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Notice of Appeal.

(Filed November 20, 1929.)

New Jersey Supreme Court

HUDSON COUNTY.

JOHN J. FORRESTER,
Plaintiff-Respondent,

vs.

THOMAS H. ECKERSON and
ALBERTHA ECKERSON,
Defendants-Appellants.

10

To:

KINKEAD & KLAUSNER,
Attorneys for Plaintiff:

20

Sirs:

PLEASE TAKE NOTICE that the defendants appeal to the Court of Errors and Appeals in the last resort in all causes from the judgment entered in the above entitled cause, on the following grounds:

1. The trial court erred in refusing to grant defendants' motion for a non-suit.

2. The trial court erred in refusing to grant defendants' motion for the direction of a verdict in favor of defendants.

30

Yours, &c.,

WALL, HAIGHT, CAREY & HARTPENCE,
Attorneys for Defendants-Appellants.

[ENDORSEMENT.]

Service of a copy of the within notice is hereby acknowledged this 9th day of November, 1929.

KINKEAD & KLAUSNER,
Attorneys for Plaintiff-Respondent.

40

Complaint.

(Filed March 1, 1928.)

NEW JERSEY SUPREME COURT,
HUDSON CIRCUIT.

10

 JOHN J. FORRESTER,
Plaintiff,
vs.
 THOMAS H. ECKERSON and
ALBERTHA ECKERSON,
Defendants.

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Plaintiff, residing in the City of Jersey City, County of Hudson and State of New Jersey, says that:

1. At all times hereinafter mentioned, the defendants, Thomas H. Eckerson and Albertha Eckerson, were and still are residents of the City of Hackensack, County of Bergen and State of New Jersey.

30

2. On or about October 14, 1927, the plaintiff, John J. Forrester, was employed by the Holland Butterine Co. of the City of Jersey City, County of Hudson and State of New Jersey, as a painter, and for general maintenance work, at the factory of said Holland Butterine Co. in Jersey City.

40

3. On or about said date, the defendant, Thomas H. Eckerson, employed and hired said plaintiff to paint the roof of said defendant's home, situated in the City of Hackensack, County of Bergen and State of New Jersey, and also to perform all ser-

Complaint.

vices requested and directed by the defendant, Albertha Eckerson, wife of said defendant.

4. Said plaintiff was instructed to perform said work, under the supervision and direction of the defendant, Albertha Eckerson, wife of the defendant, Thomas H. Eckerson.

10

5. On or about said date, after painting said roof, plaintiff was ordered by said defendant, Albertha Eckerson, to remove and take down a certain screen on the roof of said premises.

6. At the same time, said plaintiff proceeded to remove said screen, and while standing upon a ladder, supplied by said defendants for aforementioned purpose, said ladder broke, causing the plaintiff to fall, thereby sustaining serious injuries.

20

7. It was and became the duty of the defendants to use reasonable care to provide and furnish said plaintiff with reasonably safe appliances, and a reasonably safe place in order to perform said work; it also was and became the duty of the said defendants to observe and inspect said appliances and place with reasonably frequency, and it also was and became the duty of the said defendants to keep and maintain said appliances and place in such a condition that they would be reasonably fit for use by said plaintiff.

30

8. Notwithstanding the duties owing to the said plaintiff, said defendants were negligent in that:

(a) Said defendants failed to exercise reasonable care to provide and furnish said plaintiff with a reasonably safe ladder and place in which to work.

40

Complaint.

(b) Said defendants permitted said ladder and place to remain in an unsafe and dangerous condition, although they had notice and knowledge of such condition.

10 (c) Said defendants failed to make careful inspection of said ladder and place, which if made, would have disclosed that said ladder and place were in a dangerous and unsafe condition.

(d) Said defendants attempted to repair said ladder so that it would be reasonably safe for use in the performance of said work, and said repair was done in a negligent, careless and unskilful manner.

20 9. By reason of the careless and negligent actions of the defendants, the plaintiff sustained severe injuries, and was hurt, cut, wounded, bruised and injured, internally and externally, in and about his body, back and limbs, sustaining a double direct traumatic inguinal hernia, which scars and injuries, are of a permanent and lasting nature, and he has suffered from the result of said injuries ever since that time.

30 10. By reason of the said injuries, the plaintiff has suffered and undergone great pain and torment, his nervous system has been shocked and injured, he has been made sick, sore, lame and disordered, and so continues. He still suffers and will continue to suffer great pain and torment. He has lost his earnings, and will continue to lose such earnings in the future. He has been confined to his bed and to the hospital, and has been forced and obliged to pay out a large sum of money for
40 medicine and doctors' and hospital bills, and has

Answer.

further expended and will continue to expend large sums of money in efforts to recover from his injuries.

Plaintiff demands against the defendants, Thomas H. Eckerson and Albertha Eckerson, the sum of Ten Thousand (\$10,000) Dollars damages.

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KINKEAD & KLAUSNER,
Attorneys of Plaintiff.

Answer.

(Filed April 4, 1928.)

NEW JERSEY SUPREME COURT,
HUDSON COUNTY.

20

JOHN J. FORRESTER,
Plaintiff,

vs.

THOMAS H. ECKERSON and
ALBERTHA ECKERSON,
Defendants.

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Defendants, residing in the City of Hackensack, County of Bergen and State of New Jersey, answer the complaint filed herein, say:

1. They admit the allegations of paragraphs 1, 2 and 3.
2. They deny the allegations of paragraphs 4, 5, 6, 7, 8, 9 and 10.

40

Answer.

First Separate Defense:

10 The injuries complained of resulted from the sole negligence of the plaintiff in that said plaintiff used and stood upon or attempted to stand upon a ladder which was in an unsafe and unfit condition to use.

Second Separate Defense:

20 The injuries complained of resulted from the negligence of the plaintiff in that said plaintiff used and stood upon or attempted to stand upon a ladder which was in an unsafe and unfit condition to use.

Objection in Point of Law:

At or before the trial of this issue defendants will move to strike out the complaint on the ground that it does not set forth sufficient facts to constitute a cause of action.

WALL, HAIGHT, CAREY & HARTPENCE,
Attorneys for Defendants.

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Reply.

(Filed April 10, 1928.)

NEW JERSEY SUPREME COURT,
HUDSON CIRCUIT.

JOHN J. FORRESTER,
Plaintiff,

vs.

THOMAS H. ECKERSON and
ALBERTHA ECKERSON,
Defendants.

10

The plaintiff denies each and every allegation 20
contained in the answer of the defendants.

KINKEAD & KLAUSNER,
Attorneys of Plaintiff.

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Testimony.NEW JERSEY SUPREME COURT,
HUDSON CIRCUIT.

10

JOHN J. FORRESTER,
Plaintiff,*vs.*THOMAS H. ECKERSON,
Defendant.Before:
Hon. Henry E.
Ackerson, Jr., J.,
and a Jury.Jersey City, N. J.,
September 25th, 1929.

20

Appearances:

KINKEAD & KLAUSNER, Esqs. (By Mr. David
Klausner), Attorneys for the Plaintiff.WALL, HAIGHT, CAREY & HARTPENCE, Esqs.
(By Mr. Edward O'Mara), Attorneys for
the defendant.30 A jury was duly impaneled, found satisfactory
and sworn.

Opening by counsel to the jury.

 JOHN J. FORRESTER, sworn on his own behalf,
testified as follows:
*Direct examination by Mr. Klausner:*40 Q. Mr. Forrester, where do you live? A. 58
Carlton Avenue, Jersey City.

John J. Forrester, Plaintiff—Direct.

Q. How old are you? A. Twenty-seven.

Q. Were you employed by the Holland Butterine Company at one time? A. Yes, sir.

Q. About when was that? A. About 1924-25 on to 1927.

Q. And when you went into their employ, what work did you do? A. I started in as painter. 10

Q. Then as you continued did you do any other work for the Holland Butterine Company? A. Not for a while. Then I got made foreman of the fifth floor.

Q. Doing what? A. Why, the only work I had to do was keeping the time of the men and testing the butterine.

Q. You were testing the butterine? A. Yes.

Q. Now, did you ever have occasion to do any work for any other people during the time you were employed by the Holland Butterine Company Did you do any outside work? A. Yes, sir. For Mr. Sherman, the superintendent. 20

Q. You did some work for Mr. Sherman? A. Yes, sir.

Q. Did you do any work for anybody else? A. For Mr. Osterman.

Q. Were they special jobs? A. Yes, sir; painting work.

Q. Did you do any work for anybody else? A. Yes, sir; Mr. Eckerson. 30

Q. Now, did you do any work—were you asked to do any work for Mr. Eckerson in October, 1927? A. Yes, sir.

Q. When Mr. Eckerson asked you to do this work, by whom were you employed just prior to the time that he asked you about this work? A. I had the foreman's job.

Q. For whom? A. For the Holland Butterine Company. 40

John J. Forrester, Plaintiff—Direct.

Q. Now, about when was it Mr. Eckerson asked you about this work? A. Around October second or third. I just forget the actual date.

Q. What year? A. 1927.

10 Q. What did Mr. Eckerson say to you? A. He told me he wanted me to go out to the house and paint the roof and do a couple of other jobs.

Q. Who was to tell you what to do out there? A. Mrs. Eckerson.

Q. Did Mrs. Eckerson tell you? A. Yes, sir.

Q. And did you go out to his house? A. Yes, sir.

Q. Where is his house? A. Union and Berry Street, Hackensack, New Jersey.

Q. When you got out there, who did you speak to? A. Mrs. Eckerson.

20 Q. What did she tell you to do? A. Told me to paint the roof and take the screening off the skylight, fix the bells, put new screening in a couple of screens.

Q. And who was to pay you for that work? A. Mr. Eckerson.

Q. Now, did you do this painting out there? A. Yes, sir.

30 Q. And they told you to do what with reference to the screens, I mean Mrs. Eckerson? A. Why, there was a couple of screens I had to put new wire on them and when I was ready to go home, Mrs. Eckerson told me to go up on the roof and take off the screening on the skylight.

Q. Take the screen off where? A. Over the conservatory.

Q. In order to do that, did you need a ladder?

Mr. O'Mara: I object to that as calling for a conclusion.

40 The Court: How could you get up?

John J. Forrester, Plaintiff—Direct.

By Mr. Klausner:

Q. How could you get up to this skylight you were to take the screen off? Just as you were about to go home she asked you to do what? A. Go up and take the screening off the skylight.

Q. Where was this skylight? A. On the roof on top of the conservatory. 10

Q. Roof of what? A. The roof of the conservatory.

Q. How were you going to get up to the skylight? A. Why, you would have to have a ladder to get up. I told Mrs. Eckerson. She pointed behind the garage, "There's a ladder behind the garage".

Q. Who pointed? A. Mrs. Eckerson.

Q. Pointed to what? A. "Behind the garage", she said, "there is a ladder behind the garage." 20

Q. What did she say to do with that ladder? A. Get the ladder and use it to take the screening off, and I did.

Q. And did you take the ladder from behind the garage? A. Yes, sir.

Q. Where was this garage? A. Right alongside the house.

Q. Whose house? A. Mr. Eckerson's.

Q. You took this ladder, and what did you do with it? A. Put it up against the conservatory and went up to get the screening off. I had the screening in my hand. I had it over my head and was standing on the top rung of the ladder, and it broke and the next rung got behind my leg and I fell down and hit the concrete. 30

Q. Did you sustain any injuries? A. Yes, sir.

Q. Where did you fall? A. Between my legs.

Q. Did you see Mrs. Eckerson around at that time? A. Yes, sir. 40

John J. Forrester, Plaintiff—Direct.

Q. Where was Mrs. Eckerson? A. Inside the conservatory and when I fell she immediately ran to the front door with the maid and I held myself like that (indicating) and walked over to the front door and they took me in and sat me down in a chair.

10 Q. Who took you in? A. Mrs. Eckerson and the maid.

Q. You were holding yourself you say? A. Yes, sir.

Q. Did you look at the ladder? A. Later on; not then.

Q. Did you see what the trouble was with the ladder? A. Later on; yes, sir.

20 Q. What was the matter? A. It was all weather-beaten; rotten.

Q. At the place where it broke? A. Yes, sir.

Q. Did Mrs. Eckerson see it? A. Yes, sir; she picked up the rungs.

Q. Did Mrs. Eckerson see the ladder where it was broken? A. Yes, sir; she picked up the rungs of the ladder.

Q. That were broken? A. Yes, sir.

Q. Did she say anything? A. Yes, sir; she told me she would take them inside and burn them.

Q. Did you say anything to that? A. No, sir.

30 Q. Then what did you do? What happened after that? You say they took you inside. A. Yes, sir; then Mrs. Eckerson wanted to get a doctor. I told her, "Wait a minute, I would probably be all right". I was sitting down in a chair. I walked up and down a little bit. I wanted to go somewhere and look to see what my trouble was. I went out in the garage.

Q. You were ashamed to look while you were there? A. Yes, sir.

40 Q. You went to the garage? A. Yes, sir.

John J. Forrester, Plaintiff—Direct.

Q. You were going to look? A. Yes, sir.

Q. What did you see? A. Found two big lumps between my limbs. I went back to Mrs. Eckerson and told her I better see a doctor. She told me there was a doctor right down the street near the corner; Doctor Curtis.

Q. Did you go to see him? A. Yes, sir; he examined me and told me what was the trouble. I better go home and get right in bed and get my family doctor and have an operation immediately. 10

Q. Did you go home? A. Yes, sir.

Q. Then did you call your family doctor? A. Yes, sir; my wife did. Doctor Duckitt.

Q. Did Doctor Duckitt treat you? A. No, sir. He didn't do anything definite and he recommended Doctor Freile.

Q. Then what happened to you? A. That was on a Sunday and Doctor Freile told me I would have to go to the hospital. 20

Mr. O'Mara: I object to any conversation.

The Court: Not what he told you.

Q. Then as a result of what Doctor Friele said, where did you go from your house? A. To the hospital on Monday.

Q. When did this accident happen? A. On a Thursday. October the 14th. 30

Q. And did you see Doctor Curtis the same day? A. Yes, sir.

Q. Did you see Doctor Duckitt the same day? A. Yes, sir.

Q. And then Doctor Freile saw you and recommended you to go to the hospital? A. Yes, sir.

Q. And did you go to the hospital? A. Yes, sir; on a Monday. 40

John J. Forrester, Plaintiff—Direct.

Q. What hospital? A. Christ Hospital.

Q. Did they operate on you there? A. Yes, sir; on a Tuesday morning.

Q. Who did? A. Doctor Freile.

Q. Did anybody else see you there? A. I believe a couple of internes.

10 Q. Did Doctor Willis treat you at any time? A. No, sir; he gave me the anesthetic.

Q. At the time you had the operation? A. Yes, sir.

Q. What hospital was this? A. Christ Hospital on Palisade Avenue in Jersey City.

Q. About how long were you in the hospital? A. About fifteen or sixteen days.

20 Q. Were you operated on just once? A. Yes, sir.

Q. Now, did you have any pain during this time? A. Yes, sir.

Q. Was the pain severe? A. Yes, sir.

Q. Particularly, where? A. Right in my side here (indicating). The left side.

Q. Did you have pain all the time that you were at the hospital? A. Pretty nearly all the time, yes, sir.

Q. Now, did that pain continue for some time?

30 Mr. O'Mara: I object to counsel leading the witness.

The Court: Yes; don't lead any more than you have to. Go ahead.

Q. When were you able to go back to work again?

The Court: You mean after his disability?

40 Q. After this disability. After you came out of the hospital, did you have to stay home from work? A. Yes, sir.

John J. Forrester, Plaintiff—Cross.

Q. When were you able to go back to work? A. Around April 1928.

Q. April 1928? A. Yes, sir.

Q. Do you remember about what date in April? A. Around the first week in April. I don't remember the exact date.

Q. And did you have to stay home from work from October 14th, 1927 until April, 1928, as a result of this accident? A. Yes, sir.

Q. Now, what was the hospital bill? A. \$113.00.

Q. What was Doctor Freile's bill? A. \$350.

Q. Did Doctor Curtis render a bill? A. No, sir; I believe that was paid.

Q. What was Doctor Duckitt's bill for that visit? A. \$3.00.

Q. How long did you suffer pain as a result of this accident? A. About up until about six or seven months ago.

Q. Six or seven months ago? A. Yes, sir.

Q. How long was this pain that you say you had between your legs, and on the left side particularly, how long was it very severe after the accident? A. About nine or ten months.

Q. That you had real, severe pain? A. Yes, sir.

Q. Do you have any pain now-a-days? A. Occasionally. Only in damp weather.

Q. In damp weather? A. Yes, sir.

Q. Who was to pay you for this work you were going to do at the Eckersons' home? A. Mr. Eckerson.

Q. Not the Holland Butterine Company? A. No, sir.

Cross-examination by Mr. O'Mara:

Q. Did you paint the roof of that conservatory? A. Yes, sir.

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William Freile, M. D., for Plaintiff—Direct.

Q. In October, 1927? A. Not at that particular time.

Q. Not at that particular time? A. No, sir.

Q. When did you paint the roof of the conservatory? A. Oh, that was about, probably, a couple of weeks before.

10

Mr. Klausner: If your Honor pleases, Doctor Friel has just arrived in court, and if counsel has no objection I would like to interrupt Mr. Forrester's cross-examination and put him on the stand.

Mr. O'Mara: No objection.

The Court: All right, you may do so.

20

WILLIAM FREILE, M.D., sworn for the plaintiff, testified as follows:

Direct examination by Mr. Klausner:

Q. Doctor Freile, where is your office? A. 25 Tonnele Avenue, Jersey City.

Q. Are you a licensed, practicing physician of the State of New Jersey?

30

Mr. O'Mara: The doctor's qualifications are admitted.

Q. How long have you been a practicing physician of the State of New Jersey? A. Thirty years.

Q. Do you specialize? A. Surgery.

Mr. O'Mara: I admit not only is he a surgeon, but a good one; one of the best in the State of New Jersey.

40

William Freile, M. D., for Plaintiff—Direct.

Q. Doctor, did you have occasion to treat Mr. Forrester, the plaintiff in this action? A. I did.

Q. Do you recall when that was? A. I first saw him on October 17th, 1927, at his house in consultation with Doctor Duckitt.

Q. When you saw him there for the first time, will you please describe in detail what you found his condition to be? A. He had some discoloration over the groins on both sides; tenderness, and complained of pain, and I took him to the hospital and operated on him the following day at Christ Hospital, Jersey City. 10

Q. What would you say his injuries were? A. He had a traumatic double rupture.

Q. Will you please tell us laymen fully in plain English what traumatic double rupture is? A. Traumatic double rupture means a protrusion of the intestines. In this case as a result of strain or injury. 20

Q. Does the word traumatic mean the result of a blow? A. It means the result of injury.

Q. Mr. Forrester has testified that he received an injury on October 14th, 1927, while going down a ladder. He fell through one rung and then a couple of other rungs and it caught him between the legs and he sustained this injury. Would you say the condition you found him in would probably be the result of such an accident, assuming those facts to be true? A. It could result from such an accident. 30

Q. It probably would? A. It could.

Q. Would you say from the history of the case that the injury—that the condition which you found him in on October 17th was probably the result of the injury which he explained to you in the history of the case? A. I would, with the additional statement that he probably had a weak- 40

William Freile, M. D., for Plaintiff—Direct.

ness in the rings on both sides of the body, with this accident causing and producing his hernia, his ruptures.

Q. The accident produced hernia from the condition he had? A. Yes.

10 Q. Did you then have charge of him while he was in the hospital? A. I did.

Q. Would you tell us exactly what his condition was during the course of his stay at the hospital? Did he suffer any pain there? He complains he had severe pain as a result of this accident. Would you say that that is probably so? A. I don't think he had any more than the average amount of pain that results from the double operation. These are always accompanied by some pain and temporary distress.

20 Q. This was a double operation? A. Yes, sir; both sides.

Q. You had to operate on both sides? A. On both sides.

Q. Now, he claims that he had this pain for quite a long time afterwards. Would you say that would be the probable result of this? A. Well, there always is some sensitiveness in the scars after these operations for at least a number of weeks.

30 Q. He complains that he still has pain in damp weather. Would you say that that is probably so? A. I think sufficient time has elapsed. He shouldn't have any particular pain now.

Q. But if he does complain, doctor, of that pain, would you say that that would be probably so? A. I think sufficient time has elapsed for us not to expect him to have any pain in the operative region.

40 Q. That is, you would not ordinarily expect it, but if it is there it might be so? A. It might be.

William Freile, M. D., for Plaintiff—Direct.

Q. Now, doctor, your fee was \$350? A. Yes, sir.

Q. Is that a fair and reasonable charge for the services you rendered? A. I think it is.

Q. The hospital bill was \$113.00. Is that a fair and reasonable charge for the services rendered by the hospital? A. It is the usual charge if you have an anesthetist. 10

Q. The anesthetist was Doctor Willis, was he not? A. Yes.

Q. Do you know what Doctor Willis' charge was in this case? A. My recollection is it was about \$20.

Mr. O'Mara: I don't think the doctor should testify to that.

Mr. Klausner: This doctor knows. 20

Q. Doctor Willis was the anesthetist. What is that, doctor? A. It means the person who administered the anesthetic, whether it is ether, gas, or so forth.

Q. He was the man that administered the ether for this operation you performed? A. Yes.

Q. Do you know what his charge was? A. The charges vary from \$15 to \$50.

Q. And any charge between \$15 and \$50 would be reasonable for the services rendered by Doctor Willis at that operation? A. Yes. 30

Q. Doctor, may we ask you, if you will, to explain just your course of treatment in this case? A. Do you mean by that—

Q. After the operation just what you did. A. We kept him in bed about the usual time—fourteen days—and after that he didn't require any special treatments. He was warned not to do any work for about six subsequent weeks, then he 40

William Freile, M. D., for Plaintiff—Cross.

could do light work, and I told him he shouldn't do any heavy lifting for a period of about three months subsequent to the date of operation.

10 Q. And during the two weeks, you say fourteen days, he was in bed, after the day that you operated upon him, will you please just describe what treatment you did give him? What was necessary? A. Well, he had the usual routine treatment of a small quantity of opiate on the night following the operation.

Q. What is that opiate? Is that a drug to ease the pain? A. Yes.

Q. Then what after that? A. Then he had the ordinary rest in bed, and laxative when he needed it and the stitches were removed in the routine time.

20 Q. How many days after? A. Usually about the tenth day.

Q. The tenth day the stitches were removed? A. Yes.

Q. Then you gave him the regular treatment you would ordinarily give in a double rupture case? A. Yes.

Mr. Klausner: Cross-examine.

Cross-examination by Mr. O'Mara:

30 Q. When did you last see Mr. Forrester? A. Yesterday.

Q. I mean, when did you last treat him for this injury? A. I didn't do anything for him after he was dismissed from the hospital.

Q. And when was that? A. About fifteen days after the operation.

40 Q. Would you say, doctor, that a period of twelve to sixteen weeks is a fair period of convalescence for injuries such as this? A. It is;

John J. Forrester, Plaintiff—Cross.

where they had a good result following the operation.

Q. And there was a good result in this case?

A. Absolutely.

Mr. O'Mara: That is all.

10

JOHN J. FORRESTER, recalled.

Cross-examination (cont'd) by Mr. O'Mara:

Q. Mr. Forrester, you say you painted the roof of this conservatory some time in October, 1927?

A. I think so; yes, sir.

Q. You worked at the Eckerson home on the 3rd, 4th, 5th, 6th, 7th, 8th, 13th and 14th of October, 1927, is that right? A. Yes, sir.

20

Q. And was it on one of those days that you painted this roof? A. I believe so, yes, sir.

Q. How did you get out on the roof on those days? A. I had a ladder belonging to Mr. Sherman, a new ladder coming in two sections. The carpenter had to go out and tack down the roof before I painted it. That was in the first part of October. We had a ladder belonging to Mr. Sherman. We got it down his house and the carpenter had to tack the roof down, a canvas roof, he had to tack it down before I painted it. We used that ladder and took it back to Mr. Sherman's house.

30

Q. Did you ever get on that roof by going out the window of the first story? A. Not on that particular roof; no, sir.

Q. Did you do it on the roof on the other side of the house? A. Yes, sir.

Q. Is this a true picture as it was on October 14th, 1927? (Handing witness photograph.) A. Yes, sir.

40

John J. Forrester, Plaintiff—Cross.

Mr. O'Mara: I offer it in evidence.

Mr. Klausner: No objection.

(The photograph above referred to was received and marked in evidence Exhibit D-1.)

10

Q. Now, will you mark on that picture the skylight from which you removed the screen on October 14th, 1927? Put an "X" on it if you will.
A. (Witness complies.)

Q. Now, there is a window right adjoining the roof, is there not? A window of a room on the second floor of the house? A. Yes, sir.

20

Q. Did you know access can be gained to that roof through that window? A. Yes, sir; I believe it could.

Q. Now, did you work for Mr. Eckerson on any other days except the days which you have already testified to? Days in October, 1927? A. Well, prior to that, the year before.

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

Q. Now, you went to work for the Holland Butterine Company in 1924 and 1925? A. Yes, sir.

Q. And you were hired as a plant painter, were you not? A. Yes, sir.

30

Q. During some intervals since your employment—after your employment by the Holland Butterine Company, you did work for various persons who were interested in the company, that is, Mr. Eckerson and Mr. Sherman? A. Yes, sir.

Q. And the other gentleman, Mr. Osterman? A. That's right.

Q. How often did you work for Mr. Sherman?
A. I believe I only worked once for him.

40

The Court: Once before this October?

The Witness: Yes, sir.

John J. Forrester, Plaintiff—Cross.

Q. How many times did you work for Mr. Eckerson? A. Twice, I believe, I don't know exactly.

Q. Two or three times? A. Yes, sir.

Q. You worked for him in November of 1926, did you not? A. Yes, sir.

Q. You worked for him on the following days in November, 1926: 5th, 6th, 8th, 9th, 10th, 11th, 12th, 13th, 15th, 16th, 19th, 20th, 22nd, 23rd, 24th, 25th, 26th, 27th, 29th, 30th, and on December 6th and 7th, 1926, is that right? A. That's right. 10

Q. And on those days did you do painting on the roof, on the porches? A. Just around the edges.

Q. And did you remove any screens? A. No, sir.

Q. Now, during the time you worked for Mr. Eckerson, you were paid by Mr. Eckerson? A. Yes, sir. 20

Q. You didn't receive any compensation from the Holland Butterine Company? A. No, sir.

Q. And when you finished working for Mr. Eckerson you returned to work for the Holland Butterine Company, is that right? A. Yes, sir.

Q. Where is the garage with reference to the Eckerson home? A. Right—. This is Union Street this way (indicating). Right there on this corner. Left of the house. 7 30

Q. Now, after the accident of October 14th, 1926, did you make a claim to the compensation bureau for compensation?

Mr. Klausner: That speaks for itself. I have no objection, with Mr. O'Mara's consent—here is the petition and here is the answer, we will admit them.

Mr. O'Mara: All we want to do is to show that there was an application made and as a result of that the hospital bill was paid. 40

John J. Forrester, Plaintiff—Cross.

The Court: If the hospital bill was paid, what difference would that make?

Q. The hospital bill was paid? A. Yes, sir.

(Recess until 10 a. m. September 26th,
1929.)

JERSEY CITY, N. J., September 26, 1929, trial resumed pursuant to adjournment.

JOHN J. FORRESTER, recalled.

20 *Cross-examination by Mr. O'Mara (Continued):*

Q. Mr. Forrester, you were paid by the day, were you not? A. By the week.

Q. But your compensation was figured by the daily rate, was it not? A. I guess so.

Q. And when you went to work at Mr. Eckerson's home you expected to continue working there as long as there was any painting to be done, isn't that so,—as long as they wanted you? A. I suppose so.

30 Q. And it was Mr. Eckerson you were to please on the job? He was the man to be satisfied? Isn't that so? A. He was when I was talking to him, when he sent me up there.

Q. In other words The Holland Butterine Company had no concern with how that job was to be done? It was Mr. Eckerson that was to be satisfied? A. Yes, sir.

40 Q. I understood you to say on your direct examination that prior to October 14, 1927, you used another ladder in part of the painting? A. Yes, sir.

John J. Forrester, Plaintiff—Cross.

Q. And that ladder was what you called a long ladder? A. A double extension ladder, yes, sir.

Q. And you used that to paint the high cornices, isn't that so? A. That was the first time I went up there that I used it to paint the high cornices.

Q. And that ladder was taken away when? A. It was taken away then after I left there the first time, and then I brought it back again. 10

Q. You mean after you left there in 1926? A. Yes, sir.

Q. And in 1927 you brought it back again when you started to work on October 3rd? A. Yes, sir.

Q. And you continued to use that ladder how long? A. Until I had the roof painted.

Q. How long was that? A. That was the first couple of days I was up there.

Q. Do you know when that ladder was taken away? A. I believe I took it away about the third or fourth day I was up there. 20

Q. You took it away yourself? A. Yes, sir, to Mrs. Sherman's house.

Q. After you took that first ladder away how did you get on the roof of the porch? A. I had no need to get on the roof of the porch. Mrs. Eckerson came out and told me to paint inside the conservatory and fix the screens and paint a couple of chairs on the porch.

Q. You were painting inside the house and around on the grounds? A. Yes; and fix the bells. 30

Q. Did you ever use this particular ladder, the one you used on October 14th, the day of the accident? A. No, sir.

Q. Did you ever see it before? A. No, sir.

Q. Did you ever see it around the grounds? A. No, sir.

Q. Do you know whose ladder it was? A. No, sir. 40

John J. Forrester, Plaintiff—Cross.

Q. You do not? A. No.

Q. You never saw it until October 14th? A. Yes, sir.

Q. When you say your attention was called to it by Mrs. Eckerson? A. Yes, sir.

10 Q. Will you relate, using the exact words, as near as you can remember, the conversation between you and Mrs. Eckerson on October the 14th, with relation to the taking down of that screen?
A. Before I got hurt?

20 Q. Yes, on the day of the accident. A. I was doing some work in and around the house for Mrs. Eckerson, and she told me the bells in the kitchen didn't work and she wanted to know if I knew what was the trouble with them, and I went in and looked at them and tested the batteries and found they were dead, and she told me to go over to get some batteries, which I did get some batteries, and she told me the screens needed some new wire, and I went over on Main Street and came back and put the screening on the screens; and then she said, "There are a couple of chairs out on the porch to be painted"; and I painted them for her, and then I was ready to go home, and she said, "You had better take that screening down off the skylight"; and I told her I needed a ladder to do it, and she
30 pointed behind the garage that there was a ladder behind the garage.

Q. You said you were ready to go home, what time was it? A. Around 1:45 or 1:30.

Q. Around 1:45 or 1:30 when this conversation took place? A. Something like that.

Q. And you were ready to go home because you had finished everything to be done? A. Yes, sir.

Q. Where did the conversation take place? A. On the porch.

40 Q. On the porch? A. Yes, sir, on the side porch.

John J. Forrester, Plaintiff—Cross.

Q. On the conservatory or— A. On the open porch.

Q. That is on the other side of the house? A. Yes, sir.

Q. Where was this ladder at the time the conversation took place? A. I didn't know.

Q. Did Mrs. Eckerson point it out to you or tell you where you could find it? A. Yes, sir, she pointed behind the garage. 10

Q. She said there was a ladder behind the garage? A. Yes, sir.

Q. And you went over there and found it? A. Yes, sir.

Q. You don't know whose ladder it was? A. No, sir.

Q. When you went to get the ladder how did it look to you as to its condition? A. I didn't notice; I just picked it up and went over and put it up against the building. 20

Q. You didn't notice how the ladder was? A. No, sir.

Q. Didn't you look at it? A. No, sir, I just picked it up, that is all.

Q. Just picked it up? A. Yes, sir.

Q. And when you placed it up against the building did you look at it? A. No, sir.

Q. You didn't look at it at all? A. No, sir. 30

Q. Well, you saw it, of course? You saw it there in front of you? A. I had it in my hands.

Q. You had it in your hands, picked it up and carried it from the garage over to opposite the conservatory? A. Yes, sir.

Q. How far is that? How long a distance is that? A. Well, about—from the garage to the conservatory about one hundred and fifty feet, I guess.

John J. Forrester, Plaintiff—Cross.

Q. One hundred and fifty feet; now from where you say the conversation with Mrs. Eckerson took place could the ladder be seen behind the garage?

A. No, sir.

Q. It could not? A. No, sir.

10 Q. And you went over and picked it up and carried it one hundred and fifty feet, placed it against the conservatory and started to climb up, is that so? A. Yes, sir.

Q. You didn't take any particular notice of it at that time? A. No, sir.

Q. As far as you could see from having the ladder in front of you and making such inspection of it as you did by merely looking at it, it was all right, wasn't it? A. I didn't notice it.

20 Q. Didn't notice it? A. No, sir.

Q. Just went up the ladder? A. Yes.

Q. It was all right going up? A. Yes, sir.

Q. Did you notice that on the bottom of this ladder—I am talking about before you used it—when you took it to use it—that there were boards nailed across instead of rungs? A. No, sir.

Q. You didn't notice that? A. No, sir.

Q. Did you notice it after the accident? A. No, sir.

30 Q. You don't know even now? A. No, sir.

Q. Do you know Mr. McHugh? A. No, sir.

Q. You know the man that took care of the grass and furnace at the Eckerson home? A. I seen the man up there cutting grass, but just know him by sight.

Q. You just know him by sight? A. Yes, sir.

Mr. O'Mara: Mr. McHugh, stand up.

(Man in court room stands up.)

40 Q. Is that the gentleman? A. Yes, sir.

John J. Forrester, Plaintiff—Re-direct.

Q. Do you know where his home is? A. I believe next door; I am not positive.

Q. How? A. I believe next door.

Q. Did you ever go over to his property for anything? A. No, sir.

Q. Did you ever go there in 1926? A. No, sir.

Q. When you were working at the Eckerson home? A. No, sir. 10

Q. Didn't you go over there in 1926 and get this very ladder from Mr. McHugh's property? A. No, sir.

Q. You are sure about that? A. Positive.

Re-direct examination by Mr. Klausner:

Q. Mr. Forrester, at the time that you were working out there for Mr. Eckerson just before you went there, how much were you earning a week? A. Thirty-five dollars. 20

Q. A week? A. Yes, sir.

Q. And after the accident did you receive any wages—after October 14th were you paid for any of your time? A. Yes, sir, I believe two or three weeks' wages.

Q. You did receive that? A. Yes, sir.

Q. While you were in the hospital? A. Yes, sir.

Q. Are you sure just how much you did receive? A. Not positive; I believe about three weeks. 30

Q. When you went and took this ladder from behind the garage you looked at it? Before you picked it up you looked at it? A. No, sir, I just picked it up.

Q. When you went to pick it up did you look at it? A. Yes, sir.

Q. You looked at the ladder? A. Yes, sir. 40

John J. Forrester, Plaintiff—Re-cross.

Q. And from outward appearances it looked all right? A. Yes, sir.

The Court: It did or did not?

The Witness: Yes, sir.

10 *Re-cross-examination by Mr. O'Mara:*

Q. As a matter of fact, Mr. Forrester, it was five weeks you were paid after the accident, wasn't it? A. I don't know for sure, it was around three weeks.

Q. Are you sure it wasn't five? A. I couldn't say.

20 Mr. Klausner: If you say it was five we will admit it was five. He received some wages, and if you will show what it was we will admit it.

Mr. O'Mara: Five weeks.

Mr. Klausner: We admit it was five.

By the Court:

Q. After that did you receive any wages? A. No, sir.

Q. For how long afterwards did you not receive any wages? A. I never received any.

30 Q. Don't you work now? A. In April I started to work for the——

Q. Up until April, 1928, you didn't work at all? A. No, sir.

Q. After this accident. First, how many rungs were broken in your fall? A. Three.

Q. Did you see them after the accident? A. Yes, sir, Mr. Eckerson had them in her hand.

Q. What was their appearance? A. Weather-beaten and rotten, like.

40 Q. Describe what you mean by rotten. That is,

John J. Forrester, Plaintiff—Re-cross.

how did they appear? A. Looked like all rotten wood, decayed, and they broke off clean.

Q. Could you see that by looking at the place where the breaks were? A. Yes, sir.

Q. Did it appear on the outside too? A. Yes, sir.

Q. Now this ladder that you had used in the early part of this work, you got that from where? 10

A. From Mr. Sherman, the superintendent. He lives in Rutherford.

Q. Was it your ladder? A. No, sir.

Q. You were not to furnish any ladder or anything? A. No, sir.

Q. You were out at Mr. Eckerson's home in November and the early part of December in 1926? A. Yes, sir.

Q. And you were out there on other occasions in 1927? A. Yes, sir. 20

Q. Had you worked thereat any other time for him? A. For Mr. Eckerson, no, sir,—just 1926 and 1927.

Q. That was miscellaneous work including painting and other work? A. The first time I painted the outside of the house.

Q. Did you do that alone? A. Yes, sir.

Q. When you went to work for the Holland Butterine Company was there any understanding or agreement with respect to your doing work outside, or did that just come up as a casual matter while you were employed? A. No, sir; there was no agreement; it just came up. 30

Q. You were to work for them steadily, were you? A. Yes, sir.

Q. Did you have any agreement at any time with Mr. Eckerson, whereby you were to come at different times to work for him, or did he on each occasion engage you? A. On each occasion he engaged me. 40

John J. Forrester, Plaintiff—Cross.

Q. There was no understanding that you were to come back at any stated time or intervals? A. No, sir.

Q. You are sure of that? A. Yes, sir.

10 Q. The only knowledge that you had that you were to work for him was each of these two times when he told you, or had you had any understanding whatsoever regarding the work that might be done in the future? A. No, sir, just when he came and told me.

Cross-examination by Mr. O'Mara (Continued):

20 Q. But practically all the time from the time you had been employed by the Holland Butterine Company in 1925 at various intervals you were told to go to the homes of people connected with the Holland Butterine Company, for the purpose of doing painting and work you did do? A. Yes, sir; when they asked me.

Q. When did that first happen? A. I believe I painted Mr. Sherman's house first.

Q. You painted Mr. Sherman's house first? A. Yes, sir.

Q. And you worked for Mr. Eckerson first in the fall of 1926? A. In November, yes, sir.

30 Q. November and December, for a period of twenty-two days? A. About that time.

Q. At a compensation of \$7.50 a day? A. I got more.

Q. You got more than that? A. Yes, sir.

Q. What was the daily rate? A. No daily rate, just the amount that they give me. I got forty-five dollars sometimes, forty-four dollars another time.

40 Q. Forty-five dollars at one time and forty-four dollars at another time? A. Yes, sir.

Colloquy.

Q. Do you know how that was figured? A. No, sir, it was always brought to my house.

Q. It was always brought to your house? A. Yes, sir.

(Witness excused.)

Mr. Klausner: I have here, your Honor, a copy of the answer filed by Mr. Eckerson in the action which was started in the Workmen's Compensation Bureau, which was never tried there, and I believe I showed this to Mr. O'Mara yesterday, and he admits that that is an exact copy of the answer filed in the action which was never tried, and which is still pending. 10

Mr. O'Mara: That is a copy of it.

Mr. Klausner: I offer it in evidence. 20

Mr. O'Mara: I object to it. I do not see its materiality.

The Court: Let me see it.

(Paper handed to the court.)

Mr. Klausner: As to its materiality, I think it is corroborative of the fact that this does not come under the Workmen's Compensation Act.

The Court: Pardon me. This seems to be merely a copy. 30

Mr. O'Mara: I will not object on that score.

The Court: What is its relevancy?

Mr. Klausner: The relevancy is this: under the case of *Lincks vs. Erie Railroad*, 97 N. J. Law, 343, I think it is admissible for the very purpose that we are showing. What is stated in that answer is an admission by Mr. Eckerson, as in this case, the defense, according to that answer in the 40

Colloquy.

10 Workmen's Compensation case, is that it is not arising out of the course of the employment, and does not come under the Workmen's Compensation Act. We therefore want to introduce that in evidence, that we are in this court properly; and their defense in the opening is that we are in the Workmen's Compensation Bureau. They are blowing hot and cold. When we are in the Workmen's Compensation Bureau they say we belong here, and when we are here they say we belong there.

The Court: What is that case to which you referred?

20 Mr. Klausner: *Lincks vs. The Erie Railroad Company*, 97 N. J. L., 343. In that case the answer in the law action is not even sworn to, whereas here we have a sworn answer.

The Court: It will be received.

Mr. O'Mara: May I have an exception?

The Court: Yes, you may have an exception.

Received in evidence and marked P-1.

30 (Exhibit P-1 read to the jury by Mr. Klausner.)

Mr. Klausner: May we also put in the petition, your Honor?

Mr. O'Mara: No objection.

Mr. Klausner: By consent, your Honor, the petition in the Workmen's Compensation Bureau is being admitted.

(Marked P-2 in evidence.)

40 Mr. Klausner: And I suppose it is further stipulated, for the purpose of the

James Whalen, for Plaintiff—Direct.

record, that the action in which this petition and answer were filed is still pending and not tried?

Mr. O'Mara: Yes.

The Court: All right. So stipulated.

10

JAMES WHALEN, SWORN.

Direct examination by Mr. Klausner:

Q. Where do you live? A. 125 Oakland Avenue, Jersey City.

Q. Were you working for the Holland Butterine Company in October, 1927? A. Yes, sir.

Q. Do you know Mr. Forrester, the plaintiff in this action? A. Yes, sir. 20

Q. In October, 1927, before this accident happened, was Mr. Forrester working for the Holland Butterine Company? A. Yes, sir.

Mr. O'Mara: What period?

Q. Prior to October, 1927, prior to October 14, 1927? A. Yes, sir.

Mr. O'Mara: I object to that, because the plaintiff himself has testified that from the 3rd to the 14th he was working for Mr. Eckerson. 30

Mr. Klausner: I withdraw the question.

Q. In September, 1927, was Mr. Forrester working there? A. Yes, sir.

Q. Do you know what he was doing there?

Mr. O'Mara: I object to that on the ground it is immaterial. 40

Motion for Non-Suit.

The Court: What are you driving at?

Mr. Klausner: I have two witnesses here to show that prior to being employed by Mr. Eckerson he was employed by the Holland Butterine Company.

10 The Court: I do not see that that makes any difference.

Mr. Klausner: Very well, I will withdraw the witness.

PLAINTIFF RESTS.

20 Mr. O'Mara: If the Court please, I move for a nonsuit in favor of both defendants, on the ground that the employment of the plaintiff was not casual, and therefore that the plaintiff's sole remedy is under the Workmen's Compensation Act, and an action to enforce this remedy is now pending. It seems to me, if your Honor please, that this case is controlled by the case of Sabella *v.* Brasileiro, 86 N. J. L. 505, where the Supreme Court, through Mr. Justice Bergen, said this:

30 "The ordinary meaning of the word 'casual' is something which happens by chance, and an employment is not casual—that is arising through accident or chance, where one is employed to do a particular part of a service recurring somewhat regularly with the fair expectation of its continuance for a reasonable period."

Now the facts in the Sabella case, with which your Honor is no doubt familiar—

40 The Court: Yes; but the distinction be-

Motion for Non-Suit.

tween that and this is just as wide as the Pacific Ocean—the difference between this case and all that line of cases where it is said it is not a casual employment—because it does not arise in accident or consist of an unforeseen emergency. All those cases are where the employee is in the regular employ of the employer. Now the question put by the Court to the plaintiff himself on the stand indicated that whatever his work for Eckerson was that it came under the second branch of the declaration as set forth in the Workmen's Compensation Law, namely, that all employment is casual unless it is regular, recurring, or periodic; so you see there is little in this case to show any of those. You see there is a difference between the two kinds of employment.

Mr. O'Mara: I appreciate that, but it seems to me that the answer to that is this, that the employment was periodic.

The Court: No, because he has already said that he was only employed first, and by no agreement. The whole thing hinges upon what was the understanding at each time, at the time the employment began. That isn't like a laundress coming week after week, but was it recurring, like a person beginning at the first of the season to mow a lawn?

Mr. O'Mara: Here is a man employed there each season of the year to do work that is usually done at that season of the year, painting, a canvas cover on the porch, and screens, and things of that kind. The employment in the first instance lasted for a period of twenty-two days, and in the sec-

Motion for Non-Suit.

ond instance the employment lasted for a period of eight days. Now it seems to me that that certainly is within the language of the act, even if we admit that this comes within the second division of the act.

10 The Court: It certainly does not come under the first.

Mr. O'Mara: My theory is this: During these periods this man was not an employee of the Holland Butterine Company at all; he was an employee of the individual, Mr. Eckerson, who was having the house painted. Now that was the business for which this man was employed for that time, the painting.

20 The Court: Unless the court entirely misconceives the meaning of that definition it was not Mr. Eckerson's business to have houses painted.

Mr. O'Mara: It was his business to have his own house painted.

The Court: No, that is not his business. He is not engaged in the business of having his house painted. At this time I will deny the motion, reserving the right to reconsider it at the end of the defendants' case.

30 Mr. O'Mara: Is it necessary for me to take an exception under those circumstances?

The Court: Yes.

Mr. O'Mara: I take an exception.

Mrs. Albertha Eckerson, for Defendants—Direct.

MRS. ALBERTHA ECKERSON, sworn for the defendants.

Direct examination by Mr. O'Mara:

Q. Mrs. Eckerson, you are one of the defendants in this case? A. Yes. 10

Q. And you are the wife of Mr. Thomas H. Eckerson, the other defendant? A. Yes.

Q. And your home is in Hackensack? A. Yes.

Q. You know Mr. Forrester, the plaintiff? A. Yes.

Q. And Mr. Forrester was engaged by Mr. Eckerson to do some painting at your home? A. Yes.

Q. And some work around the house? A. Yes. 20

Q. During the months of November and the early part of December, 1926? A. Yes.

Q. And also during the period of October 3rd to 14th, 1927, is that right? A. Yes.

Q. Now, Mrs. Eckerson, on October 14, 1927, you directed Forrester to remove a small triangular screen from the roof of a conservatory? A. Yes.

Q. Will you relate, please, for the court and jury, the conversation you had with Mr. Forrester on that occasion? A. Well, I don't know if there was much besides he was about ready to go home and I said I would like to have him remove that screen before he went. 30

Q. Anything else? A. I don't remember now.

Q. Did Mr. Forrester say anything to you about using a ladder to remove that screen?

Mr. Klausner: If you Honor please, I object to that as being leading. The question should be, "What was the conversa- 40

Mrs. Albertha Eckerson, for Defendants—Cross.

tion?" And Mrs. Eckerson says she doesn't remember now.

The Court: I think it should be whether there was any conversation respecting the doing of this work.

10 Q. Was there any conversation between you and Mr. Forrester as to the manner in which the screen should be removed? A. No.

Q. What implements he was to use? A. No.

Q. Did you see him removing the screen? A. No, I did not.

Q. Or whether or not he was using a ladder? A. No, I didn't see him.

Q. Did you have any conversation with him regarding the use of a ladder? A. No.

20 Q. Mr. Forrester has testified in substance that on the occasion of this conversation, which he says took place on the porch, he told you that he would have to have a ladder, and that you said to him, "There is a ladder out behind the garage, go and get that". Is that so? A. No.

Q. You saw Mr. Forrester shortly after he fell, did you not? A. Yes.

Q. Did you see the ladder then? A. Yes.

Q. Whose ladder was it? A. I don't know.

30 Q. Was it yours? A. I didn't own any.

Q. Didn't own any? A. No, it was not mine.

Q. Was it Mr. Eckerson's? A. No.

Q. Did you ever see the ladder before? A. Not that I remember, no.

Cross examination by Mr. Klausner:

Q. Did you see him in pain? I mean did he complain of pain? A. Yes.

Q. You saw the broken ladder? A. Yes.

40 Q. And where were you when you spoke to him

Mrs. A. Eckerson, for Defendants—Re-direct.

about taking off the screen of the skylight? A. I don't remember. I was in the house and out of the house all morning. I don't remember just where it was.

Q. You don't particularly remember this at all, do you? A. I don't remember just where I was when I told him. 10

Q. You don't remember that? A. Not where I was, no.

Q. Whether you were inside or outside? A. No, I don't.

Q. And you don't particularly remember just what the conversation was? A. No, except I simply said, "Take off the screen" before he went away.

Q. But you don't particularly remember what he said? 20

Mr. O'Mara: She testified that she did remember what was said.

Mr. Klausner: I object to counsel saying what she said. The witness is here.

The Court: All right, go on.

Q. Did I ask you if you saw the ladder broken? A. If it was broken? Yes.

Q. Where was the ladder, near where the screen was to be taken off? A. Yes. 30

Re-direct examination by Mr. O'Mara:

Q. Would it have been possible for Mr. Forrester to gain access to the roof of the conservatory for the purpose of removing the screen by going through the window of the room adjoining the roof? A. Oh, yes, it always had been taken off that way.

Q. What was the size of the screen? A. Possibly a little bit larger than that table. 40

John McHugh, for Defendants—Direct.

Q. About three feet or so? A. Yes.

Q. And how high was it? A. Maybe two feet high. It was a triangular screen.

(Witness excused.)

10

JOHN McHUGH, sworn.

Direct examination by Mr. O'Mara:

Q. Mr. McHugh, where do you reside? A. 107 Berry Street, Hackensack.

Q. Is that right adjoining the home of Mr. and Mrs. Eckerson? A. Yes.

20 Q. Do you cut the grass for the Eckersons? A. I do.

Q. How long have you been living there? A. Twenty years.

Q. Were you present on the day that Mr. Forrester—you know Mr. Forrester, the plaintiff? A. Yes, I do.

Q. Were you present on October 14, 1927, when Mr. Forrester fell? A. No, I wasn't.

Q. Did you see the ladder which he was using after the accident? A. Yes, I did.

30 Q. Whose ladder was that? A. It was my ladder.

Q. It was your ladder? A. Yes.

Q. How long had you had that ladder? A. Oh, about twenty years.

Q. Where did you keep that ladder prior to October 14, 1927? A. Out in the yard.

Q. In your yard? A. Yes.

40 Q. How long had it been out in the yard? A. It was out there all the while. All the time it was there.

John McHugh, for Defendants—Cross.

Q. Since you owned it? A. Yes.

Q. Mr. Forrester has testified that he secured the ladder from in back of the garage on the Eckerson property. Do you know whether the ladder was in back of the Eckerson garage on October 14th? A. No, sir.

Q. It was not? A. It was back of my yard. 10

Q. In back of your yard, on October 14, 1927? A. Yes.

Cross-examination by Mr. Klausner:

Q. When did you see the ladder the first time after this accident happened? A. (No answer.)

Q. How soon after this accident happened in which Mr. Forrester was hurt did you see the ladder? A. I guess it was right that same day after. 20

Q. When you say you guess,—do you remember? A. No, I do not.

Q. You don't remember when you saw it? A. No.

Q. You don't remember how soon after this accident happened you saw it? A. I think it was the same day.

Q. You think it was? A. Yes.

Q. About what time of day? A. In the evening. 30

Q. Toward the evening? A. Yes.

Q. Who told you about this accident? A. Mrs. Eckerson.

Q. Mrs. Eckerson? A. Yes.

Q. Did you tell her it was your ladder? A. Yes, I told her it was my ladder.

Q. That day you told her that? A. Yes.

Q. So Mrs. Eckerson knew it was your ladder? A. After that she did, not before.

Q. Not before? A. No. 40

John McHugh, for Defendants—Re-direct.

Motion for the Direction of Verdict.

Q. Do you remember how long before this accident you saw this ladder? That is, did you see the ladder the day before this accident happened? A. I don't remember.

10 Q. You don't remember? A. No.

Q. That is, you don't remember the last time you saw this ladder before the accident happened? A. No, I don't.

Q. You might not have seen this ladder for maybe a week before the accident? Had you used it for a week before the accident? A. I never used it.

Q. You never used it? A. No.

20 Q. So you don't know just when you saw the ladder before this accident happened? A. No, I do not.

Re-direct examination by Mr. O'Mara:

Q. And the back of your property comes back to the Eckerson garage, isn't that so? A. Yes.

Q. Were there strips of wood nailed to that ladder in place of rungs? A. Yes.

Q. Before the accident? A. Yes.

(Witness excused.)

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(DEFENDANTS REST.)

Mr. Klausner: No rebuttal.

40 Mr. O'Mara: If the Court please, I move for the direction of a verdict in favor of both defendants on the ground that the employment of Mr. Forrester was not casual and consequently his only remedy is under the Employers' Liability

Motion for the Direction of Verdict.

Act; on the second ground that the plaintiff has failed to prove any negligence on the part of either of the defendants in this case. The testimony is merely that this ladder was not owned by the defendants; and was, under the plaintiff's testimony, directed by Mrs. Eckerson to be used in the operation of removing that screen. Now it seems to me that that in itself is certainly not sufficient to charge Mrs. Eckerson, and certainly not Mr. Eckerson, with negligence. And on the third ground that the proof clearly shows that had this plaintiff been exercising ordinary care he must have seen, from even casual inspection of the ladder,—whether that was a safe ladder to use. The testimony of Mr. McHugh is that strips were nailed across the ladder instead of rungs; that the ladder had been out in the weather on his premises for a long period of time. 10 20

And for those reasons I move for a direction of a verdict in favor of the defendants.

The Court: What have you to say upon the question of whether or not Mrs. Eckerson should be held in this case and not Mr. Eckerson?

Mr. Klausner: This, your Honor; That Mrs. Eckerson was the one who told him where to get the ladder, according to his testimony, and it is admitted in this case, that the house was owned by Mrs. Eckerson, although Mr. Eckerson told him to do the work and was going to pay for it. He was then really acting for both in this case. Although he was to be paid by Mr. Eckerson, the house was owned by Mrs. Eckerson. That is in the pleadings. 30

The Court: It may be in the pleadings but it is not in the evidence.

Mr. Klausner: It is admitted.

The Court: I haven't heard any admission. 40

Motion for the Direction of Verdict.

Mr. Klausner: We had a stipulation to that effect. I would like to re-open the case. It is admitted that the house is owned by Albertha Eckerson. Isn't that so, Mr. O'Mara?

Mr. O'Mara: Yes. I have no objection to that.

10 The Court: Then that may appear in the record.

This is one of those border-line cases, but the Court feels that it is a case which should go to the jury; and in denying this motion the Court wishes to make this observation with respect to the contention that the defendants here are not liable because this is a casual employment. A casual employment as defined in the Employers' Liability Act, otherwise known as the Workmen's Compensation Law, Section 23, subdivision (c),
20 reads as follows:

30 "Employee is synonymous with servant, and includes all natural persons who perform service for another for financial consideration, exclusive of casual employments, which shall be defined, if in connection with the employer's business, as employment the occasion for which arises by chance or is purely accidental; or if not in connection with any business of the employer, as employment not regular, periodic or recurring."

Now it is to be noted that there are two types of employment set forth in this declaration.

One is where the employment is in connection with the business of the employer and the second is where the employment arises in connection with some undertaking which is not a business, not a regular business of the employer. And this case
40 we are trying falls within the latter qualification.

Motion for the Direction of Verdict.

Now the cases to which I have been referred, such as *Sabella v. Brasileiro*, 86 N. J. L. 505, and the more recent case of *Mullen v. Walker*, Vol. VI, of Advanced Reports, No. 43, at p. 1537, are cases which fall within the first division of this definition and therefore are not authority for the determination of this case. This case falls under what has been aptly termed by Mr. Stubbs, Deputy Commissioner in the Department of Labor, in the case of *La Terre v. Skillman*, Vol. VII, Misc. Rep. No. 38, at p. 766, as "domestic employment". And it is then you ascertain whether or not we have any evidence here to show whether this employment is regular, recurring or periodic. That it is not regular is conceded; that it is not periodic in the sense contemplated by that definition it seems to me is clear, because there is no testimony here that there was any agreement whatever that there was to be periodic service. It necessarily must be predicated upon agreement or understanding that there is to be a periodic employment, such as would be the case of a washwoman who comes to a house under regular employment to come there once a week throughout the year. Neither is it recurring, because there was no agreement that there was to be any further employment, nor was there any understanding to that effect, because the only testimony we have on that is from the plaintiff himself, who says he was engaged after employment by the Holland Butterine Company to work for officers of that company at different times. The mere fact that he may have been employed at different times isn't a test. The test is whether or not there is a mutual understanding that the services extending over a period of time were periodic or were performed through a general re-

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Motion for the Direction of Verdict.

10 currence. An example of recurrence would be a man who was employed for the season to mow a lawn, who would be expected to mow that lawn after the grass commenced growing. Now I do not find that there are any of these situations in this case, and that is the reason I am sending this case to the jury, because it is not within the Workmen's Compensation Act. On the other hand, I think it is a question for the jury. You may have an exception.

Mr. O'Mara: May I call your Honor's attention to the case of *Skillman v. The Judges of the Court of Common Pleas of Essex County*, 6 Misc. Reps., p. 6?

20 The Court: My attention has been called also to the case of *Skillman v. The Judges of the Court of Common Pleas of Essex County*, found in 6 Misc. Reps. at page 6. From the reading of that case it is clearly indicated that that was not a casual employment, for the reasons stated in the opinion by the Supreme Court, which says:

30 "The employment was for a definite period of two weeks, with an uncertain and indefinite period added thereto. The petitioner was bound to continue in that work for such a period and would have been liable in damages if she had quit. The work to be done was of a regular character, being ordinary housework. The work was of a kind usually done by petitioner, although not with strict regularity. For the period for which she was engaged, however, she was in every sense a regular servant of the prosecutor within the requirements of the Workmen's Compensation Act."

40 This is very different from the case we are deciding. This plaintiff was merely sent down to do such work as he might be directed to do by

Motion for the Direction of Verdict.

Mrs. Eckerson, and he might have quit that day or the next day, and there was no regular, definite employment. He would not have been subject to damages had he ceased work on the day he started.

The motions for a nonsuit and for direction of verdict are both denied. 10

Mr. O'Mara: May I have an exception to your Honor's ruling?

The Court: Yes.

Mr. O'Mara: Exception.

(Mr. O'Mara thereupon summed up to the jury.)

The Court: For the purpose of the record it is conceded that Mrs. Eckerson owned this house. The pleadings, however, allege that the house is owned by Mr. Eckerson. I assume that the pleadings should be amended so as to make it appear that the house is the property of Mrs. Eckerson. 20

Mr. O'Mara: Yes.

The Court: Let it so appear on the record, that the pleadings are so amended.

(Thereupon Mr. Klausner summed up to the jury.)

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Court's Charge.

The Court thereupon charged the jury as follows:

10 Gentlemen of the Jury: On August 14, 1927, John J. Forrester, while endeavoring to come down from the roof of a conservatory in a house owned by Mrs. Albertha Eckerson, fell, as he claims, because of defects in the rungs of a ladder which he was using for the purpose of reaching and leaving the roof of this conservatory, where he had been directed to put in a new screen or change the wiring on the screen over a skylight in the conservatory, he claiming that he was an employee generally of a company with which Mr. Eckerson was connected and that Mr. Eckerson
20 sent him down to his home to do such work as his wife might direct.

 Now as a result of the fall Mr. Forrester had at that time he claims to have been injured, and he has brought this suit against both Thomas H. Eckerson and his wife Albertha Eckerson to recover compensation for the injuries which he sustained and which he claims were due to the negligence of Mr. and Mrs. Eckerson.

30 Well, now, gentlemen, there could be no recovery in this case unless and until the plaintiff was proven to your satisfaction by a fair preponderance of the evidence that these defendants, or one of them, breached some duty owing to this plaintiff. Therefore your first consideration will be to ascertain or to know what duty, if any, was owing to this plaintiff on this occasion; and there would be no duty unless Mr. Forrester was the agent or servant of one or both of these defendants.

40 Now he claims that he was employed for this particular work by Mr. Eckerson and that when

Court's Charge.

he got down there, he having been told that Mrs. Eckerson would give the directions, that she directed him, after he had done work for several days upon this home, to go upon the conservatory and change the wiring in the screen over the skylight there; and he says that the ladder that he had previously used in connection with his work about this home had been taken away. It was no longer there, at least, and that he spoke to Mrs. Eckerson about the means of getting upon the conservatory. He said that she pointed, as I recall the testimony—and you will always be governed by your own recollection of the testimony—that she pointed to the rear of the garage and indicated there was a ladder there which he could use. He claims that it was that ladder which was defective and which was the reason for his fall. 10
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If you find that this plaintiff was the agent or servant of either one or both of these defendants at that time, then, gentlemen, you will want to know what duty was owed to the plaintiff with respect to the appliances that he might use in the performance of the labor which I have indicated. The rule is that the master, the person who engages another to do a piece of work for him, must exercise reasonable care to furnish reasonably safe appliances and tools or means with which to do the work. The master is not an insurer—I want you to remember that—of the safety of the employee, but can only, in any event, be charged with reasonable care in supplying reasonably safe tools and appliances or means with which to do the work. 30

Now Mrs. Eckerson on the stand says that she never at any time indicated to this plaintiff that he was to use the ladder which he used,—at least that is my understanding of her testimony—and 40

Court's Charge.

that theretofore there had been used by this plaintiff and there was within easy reach a window on the second floor from which he could have gotten out on this roof and done this work. Well, of course, if the employer furnishes a reasonably safe means with which to do the work, and if the employee then, of his own volition and without the knowledge or consent of the master, assumes to go beyond the scope of his employment and take some other means, he cannot hold the master responsible for any defect in that means if the master used reasonable care in furnishing reasonably safe appliances or means with which to do the work.

In this connection, while I have given you this degree of care, I want you to remember always that a master is not liable for injuries resulting to a servant by reason of latent defects of which he was ignorant and which cannot be discovered by the exercise of reasonable care or diligence by the master. You see that is no more than fair, because if the exercise of reasonable care would have disclosed its existence it would be equivalent to saying that a master is an insurer of his employee, and that is not the law. And then, too, it is not necessary that the master should have had actual knowledge of the defects, if there were any defects, but it is sufficient to show that he could have ascertained such knowledge by the exercise of proper and ordinary care and diligence in performing the duties of the master.

Of course, if Mr. Eckerson, as the master or employer, or one of the employers, of this man on this occasion, directed that Mrs. Eckerson should show the plaintiff what to do, naturally she would be acting for Mr. Eckerson in directing the plaintiff what to do, but in no event can this plaintiff right-

Court's Charge.

fully have a verdict unless he has shown to your satisfaction by a fair preponderance of the evidence that there was negligence on the part of these defendants, or one of them, and that such negligence was a proximate cause of this accident; and that involves a careful application of these rules that I have given you with respect to the care that must be exercised by a master. 10

If you find that the defendants were negligent that does not determine this question. You will have to then ascertain whether or not such negligence was a proximate cause of the accident. Generally speaking, was it such a cause as you might naturally and in the ordinary course of events expect would bring about this very accident? Is it the moving, efficient cause of the accident without which the accident would not have happened? 20
Now a given person may be negligent in some respects but unless that negligence is a cause of bringing about an accident you cannot charge the person thus negligent with responsibility for the accident. The two have to be coupled up together, negligence and proximate cause. Therefore, in this case if the plaintiff has failed to satisfy you by a fair preponderance of the evidence that, even if the defendants were negligent, such negligence was a proximate cause of the accident, again there should be a verdict against the plaintiff of no cause of action; but if you find that there was negligence, that such negligence was the proximate cause of the accident, then you will have to determine, before you can award a verdict in favor of the plaintiff and against the defendant or defendants, whether the plaintiff was free from contributory negligence. Now you see the defendants here have raised in their answer the defense of contributory negligence on the part of the plaintiff, 40

Court's Charge.

and therefore the duty rests upon them of making that out, of establishing that to your satisfaction by a fair preponderance of all the evidence in the case, not only the evidence produced on the part of the defendants but all of the evidence produced here.

- 10 Although this plaintiff may have been an employee, he was not relieved from all responsibility in connection with his own conduct. He was required to exercise reasonable care for his own safety, such care as a reasonably prudent person would have exercised if put in his place under the same circumstances that confronted him. Now you heard his story and you heard all the evidence as to his conduct on this occasion. Did it
- 20 square with what would have been expected from a reasonably prudent person in this situation? If it did not and he thereby contributed in any degree to the happening of this accident, that would bar a recovery by him, even though you should find that there had been negligence on the part of the defendants and even though you should find that the defendants, or one of them, had been more negligent than the plaintiff, because you are not privileged to weigh the relative degrees of negligence. If both parties were
- 30 negligent, although in unequal degrees, and they thereby contributed jointly to the happening of this accident, that would bar a recovery by the plaintiff, and your verdict would be in favor of the defendants and against the plaintiff, a verdict of no cause of action. But, on the other hand, if you find that the plaintiff has established negligence in this case and that such negligence was a proximate cause of the accident, if you find he has made that out to your satisfaction by a fair

Court's Charge.

preponderance of the evidence and that this plaintiff was free from contributory negligence, then this plaintiff should have a verdict.

If that is the result you reach, then gentlemen, he is entitled to be compensated for the injuries that he personally sustained as the natural and proximate result of this accident. That would include pain and suffering for so long a time as you find he experienced pain and suffering, and it would include any disability to which he was subjected because of this accident. He claims that right after the accident he noticed two lumps just at the base of the abdominal cavity, and he also says there was a discoloration there. The doctor has borne him out in that respect; and the doctor says that this was a traumatic double rupture that was sustained by the plaintiff. Now if those things are true, or in so far as any of them are true, the plaintiff is entitled to be compensated; he is entitled to be compensated for that injury that was thus inflicted upon him. He also would be entitled to be compensated for any loss of earnings that he may have sustained because of this accident. He says he was making—if I remember the testimony correctly—thirty-five dollars a week. He was paid for five weeks after this accident, so of course that could not be considered a loss; but he says thereafter he was not able to work; that he lost his wages for a considerable period of time. If that is true he is entitled to be compensated for that loss. He is entitled also to be compensated for any medical expenses that were reasonably expended by him in an effort to cure himself of his injuries, and for any doctors' bills that he paid. On the question of hospitalization, I understand that the bill has been paid, and you

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Court's Charge.

are not concerned with any hospital bill in this case.

10 Something has been said in the course of summation that after the determination of this case the plaintiff might continue his cause of action in the Workmen's Compensation Court. Of course, gentlemen, that is not an accurate statement, because the Court has determined here that this is a case that should stay in this court. It is in this court and while this determination stands it is dispositive of this question, and, therefore, whichever way you find, that will be a determination of his cause of action. I want you to understand that. You may take the case.

20 (Thereupon the jury retired.)

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Rule for Judgment.

(Filed Oct. 1, 1929.)

10

JOHN J. FORRESTER,
Plaintiff,

vs.

THOMAS H. ECKERSON and
ALBERTHA ECKERSON,
Defendants.

20

IT IS ORDERED, that judgment be and hereby is entered in favor of plaintiff and against the defendants for the sum of one thousand four hundred and ninety dollars, besides costs to be taxed *nisi*.

Entered Oct. 1, 1929.

On Motion of

KINKEAD & KLAUSNER,
Attorneys.

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Exhibit P-1.

Form No. 23

NEW JERSEY DEPARTMENT OF LABOR

WORKMEN'S COMPENSATION BUREAU

Trenton, N. J.

RESPONDENT'S ANSWER TO EMPLOYEE'S
CLAIM PETITION

10

JOHN J. FORRESTER,
Petitioner,

vs.

HOLLAND BUTTERINE Co.,
*Respondent.*Claim Petition
No. 7625.
February 7th,
1928.

20

Attorneys for Respondent, WALL, HAIGHT,
CAREY & HARTPENCE, 15 Exchange Place,
Jersey City, N. J. (Address)

In answer to Claim Petition filed in this cause:

1. What is the petitioner's name? JOHN J.
FORRESTER (From information in petition). 302. Where does he reside? 58 Carlton Avenue,
Jersey City, N. J. (From information in peti-
tion). (City or Town)
(Street Address)6. Was the petitioner in your employ at the
time of the accident? No.7. State your business. Manufacturer of oleo-
margarine. 40

Exhibit P-1.

8. Did you receive written notice from the Petitioner at the time of hiring, or later, that the Compensation Law was not to apply to him? No.
9. Did you give such notice to him? No.
- 10 10. When did you first have knowledge of this accident? October 14, 1927.
11. Did you receive notice of this accident from the Petitioner? No.
12. If so, on what date?.....
13. Has any claim for compensation been made? Yes.
14. What was the Petitioner's regular occupation, and what kind of work was he doing at the time of the accident? Painter. Painting.
- 20 15. When did the accident happen? October 14, 1927. (State month, day, year and hour)
16. Where did the accident happen? At home of Thomas H. Eckerson, 345 Union Street, Hackensack, N. J.
17. What was the nature of the accident, and how did it happen? From report received, the petitioner fell from a ladder that he placed at the side of Mr. Eckerson's house and, in falling, injured himself in the body.
- 30 18. On what date was the petitioner compelled to stop work because of injury? October 14, 1927.
19. On what day was the injured well enough to work again?.....
- 40 20. If still disabled, on what date do you estimate he will be able to work?.....

Exhibit P-1.

21. Give your understanding of the nature of any injury from which he should recover? Respondent has report that petitioner has suffered from a hernia.

22. Give your understanding of any permanent injury which has resulted, either amputation or loss of usefulness of any member or impairment of any physical organ. Explain fully. None. 10

23. Were the wages fixed by piece-work? No.

24. If so, what was the average weekly wage of the injured?.....

25. If wages were fixed by the hour, state rate per hour.

26. Give number of hours in an ordinary working day. Eight. 20

27. Give number of days in an ordinary working week.....

28. State the amount of weekly wages. \$35.00.

29. How much money have you paid the injured as compensation (not including medical aid) since the accident?.....

30. Have you promised to pay compensation? Paid amount equal to compensation from term of disability. 30

31. If so, how much?.....

32. Was medical aid required? Yes.

34. Were you requested to supply the necessary medical service required by law? No.

35. Did you furnish this service? No.

36. If so, between what dates?..... 40

Exhibit P-1.

37. If not, give reason for failure to do so. Respondent not responsible for payment.

38. Give name of physician and hospital rendering service at your direction.....

10 39. What other facts are there which you believe important? If you deny that compensation is payable in this case, explain fully your reasons for this conclusion. At the time of the alleged accident the petitioner was not in the employ of the respondent and the accident did not arise out of and in the course of his employment.

HOLLAND BUTTERINE Co.,
(Respondent)

20

By WALL, HAIGHT, CAREY
& HARTPENCE,
Attorneys.
142 Bay Street,
Jersey City, N. J.
(Address)

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Exhibit P-1.

STATE OF NEW JERSEY }
 COUNTY OF HUDSON. } ss.:

ALFRED F. CONWAY, of full age, being duly sworn according to law, on his oath deposes and says: That he is the attorney in charge of within cause for the respondent named in the foregoing answer to claim petition; that he has read the same and is familiar with the contents thereof; and that the matters and things therein set forth are true according to the best of his knowledge and belief. 10

ALFRED F. CONWAY,
 Attorney of Respondent.

Subscribed and sworn to before }
 me, this Seventh day of February, 1928, at Jersey City, N. J. } 20

WM. W. SHAW,
 Master in Chancery
 of New Jersey.

(This affidavit may be sworn to before a Deputy Commissioner or a Compensation Referee, or any other person authorized to administer an oath.) 30

It is consented that the within answer be filed as within time.

KINKEAD & KLAUSNER,
 Attorneys of Petitioner.

Exhibit P-2.

Form No. 20

NEW JERSEY DEPARTMENT OF LABOR
WORKMEN'S COMPENSATION BUREAU
Trenton, N. J.

10

EMPLOYEE'S CLAIM FOR COMPENSATION

JOHN J. FORRESTER,
Petitioner,

vs.

HOLLAND BUTTERINE Co.,
Respondent.

20

Received at Trenton.....
Claim Petition No.....
Date of Accident October 14th, 1927.

Attorney for Petitioner, KINKEAD AND KLAUS-
NER, 586 Newark Ave. J. C.
(Address)

30 *To the Workmen's Compensation Bureau of New
Jersey:*

The claimant respectfully alleges the following
facts:

1. What is your name? John J. Forrester.
2. Where do you live? 58 Carlton Avenue,
(Street Address)

Jersey City, N. J.
(City or Town)

3. Sex. Male.

40

4. Age 26.

Exhibit P-2.

5. Married. Yes.

6. By whom were you employed at the time of the accident? (Give name and business address) Holland Butterine Company, 142 Bay

Street, Jersey City, ^(Name)New Jersey. ^(Street)

Address)

(City or Town)

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7. What was the business of your employer? Manufacturer of oleomargarine.

8. Did you give written notice to your employer at the time you were hired, or later, that the Compensation Law should not apply to you? No.

9. Did you receive such notice from your employer? No.

10. Did your employer have knowledge of your accident? Yes.

20

11. Did you notify your employer of your accident? Yes.

12. If so, on what date? October 14, 1927.

13. Have you made claim to your employer for compensation? No.

14. What was your regular occupation, and what kind of work were you doing at the time of the accident? Was employed as a painter. At time of accident I was removing a screen in the home of my employer.

30

15. When did the accident happen? October 14, 1927.

(State month,

day, year and hour)

16. Where did the accident happen? At employer's home in Hackensack.

17. What was the nature of the accident, and how did it happen? After finishing painting roof, I was ready to go back to the factory, in Jersey

40

Exhibit P-2.

- City, when Mrs. Eckerson told me to take down the screen over the skylight. She gave me a ladder and when I was on the top rung, the top rung broke and I fell, straddling and breaking the next 2 rungs, falling to the floor. Suffer bilateral direct traumatic inguinal hernia and broken blood vessel in left groin.
- 10
18. On what date were you compelled to stop work because of the injury? October 14, 1927.
19. On what date were you well enough to work again?
20. If still disabled, on what date do you think you will be able to work? Unable to tell.
21. Give nature of any injury from which you will recover.
- 20
22. If any permanent injury has resulted, either amputation or loss of usefulness of any member, or impairment of any physical organ, explain fully.
23. Were your wages fixed by piece-work? No.
24. If so, what was your average weekly wage?
25. If wages were fixed by the hour, state rate per hour. No.
- 30
26. Give number of hours in an ordinary working day. Eight.
27. Give number of days in an ordinary working week.
28. State the amount of weekly wages. Thirty-five dollars.
29. How much money have you received from your employer as compensation (not medical aid) since your accident?.....
- 40

Exhibit P-2.

30. Has your employer promised to pay you any compensation? Yes.
31. If so, how much? Pay all expenses.
32. Was medical aid required? Yes.
33. Did you receive medical, surgical or hospital service? Yes, received all. 10
34. Did you request your employer to furnish these services? Yes.
35. Were they furnished? Yes, but they were not paid for.
36. If so, between what dates? October 14, 1927 and November 3, 1927.
37. If not, what sum did you expend for medical, surgical or hospital services? Still owe Doctor's Bills, and hospital fees. 20
38. Give name and address of physician and hospital. Christ Hospital, Palisade Avenue, Jersey City. Dr. Wm. Freile, 25 Tonnele Ave. Dr. Warren Duckett, 21 Carlton Ave. Dr. Curtis, Hackensack, N. J.
39. What other facts are there which you believe important? This petition is filed for the purpose of protecting the rights of the petitioner in this court, for a civil action is about to be started in the Hudson County Circuit Court in this matter. 30
40. Are you willing that the Compensation Bureau endeavor to secure compensation for you, by agreement before calling for an official hearing?....
Your Petitioner therefore prays that your Honorable Bureau will determine the amount of compensation due to your Petitioner from the said defendant, under the act entitled "An Act prescrib- 40

Exhibit P-2.

10 ing the liability of an employer to make compensation for injuries received by an employee in the course of the employment, establishing an elective schedule of compensation and regulating procedure for the determination of liability and compensation thereunder," approved April 4th, 1911, and the Acts supplemental thereto and amendatory thereof, and that your petitioner may be awarded his costs in this proceeding, and such other or further relief as may be proper.

And your petitioner will ever pray, etc.

JOHN J. FORRESTER.

(Petitioner)

58 Carlton Ave. Jersey City.

(Address)

20 STATE OF NEW JERSEY }
COUNTY OF HUDSON. } ss.:

JOHN J. FORRESTER of full age, being duly sworn according to law, on his oath deposes and says: That he is the petitioner named in the foregoing petition; and that he has read the same and is familiar with the contents thereof; and that the matter and things therein set forth are true according to the best of his knowledge and belief.

30

JOHN J. FORRESTER.

(Petitioner)

Subscribed and Sworn to before }
me, this 12th day of Decem- }
ber 1927, at Jersey City, N. J. }

JOSEPH M. SCHOENBERG,

Attorney at law of New Jersey.

40 (This affidavit may be sworn to before a Deputy Commissioner or a Compensation Referee, or any other person authorized to administer an oath.)

Exhibit P-2.

TO THE RESPONDENT

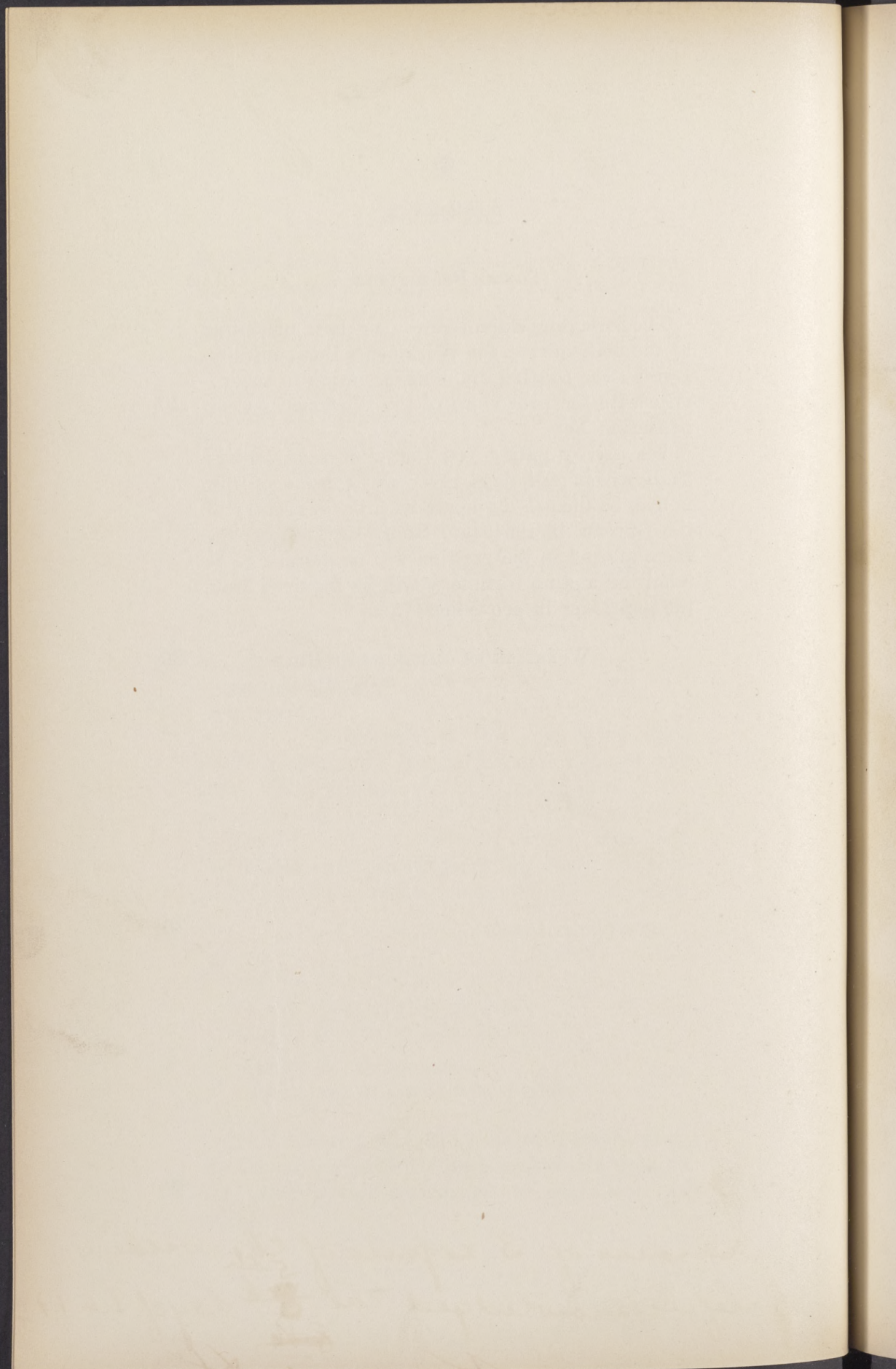
The foregoing claim petition has been presented by the petitioner to the Workmen's Compensation Bureau for hearing and determination in accordance with the provisions of the Workmen's Compensation Act. 10

We hereby notify you that unless an answer shall within ten days after the service of this notice, be filed in duplicate with the Secretary of the Bureau, in the State House at Trenton, the facts alleged in the petition will be deemed to be admitted and no testimony will be required from the petitioner to prove such facts.

WORKMEN'S COMPENSATION BUREAU 20
W. E. STUBBS,
Secretary.

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40



New Jersey Court of Errors and Appeals

JOHN J. FORRESTER,
Plaintiff-Respondent,

vs.

THOMAS H. ECKERSON and
ALBERTHA ECKERSON,
Defendants-Appellants.

BRIEF ON BEHALF OF DEFENDANTS- APPELLANTS.

Statement of Facts.

The plaintiff had been employed by the Holland Butterine Company as a plant painter from 1924 or 1925 to 1927 (Case, p. 9). During this time he had on different occasions been engaged in doing painting work at the homes of various persons connected with the Holland Butterine Company (Case, p. 22). He was so employed by a Mr. Sherman, a Mr. Osterman and by Mr. Eckerson, the President of the Holland Butterine Company, and one of the defendants in this case (Case, p. 22). He was employed by Mr. Eckerson and did some painting work at Mr. Eckerson's home for a total of twenty-two days between the 5th of November and the 7th of December, 1926 (Case, p. 23). He was also employed by Mr. Eckerson to work at his home for eight days between October 3rd and October 14th, 1927 (Case, p. 21). On both these occasions, he was paid by Mr. Eckerson (Case, pp. 10, 23). While engaged in

*Service of 3 copies of the within
brief acknowledged the ^{5th} ~~8th~~ day of Feb. 1933
S. H. A.*

removing a screen from the skylight in the roof of the porch at the Eckerson home, and in attempting to descend a ladder while carrying the screen, one of the rungs of the ladder is alleged to have broken and the plaintiff fell and sustained injuries to recover for which this suit is brought (Case, pp. 11, 12 and 13). The accident occurred on October 14th, 1927 (Case, p. 13).

The defendant, Thomas H. Eckerson early in October, 1927, told the plaintiff to go to his home in Hackensack, that he wanted him to paint the roof and do a couple of other jobs. He further told him that Mrs. Eckerson (the other defendant) would tell him what to do (Case, p. 10). Although the plaintiff was paid weekly, his compensation was figured on a daily basis (Case, p. 24). At the beginning of this employment, there was no definite understanding as to how long the employment at the defendants' home was to continue, but the plaintiff expected to work there as long as there was any painting to be done, or as long as the defendants wished him to (Case, p. 24).

At the conclusion of the plaintiff's case, defendants moved for a non-suit on the ground that the plaintiff's sole remedy was under the Workmen's Compensation Act (Case, p. 36). On the conclusion of the entire case, defendants moved for direction of a verdict in favor of defendants on the ground, among others, that the plaintiff's sole remedy was under the Workmen's Compensation Act (Case, p. 44). Both motions were denied by the Court on the ground that the employment of the plaintiff by the defendants was a casual employment and so not within the provisions of the Workmen's Compensation Act. Exceptions to these rulings were duly noted (Case, p. 49).

ARGUMENT.

POINT I.

The Court erred in denying defendants' motions for a non-suit, and for the direction of a verdict.

The sole question presented for the consideration of this Court is whether or not the employment of the plaintiff by the defendants was casual. If it was, the Trial Court had jurisdiction of this case. If it was not, the plaintiff's sole and exclusive remedy was under Chapter 95 of the Laws of 1911, popularly known as the Workmen's Compensation Act.

Section 23, Subdivision C, of this Act (as amended by Chapter 93 of the Laws of 1919) is as follows:

“ * * * employee is synonymous with servant, and includes all natural persons who perform services for another for financial consideration, exclusive of casual employments, which shall be defined, if in connection with the employer's business, as employment, the occasion for which arises by chance, or is purely accidental; or if not in connection with any business of the employer, as employment not regular, periodic or recurring.”

It will be noted that the Legislature has, for the purpose of this section, divided employment into two classes: first, that which is in connection with the employer's business, and second, that which is not in connection with the employer's business. It must be conceded that the employment in the case at bar falls within the second classification. The section, so far as its

language is concerned, establishes a different test for each class of employment.

It is obvious, however, that these definitions somewhat overlap, and that there is no clear distinction between them. It could hardly be said that an employment which was periodic or recurring was purely accidental, or arose by chance within the meaning of this section. That the Supreme Court and this Court have recognized this, is evident from the decisions in the cases of *Thompson v. Wagner*, 103 N. J. L., p. 230, and *Sabella v. Brasileiro*, 86 N. J. L. 505, affirmed 87 Id. 710.

Thompson vs. Wagner (*supra*) was a certiorari to review an award by the Court of Common Pleas in a Workmen's Compensation case. The petitioner had been engaged by the respondent to help in clearing a snowfall from the tracks of the Erie Railroad. The defense was that the employment was casual. In sustaining the contention of the respondent, Mr. Justice Parker, writing for the Supreme Court, said at page 231:

“The petitioner was hired like any other man standing idle in the market place; his pay was fifty cents an hour. There was no claim that he was held in reserve, that there was any regularity about his being called on, or any recurrence of employment at all, as in *Sabella v. Brasileiro*, 86 N. J. L. 505; affirmed, 87 *id.* 710; the case simply shows that a snowfall occurred; that outside chance laborers were needed to clear it off, and that petitioner was hired as one of these chance men. He was injured on the very day that he went to work by the shovel of another man striking his finger, making it bleed; and for lack of proper treatment gangrene set in and he lost his finger. He worked all or part of the second day and stopped because of the injury.”

The employment in the *Thompson* case was, of course, within the first classification, *i. e.*, employment in connection with the employer's business. The test laid down by the statute for this type of employment is whether or not it arose by chance or is purely accidental. It is obvious, however, that in arriving at a determination of this question the Supreme Court applied several of the elements which nominally, by the terms of the statute, apply to the second classification of employment, *i. e.*, employment not in connection with the employer's business. Among the elements considered by the Supreme Court were regularity of employment and recurrence.

In *Sabella v. Brasileiro* (*supra*), which was a certiorari to the Hudson Common Pleas to review an award in a Workmen's Compensation case, the petitioner had been engaged by the respondent at various intervals as a stevedore to load and unload ships. In this case also the respondent made the point that the employment was casual. Mr. Justice Bergen, writing for the Supreme Court, held that the employment was not casual. He said in part (p. 506):

"As to the other point" (casual employment), "the evidence shows that the deceased was justified in the expectation that the employment would continue at least until the ship was loaded or so long as his services were required for that purpose. While this class of work was not constant, depending upon there being a ship of the prosecutor in port, it appears that the deceased was frequently called upon by the prosecutors to serve them in this particular character of work, being one of a class of stevedores ready to respond when called. We think this supports the finding that the employment was not casual within the meaning of the word as expressed in the statute. The ordinary meaning of the word 'casual' is something which

happens by chance, and an employment is not casual—that is, arising through accident or chance—where one is employed to do a particular part of a service recurring somewhat regularly with the fair expectation of its continuance for a reasonable period. In our opinion, the trial court correctly disposed of the questions argued on the return of the writ allowed in this cause, and the judgment is therefore affirmed, with costs.”

It is clear, therefore, that in the *Sabella* case, where the employment also was in connection with the employer's business, the Court used as a test the regularity of the employment and its recurrence. It must also be noted that in this case the test of regularity was the fair expectation of the continuance of the employment for a reasonable period. The decision in this case was affirmed by this Court, 87 N. J. L. 710.

We cite these cases to show that in the opinion of the Supreme Court, and of this Court, there is no real distinction between the test set forth in the statute for employment which arises in connection with the employer's business and that which does not so arise, and that the cases of which *Sabella vs. Brasileiro (supra)* is an example, are as much authorities for cases wherein the employment is not connected with the employer's business as where it is so connected.

The employment in the case at bar, in our opinion, contained all three of the elements enumerated by the statute when it defines casual employment which does not arise in connection with the employer's business. It was regular, it was periodic and it was recurring. It must be noted that the statute does not require the presence of all three elements. The presence of any one is sufficient to exclude the employment from the realm of casual employment.

As we said before, the test of whether or not employment is regular is whether there is a fair expectation of its continuance for a reasonable period. In this case the plaintiff had been employed by the defendants for a period of eight days between October 3rd and October 14th, 1927, when the accident occurred. The year prior, he had been employed by them for twenty-two days, between November 5th and December 7th, 1926. At the time he went to work for the defendants at their home, he expected to be employed there as long as there was any painting to be done, or as long as they wanted him (Case, p. 24). This is a far more striking example of regularity of employment than that in the *Sabella* case (*supra*), where the accident occurred within two hours after the petitioner commenced work and where his expectation of employment did not extend beyond the loading of the ship.

In *Mullen vs. Walker* (6 N. J. Adv. Rep. 1537, 143 Atl. 363), the plaintiff was engaged by the defendants to help in the unloading of a carload of flour. He was informed by the defendants that the work which they had was not permanent. He worked part of one day and was paid \$3.00. He was then informed by the defendants that they expected another car within two or three days and that he might, if he desired, be similarly employed at that time. Several days later, the defendants left word at his home for him to report at their place of business the next day, which he did, and commenced to remove the bags of flour from the car and pile them in the warehouse. He had apparently been working but a short time on this second occasion when he received the injury complained of. The trial court granted a motion for a non-suit on the ground that the employment was not casual, and in so doing was sustained by

this Court on the authority of *Sabella v. Brasileiro* (*supra*). It is perfectly evident that in the *Mullen* case the plaintiff's expectation of employment did not go beyond the unloading of a single car of flour. In the case at bar the plaintiff's expectation of employment by the defendants was far more extensive, if we can judge from the length of time which it actually lasted and from his experience as an employee of the defendants in the preceding year.

The employment of the plaintiff was also periodic and recurring. Although there was never any express understanding between the plaintiff and the defendants that he was to be employed at the defendants' home at certain specified periods of the year, it is obvious that during the entire course of the plaintiff's employment by the Holland Butterine Company he had been at different times directed to do work at the homes of various men connected with that company (Case, p. 22).

He did painting work for Mr. Sherman and Mr. Osterman (Case, p. 9) and on the two occasions referred to he did work at the home of Mr. Eckerson, the defendant. So far as the record shows, this work was done without protest on the part of the plaintiff. In continuing in the employ of the Holland Butterine Company he must have known that at intervals in the future, as the necessity of these various individuals connected with the Company demanded, he would be called upon to again perform similar services. As far as the defendant Eckerson is concerned, the fact that at substantially the same period every year of his employment by the Holland Butterine Company, except the first, he had been called upon to go to the Eckerson home and performed services which are usually performed at that period of the year

—painting, removing screens, etc.—fairly gives rise to the inference that he would be called upon to perform such services at substantially the same period of each year during the course of his employment with the Holland Butterine Company.

Stillman vs. Judges of the Court of Common Pleas of Essex County, 6 N. J. Misc., p. 6, was a certiorari to review an award by the Workmen's Compensation Bureau.

We quote at length the *per curiam* opinion of the Supreme Court (p. 7).

“Louisa Reinhart, upon her petition, filed with the Workmen's Compensation Bureau, was awarded compensation against the prosecutor of this writ of *certiorari*, Michael Stillman. This determination was affirmed by the Court of Common Pleas. By the present writ of *certiorari* the prosecutor seeks to reverse that judgment of affirmance upon the sole ground that the employment of Louisa Reinhart was a casual employment within the meaning of section 23c of the Workmen's Compensation Act, as amended *Pamph. L. 1919*, p. 211.”

“The facts found by the commissioner are substantially as follows:

“Mr. Stillman's wife was required to go to a hospital for an operation for appendicitis. Through one Mrs. Ryan, a friend, the Stillmans sought to obtain someone for a period to take care of the house in her absence, and finally, through the instrumentality of Mrs. Ryan, Mrs. Reinhart was engaged to work in household service of the Stillmans for two weeks at least, and for such further time as she should be required. Mrs. Reinhart had been accustomed to this sort of service, sometimes engaging for domestic work generally, and sometimes as a seamstress.

“The contention of the respondent is that this was a casual employment and that there-

fore Mrs. Reinhart, after having been injured in such service during that period of two weeks, cannot recover.

“This contention was rejected by the Compensation Bureau and by the Court of Common Pleas, and we think rightly. We think that the service was not casual. It was for a definite period of two weeks, with an uncertain and indefinite period added thereto. The petitioner was bound to continue in that work for such a period and would have been liable in damages if she had quit. The work to be done was of a regular character, being ordinary housework. The work was of a kind usually done by petitioner, although not with strict regularity. For the period for which she was engaged, however, she was in every sense a regular servant in the household of the prosecutor within the requirements of the Workmen’s Compensation Act as amended in 1919, page 211.

“The judgment brought up will be affirmed, with costs.”

It will be noted that in this case the employment was not in connection with the employer’s business. The decision of the Court that the employment was not casual was based upon its regularity. The Court pointed out that the work was of a kind usually done by the petitioner although not with *strict* regularity. The only distinction between that case and the case at bar was that the employment in the Stillman case was for a period of two weeks, and such further time as should be found to be necessary, and in the case at bar the employment was for an indefinite period, but as long as the services of the plaintiff should be required. That distinction, however, is of little force in its bearing upon the question of regularity of employment.

It would be absurd to say that employment was not regular unless the contracting parties agreed

upon a definite term. If that were so, practically all cases of domestic employment would be casual. In almost every case of domestic employment, the servant is engaged not for a specific term, but for as long a period as he or she renders satisfactory service to the master. It could not be successfully contended, however, that the ordinary case of domestic employment is casual employment, and hence not within the terms of the Workmen's Compensation Act. A more satisfactory test of whether employment is regular or casual is that laid down by the Supreme Court and by this Court in the case of *Sabella vs. Brasileiro*, (*supra*)—the fair expectation on the part of the servant of the continuance of the employment for a reasonable period. That expectation certainly existed in the case at bar.

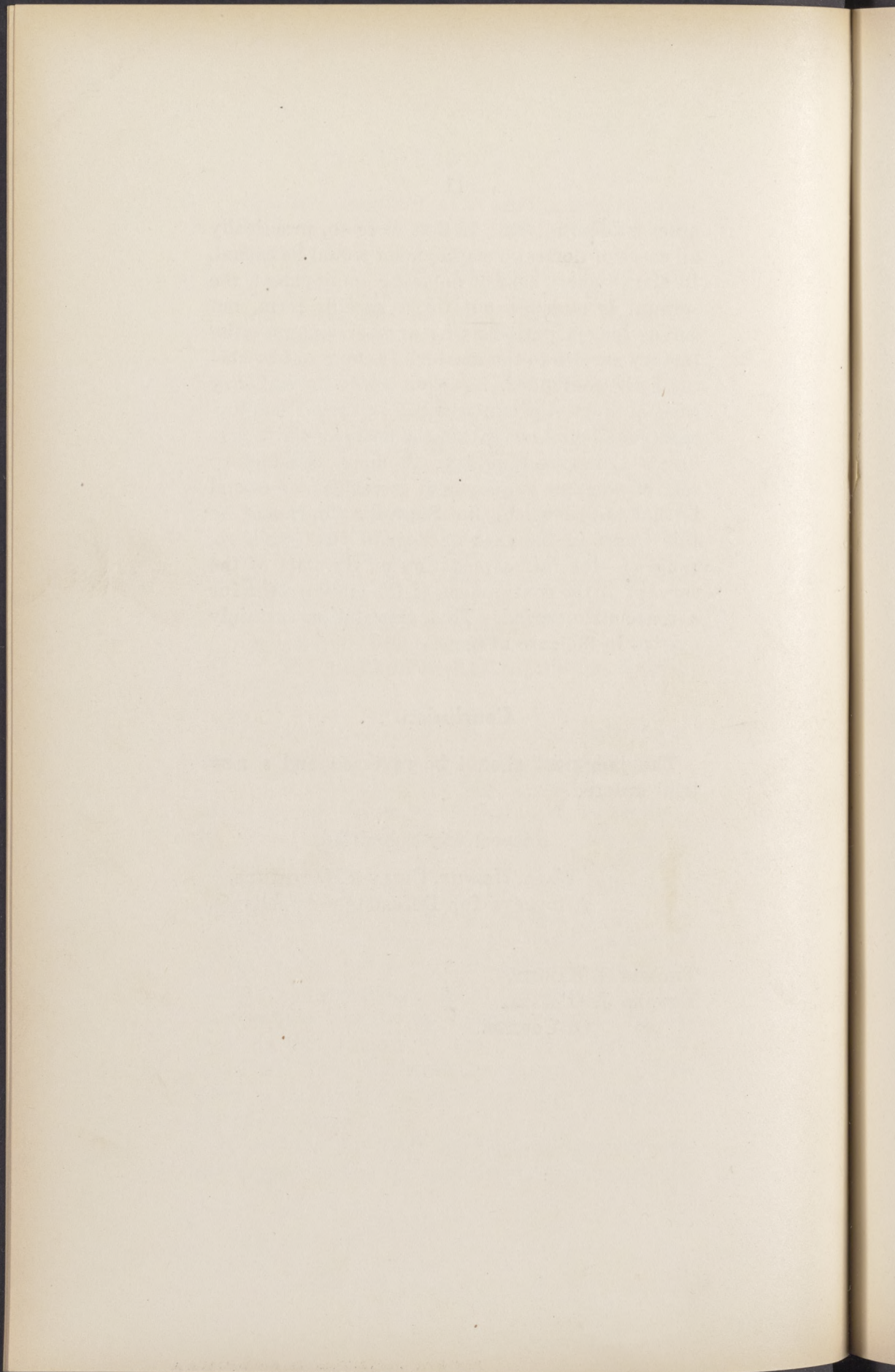
Conclusion.

The judgment should be reversed and a new trial ordered.

Respectfully submitted,

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THOMAS G. HAIGHT,
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Of Counsel.



New Jersey Court of Errors and Appeals

JOHN J. FORRESTER,
Plaintiff-Respondent,

vs.

THOMAS H. ECKERSON and
ALBERTHA ECKERSON,
Defendants-Appellants.

REPLY BRIEF IN BEHALF OF DEFENDANTS-APPELLANTS.

Respondent, in his brief (p. 9) states that the plaintiff's regular employment was with the Holland Butterine Company, and it was only by chance that he was employed by the defendants. We cannot concede the accuracy of this statement. The respondent was a painter by trade. He was generally employed by the Holland Butterine Company, but during the intervals referred to in the record when he was performing services at the home of various officials of the Holland Butterine Company, he was in no sense an employee of the Holland Butterine Company. As we pointed out in our main brief, the two instances in which he was employed by the defendants were in 1926, when he was so employed for twenty-two days, and in 1927, when he was employed for eight days. In our view his regular employment (using the word "regular" as we think the statute uses it), during those periods

was by the defendants—not by the Holland Butterine Company.

The cases of *Otmer vs. Perry*, 94 N. J. L., p. 73, and *Laterre vs. Skillman*, 7 N. J. Misc., p. 766, cited by the respondent on p. 9 of his brief, were both clearly cases where the relationship was that of an independent contractor.

In the case of *Martin vs. Belais*, 5 N. J. Misc., p. 68, cited by the respondent on p. 10 of his brief, the facts were quite different from the facts in the case at bar. In that case the petitioner was engaged for the specific purpose of dusting the respondent's summer home and getting it ready for occupancy. Her occupation could not possibly last more than a few hours.

In *Adams vs. Quackenbush*, 7 N. J. Misc. Rep., p. 444, the facts were also quite different from the facts in the case at bar. In that case also the employment of the petitioner was for the purpose of cleaning an apartment before the respondent's occupancy. The occupation, in the words of the opinion, ought not to have taken more than one full day or part of another.

Counsel for the respondent makes the point (p. 11, respondent's brief) that the appellants filed an answer to the petition in the Workmen's Compensation case in which they admitted that the employment of the respondent was not within the Workmen's Compensation Act. Counsel argues on the authority of *Links vs. Erie Railroad*, 97 N. J. L. 343, that the filing of this answer ought to be strong evidence against the appellants on the issue as to whether or not the employment comes within the Workmen's Compensation Act. The answer in question is printed as an exhibit in the State of the Case (Case, p. 59). We can find nothing in the answer which is contrary to the contention of the appellants that the

employment of the respondent was not casual. We assume that when counsel say that the answer admits that the employment of the plaintiff-respondent was not within the Workmen's Compensation Act he is referring to the following paragraph (Case, p. 62):

“39. What other facts are there which you believe important? If you deny that compensation is payable in this case, explain fully your reasons for this conclusion. The accident did not arise out of and in the course of his employment.”

We can find no other averment in the answer which could possibly support the construction for which counsel contends. An averment that a certain accident did not arise out of and in the course of the plaintiff-respondent's employment is, of course, far different from an averment that the plaintiff-respondent's remedy was not within the Compensation Act because his employment was casual.

Even if the defendants-appellants had set up in their answer in the Workmen's Compensation suit that the employment was casual, we doubt if such a statement would have been an admission within the rule laid down in the *Links* case. In that case a suit was commenced in the Circuit Court to recover damages under the Federal Employers' Liability Act. The defendant in its answer stated that the plaintiff was employed solely in intrastate commerce. A non-suit resulted. Subsequently, an award of compensation was made by the Court of Common Pleas, the record in the Circuit Court case having been introduced in the Compensation case. It was held in this case that the allegation in the defendant's answer in the law suit that the petitioner had been engaged in

intrastate commerce was evidential in the Workmen's Compensation case. In that case it will be noted the allegation was an allegation of fact, namely, that the engine upon which the injured workman had been employed was not being used in interstate commerce. An allegation, on the other hand, that the man's employment was casual could, at most, be a conclusion of law.

Respectfully submitted,

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New Jersey Court of Errors and Appeals

JOHN J. FORRESTER,
Plaintiff-Respondent,

vs.

THOMAS H. ECKERSON and
ALBERTHA ECKERSON,
Defendants-Appellants.

BRIEF ON BEHALF OF THE PLAINTIFF-RESPONDENT.**(I)****Statement of the Case.**

This appeal brings before this Court for review a judgment of Fourteen Hundred and Ninety (\$1490) Dollars rendered in the Hudson Circuit, New Jersey Supreme Court, in favor of the plaintiff, John J. Forrester, *vs.* the defendants, Thomas H. Eckerson and Albertha Eckerson.

The plaintiff was employed by the Holland Butterine Company at its factory in Jersey City as a plant painter from 1924 or 1925 to 1927 (p. 9, ll. 2-18). In October, 1927, the defendant, Thomas H. Eckerson, one of the officers of the Holland Butterine Company, told the plaintiff to go to his home in Hackensack where he wanted the plaintiff to paint the roof and to do a couple of other jobs (p. 9, l. 30; p. 10, l. 10). This home was owned by Mrs. Eckerson, the other defendant (p. 49, ll. 18-26). He further told the plaintiff that Mrs. Eckerson would tell him what to do out there.

The plaintiff, accordingly, went to the home of the defendants, and there Mrs. Eckerson told him to paint the roof, take the screening off the skylight, fix the bells and put new screening in a couple of screens (p. 10, ll. 11-24).

On October 14, 1927, after the plaintiff had done this work for eight days, and when he was about to go home, Mrs. Eckerson told him to go up on the roof of the conservatory and take off the screening on the skylight. She told him to use the ladder which was behind the garage in order to do it. While he was endeavoring to come down from the roof of the conservatory with the screening in his hand, the top rung of the ladder broke because of defects in the rungs and he fell and sustained serious injuries (pp. 10-13). This action was brought to recover damages for the said injuries.

During the plaintiff's employment by the Holland Butterine Company, he was engaged to work for officers of that company at different times, once for Mr. Sherman, once for Mr. Osterman and twice for Mr. Eckerson. The second time that he worked for Mr. Eckerson was in October, 1927, when the accident in question occurred (p. 22, ll. 20-40). The first time that he worked for Mr. Eckerson he only did painting work (p. 31, ll. 18-28). On both of these occasions, he was paid by Mr. Eckerson (p. 10, l. 25). When the plaintiff went to work for the Holland Butterine Company, there was no understanding or agreement with respect to his doing work outside, but that just came up as a casual matter while he was so employed. He was to work steadily for the company. He did not have any agreement, at any time, with Mr. Eckerson, whereby he was to come at different times to work for Mr. Eckerson, but on each occasion, he was engaged by Mr. Eckerson. There was no understanding that he was

to come back at any stated time or intervals. The only knowledge that he had that he was to work for Mr. Eckerson was each of these two times when Mr. Eckerson told him, and he did not have any understanding whatsoever regarding the work that might be done in the future (p. 31, l. 29; p. 32, l. 14).

After the accident, the plaintiff filed a petition in the Workmen's Compensation Bureau against the defendant, Thomas H. Eckerson (Ex. P-2, p. 63). The sworn answer to that petition filed by the defendant denies that the plaintiff's employment comes within the Workmen's Compensation Act (Ex. P-1, p. 62, ll. 1-10).

In the case at issue, the defendant moved for a non-suit on the ground that the plaintiff's sole remedy was under the Workmen's Compensation Act, because the employment of the plaintiff by the defendants was not casual (p. 36) and also moved for a direction of the verdict on the same ground (p. 44). Both motions were denied by the Court on the ground that the employment of the plaintiff by the defendants was a casual employment and therefore this case is not within the Workmen's Compensation Act (pp. 36-38; 46, 47, 48 and 49).

Alleged Ground of Appeal.

The two grounds of appeal, which are that the Trial Court (1) erred in refusing to grant the defendants' motion for a non-suit, and (2) erred in refusing to grant defendants' motion for a direction of the verdict, are based upon one reason. The defendants contend that these motions should have been granted because the employment of the plaintiff by the defendants was not casual, and therefore comes within the Workmen's Compensation Act.

ARGUMENT.

POINT I.

The employment of the plaintiff by the defendants was casual, and therefore not within the Workmen's Compensation Act.

In deciding defendants' motions for a non-suit and for the direction of a verdict, the learned Trial Court profoundly discussed and distinguished the cases cited by counsel for the defendants in their brief.

With reference to the sole question at issue on this appeal, Judge Ackerson said (pp. 46-49):

“In denying this motion the Court wishes to make this observation with respect to the contention that the defendants here are not liable because this is a casual employment. A casual employment as defined in the Employers' Liability Act, otherwise known as the Workmen's Compensation Law, Section 23, subdivision (c), reads as follows:

‘Employee is synonymous with servant, and includes all natural persons who perform service for another for financial consideration, exclusive of casual employments, which shall be defined, if in connection with the employer's business, as employment the occasion for which arises by chance or is purely accidental; or if not in connection with any business of the employer, as employment not regular, periodic or recurring.’

“Now it is to be noted that there are two types of employment set forth in this declaration.

“One is where the employment is in connection with the business of the employer and the second is where the employment arises in connection with some undertaking which is

not a business, not a regular business of the employer. And this case we are trying falls within the latter qualification.

“Now the cases to which I have been referred, such as *Sabella v. Brasileiro*, 86 N. J. L. 505, and the more recent case of *Mullen v. Walker*, Vol. VI, of *Advanced Reports*, No. 43, at p. 1537, are cases which fall within the first division of this definition and therefore are not authority for the determination of this case. This case falls under what has been aptly termed by Mr. Stubbs, Deputy Commissioner in the Department of Labor, in the case of *La Terre v. Skillman*, Vol. VII, Misc. Rep. No. 38, at p. 766, as ‘domestic employment’. And it is then you ascertain whether or not we have any evidence here to show whether this employment is regular, recurring or periodic. That it is not regular is conceded; that it is not periodic in the sense contemplated by that definition it seems to me is clear, because there is no testimony here that there was any agreement whatever that there was to be periodic service. It necessarily must be predicated upon agreement or understanding that there is to be a periodic employment, such as would be the case of a washwoman who comes to a house under regular employment to come there once a week throughout the year. Neither is it recurring, because there was no agreement that there was to be any further employment, nor was there any understanding to that effect, because the only testimony we have on that is from the plaintiff himself, who says he was engaged after employment by the Holland Butterine Company to work for officers of that company at different times. The mere fact that he may have been employed at different times isn’t a test. The test is whether or not there is a mutual understanding that the services extending over a period of time were periodic or were performed through a general recurrence. An example of recurrence would be a man who was employed for the season to mow a lawn, who would be ex-

pected to mow that lawn after the grass commenced growing. Now I do not find that there are any of these situations in this case, and that is the reason I am sending this case to the jury, because it is not within the Workmen's Compensation Act. On the other hand, I think it is a question for the jury. You may have an exception.

"Mr. O'Mara: May I call your Honor's attention to the case of Skillman *v.* The Judges of the Court of Common Pleas of Essex County, 6 Misc. Repts., p. 6?"

"The Court: My attention has been called also to the case of Skillman *v.* The Judges of the Court of Common Pleas of Essex County, found in 6 Misc. Repts. at page 6. From the reading of that case it is clearly indicated that that was not a casual employment, for the reasons stated in the opinion by the Supreme Court, which says:

'The employment was for a definite period of two weeks, with an uncertain and indefinite period added thereto. The petitioner was bound to continue in that work for such a period and would have been liable in damages if she had quit. The work to be done was of a regular character, being ordinary housework. The work was of a kind usually done by petitioner, although not with strict regularity. For the period for which she was engaged, however, she was in every sense a regular servant of the prosecutor within the requirements of the Workmen's Compensation Act.'

"This is very different from the case we are deciding. This plaintiff was merely sent down to do such work as he might be directed to do by Mrs. Eckerson, and he might have quit that day or the next day, and there was no regular, definite employment. He would not have been subject to damages had he ceased work on the day he started.

"The motions for a nonsuit and for direction of verdict are both denied."

Although counsel for the defendants argued at the trial that the employment of the plaintiff in the case at bar came within the first classification of casual employment, *i. e.*, it is in connection with the employer's business (p. 38) they now concede on p. 3 of their brief that it falls within the second classification, *i. e.*, it is not in connection with any business of the employer. However, counsel argue at page 6 of their brief that there is no real distinction between the test set forth in the statute for employment which arises in connection with the employer's business, and that which does not so arise, and that the cases of which *Sabella vs. Brasileiro (supra)* is an example, are as much authorities for cases wherein the employment is not connected with the employer's business, as where it is so connected. They cite in support thereof, the case of *Sabella vs. Brasileiro (supra)* and *Thompson vs. Wagner*, 103 N. J. L. 230, and state on pp. 6 and 11 of their brief that the test of whether employment is regular or casual is that laid down by the Supreme Court and by this Court in the case of *Sabella vs. Brasileiro (supra)*—the fair expectation on the part of the servant of the continuance of the employment for a reasonable period. A careful examination of that case, however, shows that that is not the test laid down by the Court. Justice Bergen, at p. 507, said:

“The ordinary meaning of the word ‘casual’ is something which happens by chance, and an employment is not casual—that is, arising through accident or chance,—where one is employed to do a particular part of a service *recurring somewhat regularly with the fair expectation of its continuance for a reasonable period.*” (Italics ours.)

There must not only be a fair expectation on the part of the servant of the continuance of the

employment for a reasonable period, but the employment must also be one recurring somewhat regularly. It must be further noted that both the Thompson and Sabella cases involved an employment within the first classification set forth in the statute, *i. e.*, in connection with the employer's business. The same test was therefore applicable even though the Sabella case was decided in 1914, at which time, the statute merely used the language "exclusive of casual employments" without any attempt at definition. Chapter 95 of the Laws of 1911, commonly known as the Workmen's Compensation Act, Sec. 23, provides "employee is synonymous with servant, and includes all natural persons who perform service for another for financial consideration, exclusive of casual employments." This was amended by Laws of 1919, Chapter 93, p. 211, to read as heretofore stated; the Legislature added to the words "casual employments" the following: "which shall be defined, if in connection with the employer's business, as employment the occasion for which arises by chance or is purely accidental; or if not in connection with any business of the employer, as employment not regular, periodic or recurring."

In *Thompson vs. Wagner* (*supra*) Justice Parker points out this change. In that case, a laborer hired in the open market at a stipulated sum per hour to aid in removing a fall of snow from railroad tracks, subject to discharge at any time and in any event when the snow should be cleared, was held to be under casual employment and not within Sec. 2 of the Workmen's Compensation Act, as amended. Since that employment was connected with the employer's business, the Court distinguished it from *Sabella vs. Brasileiro* (*supra*) which also involved an employment connected with the employer's business.

In the case of *Mullen vs. Walker* (*supra*), cited at pp. 7 and 8 of counsel's brief, the employment was in connection with the defendant's business, and therefore the same test as to casual employment could be applied as in the Sabella case. We respectfully submit that even if the same test were applied to the case at bar, the employment in question would be considered casual. Forrester's employment by the defendants could not be said to be one which would recur somewhat regularly with a fair expectation of its continuance for a reasonable period. In the case at bar the plaintiff's regular employment was with the Holland Butterine Company. It was only by chance that he was employed by the defendants.

In *Otmer vs. Perry*, 94 N. J. L. 73, the Supreme Court, through Justice Minturn, held that the employment was casual where the petitioner was injured while repairing a well for the respondent at her home under a contract to repair the well, for which he was to be paid One Dollar per hour. This case was decided before the 1919 amendment to the Workmen's Compensation Act went into effect, and was a case similar to the case at bar. It cannot be said that in either case would the employment recur somewhat regularly.

However, the case *sub judice* must be decided by the test enacted by the Legislature as pointed out in *Thompson vs. Wagner* (*supra*). A case on all fours with the one at bar is *La Terre vs. Skillman*, 7 N. J. Misc. p. 766, in which a painter was employed to paint the respondent's house. He was to be paid on an hourly basis. After working for two days, the respondent gave him certain information regarding additional work and while ascertaining what was to be done, he fell through a stairway and was killed. Mr. Stubbs, Deputy Commissioner in the Department of Labor, in de-

ciding the case, very clearly applied the test which governs the case at bar and said at p. 768:

“According to the facts as brought out, the work to be performed was of a domestic nature, namely, the painting of all or a portion of the dwelling of the respondent. This being the case, the relationship between the deceased and the respondent is subject to the provisions of paragraph 23 (c) of the Workmen’s Compensation act, which sets forth that if the service rendered is not in connection with any business of the employer, then the employment is casual unless such employment is either regular, periodic or recurring. Quite evidently one does not engage another in regular employment for the purpose of painting his house or any portion thereof, neither can it be held that such employment is periodic as is the case with a laundress who comes regularly on a stated day in the week for the purpose of doing the weekly wash, nor is it recurring such as might be the case where a lawn is to be mowed, not at regular stated intervals, but at such times as the growth of the grass makes it necessary. In the present instance, therefore, since this domestic situation did not involve any one of the three elements cited above, the employment involved must be classified as casual and as such the employment was not subject to the provisions of the Workmen’s Compensation act. Therefore, the dependents of the deceased are not deprived of such common law rights as may be theirs under the general statute.”

Another example of a casual employment which is not in connection with any business of the employer is the case of *Martin vs. Belais*, 5 N. J. Misc. Reps., p. 68, where the petitioner was injured while engaged to dust and arrange respondent’s summer home for occupancy.

In *Adams vs. Quackenbush*, 7 N. J. Misc. Reps., p. 444, Deputy Commissioner Goas held that the

employment of the petitioner to do some cleaning preparatory to the occupancy of an apartment by the respondent was casual.

An exhaustive note upon what is considered casual employment in the various courts throughout the United States can be found in 33 A. L. R. 1452. It should be noted, however, that the determination of the case at bar is governed by our statute.

As to the case at issue, the defendants admitted, in their answer which they filed in the Workmen's Compensation Bureau, that the employment of the plaintiff by the defendants was not within the Workmen's Compensation Act (Ex. P-1, p. 62). They now contend that the employment is within the Workmen's Compensation Act, and that the Trial Court therefore had no jurisdiction in the case.

In common parlance, they are blowing hot and cold. The reverse of the plaintiff's situation occurred in *Lincks vs. Erie Railroad Company*, 97 N. J. L. 343, where the plaintiff first was nonsuited in his action at law on the ground that the case came within the Workmen's Compensation Act. Subsequently, in the Workmen's Compensation Bureau, the admissions in the answer of the defendant filed in the action at law were admitted in evidence to show facts to bring the case within the Workmen's Compensation Act. In the *Lincks* case, the answer filed by the defendant in the law court was not verified, whereas, in the case at issue, the answer filed by the defendants in the Compensation Bureau is verified.

Surely, that ought to be strong evidence against the defendants in the case at issue as to whether or not the employment comes within the Workmen's Compensation Act.

In *Andre vs. Mertens*, 88 N. J. L. 626-627, this Court, speaking through Justice Trenchard, said:

“Of course, in passing upon motions to non-suit and for the direction of a verdict, the court cannot weigh the evidence, but must take as true all evidence which supports the view of the party against whom the motions are made, and must give him the benefit of all legitimate inferences which are to be drawn therefrom in his favor.”

Conclusion.

We respectfully contend that the employment of the plaintiff by the defendants was casual and that this case is not within the Workmen's Compensation Act.

The Trial Court, therefore, did not err in denying defendant's motion for a non-suit and for the direction of a verdict.

February Term, 1930.

Respectfully submitted,

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