theatre was negligent.

The burden, however, of proving her negligence is upon the defendant. That must appear by the greater weight of the evidence before she is prevented from recovering against the theatre because

Charge of the Court.

of her contributory negligence. But if you decide that she did contribute by her own negligence to the happening of this accident, your verdict should be for the defendant.

Now, assuming for what I shall now say that contributory negligence has not been shown and that negligence on the part of the defendant has been shown, then you come to the consideration of the question of damages, but not until then. You should consider the other two questions first, the question of the negligence of the defendant and the question of the contributory negligence of the plaintiff. 10

If you decide that Mrs. Del Pomo is entitled to your verdict, she is entitled to be compensated for the injury she sustained, which was a fractured right shoulder, for such pain and suffering as she has undergone as the result of those injuries, and for her disability; and her husband is entitled to recover for the loss of the society and services of his wife and the amount of money which he has expended in attempts to cure her or to alleviate her pain and suffering. 20

There seems to be no dispute about the fractured shoulder. She claims to have been incapacitated for a considerable length of time. In fact, she claims to be suffering pain down to the present time. She claims to have been unable until a comparatively recent date to resume the embroidery work which she said she was doing before that time. The doctor does not quite agree with that. Her own doctor testified that the last he saw of her was the end of May, 1925, about three months after this accident, having previously said that the nature of her injuries was such that she ought to 30

Charge of the Court.

10 have been entirely recovered in from three to five months. Although this was a fracture of the shoulder, he says it was not a complete fracture and there was no displacement at all of the fracture and it caused no deformity or displacement, and he says that when he last saw her the latter part of May, 1925, the pain was gone and that he told her she should use her arm. He wanted her to use her arm so that the joint would not become stiff.

20 Now, whatever you decide from all the evidence in the case—and of course in determining this question you must consider the interest of Mrs. Del Pomo in the case and the interest or lack of it on the part of the physician who so testified—she is entitled to recover compensation for the injury and pain and suffering for such length of time as she did suffer pain and for the disability for that length of time, and in addition to that for any loss of earnings. She said she was getting five dollars a week for this embroidery and that for some months and years she has been unable to do it, but if the doctor is right about it and at the end of three months or five months she was able to resume it, then her right to recover that loss of earnings is limited to that length of time.

30 If she is entitled to your verdict the husband is entitled to your verdict for the loss of the society and services of his wife as he had been accustomed to enjoy them before that time, and for his expenses. These according to the testimony are the doctor's bill, \$250, (that is corroborated by the doctor who says that was the amount of his bill), the X-ray, \$10, the nurse \$11, and medicine \$88. That is \$359. In addition to that he says he has
40 had a woman to come there to scrub (his wife said

Charge of the Court.

at week ends), and has sent out the laundry at a cost of a little more than \$5 a week, and he claims to have had that woman right down to this time, all these four years and more. Of course he is not entitled to be compensated for what he has paid for the laundry and to the scrub woman beyond the length of time of the incapacity of his wife. If you find that the greater weight of the evidence shows that she has been incapacitated right down to this time as the result of her injuries, then of course he would be entitled to recover right down to this time for the expenses which he has paid because of that incapacity, but if she was able to go to work and do the things which she had theretofore done, in three to five months, then his right to recover for that item would be limited to that length of time.

10

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These elements of damage—that is, the elements of compensation for pain and suffering and disability of the wife and loss of services of the wife—must be left very much to the sound discretion and judgment of the jurors. That you cannot accurately calculate, but if you decide she is entitled to your verdict, it will be for you to express in terms of dollars and cents compensation for the elements of the wife's damage and compensation for the husband's damage. However, you should not consider at all the subject of damages until you have first determined the subjects of negligence and contributory negligence.

30

Mr. Laird: Will your Honor instruct the jury that if they find this to be a case of pure accident there cannot be any recovery?

The Court: Oh, yes, of course. If it was a pure accident and not as the result of negligence on the

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Charge of the Court.

part of the defendant, then there can be no recovery. I have substantially said that to you when I said that the defendant is not an insurer of the safety of its patrons.

10 I am asked by the defendant to charge you that you are instructed that you are not in this case "to consider that there was any defect in the carpet or any obstruction for which the defendant was responsible." No, you are not to consider that at all, because there is no proof in this case that there was any defect in the carpet. I think I have told you that.

Have I covered your second request?

Mr. Laird: I think you have.

20

DEFENDANT'S REQUESTS TO CHARGE.

The jury are instructed that they are not in this case to consider that there was any defect in the carpet or any obstruction for which the defendant was responsible.

30 The jury is not to consider the fact that aisle seat lights have lately been installed as this is not evidence that their absence at the time of the accident was negligence.

40

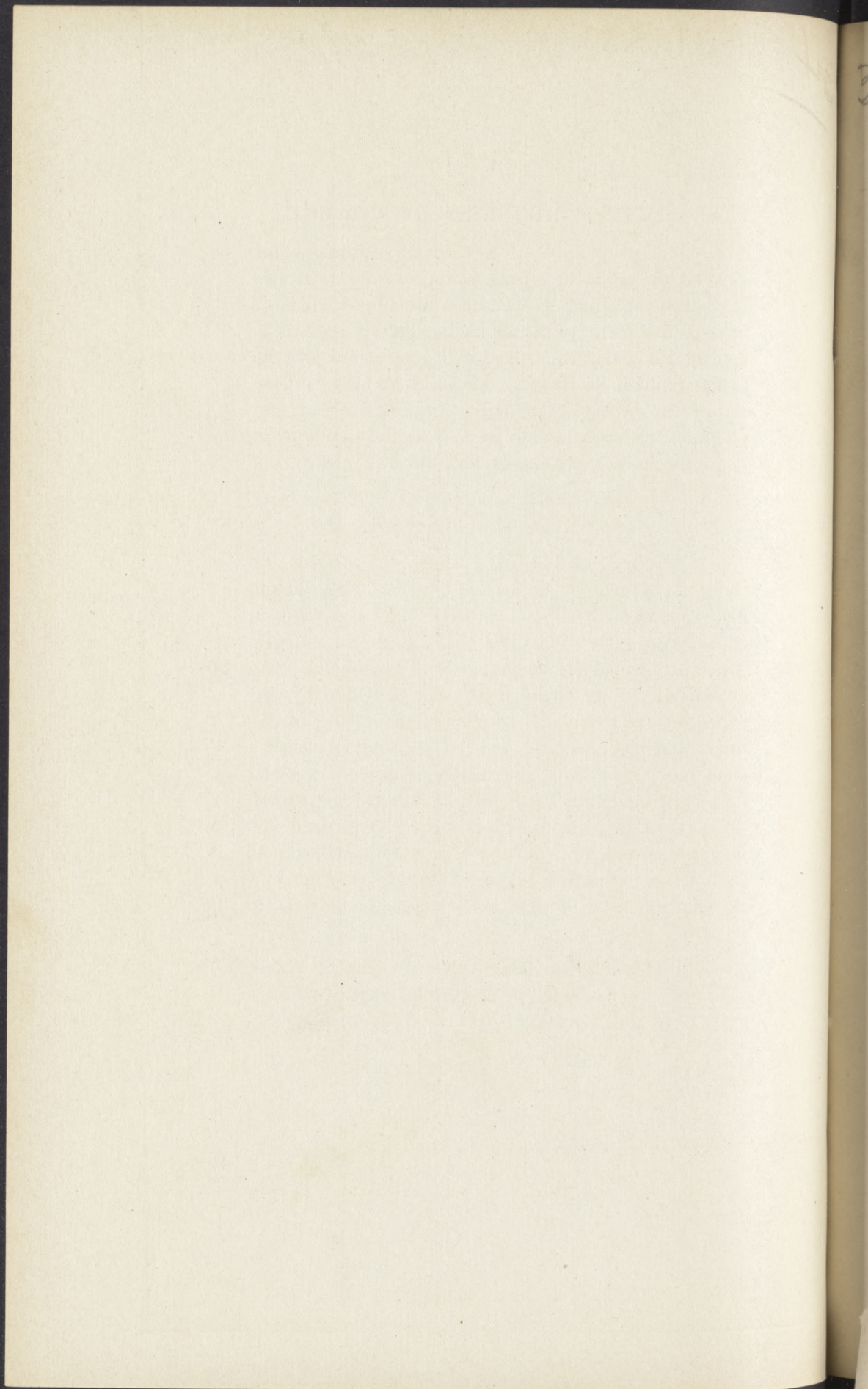
PLAINTIFFS' REQUESTS TO CHARGE.

1. The proprietor of a theatre conducted for reward or profit to which the general public are invited to attend performances must use ordinary care to make the premises as reasonably safe as is consistent with the practical operation of the theatre and if he fails in this duty he may be held liable for personal injuries occasioned, and the question as to whether or not the defendant is negligent is a question of fact for the jury. 10

Andre vs. Mertens, Court of Errors and Appeals, 88 N. J. Law page 126.

2. Where a patron of a theatre is invited to enter it by way of a level platform from which aisles lead to the seat he is expected to occupy, it is not conclusive evidence of contributory negligence on his part if he proceeds to the logical conclusion of the invitation by a way provided by the owner of the premises, and if the invitation to enter includes the use of a seat to be found in a darkened room, by a way provided by the owner, without warning given of a pitfall therein, by which the patron is injured, contributory negligence is not established, as a matter of law, simply because the patron proceeded without further investigation of the way which he had been impliedly invited to pursue. 20 30

Dondero vs. Tenant Motion Picture Company, 94 N. J. Law 483, Court of Errors and Appeals.



32/34 FEB.T.1930

New Jersey Court of Errors and Appeals

CARMELA DEL POMO and MI-
CHAEL DEL POMO, her husband,
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vs.

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Defendant-Appellant.

Action at Law.
On Appeal
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DEFENDANT-APPELLANT'S BRIEF.

Facts and Statement.

On February 22, 1925 plaintiff, Carmela Del Pomo entered defendant Loew's Theatre in Newark, N. J., to witness motion picture and stage performance, having purchased a ticket at the box-office entitling her to a seat in the second balcony. Plaintiff, Carmela Del Pomo, having entered the theatre took the stairway on her right and emerged on a landing separating the lower or first balcony from the upper or second balcony. Said plaintiff proceeded along this landing and turned up the first aisle on her left mounting the steps in said aisle till she had reached the third row of seats from the rear of said second balcony. Seeing no vacant seats she turned around and had proceeded down "one or two steps" (State of Case, page 15, lines 16-22) when her heel caught on something and she fell down the remaining steps to the aforementioned landing. It was for compensation for her injuries caused by this fall that this suit was brought. Verdict in the Supreme Court was for

*Series of 3 copies of this within brief is
acknowledged this 5th day of December, 1929.*

*Felix F. Forlengia
~~Hubert J. Harrington~~
attorney for plaintiffs-Respondents*

the plaintiff, Carmela Del Pomo, in the amount of \$1,000.00 and for her husband the plaintiff Michael Del Pomo, in the amount of \$700. At the trial there was no evidence at all introduced to show on what, if anything, plaintiff Carmela Del Pomo's heel had caught. The only evidence introduced to show the defendant was negligent was to the effect that the theatre was insufficiently lighted. The plaintiff, Carmela Del Pomo, however, admitted she had been in the theatre and in the balcony on other occasions, and that the lighting was similar on those occasions to the lighting at the time she fell. Motion for a non-suit was made by defendant at the close of plaintiff's case on the ground that no negligence on the part of defendant had been shown, same being denied (State of Case, page 51, lines 21-30). Defendant excepted and has brought this appeal from the refusal of the trial court to non-suit the plaintiffs. Defendant contends it was not negligent since the plaintiff, Carmela Del Pomo, assumed the risk of falling, for:

(a) Plaintiff, Carmela Del Pomo, had been in the theatre on other occasions prior to the time she received her injuries, was familiar with the lighting therein, and must therefore be taken to have assumed the risk of falling.

ARGUMENT.

Plaintiff, Carmela Del Pomo, assumed the risk of falling since she had been in the defendant's theatre on previous occasions.

It should be pointed out at the start that the part of defendant's theatre in which plaintiff, Carmela Del Pomo fell was not in absolute darkness but merely dimly lighted. Plaintiff, Carmela Del Pomo, herself testified as follows: (State of the Case, page 15, lines 8-15):

“Q. What was the condition of the theatre at that time? A. Well, it was very dim, very dim, so we were looking, trying to find some seats, and we got almost to about the third row from the last and we saw there wasn't any; so we turned about to come down, and my oldest daughter said—”

Witness for defendant Larry Boehm, testified as follows to the lighting of the theatre during an average performance of which this was one (State of the Case, page 54, lines 1-10):

“Q. Now, Mr. Boehm, during the showing of a picture are these side bracket lights as indicated in this photograph lit? A. The two central lamps are lit and the two outer ones are dead.”

And further on the same witness testified to the following effect (State of the Case, page 54, line 31—page 55, line 24):

“Q. I show you another photograph marked Defendant's Exhibit 2 for identification, and ask you if the side bracket lights as shown on that photograph were in the same

position in February, 1925. A. Yes, all with the exception of those three seats.

“Q. I am asking you about the side bracket lights, on the wall. A. These here?”

“Q. Yes. A. Just exactly as they were when the house opened.

“Q. And when a picture is shown are those side bracket lights kept lit? A. Two of them. Two on each bracket.

“Q. Now, Mr. Boehm, I want you to give us a description as best you can of this balcony as far as the lighting conditions were concerned in February, 1925, when the picture was on. In other words, what I want you to do is to describe to us how many lights were there and how light or how dark it was when a picture was being shown. A. Well, in that particular corner there was burning at the time that the pictures was showing five lamps.

“Q. And where were those lamps located? A. There were two on each bracket, each side of the exit door, and there was one burning at the head of this second aisle right up against the back wall.

“Q. And by the second aisle you mean the second aisle upon the right hand side of the theatre as you face the stage, do you? A. Yes, sir.”

It is admitted that the case of *Dondero vs. Tenant Motion Picture Co.*, 94 N. J. L., 483, and *Andre vs. Mertens* 88 N. J. L., 626, establish the proposition that where a patron of a theatre is injured due to a fall in the darkened interior of the theatre the question of the theatre's negligence in failing to provide more lights is for a jury. The distinguishing feature of the present case, however, is the fact that the plaintiff, Carmela Del Pomo, had been in the theatre prior to the time of the accident, and must be taken to have been familiar with the sufficiency, or insufficiency of the lighting.

Plaintiff, Carmela Del Pomo, testified in part as follows (State of Case, page 23, lines 21-23) :

“Q. How frequently had you been in this theatre prior to the accident? Had you ever been there before? A. Yes, sir.”

Plaintiff also testified as follows (State of Case, page 29, lines 24-30) :

“Q. With reference to that question, to what part of the theatre had you been before? A. The orchestra seats and up in the first balcony.

“Q. About how many times had you been to the second balcony before? A. That was about the second time.”

With reference to plaintiff's statement that she had been in the first balcony on prior occasions, it being remembered that the accident happened in the second balcony, it should be pointed out that the first and second balconies comprised in reality one continuous balcony with an aisle or platform between. Plaintiff's, Carmela Del Pomo's testimony on this point, was as follows (State of Case, page 30, lines 9-25) :

“Q. Now, is the second balcony a separate place above the first balcony in the same manner that the first balcony is above the orchestra? A. No. There is a platform between the first and second balcony.

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“Q. Oh, then it is really a continuous balcony from the front all the way up? A. Just this platform.

“Q. With a platform between? A. Yes, your Honor.

“Q. That is the only way the second balcony is above the first balcony? A. That is all.

“Q. That is, below this platform is the

first balcony and above it is the second balcony? A. Yes, your Honor."

It was admitted by Esther Del Pomo, witness for plaintiffs, that conditions in the theatre were the same at the time of the accident as on prior occasions when she had been there. Her testimony on this point was as follows (State of Case, page 43, lines 16-20) :

"Q. How often had you been to this theatre before? A. I had been there quite often.

"Q. Were the conditions on this particular day about the same as you had seen there before? A. Yes, I would say they were."

In fact the plaintiff, Carmela Del Pomo, herself admitted that the theatre actually was in the same condition at the time of the accident as on her prior visits to the theatre. Her testimony is (State of Case, page 32, lines 1-19) :

"Q. Now, was it in the same condition that it has been in when you were there on other occasions? A. Yes, they put the lights on and off accordingly that is going on.

"Q. Yes, they have dim lights when the vaudeville acts are on, haven't they, as well as the side lights, and when the moving picture comes on they turn off the big dome lights and leave on the side lights? That is the way it always was when you were there before? A. Yes, it was dark."

It is well settled that a person who with knowledge of the unsafe condition of certain premises, nevertheless proceeds to use same, cannot recover from injuries caused by the unsafe condition. In *Saunders vs. Smith Realty Co.*, 84 N. J. L., 276, the plaintiff had recovered a judgment in the Supreme Court for injuries occasioned by a fall in an

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It is therefore respectfully submitted that judgment obtained in favor of the plaintiffs be reversed.

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Action at Law.

Appeal from
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BRIEF OF PLAINTIFFS-RESPONDENTS.

The appeal of the Defendant-Appellant from judgment entered against it in favor of the Plaintiffs-Respondents on a verdict after trial in the above action is granted solely upon the refusal of the trial court to non-suit the Plaintiffs-Respondents on the ground that no negligence had been shown on the part of the Defendant-Appellant (S. C., p. 51, l. 21).

Facts.

The facts stated in Defendant-Appellant's brief omit certain allegations which are very vital in this matter and the Court's attention is respectfully called to the following evidence adduced at the trial.

On her direct testimony the Plaintiff-Respondent, Carmela Del Pomo, testified that she purchased tickets for the orchestra and after waiting a long time an attendant attached to the Defendant-

Appellant's theatre came out and stated that there were seats in the balcony for anyone who wished them and that the Plaintiff-Respondent, Carmela Del Pomo, proceeded to the balcony following the directions of the ushers connected with the theatre (S. C., p. 14, ll. 13-22) ; that the light in the theatre was very dim (S. C., p. 15, l. 9) ; that she had to proceed slowly and had to feel her way (S. C., p. 31, ll. 30-32) ; that no usher accompanied her to her seat (S. C., p. 15, l. 28).

The Court's attention is also called to the testimony of Esther Del Pomo, daughter of the Plaintiff-Respondent, Carmela Del Pomo, and who was present at the theatre with the Plaintiff-Respondent, Carmela Del Pomo, at the time of the accident.

On her direct-examination she stated that the theatre was dark enough to make it necessary for her to feel her way along cautiously (S. C., p. 42, ll. 1-5), and that there were no ushers beyond the second flight of steps in the theatre (S. C., p. 42, ll. 8-10).

The Court's attention is also called to the testimony of Adele Del Pomo, daughter of the Plaintiff-Respondent, Carmela Del Pomo, and who also was present at the theatre on the night of the accident.

In her direct-examination she states that the theater was very dark and she had to feel her way along very carefully (S. C., p. 46, l. 40 and S. C., p. 47, l. 3) ; that there were no lights in the aisle to indicate the seats (S. C., p. 47, ll. 15-16) ; that there were no ushers to show the way; the last usher being left at the foot of the stairs leading to the second balcony (S. C., p. 47, ll. 18-20).

POINT I.

Defendant-Appellant not having argued the sole ground upon which the appeal was taken is presumed to have abandoned same.

The sole ground of appeal upon which the Defendant-Appellant bases its appeal is a refusal of the trial court to grant Defendant-Appellant's motion for a non-suit (S. C., p. 12). This motion was made at the close of the Plaintiff-Respondent's case and was grounded solely on the contention that no negligence had been shown on the part of the Defendant-Appellant (S. C., p. 51, ll. 21-24). The refusal of this motion is also set forth as the sole ground of appeal in the statement of facts set forth in Defendant-Appellant's brief (p. 2, ll. 13-19). This ground is not argued in Defendant-Appellant's brief, the sole ground set forth therein being captioned "PLAINTIFF, CARMELA DEL POMO, ASSUMED THE RISK OF FALLING SINCE SHE HAD BEEN IN THE DEFENDANT-APPELLANT'S THEATRE ON PREVIOUS OCCASIONS", nor is it contended that the motion for a non-suit at the close of Plaintiff-Respondent's case was erroneously denied by the trial court.

It is well settled that where a ground of appeal is not argued either orally or in the appellant's brief, it is considered by the Appellate Court to have been abandoned.

A. Makray, Inc. vs. Wm. McCullough, 103 N. J. L. p. 346; Allen vs. Paterson Theatre, 99 N. J. L. p. 489; 3 C. J. 1428 par. 1591; Punk vs. Botany Worsted Mills, 95 decided in the Court of Errors and Appeals on October 14, 1929, and not yet reported.

The Defendant-Appellant not having argued the

sole ground upon which its appeal is based is therefore presumed to have abandoned the same and it is therefore respectfully submitted that the judgment appealed from should be affirmed.

POINT II.

Defendant's defense of assumption of risk not having been pleaded nor set up as a ground for a non-suit or a ground of appeal, cannot now be raised.

Defense of Defendant-Appellant of assumption of risk is an affirmative defense and must be specially pleaded.

Shaw vs. Bender (90 N. J. L. 147)

Titus vs. Pennsylvania R. R. Co. (87 N. J. L. p. 157)

State vs. Heyer (89 N. J. L. p. 187)

Defendant-Appellant in its answer (S. C., p. 5, 6 & 7) does not raise the defense of assumption of risk and it was therefore not an issue at the trial and cannot now be raised by the Defendant-Appellant. The question of contributory negligence, which was pleaded as a defense, was properly submitted to the jury by the trial court and the assumption of risk being a similar form of defense and almost without exception a question of fact for the jury would, necessarily, have been submitted to the jury if this defense had been raised.

Counsel endeavors to distinguish the case at bar from the cases of Andre vs. Mertens, 88 N. J. L. 626; Dondero vs. Tenant Motion Picture Co., 94 N. J. L. 483 and Heine vs. Acme Theatre Co., 5 M 164—(all three of which cases were decided by

this court and on which the Plaintiffs-Respondent rely) on the theory that under the cases cited the Plaintiff-Respondent Carmela Del Pomo having previously been in the Defendant-Appellant's theatre was cognizant and therefore assumed all of the risk attendant thereto. There is nothing in the evidence to indicate that the Plaintiff-Respondent, Carmela Del Pomo, had any previous knowledge of the particular spot where she was injured. There is not one scintilla of evidence to indicate that the Plaintiff-Respondent Carmela Del Pomo had even the slightest knowledge of the existence of the dangerous condition existing at the place of the accident. In the cases cited by the Defendant-Appellant it is shown that the injured parties were presumed to have assumed the risk only where they had full knowledge of the existence of the dangerous condition and, despite that, had proceeded. There can be no analogies drawn between these situations and that of the case at bar.

In conclusion it is respectfully called to the attention of the court that nowhere in the argument does Defendant-Appellant point out or indicate any error complained of and this court therefore has nothing before it to consider and is not therefore under any duty to search the record for errors not pointed out or indicated by the Appellant.

Precipio vs. Insurance Co. of The State
of Pennsylvania, 103 N. J. L. 589.

For the reasons set out in Point I and also in Point II it is therefore respectfully submitted that the judgment appealed from be affirmed.

Respectfully submitted,

FELIX FORLENZA,
Attorney and of Counsel
for Plaintiff-Respondent.

