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Filed April 30, 1914.

10

COURT OF ERRORS AND APPEALS ON AP-
PEAL FROM NEW JERSEY

SUPREME COURT

20

John Duel,
By his next friend,
John Duel,

Plaintiff,

vs.

Mansfield Plumbing Company,
Defendant

Action at Law.

Notice of Appeal 30

To Lefferts and Lefferts,

Attorneys of Plaintiff.

40

Take Notice, that defendant appeals to the Court
of Errors and Appeals from the whole of the
judgment entered in this cause.

LOUIS A. COWLEY,

Attorney of Defendant.

Served April 22, 1914.

10 Filed April 30, 1914.

COURT OF ERRORS AND APPEALS
OF NEW JERSEY

| | | | | |
|----|--|-----------------------------|---|-----------------------|
| 20 | John Duel, By John Duel As next friend, | Plaintiff and Respondent | } | Grounds of Appeal. |
| | vs. | | | |
| 30 | Mansfield Plumbing Company, Defendant and Appellant | | | |

The Appellant states the following grounds of Appeal:

1. The complaint, as amended at the trial, does not show any cause of action against the defendant. It fails to show that the defendant owed any duty to the plaintiff in relation to the work performed, by the defendant for one Anna H. Earl.

2. Said complaint, as amended at the trial, does not show that the plaintiff while on the premises of the said Anna H. Earl at the time when he sustained the injury, on which the above suit was brought, was there in any capacity other than that of a trespasser or licensee and it fails to show any invitation on the part of the defendant to the said plaintiff to enter upon said premises.

3. There was no proof of negligence on the part of the defendant. 10
4. The evidence shows that plaintiff was on said premises as a visitor to his grandmother, Anna H. Earl.
5. If any duty was owing to the plaintiff to keep said premises safe, it was the duty of the said Anna H. Earl, and not the duty of the defendant. 20
6. The evidence shows that the work done by the defendant was performed in a prudent, safe and careful manner.
7. The following question was admitted to the witness, Anna Duel: "What was his habit in that respect?"
8. The following answer to said question was not struck out: "He was more at his grandmother's than he was at home." 30
9. The Court refused to grant a non suit to the defendant.
10. The Court refused to direct a verdict for the defendant.
11. The Court erred in Charging the Jury as follows: 40

"That the owner or occupier—and for the purposes of this case the defendant here the Mansfield Plumbing Company was the occupier of these premises where the injury occurred—that the owner or occupier of lands who by invitation expressed or implied induces persons to come upon the premises for any purpose, is under a duty to exercise

10 ordinary care to render the premises reason-
ably safe for such purposes, or, at least, to ab-
stain from any act that will make the entry
upon or use of the premises dangerous.”

If you find that the evidence does not satisfy
your minds that the defendant company rendered
these premises unsafe by the lack of ordinary care
in the place in which it put that stone, then, of
course, your verdict should be for the defendant.
20 If, on the other hand, you find that this defendant
Company, under that rule that is given to you,
failed to exercise ordinary care, and the failure
of that care, the thing that it did, was the prox-
imate cause of this injury, the falling of the stone,
then you may render a verdict in favor of the
plaintiff—

30 12. The Court erred in refusing the defend-
ant's request to charge as follows:

“The evidence shows that the plaintiff was a
licensee and the defendant was an independ-
ent contractor, and owed no duty to the plain-
tiff, except to abstain from wilful injury.”

13. The verdict was against the weight of evi-
dence.

40

LOUIS A. COWLEY,

Attorney of Deft.-Appellant.

Served April 29, 1914.

The State of New Jersey to Mansfield Plumbing Co. 10

You are summoned to answer the annexed complaint of John Duel in an action at law in the Supreme Court. And take notice that unless you file your answer to said complaint with the Clerk of the Supreme Court at Trenton, within twenty days after service upon you of this writ and the annexed complaint, the plaintiff may proceed in the suit and judgment may be entered against you. 20 30

WITNESS, William S. Gummere, Chief Justice of the Supreme Court, at Trenton, this fourth day of December, 1913.

WILLIAM C. GEBHARDT,
Clerk.

40

LEFFERTS AND LEFFERTS,
Attorneys for Plaintiff.

| | | | |
|----|---|---|-----------|
| | <p>John Duel, by John Duel as next friend,</p> | } | Complaint |
| | <p style="text-align: center;">Plaintiff</p> | | |
| 20 | vs. | | |
| | <p>Mansfield Plumbing Co.</p> | } | Complaint |
| | <p style="text-align: center;">Defendant.</p> | | |

Plaintiff, John Duel, of the City of Passaic, County of Passaic and State of New Jersey, says.

30 1. On June 3, 1913, about 5 P. M. the defendant a corporation duly incorporated in the State of New Jersey, was doing some work on premises on 277 Chestnut Street in the City of Passaic, owned by Anna H. Earl and in doing said work placed a large quantity of earth and other materials along the pathway leading from the street into the back yard of said premises.

40 2. Said earth and materials were so negligently placed as to obstruct this passageway in an improper and dangerous manner. That the said defendant, by its agents in the performance of its work, took up a big stone slab from the passageway and rested it against the fence near by, in a perpendicular way, so that the slightest jarring of the fence would cause the stone slab to fall over. That this stone slab was permitted to remain in said condition by said defendant and said workmen for several weeks before the time of the accident hereafter described.

3. Plaintiff says that he was walking along the passageway in his father's yard, which had been narrowed somewhat by dirt carelessly heaped up by said defendant, in order to meet his uncle, Thomas Earles, who was coming along said pathway on his bicycle, that said Thomas Earles got off his bicycle to come in the gate when the plaintiff was opposite this slab of stone described, whereupon said slab of stone being carelessly placed as aforesaid by defendant and its agents, fell over upon the plaintiff, knocked him down and injured him, so that his right leg received a double fracture and which has since become shorter than the other leg and was otherwise permanently injured, through no fault of his own. 10 20

4. Plaintiff by reason of said accident, was put to great expense for doctor's bills and care, and suffered great pain for a long period of time.

Plaintiff demands therefore, \$5,000 damages. 30

LEFFERTS & LEFFERTS,

Attorney for Plaintiffs.

By leave of the court the plaintiff was allowed to amend his complaint by striking out the word "FATHER'S" in the second line of the third paragraph and substituting the word "GRANDMOTHER'S" in lieu thereof. 40

10 Filed Dec. 28, 1913.

NEW JERSEY SUPREME COURT

| | | | | |
|----|---|---|------------|---------|
| 20 | <p>John Duel, By John Duel, As next friend</p> | } | Plaintiff. | Answer. |
| | vs. | | Defendant | |

First Defense:

30 1st. Defendant admits that it is a corporation of the State of New Jersey, having its place of business at No. 206 Washington Place, in the City of Passaic.

40 That it did some work on premises, No. 277 Chestnut Street, in the City of Passaic, for Anna H. Earl, on or about June 3, 1912, but denies that it did any work on said premises on June 3, 1913, or placed a large quantity of earth and other materials along the pathway leading from the street into the back yard of said premises as is alleged in the first paragraph of the complaint filed in the above cause;

2nd. Defendant denies the second paragraph of said complaint;

3rd. Defendant denies the third paragraph of said complaint;

4th. Defendant says that as to the matters alleged in the fourth paragraph of said complaint, it has not any knowledge or information thereof sufficient to form a belief. 10

Second Defense:

1st. Defendant says that the work it performed on the aforesaid premises during the month of June, 1912, was performed in a workmanlike and skillful manner and avers that the injuries received, if any, by plaintiff were not caused by defendant's negligence, but on the contrary, were caused by the direct and contributory negligence of plaintiff. 20

LOUIS A. COWLEY,
Attorney of Defendant. 30

10 Filed January 5, 1914.

NEW JERSEY SUPREME COURT

| | | | |
|----|---|-------------|----------|
| 20 | John Duel, By John Duel, As next friend. | } Plaintiff | } Reply. |
| | vs. | | |
| | Mansfield Plumbing Co., Defendant. | | |

30 The plaintiff denies every allegation in the answer.

Dated January 3, 1914.

LEFFERTS & LEFFERTS,

Attorneys for Plaintiff.

40

NEW JERSEY SUPREME COURT

10

PASSAIC COUNTY

John Duel,
By John Duel,
As next friend,

Plaintiff.

vs.

Mansfield Plumbing Company,
 Defendant.

Before: 20

Hon Charles C.**Black, J.**

and a Jury

30

Paterson, N. J., February 17, 1914.

APPEARANCES:

Messrs. Lefferts & Lefferts, and Francis Scott,
Esq., for the Plaintiff,

Louis A. Cowley, Esq., for the Defendant.

40

(A Jury being selected and found satisfactory,
 they were sworn.)

(Mr. Lefferts opens for the Plaintiff.)

(Mr. Cowley opens for the Defendant.)

ANNIE EARLE, sworn as a witness on behalf

10 of the Plaintiff, testifies as follows:

DIRECT EXAMINATION by Mr. Lefferts.

Q. You reside in Passaic? A. Yes, sir.

Q. Are you the grandmother of John Duel?
A. Yes, sir.

20 Q. How long have you lived in Passaic? A.
About forty years.

Q. Are you the owner of the property, No. 277
Chestnut street, in Passaic? A. Yes, sir.

Q. Who did you engage to connect your house
with the sewer? A. Mr. Cullen.

30 Q. Who does he represent? A. The Mans-
field Company.

Q. In the performance of their duty what did
they do? A. They were connecting to the sewer.

Q. While they were doing that, what did they
do? A. Well, they had to open a trench under
the front stoop.

40 Q. Did they move anything while they were
digging the trench? A. Yes, sir.

Q. What did they move? A. They moved a
flag.

Q. Just describe that flag. A. Well, the flag
was under the front stoop and they had to move
the flagging to get to it.

THE COURT: Was the flag on the street?

THE WITNESS: No, sir, inside the fence. 10

THE COURT: Over in your yard?

THE WITNESS: Yes, sir.

Q. (Showing witness a photograph.) Is that a picture of the flag that they moved? A. Yes, sir.

MR. LEFFERTS: I offer this photograph in evidence. 20

ADMITTED AND MARKED "Plaintiff's Exhibit P1" of this date.

Q. Is this in its original position before they removed it, as shown on that photograph? A. Yes, sir.

Q. This is the position of the flag before it was moved, as shown in this second photograph that I show you? A. Yes, sir. 30

MR. LEFFERTS: I offer that photograph in evidence also.

ADMITTED AND MARKED "Plaintiff's Exhibit P2" of this date.

THE COURT: That is outside of the fence, is it not? 40

THE WITNESS: No, sir, it is inside.

MR. SCOTT: That denotes the physical condition on the fourth of January, long after the accident.

THE COURT: Which flag was it, this one in here?

10 THE WITNESS: The inside flag.

Q. That flag was moved and placed where? A. It was moved up against the fence, on the inside, by the walk.

Q. How was it placed? A. Upward, straight.

Q. Alongside of the fence? A. Yes, sir, up against the post.

20

Q. And who placed it against the fence? A. Well, the men that Mr. Cullen had working for him.

Q. Did you have any talk with Mr. Cullen about the stone being placed there against the fence in that peculiar position? A. I told him it was in a dangerous position.

30

Q. What did he say to you? A. He said he would have it moved.

Q. Where were you on June third, 1912? Were you living at the same premises? A. Yes, sir.

Q. Did you see the accident? A. No, sir.

THE COURT: What day of the week was this?

40

MR. LEFFERTS: Monday.

THE WITNESS: On Monday.

Q. Did you see John Duel after the accident?
A. Yes, sir.

Q. How long afterwards? A. Well, it was about, I guess about a half an hour.

Q. What was his condition when you saw him? 10
 A. He was on the bed. On my bed.

Q. What was his condition? A. Well, I could not really tell, for the doctor was there at the time.

Q. You could not really tell? A. He did not know until he had taken him to the hospital. I helped him to get the splints on the boy's leg. 20

Q. How long was he in the hospital? A. Seven weeks.

Q. Who did you pay for the work done on the premises, connected with the sewer, who did you pay for that work? A. Well, I paid in the office.

Q. Who? A. I paid the bookkeeper or clerk.

Q. At whose office? A. Mansfield. 30

Q. Mansfield what? A. Company.

Q. Mansfield Plumbing Company? A. Yes, Mansfield Company, ain't it?

Q. Mansfield Plumbing Company? A. Yes, Sir.

Q. The defendants in this case? A. Yes, sir. 40

CROSS EXAMINATION by Mr. Cowley.

Q. When did this work begin? A. Well, it was about a week before the accident happened.

Q. When was the stone lifted and placed in this position against the fence? A. Just right away as soon as the work was started.

10 Q. About a week after that the accident occurred? A. Yes, sir.

Q. And the stone remained in that position during that week? A. Yes, sir.

Q. When did you speak to Mr. Cullen about it. A. Right away after it happened, before it happened.

20 Q. Before it happened? A. Yes, sir.

Q. It happened on a Monday didn't it? A. Yes, sir.

Q. What time of the day? A. Between five and six.

30 Q. What time before that did you speak to Mr. Cullen? A. Well, it was right after the man had placed it there.

Q. Just about a week previous? A. Yes, sir.

Q. So you allowed it to remain there in that dangerous position for the week? A. Yes, sir.

Q. Do you know what caused it to fall? A. No, sir.

40 REDIRECT EXAMINATION by Mr. Lefferts.

Q. Did you have a talk with Mr. Cullen after the accident? A. Yes, sir.

Q. Where? A. In my own house, the next morning.

Q. What did you say to him and what did he say to you? A.

MR. COWLEY: Objected to. 10

Objection sustained.

Q. What did you say to him?

MR. COWLEY: Objected to.

Objection sustained.

MR. SCOTT: I would suggest if Mr. Cullen is 20
the Mansfield Plumbing Company, anything he
said after the accident would be an admission of
the Mansfield Plumbing Company.

THE COURT: If you can prove that the Mans-
field Plumbing Company authorized him to talk
for it, of course you can introduce evidence of
what he said.

MR. SCOTT: Oftentimes a man will be in busi- 30
ness as a company and if he is the Company any-
thing he said would be binding upon this defend-
ant.

THE COURT: You would first have to prove
that he was authorized to speak for the Company.

MR. SCOTT: If we prove that to be the fact
then this evidence would be competent.

THE COURT: I will determine that when you 40
make the proof. For the present I overrule this
question.

THOMAS EARLE, sworn as a witness on behalf
of the Plaintiff, testifies as follows:

DIRECT EXAMINATION by Mr. Lefferts.

Q. Where do you live? A. I live at No. 277
Chestnut street, Passaic.

10 Q. Are you an uncle of Johnny Duel, who was injured? A. Yes, sir, I am his uncle.

Q. Did you see the accident? A. Yes, sir, seen the accident.

Q. That took place June third, 1912? A. Yes, sir.

20 Q. Just tell the Court and Jury how that accident occurred. A. Well, that night, as I was just coming home from work, it was on a Monday, and I was coming home from work and he was coming to meet me and I was just coming in the gate when I went to go in the gate he was just passing the stone running to meet me and I just let the gate come to and the stone tipped over from the jar of the fence.

30 Q. Had you seen that stone standing against the fence? A. Yes, sir, I had seen the stone standing against the fence.

Q. How did it stand? A. It stood upright.

Q. Against the fence? A. Against the fence.

Q. On the inside? A. On the inside.

40 THE COURT: What knocked it down?

THE WITNESS: Well, I was coming in the gate and I just guess it was the little jar of the gate.

MR. COWLEY: I ask that that be stricken out on the ground that it is a guess.

THE COURT: You did not see it?

THE WITNESS: Well, I did not see the jar. 10

Q. What caused the stone to fall down? A. Well, I guess it was the gate coming back.

MR. COWLEY: I object.

THE WITNESS: It was the gate coming back.

MR. SCOTT: When he says that he guesses he means that he says. 20

MR. COWLEY: I object and I object to what counsel suggests.

THE COURT: He cannot tell us anything but what he saw and it may be all stricken out.

Q. What caused the stone to fall? A. Well, the little slam of the gate, the gate. 30

Q. As you walked in it? A. Yes, sir.

CROSS EXAMINATION by Mr. Cowley.

Q. How big was the stone? A. It was three feet by four feet.

Q. Did you measure it? A. Yes, sir.

Q. When did you measure it? A. After the the accident. 40

Q. You lived at 277 Chestnut street? A. Yes, sir.

Q. You had noticed the stone before? A. Yes, sir.

Q. Had that gate been used from the time the

10 stone was placed there? A. Yes, sir.

Q. Ever since the work was begun? A. Yes, sir.

Q. Until the time stone fell? A. Yes, sir.

Q. Did you come through the small gate or which gate, the small gate or the large gate? A. The small gate. The small gate that was used all
20 the time in the front of the house.

Q. You saw the boy passing the stone? A. I saw the boy passing the stone.

Q. Where had he been? A. Coming to meet me. In the house.

Q. Where was he coming from? A. He was coming from out of the house, coming there to
30 meet me.

Q. Where did he come from, out of the house, come out of the front door? A. No, sir, he was coming out of the back door.

Q. And those premises consist of two lots and a house on one lot, isn't that right? A. There is one lot and then it is one on this side with a house
40 on.

Q. And then this boy was coming from the side of the vacant lot? A. He was coming from the side of the vacant lot.

Q. To the gate, to the small gate? A. Yes, sir, to the entrance to the gate.

Q. And was it after or before you got inside of the gate or inside of the yard that the stone

fell? A. Just as I was coming in the gate. 10

Q. Was the gate closed when you got there?

A. Yes, sir.

Q. Was it the opening of the gate or the slamming of it that caused the stone to fall? A. Well, I was just coming in, after I got in.

Q. Was it the opening of the gate? A. No, sir. 20

Q. What? A. The shutting of the gate.

Q. Then you must have been entirely inside?
A. No, I was not entirely inside, because I let it come back with my hand.

Q. How could you close the gate if you had not been inside? A. I was inside and I was just coming in. I just took hold of the gate and let gate come back with my hand. 30

Q. The boy was running to meet you? A. Yes, sir.

Q. How do you know that? A. Because when the thing fell he hollered for me.

Q. It fell right on him did it? A. Yes, sir, it fell right on him. 40

Q. And it covered his whole body? A. No, sir, only to the hips.

Q. This boy's father's name is John Earle? A. John Earle, yes, sir.

Q. Where did he live at that time? A. He lived at Burgess Place.

Q. No. 187? A. No. 187, yes, sir.

10 Q. And the boy lived there with his father?

A. Yes, sir; well, you know, he used to come down to our house quite often; he lived there most of the time.

Q. Just to visit? A. Yes, sir; he lived down to our house most of the time.

20 Q. But he was living then with his father? A. At the time of the accident he was not, he was down to our house.

Q. When did he come to your house? A. He came there I think it was in the morning; yes, sir, in the morning.

Q. In the morning of that day? A. In the morning of that day, yes, sir.

30 Q. He went to school, didn't he? A. He was at our house, I don't know about that day, if he went to school or not.

Q. What time did you go to work? A. Eight o'clock in the morning.

Q. Where did you work? A. Down at Passaic

Q. Whereabouts in Passaic? In a garage.

40 Q. Where is the garage? A. Roger's, 353 Main avenue.

Q. What time did you leave your house? A. Sometimes half past seven.

Q. Was the boy at your house before you left?
A. No, sir.

Q. He did not come there till after that. A. No, sir.

Q. So that you did not see the boy that day until you came home that night? A. I did not see the boy that day until I came home that night. 10

Q. The boy does go to school, doesn't he? A. Yes, sir.

JOHN DUEL, the Plaintiff, is produced before the Jury in response to the Court's questions he states that he is eight years old. The Court then directs that he be not sworn. 20

DR. WILLIAM H. CARROLL, sworn as a witness on behalf of the Plaintiff, testifies as follows:

DIRECT EXAMINATION by Mr. Lefferts.

Q. Do you remember treating the little boy here at the General Hospital? A. Yes, sir.

Q. How long was he at the hospital? A. From the third of June till the fourth of July. 30

Q. What was the trouble, what was his sickness? A. There was the fracture of two bones of the lower limb, and one fracture of the thigh bone, the right.

Q. Have you examined the right leg of this boy recently? A. I think about possibly three weeks ago. 40

Q. What did you find the condition of his right leg to be? A. The lower limb is perfect, but the bone in the thigh or the thigh bone there is a slight curvature outward.

Q. Does that make the right leg shorter than the left leg? A. Yes, sir.

10 Q. How much shorter? A. If I remember
rightly, about an inch.

Q. Is that a permanent injury? A. Oh, that
curve is permanent, yes, sir.

Q. And his right leg will remain an inch short-
er than his left leg during his life? A. Oh, that
might grow slightly, but probably not fully an
inch, it might lengthen out some.

20

MR. LEFFERTS: I would like to show the in-
jury to the jury.

THE COURT: Yes. If there is any point about
it. I don't know that it is important.

THE WITNESS: It is simply a curvature.
(The Plaintiff is brought before the Jury and
his leg is bared.)

30

Q. Now, if you will just explain this curvature
to the jury? A. There is no explanation that
need be made, they can see it, there is the curva-
ture.

Q. You now place your hand on the bone, what
do you call that bone? A. That is the femur, the
thigh bone.

40

THE COURT: Just above the knee?

THE WITNESS: Just above the knee. The
lower third.

CROSS EXAMINATION by Mr. Cowley.

Q. You say this boy was there from the third
of June to the fourth of July? A. Yes, sir.

Q. When did you first see him; on the third of June? A. On the morning of the fourth. 10

Q. What was the condition that you found there in regard to the —? A. I found the three fractures, that is, both bones of the lower limb and one on the upper limb, and of course the swelling that would take place after a fracture.

Q. Did you find any bruised condition of the flesh? A. No, I did not. 20

Q. You did not find that? A. No, sir.

Q. And you say the boy stayed there until the fourth of July? A. Yes, sir.

Q. Was he discharged by you or was he taken away by his parents? A. If I remember rightly, and I think I am right, that my orders to the house man was then I found that there was a curvature in the upper bone, that when the parents or relatives found the child that he was to ask consent for to allow me to break that portion of the bone over again and straighten it, and that, of course, if they did not allow it, the child would have to be taken out and a release signed. That is my recollection. 30

Q. Did you speak to the parents themselves? A. No, I did not. 40

Q. If that treatment had been accorded the child—

MR. SCOTT: I object, we cannot count on the possibilities or the probabilities.

THE COURT: No; all they have got to do is to exercise reasonable medical skill and we cannot

10 say because the parents did not consent to that
that that was improper.

Q. Could that curvature have been prevented
at that time by reasonable medical skill?

MR. SCOTT: Objected to.

20 THE COURT: I will allow the witness to state
his best judgment.

THE WITNESS: If you will allow me to finish
what I was going to say; when I went to the hos-
pital on the morning of the fifth I found that the
child had been taken away. That was the last I
saw of it. Now, the other question.

30 THE COURT: Would such treatment as you
have suggested, probably have prevented the cur-
vature?

THE WITNESS: It would in my judgment,
yes, sir.

THE COURT: That is the best you can say
about it, is it?

THE WITNESS: Yes, sir.

40 THE COURT: Medical science is not exact, of
course?

THE WITNESS: No, sir.

Q. What would have been the treatment, you
say, the bone broken over? A. The bone would
have been broken over and straightened out, prob-
ably I would have to break it what they call par-
tially though, not entirely, the curve would have
been forced down into a straight position by frac-

turing the bone on one side and then making it straight. 10

Q. You have heard the testimony here that this boy's leg was broken by the falling of a heavy stone upon him, a heavy stone, four feet by three feet, did you find any condition of the body that indicated that the break occurred in that way?

MR. SCOTT: Objected to.

Objection sustained; Defendant excepts. 20

Q. If a stone such as has been mentioned here had fallen on the boy would it not have bruised the flesh?

MR. SCOTT: Objected to.

Objection sustained: Defendant excepts.

REDIRECT EXAMINATION by Mr. Scott 30

Q. You attended him the next day you say? A. No, he was not there the next day.

Q. When did you first see him? A. You mean when the child came in?

Q. Yes? A. He came in, if I remember rightly, between five and six o'clock on the third and I saw him on the morning of the fourth, that is my recollection. 40

Q. When did you set his limb? A. His limb was not put up permanently, in a permanent position until about three days afterward. We never do.

Q. You attended the boy? A. Oh, yes.

Q. And you did whatever was necessary when-

10 ever you first saw him? A. The next morning after the accident, yes, sir.

Q. And when at the end of three days what did you do? A. He was put up in a permanent dressing then.

Q. His bones were set? A. Put up in a permanent dressing.

20 Q. By you? A. Yes, and I could not tell, of course, the result of that permanent dressing until everything was taken down.

Q. You set the leg? A. Yes, sir.

Q. And you set the fracture in the thigh, in the femur, as you call it, the big one above the knee? A. Yes, sir.

30 Q. And the result of that setting was the curvature of the bone was it not? A. No, sir.

Q. That is the way it is now? A. Yes, sir.

40 Q. No other doctor set the leg? A. No, but you will allow me, I set that limb to the best of my knowledge and belief straight and put it in permanent extension in the cast, and it is impossible to tell what was the result of that, what the result is going to be until you take it down.

Q. You are giving an explanation? A. I certainly am. I could not tell whether it was straight or not.

Q. And the result was, wasn't it, a curvature?
A. But not until I took it down.

Q. When did you notice the curvature for the

first time?

10

THE COURT: The object of redirect examination is that many matters in the cross examination which are not clear may be made clear. What is the object of this?

MR. SCOTT: The object seems to be quite plain.

THE COURT: It is not to me.

20

MR. SCOTT: He has been permitted to state to the Jury that if the curvature had been broken and set again the leg could have been straightened out and the jury might draw the inference from that that if the doctor had had his own way and the parents had consented there would not have been this curvature and perhaps not this shortening; now, I am showing that the curvature is the result of his own work.

30

THE COURT: He has said that from the very beginning; he has said that he had entire charge of the case and there was a curvature, it was impossible for him to tell but in his judgment if he had been allowed to rebreak it it might have been different.

BY MR. SCOTT:

Q. When did you first notice the curvature?

40

A. When the limb was taken down on July third.

Q. Not until that time? A. No, you could not; you could not tell.

Q. You say that was noticeable the third of July, the day he left? A. No, sir.

Q. The day before? A. Yes, the day before.

10 Q. You did not have any conference with the parents yourself at all? A. No, I said that before; I did not see them, I never saw them from the time the child went in till he went out.

Q. What attendance did you give the child after setting the limb on the third day? A. The regular service every day by watching the limb, to the best of my knowledge it was in the condition it should be .

20

Q. And you did watch it? A. Yes, sir.

Q. Every day? A. Yes, sir.

Q. Up to the third of July? A. Every day I made my rounds.

ANNIE DUEL, sworn as a witness on behalf of the Plaintiff, testifies as follows:

30

DIRECT EXAMINATION by Mr. Scott.

Q. You are the mother of this child? A. I am.

Q. At this time in June, 1912, where did you live, in Passaic? A. On Burgess Place, 187 Burgess Place.

40 Q. Is that near No. 277 Chestnut street? A. That is about three streets down, three blocks down.

Q. Your child, this boy that was hurt, on the day of June third, was visiting his grandmother, was he not? A. Yes, sir.

Q. What was his habit in that respect?

MR. COWLEY: Objected to as immaterial.

Object overruled; Defendant excepts. 10

A. He was more at his grandmother's than he was at home.

MR. COWLEY: I object to that and move that it be stricken out.

Motion denied; Defendant excepts.

Q. When did you first learn of the accident? 20

A. Well, my brother came up on a bicycle and he told me that the little fellow was hurt.

Q. Then you went down as a result of his talking to you? A. Yes, sir.

Q. How soon after the accident did you see the boy? A. Well, the doctor had not got there yet, I could not tell you just exactly, it might have been about a few minutes, it could not be any more than that for I ran right down there. 30

Q. Where was he? A. In bed.

Q. Did you know what was his condition? A. I did not know then for the doctor had not been there yet, his leg was all swollen, that is all I know, for I was so excited, I was watching for the doctor. 40

Q. The doctor came soon after that? A. Yes, sir.

Q. You found out what had happened to him? A. Yes, sir, he said there was three breaks in the leg.

Q. And he was taken to the hospital? A. Yes, sir.

10 Q. What hospital was he taken to? A. He was taken to the General Hospital.

Q. How long did he remain there? A. He went there on the third of June and came home after the fourth of July, shortly after, just how soon I don't know.

20 Q. You visited him at the hospital during that period? A. Every day.

Q. Do you know whether he suffered to any degree or not? A. Well, the nurse says he suffered something terrible.

MR. COWLEY: I object to that and move to strike it out.

Motion granted.

30 Q. What did you see yourself? A. I could see by the way he cried and the way he greeted me every day when I came there.

Q. Since that time, after he came home, was he put in bed? A. Yes, sir, for eight long weeks before we could put crutches on him.

40 Q. Do you mean eight weeks from the time of the accident? A. No, after we took him from the hospital.

Q. Eight weeks after the fourth of July? A. Yes, sir.

Q. Then he used crutches, did he? A. Yes, sir.

Q. For how long a time? A. I could not tell you. For a long while after, anywhere from six

to eight weeks, yes, eight weeks more anyway. 10

Q. Was he out of school all that time? A. He was out of school all that time.

Q. Living with you at your home? A. Yes, sir.

Q. Did he receive any doctor's attention after the fourth of July? A. No, sir. I got orders from Dr. Joyce to rub him well, keep him well rubbed with turpentine and sweet oil and paint him with iodine. 20

Q. You don't know anything about how this accident occurred. A. No, sir, I was not there at that time.

CROSS EXAMINATION by Mr. Cowley.

Q. Was not your boy going to school on the third day of June, 1912? A. He was. 30

Q. He went to school that day? A. No, he went to his grandmother's, he mostly always went to his grandmother's in the morning.

Q. He was at your house the night before? A. Yes, sir.

Q. On Sunday? A. Yes, sir. 40

Q. And he went to his grandmother's you say that morning? A. Yes, sir.

Q. How do you know? A. Well, I know I sent him in the morning.

Q. You don't know whether he went or not? A. No, I could not say he did.

10 Q. He went to school, did he? A. Yes, sir.

Q. What school? A. Number seven school.

Q. Is not number seven school between your
and your mother's? A. Yes, sir.

Q. And he would leave your house and go
down to his grandmother's and then come back
to the school? A. He often done it when it was
20 nice weather.

Q. What time did he leave your house that
morning, do you know? A. About eight o'clock.

Q. What time did school begin? A. Nine
o'clock.

Q. Didn't he go direct from your house to
school? A. Not as I know of, I sent him to his
30 grandmother's.

Q. What did you send him to his grandmoth-
er's for?

MR. SCOTT: Objected to as immaterial.

Q. He was visiting his grandmother's on that
day? A. Yes, sir.

40 PLAINTIFF RESTS.

MR. COWLEY: I ask for a nonsuit; the bill of
complaint says, although I suppose it is subject to
amendment, the bill of complaint says that the
injury occurred in this boy's father's yard.

THE COURT: I will permit an amendment to
fit the proof.

MR. SCOTT: Yes, I ask for an amendment to

make it read that it was the grandmother's yard. 10

THE COURT: Any amendment may be made that will make the pleadings conform to the proof as it is now presented.

MR. COWLEY: If, under the facts as proved here in this case the Mansfield Plumbing Company, a contracting plumber, was engaged to do a job there to connect the house with the sewer in front of the house, I think it may be said that the Mansfield Plumbing Company was an independent contractor. 20

MR. SCOTT: I don't know anything about that. Your pleading says that the Mansfield Plumbing Company was doing the work there just as we allege.

MR. COWLEY: Yes, and it had charge of that portion of the premises where the work was being done, and I should say that it owed no duty to anybody who was not either on the premises by the invitation of the Mansfield Plumbing Company or to some person who was rightfully on the premises and not there merely as a visitor. This is a case where the child was merely a licensee, and if that child went there for the purpose of visiting the occupant of the premises, merely as a visitor to the occupant of the premises, the Mansfield Plumbing Company owed no duty to that child greater than to refrain from wilful or malicious negligence or wilful injury. The Mansfield Plumbing Company would owe no greater duty to that child than the owner of the premises would owe to it unless the child was there upon invitation from the Mansfield Plumbing Company 30 40

There is nothing in this case which shows—in fact the statements are that the accident occurred

10 at a time of the day when neither the Mansfield
Plumbing Company nor any of its representatives
were there, that is, between five and six o'clock
on that day. Now, if that child came on those
premises merely as a visitor, there was no duty
upon the owner of the premises to keep them safe
or free from any danger, and therefore there is
no duty upon the Mansfield Plumbing Company
who is an independent contractor performing cer-
20 tain work there that would put upon it greater
liability than would be put upon the owner of the
premises .

I also have a case here which indicates that
there is no duty different required in the case of
an infant than in the case of an adult.

An independent contractor's liability cannot be
extended except by some act of his own.

30 THE COURT: He had to do his work in ac-
cordance with the recognized and known uses
of that property and the known uses of that prop-
erty, as I understand was to come and go at the
pleasure and necessity and convenience of these
people who occupied the premises and the con-
tractor was bound to use those premises in the
same way and refrain from acts that would injure
those persons, and in that respect it was his duty
40 to do more than to refrain from acts that are wil-
fully injurious.

As I view it it is a question of fact for the jury.

MR. COWLEY: I also ask for a nonsuit on the
ground that there is no negligence shown on the
part of the defendant.

THE COURT: It is a question of fact for the
Jury.

Motion denied; Defendant excepts. 10

ROBERT J. CULLEN, sworn as a witness on behalf of the Defendant, testifies as follows:

DIRECT EXAMINATION by Mr. Cowley.

Q. You are the manager of the Mansfield Plumbing Company? A. Yes, sir.

Q. Do you know Mrs. Earle? A. Yes, sir. 20

Q. Did you do any work on her premises in June, 1912? A. In May and June, yes, sir.

Q. What did you do? A. Why, I connected the sewer for her and put in some plumbing work in the house, No. 277 Chestnut street.

Q. Do you know of an accident occurring there on June third? A. Why, I knew of it on the fourth, I went up there between ten and eleven and Mrs. Earle told me about it. 30

Q. When was the last time you visited these premises before the accident occurred? A. On June first.

Q. What day was that? A. On a Saturday.

Q. What was the condition of the premises then? A. Why, the premises was in good condition, because I stayed there after my men, they finished up the excavating or the back filling and I stayed there after my men and seen that they left the place in good order before I left it. 40

Q. You say in good order, what was the condition of the premises when you left it?

10 THE COURT: The only thing that is complained of is this stone.

Q. What was the condition of that stone? A. The stone stood against the fence in an upright position and it stood, well, just as we left any other ordinary stone, about a foot away from the bottom of the fence.

20 Q. The stone leaned against the fence? A. The stone leaned against the fence.

Q. And the base of the stone was how far away from the base of the fence? A. About a foot, I should say.

Q. How long have you been doing this work? A. How long?

30 Q. Yes, How long have you been working as a plumber? A. I have been in business fourteen or fifteen years.

Q. You have removed stones and did work of this kind before? A. Oh, yes, several hundred.

Q. Was that stone in a safe position at that time?

40 MR. SCOTT: Objected to as calling for a conclusion.

Objection sustained; Defendant excepts.

Q. Was it customary to place stones of that sort in that position?

MR. SCOTT: Objected to.

Objection sustained; Defendant excepts.

MR. COWLEY: I want to show that there was nothing negligent in reference to the placing of that stone in that position. 10

MR. SCOTT: I have no doubt you do, but I think the Court will oblige you to show it by legal evidence. The cases all hold that you cannot justify negligence by custom.

MR. COWLEY: I suppose then your Honor's ruling is that it is left to the jury to determine whether the stone was left in a dangerous position or not when it was left as he said he left it? 20

THE COURT: Yes. Let the jury get the facts and they will tell whether it was dangerous or not.

Q. What was the condition of the fence? A. The fence was in good condition.

Q. Good, firm condition? A. Yes, sir. 30

Q. You have heard it testified to that the stone fell inward inside to the fence and not on the dirt? A. Yes, sir.

Q. In order for it to fall that way how far would the top of that stone have to be taken from the fence?

MR. SCOTT: Objected to. 40

Objection sustained: Defendant excepts.

Q. What was the condition of that walk which it was testified the boy was coming up? I show you a photograph showing some dirt there, that was thrown across the walk, was that condition there at the time on Saturday night that you last saw the place? A. That stone was lying flat, 1

10 was left lying up against the fence and that pile of dirt was across the walk.

MR. COWLEY: I offer this photograph in evidence.

ADMITTED AND MARKED "Defendant's Exhibit D1" of this date.

20 Q. In order to get from the small gate in the front of the house to the side of the house, was it necessary to climb over that dirt? A. Yes, sir.

Q. That passageway was obstructed in that way, was it? A. With the dirt from the excavation.

Q. That was thrown all across that pathway?
A. Yes, sir.

30 Q. You have heard Thomas Earle testify that he entered the small gate and that this boy came while he was entering the small gate, this small boy was approaching him from the side of the vacant lot, you heard him testify to that, didn't you?
A. He would have to come over the pile of dirt to get to it.

40 Q. You heard him testify to that, didn't you?
A. Yes, sir.

Q. For that boy to come from the side of the house or where the vacant lot was to this small gate in the front of the huse, what side of the boy would be toward the house and what side of the boy would be toward the fence?

MR. SCOTT: Objected to because it is not intelligible.

THE COURT: If the witness understands the question he may answer it. 10

A. Why, his right side would be towards the house.

Q. And his left side towards the fence? A. And his left side towards the fence .

Q. What was the size of that stone? A. The exact size of the stone was thirty inches by forty-eight inches. 20

Q. And about what was the weight of the stone? A. Well, I could not tell exactly, but about three hundred pounds, I should say.

Q. You have heard Mrs. Earle testify that just after the work began she told you that that stone was in a dangerous position, is that so? A. No, sir, Mrs. Earle never said to me a word that it was in a dangerous position or any word about danger. 30

CROSS EXAMINATION by Mr. Scott.

Q. You say that you saw this stone leaning up against the fence on Saturday, June first, two days before the accident? A. Yes, sir.

Q. And you say that the bottom of it was about a foot away from the fence? A. I should judge about a foot, yes, sir. 40

Q. How do you know? A. I was there and seen it.

Q. Did you observe it particularly? A. Why, I was there with my men.

Q. You were not observing that particularly, were you? A. I laid some planking in place of

10 this stone that was out for the excavation that we left open, that is how much I observed it.

Q. You did not make any measurement at all, you just glanced at it, was that it? A. I just glanced at it, yes, sir.

Q. Here is a picture taken the next day, do you see how the bottom of the stone is there? A. It naturally would be.

20

Q. Why? A. If a stone falls and you lift it off a person, if it is supposed to fall out, it would go back at the bottom.

Q. You think that is how that was caused? A. If this stone is right up against the fence there, yes.

30 Q. You say that Mrs. Earle did not speak to you about this stone? A. No, sir.

Q. The stone had been up against that fence for how long? A. From the twenty-eighth of May.

Q. It was part of the flagging inside of the fence that you had to take up in order to make the excavation? A. Yes, sir.

40

Q. And your man put it up against the face? A. Yes, sir.

Q. And Mrs. Earle never said a word to you about it? A. No, sir.

Q. She spoke to you the next day about the accident, didn't she? A. I went there the next day not knowing anything about the accident and Mrs. Earle told me about it.

Q. And told you how it happened? A. She 10
told me the flag fell on the boy.

Q. And did she tell you what flag? A. There
was only one flag there.

Q. That was the only one against the fence?
A. Yes, sir.

Q. And you said you were sorry, did you not? 20

MR. COWLEY: I object to that and move to
strike it out.

Motion granted.

Q. What did you say to her when she spoke to
you about the accident?

MR. COWLEY: Objected to. 30

Objection overruled; Defendant excepts.

A. I said I was sorry it happened.

Q. That flag you say was thirty inches by for-
ty-eight inches, how thick was it? A. About two
inches or two and a half inches in some parts of it.

DEFENDANT RESTS. 40

Testimony closed.

MR. COWLEY: The Defendant moves for the
direction of a verdict in its favor on the ground
that the evidence shows that the plaintiff was a
licensee and that defendant was an independent
contractor and owed no duty to the plaintiff ex-
cept to abstain from wilful injury.

10 Motion denied; Defendant excepts.

(Mr. Cowley then sums up for the Defendant.)

THE COURT THEN TOOK A RECESS UNTIL
TWO O'CLOCK THIS DAY.

AFTER RECESS:

20 The trial was resumed pursuant to adjournment.

(Mr. Scott sums up for the Plaintiff.)

The Court then charged the Jury as follows:

30 THE COURT: Gentlemen of the Jury, the testimony in this case shows that the Plaintiff, John Duel, on Monday, June third, 1912, while visiting his grandmother on her premises, No 277 Chestnut street, in the City of Passaic, was injured by a stone falling upon him.

40 The testimony further shows that this stone or flag was thirty inches by forty-eight inches in width and length and about two and a half inches thick and weighed about three hundred pounds. That it was a flag inside of the fence line of the premises, and the testimony further shows that it was taken up by the defendant, the Mansfield Plumbing Company, who had been employed by the owner of the premises, to make a connection between the sewer and the house; and the testimony also shows that the stone was taken up and placed against a post of the fence on the inside and that as the boy's uncle, Thomas Earle was coming into the yard, opened the gate, and as he was shutting the gate, he caused the stone to fall, as he says, shutting the gate caused the fall, and he allowed the gate to come back with his hand, and at that time the boy was passing by the stone and

it fell, causing the injury of which he complains. 10

At the time of the injury the boy was about six years old, and the doctor says that he had a fracture of the two bones of the lower limb and one of the thigh bone of the right leg, and that he was in the hospital eight weeks, and then he was home in bed for four weeks more, and then for eight weeks more he was on crutches, and that the bone had knitted, and that the injury has left a slight curvature of the thigh outward which the doctor seems to think may be permanent. 20

The problem for solution is, is this defendant Company liable under the facts and the law to respond to this boy for damages and to compensate him for the injury he has suffered?

Now, the elementary principle to be applied by juries in these cases is this, that the burden of proof is upon the plaintiff to satisfy you by a fair preponderance of the evidence that the defendant was guilty of the cause of the injury, and that it was caused by some negligent act on its part. 30

So you see the problem that is before you to solve is, whether the evidence as produced satisfies you that this injury to the boy was caused by some negligent act of this defendant company.

It is your province to find the facts and then to apply these facts to the legal principles before you can make that application, you must know what the legal duty of this defendant company was toward this plaintiff, and it becomes the duty of the Court to give you that rule of law to be applied to the facts when you find them. 40

Of course, if you find that this defendant company did no negligent act causing the injury, your verdict then should be for the defendant. If you

10 find that it did, then you apply this rule, as expressed by the Court of Appeals of this State, which is laid down as the law of the State for the guidance of the citizens of the State and to be applied by the trial Courts in the trial of cases and for a jury's guidance. Said the Court of Appeals:

20 "That the owner or occupier—and for the purposes of this case the defendant here the Mansfield Plumbing Company, was the occupier of these premises where the injury occurred—that the owner or occupier of lands who by invitation expressed or implied, induces persons to come upon the premises for any purpose, is under a duty to exercise ordinary care to render the premises reasonably safe for such purposes, or, at least, to abstain from any act that will make the entry upon or use of the premises dangerous."

30 If you find the evidence does not satisfy your minds that this defendant Company rendered these premises unsafe by the lack of ordinary care in the place in which it put that stone, then, of course, your verdict should be for the defendant. If, on the other hand, you find that this defendant Company, under that rule that is given to you, failed to exercise ordinary care, and the failure of that care, the thing that it did, was the proximate cause of this injury, the falling of the stone,
40 then you may render a verdict in favor of the plaintiff, and, in case you do, you will render such verdict as will compensate him for his injury; and, in making up that verdict you ought to take into consideration the pain that he suffered, his disability in the past and the probably disability and discomfort to which he will be subject in the future. The law does not permit you to make guesses as to the future but requires you to look at what is probable in the future not what is certain not what is probable and to base your verdict upon

considerations of that nature, and, when you have done that you will have reached a verdict which, if the plaintiff is to recover at all, under the rules of law which have been laid down, he will be entitled to have in this suit. 10

And, of course, gentlemen, you should consider this case with care. You saw the boy, you saw him walk; you should consider that he may or may not outgrow this apparent curvature; the doctor said with that exception the bones had knitted well and that the boy had a good recovery. 20

Take the case, gentlemen, and find a verdict that will square with the facts applied to these legal principles.

I have been requested by the defendant to charge one request, which I refuse.

THE COURT: Now, is there any misstatement of fact by the Court or any exception? 30

MR. SCOTT: There is only one slight misstatement of fact where I think your Honor said he was in the hospital eight weeks, he was only in the hospital four weeks.

THE COURT: Yes; he was in the hospital four weeks, and in bed, I meant to say, eight weeks, and eight weeks more on crutches, that was the testimony of his mother and the Court stands corrected on that statement. Is there anything else? 40

MR. COWLEY: Do you want me to make objections now?

THE COURT: Yes.

MR. COWLEY: I wish to record an objection

10 to that part of your Honor's charge in which you
said that the owner or occupier of lands, and for
the purposes of this case the Mansfield Plumbing
Company may be considered the occupier of the
lands, who by invitation, etc., invites a person to
come upon his premises is charged with a duty of
making those premises reasonably safe.

I feel that that part of the charge does not apply
to the facts in this case and that the law as cited
20 by your Honor is not the law which should guide
the Jury in their decision.

The defendant also excepts to the Court's re-
fusal to charge as requested in the written request
submitted by the defendant.

(Exceptions allowed.)

DEFENDANT'S REQUEST TO CHARGE

30

1. The evidence shows that the plaintiff was
a licensee and the defendant was an independent
contractor and owed no duty to the plaintiff ex-
cept to abstain from wilful injury.

(Refused.)

40

John Duel,
By John Duel,
As next friend,

vs.

Mansfield Plumbing Co.,

On Postea.
Lefferts & Lefferts,
Attorneys.

10

Judgment entered this thirteenth day of March, A. D., nineteen hundred and fourteen for the sum of one thousand dollars damages and fifty dollars and twenty-two cents costs.

20

WM. S. GUMMERE, C. J.

I, William C. Gebhardt, Clerk of the Supreme Court of the State of New Jersey, do certify that the foregoing is a true copy of the judgment entered in above stated cause which said judgment is recorded in this office in Vol. 7 of judgments page 313.

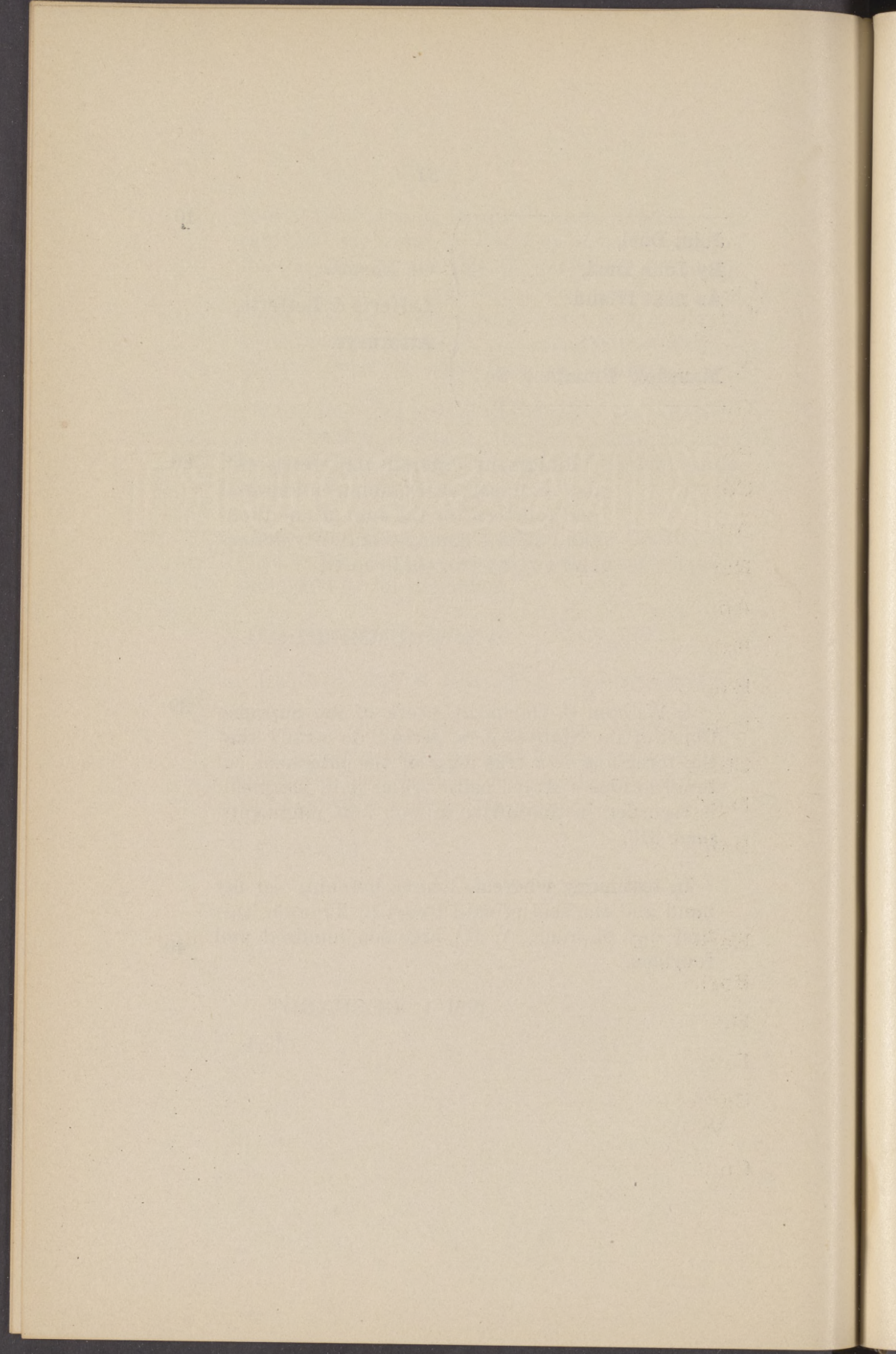
30

In testimony whereof, I have hereunto set my hand and the seal of said Court at Trenton, this first day of June, A. D., nineteen hundred and fourteen.

40

WM. C. GEBHARDT,

Clerk.



NEW JERSEY COURT OF ERRORS AND
APPEALS.

JOHN DUEL BY JOHN DUEL
AS NEXT FRIEND,

Plaintiff, Appellee.

vs.

MANSFIELD PLUMBING COMPANY,

Defendants and Appellant.

Points for Appellant.

20

Points for
Appellant.

30

STATEMENT OF THE CASE.

This is an appeal by the defendant from a judgment rendered in the Supreme Court in a cause wherein John Duel by his next friend, John Duel was plaintiff.

The case was tried in the Passaic Circuit Court. The defendant is a contracting plumber, whose place of business is at Passaic, New Jersey.

40

During the month of May, nineteen hundred and thirteen, defendant was employed by Anna H. Earl, to make a sewer connection on her premises No. 277 Chestnut Street, Passaic, New Jersey. To do said work, it was necessary to remove a stone slab on said premises between the stoop and the fence.

The defendant's workman, after removing the stone, placed it against the fence on the inside. It remained in

10 that position for a week or more.

On June third, nineteen hundred and thirteen, it was testified that this stone fell on the plaintiff and broke his right leg. It was testified by Thomas Earl, the uncle of the plaintiff, that said stone fell as he was entering the gate on said premises and that the jar of the closing of the gate caused it to fall.

20 Judgment was rendered for one thousand dollars with costs, against the defendant.

JUDGMENT OF NON-SUIT SHOULD HAVE BEEN ENTERED AGAINST THE PLAINTIFF BECAUSE THE BILL OF COMPLAINT AS AMENDED DID NOT ALLEGE A CAUSE OF ACTION.

30 The complaint as originally filed stated that the accident occurred on the premises of the plaintiff's father. Taking into consideration the age of the plaintiff, this might be considered a sufficient allegation that the plaintiff was not on said premises as a trespasser or licensee. But when the complaint was amended at the trial to read that the accident took place upon his grandmother's premises, it was not a sufficient allegation to show that plaintiff was not a trespasser or licensee. The complaint does not allege in what capacity plaintiff was on said premises.

40 "In an action for injury received, the allegation that plaintiff was lawfully on said premises was sufficient to show that he was not a trespasser * * * but such general allegation will not show that he was there with greater right than that of a licensee." *Matthews, Administrator v. Benschel, et als.*, 51 N. J. L., 30. *Taylor v. Haddonfield, et al*, 65 N. J. L. 102.

PLAINTIFF WAS A LICENSEE AND THE DE-

FENDANT OWED NO DUTY TO PLAINTIFF, EX- 10
 CEPT TO ABSTAIN FROM WILFUL INJURY TO
 HIM.

“A licensee is a person who is neither a passenger, servant or trespasser and not standing in any contractual relation with the owner of the premises and is permitted to come upon the premises for his own interest, convenience or gratification. Thus one who enters upon premises as a visitor, is a bare licensee.” 29 Cyc. 451. 20

This rule applies more strongly in favor of the defendant than it would in favor of the owner of the premises. The defendant was an independent contractor, whose servants were working on a part of the premises for the purpose of performing its contract.

The plaintiff went upon said premises to visit his grandmother. Page 36, line 38, State of Case. 30

There was no invitation, express or implied from the defendant to the plaintiff. There is no testimony that there was any invitation from the owner of the premises. The plaintiff went there for his own pleasure. There was therefore no duty owing to him to keep the premises in a safe condition.

Furthermore, the accident occurred at a time when none of the defendant's servants were on the premises. The premises were, at the time of the accident, in full charge of the owner. But the owner of lands is under no obligation to keep them in a safe condition for the use of a person who comes upon them not by the invitation of the owner but merely by his permission. Delaware R. R. Co. v. Reich, 61 N. J. L., 635. Fitzpatrick v. Cumberland Glass Mfg. Co. 61 N. J. L. 378. Turess v. N. Y. & C. R. Co. 61 N. J. L., 314. Freidman v. Snare & Triest Co. 71 N. J. L. 605. Guinn v. Delaware & Telephone Co. 72 N. J. L. 278. 40

10 THERE WAS NO EVIDENCE OF NEGLIGENCE
ON THE PART OF THE DEFENDANT AND
THEREFORE THE JUDGE SHOULD HAVE DI-
RECTED A VERDICT FOR THE DEFENDANT.

20 The testimony of Anna Earl, (page 16) was that the
flag was placed "Upward, straight up against the post."
The testimony of Thomas Earl (page 20, line 34) was that
it stood upright, against the fence.

The said Anna Earl testified that it had been in that
position for about a week (page 18, lines 10 and 32.)

The testimony of Thomas Earl (pages 21 and 22) was
that the gate, the jarring of which he said caused the stone
to fall, had been in use ever since the work begun.

30 Mr. Cullen testified (page 40) that the stone leaned
against the fence, the base of the stone being about a foot
away from the base of the fence.

This taken in connection with the testimony of Mrs.
Earl and Mr. Earl above quoted, shows that the said stone
could not have been dislodged without the interference
of some other agency than the mere shaking of the fence
by the opening of the gate.

40 From said testimony, the Jury could more reasonably
infer that the defendant had exercised reasonable care
than that it was guilty of negligence.

"The burden being upon plaintiff to show negligence, a
verdict in his favor is against the evidence; where he has
presented a state of facts from which either negligence or
reasonable care may be inferred with equal plausibility."
Louisville & N. R. Co. v. Victory, 47 S. W. 440, 104 Ky.
509.

“Where, on plaintiff’s own evidence, it is as probable 10
that the injury sued for was not due to defendant’s negli-
gence as that it was due to such negligence, plaintiff can-
not recover.” Louisville H. & St. L. Ry. Co. v. Jolly’s
Adm’x. 90 S. W. 977. 28 Ky. L. Rep. 989.

THE COURT ERRED IN CHARGING THE JURY
AS FOLLOWS:

“That the owner or occupier—and for the purposes of 20
this case, the defendant here, the Mansfield Plumbing
Company, was the occupier of these premises where the
injury occurred—that the owner or occupier of lands, who
by invitation express or implied, induces persons to come
upon the premises for any purpose, is under a duty to ex-
ercise ordinary care to render the premises reasonably
safe for such purposes, or at least, to abstain from any act
that will make the entry upon or use of the premises
dangerous.”

This charge was in error in that it left the Jury to find 30
that the Mansfield Plumbing Company, invited the plain-
tiff upon said land. There was no evidence to that ef-
fect and therefore it was not a Jury question.

THE COURT ERRED IN REFUSING THE DE-
FENDANT’S REQUEST TO CHARGE AS FOL-
LOWS:

“The evidence shows that the plaintiff was a licensee 40
and the defendant was an independent contract and
owed no duty to the plaintiff, except to abstain from wilful
injury.” Appellant submits that under the cases above
cited, its request to charge as above set forth should have
been granted.

THE VERDICT WAS AGAINST THE WEIGHT
OF EVIDENCE.

10 The only charge of negligence against the defendant was in leaning said stone against the fence. The stone weighed about three hundred pounds.

The evidence was that the fence was in good condition, (page 41, line 28). That it remained in that position a week, during which time the premises were in daily use, supports Mr. Cullen's testimony as to its position.

20 No testimony was introduced to show why the stone fell on this occasion and remained standing on the numerous other occasions when the gate was opened and closed. It was the duty of the plaintiff to have proved this.

Appellant submits that for the above reasons the Judgment below should be reversed and a new trial ordered.

LOUIS A. COWLEY,

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Attorney of Defendant, Appellant.

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New Jersey Court of Errors and Appeals.

JOHN DUEL by JOHN DUEL

as next friend

Plaintiff and Respondent

vs.

MANSFIELD PLUMBING COMPANY,

Defendant and Appellant

On Appeal
from
Passaic
Circuit
Court

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**BRIEF OF LEFFERTS & LEFFERTS IN
FAVOR OF RESPONDENT**

Statement of the Case.

This appeal brings up for review a judgment entered in the Passaic Circuit Court for the sum of One Thousand Dollars in favor of the respondent (plaintiff below and hereafter called plaintiff) as compensation for personal injuries attributable to negligence against the appellant (defendant below and hereafter called defendant). The grounds on which the appeal is predicated may be summarized as follows: **20**

(a) That the plaintiff was on the premises in question as a mere licensee. That there was no duty owing to him from the defendant. That there was no negligence for which the defendant was responsible and that, therefore, the refusal of the Court to enter a judgment of non-suit was error. **30**

(b) The refusal of the Court to direct a verdict in favor of the defendant on the same grounds was error.

(c) That there was error on the part of the Court to charge the jury as follows:

“That the owner occupier and for the purposes of this case the defendant here, The Mansfield Plumbing Company, was occupier of these premises where **40**

the injury occurred. That the owner or occupier of lands who by an invitation expressed or implied induces persons to come upon the premises for any purpose, is under duty to exercise ordinary care to render the premises reasonably safe. For such purposes or at least to abstain from any act that will make the entry upon or use of the premises dangerous. If you find that evidence does not satisfy your minds that the defendant company rendered these premises unsafe by the lack of ordinary care in the place in which it put that stone, then of course, your verdict should be for the defendant. If, on the other hand, you find that this defendant company under that rule that is given to you, failed to exercise ordinary care and the failure of that care, the thing that it did, was the proximate cause of this injury (the falling of the stone) then, you may render a verdict in favor of the plaintiff."

10 (d) That there was error on the part of the Court to refuse the defendant's request to charge as follows:

"The evidence shows that the plaintiff was a licensee and the defendant was an independent contractor and owed no duty to the plaintiff except to abstain from willful injury." (S. C. P—4 and 5.)

Statement of Fact

On June third, nineteen hundred and twelve the plaintiff, a boy then at a very tender age, was at the home of his grandmother in Passaic. His mother testified that "he was more at his grandmother's than he was at home." (S. C. P—33 L—10) She also testified that on the day in question she sent him to the home of his grandmother. (S. C. P.—36 L—10-40). The plaintiff at the time of the trial was only eight years of age. (S. C. P.—25 L—10.)

The defendant corporation was a company contracting to connect the premises of Anna Earle (grandmother of the plaintiff) with the sewer in the street. (S. C.—P—17 L—9-20-40) To do this work and execute its contract it had the use and occupancy of the premises in question. (S. C. P—37 L.—25-35) Within the premises

and between a fence running parallel with the street and the porch of the house was a path or passage-way used in common by persons coming and going to and from this house or dwelling place. (S. C. P—14-15-16) The servants of the defendant company placed a flagstone, the size of which was thirty inches by forty-eight inches and about two inches or two and a half inches thick, in an upright position against the fence and near the gate in such a manner that it was likely to fall across the passage way or path, heretofore described, whenever a person passed through the gate or jarred the fence entering the premises. (S. C. P.—20-21 also 44 and 45 L—40.) The plaintiff at the time of the accident was running along the path to meet his uncle, Thomas Earle, and as he passed the stone his uncle jarred the fence by opening the gate the result being that the stone fell on the plaintiff (a young lad six years of age) and thereby caused the injuries of which he complains. (S. C. P—20-21-22-23.) John Cullen, the manager of the defendant company, had been warned by the owner of the premises that this flagstone was dangerous and he neglected, willfully, to remove it. (S. C. P—18 L—10-30.)

It may be contended, on the foregoing facts, that the defendant in this case was guilty of willful neglect or gross negligence. This stone was so fixed that it was a perfect trap set along the pathway for persons going to and from and about the dwelling house. The defendant, after having been warned that it had set up a danger from which the owner, or her servants, or members of her family, or third persons rightfully on the premises, might sustain an injury, suffered the danger to remain notwithstanding this duty to remove it and was therefore guilty of willful negligence. To this negligence the injury of the plaintiff is altogether attributable.

To escape responsibility the defendant contends that the plaintiff was a mere licensee. Under the circumstances presented by the evidence, this contention seems to be at least very feeble. At all events so far as we are able to perceive it is not in any wise supported by the Law and Facts in this case.

Point I

THERE WAS NO ERROR IN THE REFUSAL OF THE COURT TO GRANT THE MOTION TO NON-SUIT.

The defendant seeks to apply the doctrine which finds expression in *Mathews vs. Bensel*, 51 N. J. Law 30, 16 Atl. Rep. 195. "It was held there that an owner of land is not bound to fence dangerous machinery on his premises in favor of a mere licensee. All that may be said in favor of a mere licensee is that he is only not a trespasser and the general rule of Law is that owner and occupier of private ground is under no obligation to keep in a safe condition for the benefit of trespassers, idlers, bare licensees, and others who come upon the premises for their own convenience or pleasure, however innocent their purpose may be. I Thomp. Neg. 303."

A different rule prevails where the entry or use of lands is of right or by invitation of the owner or occupier, as distinguished from an entry by mere license or sufferance. "An owner of lands who by invitation, expressed or implied, induces persons to come upon his premises is under a duty to exercise ordinary care to render the premises reasonably safe for such purposes or at least to abstain from any act that will make the entry upon or use of the premises dangerous." The foregoing quotation is from *Mounsell vs. Smyth* 7 C. B. (N. S.) 731. And it appears in *Philips et al vs. Library Co. of Burlington* in 26 Vr. 307, 27 Atl. 478; where our Court of Errors and Appeals decided "that the owner or the occupier of lands who by invitation, expressed or implied, induces persons to come upon the premises is under a duty to exercise ordinary care to render the premises reasonably safe for such purposes or at least to abstain from any act that will make the entry upon or use of the premises dangerous." The foregoing rule also appears in *McCormick vs. Anistaki*, 66 N. J. L. P-211.

In *Heaven V. Pender*, 11 Q. B. Div. 503, 508, 512, Brett, M. R., commented upon the inaccuracy of the word "invitation" in its ordinary sense, when used to express the circumstances under which the owner of

land incurs a duty in favor of persons coming upon it. The principle he deduced from the cases is "that when ever one person is by circumstances placed in such a position with regard to another that every one of ordinary sense who did not use ordinary care and skill in his own conduct with regard to those circumstances, he would cause danger of injury to the person or property of another, a duty arises to use ordinary care and skill to avoid such danger." And after commenting upon the form of pleading suggested by Willes J., in *Corby v. Hill*, speaking of the phrase "used by invitation," the master of the rolls said: "The real value of the phrase may be said to be that invitation imports knowledge by the defendant of the probable use by the plaintiff of the article supplied, and therefore carries with it the relation between the parties which establishes the duty." The proposition adopted by the master of the rolls was approved by Hawkins, J., in *Ghrussell v. Handyside*, 20 Q. B. Div. 359-363. It was not concurred in by Lord Justices Cotton and Bowen in *Heaven v. Pender*; these justices placing their opinion in favor of the plaintiff's recovery on the ground that the dock owner, having provided the dock for the repair of vessels, invited all the persons coming there on the business in which the dock owner was interested to use the dock and its appliances as incident to the use of the dock. To such persons they held that the dock owner was under an obligation to take reasonable care that the appliances were in a fit state to be used. In *Holmes v. Railway Co.*, L. R. 4 Exch. 254, a workman, going into the private grounds of a railroad company to assist in unloading coal, was allowed to recover damages for an injury sustained by the insecurity of a flagged path in the yard. Channell, B., in expressing his judgment, said: "The real difficulty is not in ascertaining what the law is, but in applying it to the facts in the case. I quite concur in the rule laid down by the cases that, where a person is a mere licensee, he has no cause of action on account of dangers existing in the place he is permitted to enter. Now, in one sense the plaintiff was a mere licensee, and

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the word 'mere' has a very qualifying operation." The learned judge then held that the fact that the plaintiff was upon the premises for the transaction of business "prevents the case from being one of a mere licensee." Cleasby, B., said "The question of mere license does not arise; for as soon as you introduce the element of business, which has its exigencies and its necessities, all idea of mere voluntariness vanishes." This case was affirmed in the court of appeals. L. R. 6 Exch. 123.

- 10** In this case the irresistible conclusion from the circumstances established by the testimony is that the plaintiff received an expressed invitation from the owner of the premises who was his grandmother. The mother of the plaintiff testified that he spent more time with his grandmother than at his own home. To the owner he was a very near blood relation or kin and much of the time must have been a member of her household. Undoubtedly the circumstances are such that he was there under an implied if not expressed invitation; but aside
- 20** from this, the plaintiff was sent there by his mother, probably on an errand and on business. This being so, he was not there as a mere licensee.

- In *Gilbert vs. Nagle* 118 Mass. 278 1 Thomp. Neg. 309. "A distinction is also to be observed by the mere negligence to keep the premises in repair and acts of misfeasance such as placing obstructions or dangerous pitfalls in the way which persons have been permitted to use with the consent of the owner or on his implied
- 30** invitation." In *Corby vs. Hill*, Justice Willes said: "The question is whether there is any legal remedy for a person lawfully using the road to whom injury results from the act of a third person in negligently placing an obstruction on the road. I should have thought that the bare statement of the proposition was enough. The defendant had no right to set a trap for the plaintiff. One who comes upon another's land by the owner's permission or invitation has a right to expect that the owner will not dig a pit thereon or permit another to dig a pit
- 40** thereon so that persons lawfully coming there may re-

ceive injury. That is so obvious that it is needless to dwell upon it."

The defendant, it seems to me, is exactly in position of a third person who wrongfully places an obstruction or dangerous pitfall in the passage way which persons are permitted to use under an expressed or implied invitation of the owner. The flagstone as it was placed in this case upon the property of the grandmother of the plaintiff was a veritable trap by reason of which the injury was sustained involved in the complaint.

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The defendant company suffered it willfully to remain and is liable for the consequences.

His Honor, Charles S. Black, trial judge in the court below, in over-ruling the motion to non-suit speaking of the defendant, said: "He had to do his work in accordance with the recognized and known uses of that property and the known used of that property as I understand, was to come and go at the pleasure and necessity and convenience of these people who occupied the premises and the contractor was bound to use those premises in the same way and refrain from acts that would injure those persons and in that respect it was his duty to do more than to refrain from acts that were willfully injurious.

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Dettering vs. English 64 N. J. L. (35 Vr.) 16, 44 Atl. 855, 48 L. R. A. 106 (h) 1900. A contractor building a wall of a building owes it to an employee a subcontractor engaged in other work about the building to take reasonable care that the wall should not fall while in the process of construction.

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The defendant as the learned trial judge decided, accepted the occupancy of the property for the purpose of executing its contract or doing the work which it had contracted to do in accordance with its well-known and recognized uses as a dwelling house. **Any person within the meeting of the Law upon the premises by an expressed or an implied invitation of the owner was also there by an expressed or implied invitation of the defendant, the occupier.** It was then the duty of the defendant to exercise ordinary care to protect such persons in the

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premises against injury as we have quoted heretofore, that whenever one person by circumstances placed in such a position with regard to another that everyone of ordinary sense who did think would at once recognize that, if he did not use ordinary care and skill in his own conduct with regard to those circumstances he would cause danger of injury to the persons or property of another. A duty arises to use ordinary care and skill to avoid such danger." The defendant in this case was

10 bound to recognize that without the use of ordinary care and skill under the circumstances that he would cause danger of injury to the person or property of another therefore, it was his duty to use ordinary care and skill to avoid such danger with the resulting injury. For its neglect to perform this duty it is liable.

Point II

THE CHARGE OF THE COURT IS A CORRECT EXPRESSION OF THE LAW.

20 The rule of Law given to the jury by the court to apply to the facts is as follows:

30 "Of course if you find that this defendant company did no negligent act causing the injury, no verdict should be for the defendant. If you find that it did, then you apply this rule as expressed by the court of appeals in this state which is laid down as the law of the State for the guidance of the citizens of the state and to be applied by the trial court in the trial of cases and for the jury's guidance. Said the court of appeals: "That the owner or occupier—and for the purpose of this case the defendant here, The Mansfield Plumbing Company, was the occupier of these premises where the injury occurred—that the owner or occupier of the lands who by invitation, expressed or implied, induces persons to come upon the premises for any purpose is under a duty to exercise ordinary care to render the premises reasonably safe for such purposes or at least to abstain from any act that will make entry

40 upon or use of the premises dangerous." The auth-

orities or cases heretofore cited show that this is a correct expression of the Law and that in this case it was applied without error.

We respectfully submit that the defendant has suffered no error or injustice on the trial of the cause in the court below and that, therefore, the judgment should be affirmed.

LEFFERTS & LEFFERTS,
Attorneys of Plaintiff-Respondent **10**

JOS. H. LEFFERTS,
Of Counsel.

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