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Complaint.

(Filed April 21, 1928.)

Hudson County Court of Common Pleas 10

MARY CONNICK and JOSEPH CON-
NICK, her husband,
Plaintiffs,

v.

EDWARD LEHMAN and MARY LEH-
MAN and JOHN F. CRAIG, INC., a
corporation,
Defendants.

Action at Law.
COMPLAINT.

20

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

FIRST COUNT.

1. At all times hereinafter mentioned, the defendants, Edward Lehman and Mary Lehman, were the owners of the premises known as 166 Magnolia Avenue, Jersey City, New Jersey, and the plaintiffs were tenants in the said premises.

30

2. On or about December 3rd, 1926, the defendants, Edward Lehman and Mary Lehman, by their agents, servants or employees, made certain alterations or repairs in the said premises and due to the careless and negligent manner in which the said alterations and repairs were made or completed, the plaintiff, Mary Connick, was severely

40

Complaint.

and permanently injured in and about the head, arms, legs and body.

10 3. The negligence of the defendants, Edward Lehman and Mary Lehman, by their servants, agents or employees, consisted in this:

20 That they failed to employ competent workmen to make the alterations or repairs; that they permitted the said alterations and repairs to be done in a careless and unworkmanlike manner; that they neglected to inspect the said work and to see that the same was properly completed so that the tenants might occupy the said premises with safety to their life and limb; that they permitted defective and inferior material to be used in connection with
20 the said alterations and repairs, and that they were otherwise careless in providing for the safe and proper completion of the work according to law.

30 4. By reason of the premises the plaintiff, Mary Connick, was severely and permanently injured in and about the head, arms, legs and body; suffered great pain and will suffer great pain in the future; has been and will be in the future greatly incapacitated in the normal use of her body and its
30 members, and suffered the loss of her wearing apparel worn at that time.

SECOND COUNT.

1. Plaintiff, Mary Connick, repeats paragraph 1 of the First Count and makes the same a part hereof.

40 2. On or about December 3rd, 1926, the defendant, John F. Craig, Inc., by its agents, servants or employees, made certain alterations or repairs in the said premises and due to the careless and

Complaint.

negligent manner in which the said alterations and repairs were made or completed, plaintiff, Mary Connick, was severely and permanently injured in and about the head, arms, legs and body.

3. The negligence of the defendant, John F. Craig, Inc., by its agents, servants or employees, consisted in this: 10

That it failed to employ competent workmen to make the alterations or repairs; that it permitted the said alterations and repairs to be done in a careless and unworkmanlike manner; that it neglected to inspect the said work and to see that the same was properly completed so that the tenants might occupy the said premises with safety to their life and limb; that it permitted defective and inferior material to be used in connection with the said alterations and repairs, and that it was otherwise negligent and careless in providing for the safe and proper completion of the work according to law. 20

4. By reason of the premises, plaintiff, Mary Connick, was severely and permanently injured in and about the head, arms, legs and body; suffered great pain and will suffer great pain in the future; has been and will be in the future greatly incapacitated in the normal use of her body and its members, and suffered the loss of her wearing apparel worn at that time. 30

THIRD COUNT.

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

1. He is the husband of Mary Connick, plaintiff herein named. 40

Complaint.

2. He repeats all the allegations contained in all of the paragraphs of the first count and makes the same a part hereof.

10 3. By reason of the premises, he was forced to expend large sums of money for medicine and medical attention in endeavoring to effect a cure of his wife's injuries; will also be obliged to expend large sums of money in the future; was forced to expend and will in the future expend large sums of money to hire someone to perform the usual domestic duties of his wife; and also suffered the loss of his wife's marital comfort and association.

FOURTH COUNT.

20 Plaintiff, Joseph Connick, repeats paragraph 1 of the Third Count.

2. ✓ He repeats all the paragraphs of the second count and makes the same a part hereof with the same force and effect.

30 3. ✓ By reason of the premises, he was forced to expend large sums of money for medicine and medical attention in endeavoring to effect a cure of his wife's injuries; will also be obliged to expend large sums of money in the future; was forced to expend and will in the future expend large sums of money to hire someone to perform the usual domestic duties of his wife, and also suffered the loss of his wife's marital comfort and association.

Plaintiff, Mary Connick, demands the sum of Twenty-five Thousand (25,000.00) Dollars as damages on the first and second counts.

40 Plaintiff, Joseph Connick, demands the sum of Ten Thousand (\$10,000.00) Dollars on the third and fourth counts.

McCARTHY & McTAGUE,
Attorneys for Plaintiffs.

Answer of John F. Craig, Inc.

(Filed April 9, 1928.)

The defendant, John F. Craig, Inc., a corporation, with its principal place of business in the County of Hudson and State of New Jersey, for answer says that:

10

FIRST DEFENSE TO FIRST COUNT.

The defendant, John F. Craig, Inc., does not answer the first count inasmuch as the same does not refer to it, but if for any reason this count should refer to this defendant, it denies each and every allegation contained therein.

FIRST DEFENSE TO SECOND COUNT.

1. It has no knowledge or information sufficient to form a belief as to Paragraph 1.

20

2. It denies Paragraph 2.

3. It denies Paragraph 3.

4. It denies Paragraph 4.

FIRST DEFENSE TO THIRD COUNT.

1. It has no knowledge or information sufficient to form a belief as to Paragraph 1.

30

2. It denies each and every allegation contained in all of the Paragraphs of the First Count of the complaint.

3. It denies Paragraph 3.

FIRST DEFENSE TO FOURTH COUNT.

1. It repeats its answer to Paragraph 1 of the Third Count.

40

Reply to John F. Craig, Inc.

2. It repeats its answers to all of the Paragraphs of the Second Count.

3. It denies Paragraph 3.

SECOND DEFENSE TO EACH COUNT.

10

The alleged accident set forth in the complaint was due to contributory negligence on the part of the plaintiff, Mary Connick, in that she failed to exercise reasonable care for her own safety.

THIRD DEFENSE TO EACH COUNT.

20

The alleged accident set forth in the complaint was due to contributory negligence on the part of the plaintiff, Mary Connick, in that she failed to look or listen or otherwise inform herself of the condition of which she complains.

COLLINS & CORBIN,
Attorneys of Defendant
John F. Craig, Inc.

Reply to John F. Craig, Inc.

(Filed April 9, 1928.)

30

Plaintiffs replying to answer filed by John F. Craig, Inc., a corporation herein, say that:

They deny each and every allegation set forth in the said defendant's answer, and in particular, deny each and every allegation set forth in the first defense to the first, second, third and fourth counts, and also the second and third defense to each count, and join issue with the said defendant thereon.

40

MCCARTHY & McTAGUE,
Attorneys for the Plaintiffs.

Answer of Edward Lehman, et al.

(Filed April 21, 1928.)

Defendants, Edward Lehman and Mary Lehman, answering the complaint herein, say:

ANSWER TO FIRST COUNT.

10

1. They admit that on or about December 3rd, 1926, plaintiff, Joseph Connick, was a tenant in the premises known as 166 Magnolia Avenue, Jersey City, New Jersey; other than as in this paragraph admitted, they deny Paragraph One.

2. They deny Paragraphs Two, Three and Four.

ANSWER TO SECOND COUNT.

1. They repeat their answer to Paragraph One of the First Count and make same part of their answer to this Count.

20

2. They deny Paragraph Two, except that they admit that on or about December 3rd, 1926, defendant, John F. Craig, Inc., by its agents, servants or employees, made certain alterations or repairs in the premises mentioned; other than as in this paragraph admitted, they deny Paragraph Two.

3. They admit Paragraph Three.

30

4. They deny Paragraph Four.

ANSWER TO THIRD COUNT.

1. They have no knowledge as to the matters set forth in Paragraph One, and therefore deny the same.

2. They repeat their answers to all the paragraphs of the First Count and make the same part of their answer to this Count.

40

Answer of Edward Lehman, et al.

3. They deny Paragraph Three.

ANSWER TO FOURTH COUNT.

10 1. They repeat their answer to Paragraph One of the Third Count, and their answers to all the paragraphs of the Second Count, and make the same part of their answer to this Count.

2. They deny Paragraph Three.

FOR SEPARATE AND DISTINCT DEFENSES TO SAID ACTION, DEFENDANTS EDWARD LEHMAN AND MARY LEHMAN SAY:

20 1. That neither of said plaintiffs suffered any injury nor sustained any loss by reason of any negligence upon the part of these defendants, either of them, their servants or agents.

2. That neither of said plaintiffs suffered the injury nor sustained the loss alleged.

30 3. That said plaintiff, Mary Connick, was guilty of contributory negligence as follows: that, having full knowledge of the work being done in said premises, and that repairs were being made therein, at her request and the request of her husband, Joseph Connick, she failed to take proper precautions for her own safety.

EDWARDS & SMITH,
Attorneys of Defendants
Edward Lehman and Mary Lehman.

Reply to Edward Lehman, et al.

(Filed April 17, 1928.)

Plaintiffs replying to the answer filed by Edward Lehman and Mary Lehman, say that:

They deny each and every allegation set forth in the said answer and particularly, deny all of the allegations set forth in paragraphs 1, 2 and 3 of the separate and distinct defenses, and join issue with the said defendants. 10

McCARTHY & McTAGUE,
Attorneys for Plaintiffs.

Filed Clerk's Office
April 17, 1928
Hudson County, N. J.

JOHN J. MCGOVERN, 20
Clerk.

30

40

Mary Connick, direct.
 COURT OF COMMON PLEAS,
 HUDSON COUNTY.

10		MARY CONNICK and JOSEPH CON- NICK, her husband, <i>Plaintiffs,</i>
	v.	
		EDWARD LEHMAN and MARY LEH- MAN, and JOHN F. CRAIG, <i>Defendants.</i>

Before—Hon. ROBERT V. KINKEAD, Judge, and a
 jury.
 Jersey City, N. J., May 27, 1929.

APPEARANCES:

FRANK McCARTHY, Esq., for the plaintiffs.
 COLLINS & CORBIN, Esqs. (By Mr. McINTYRE)
 for the defendant John F. Craig.

EDWARDS & SMITH, Esqs. (By Mr. DAWSON),
 for the defendants Edward and Mary
 Lehman.

30 MARY CONNICK, sworn.

Direct examination by Mr. McCarthy:

Q. You are the plaintiff in this action? A. Yes, sir.

Q. Where do you live? A. 35 Bartholdi Avenue, now.

Q. Where did you live? A. 166 Magnolia Avenue.

40 Q. As of December 3, 1926? A. Yes.

Q. Do you know of your own knowledge who

Mary Connick, direct.

owned that building in which you lived? A. Mr. Lehman.

Q. Is that Mr. Edward Lehman? A. Yes.

Q. Do you recall whether or not there was in your home as of December 3rd, 1926, or thereabouts, any people doing work or repairs? A. Yes. 10

Q. Do you know who that was that was making those repairs? A. Mr. Craig.

Q. What repairs were going on in your home about December 3rd, 1926? A. They started a new installment, to put a new heat in.

Q. Where was this heater being installed? A. Well, in the kitchen.

Q. Was there any occasion for the removing of any of the walls or ceiling or the floor of the room? A. No, they put the piping outside and the pipes that had run through from the dining room to the kitchen to this stove, that was the only thing that was upset. 20

Q. Where was that pipe, on the floor or the walls? A. On the floor.

Q. Where was that floor taken up with reference to the doorway leading from the kitchen to the dining room? A. Right as you go in, from the kitchen to the dining room, right near my gas stove. 30

Q. Right at the threshold of the door? A. Yes.

Q. When was this floor taken up? A. It was taken up about in December; it was only taken up the morning that they were running the pipes through.

Q. Is that the same day you were hurt? A. Yes.

Q. What time were the workmen finished? A. What time did they finish? They finished about twenty after eleven. 40

Q. What did they do after they had completed

Mary Connick, direct.

their work of installing these pipes? A. Oh, they went to fixing the other pipes that led up to the boiler.

Q. Did they do anything with reference to the flooring that they had taken up? A. No.

10 Q. Did they leave the floor open? A. After they had finished it, after they had connected the pipe up with the boiler, then they finished it that night.

Q. What did they do then? A. Well, they had to go into the other room.

The Court: Did they nail it up, counsel wants to know?

The Witness: They just nailed it.

Q. They replaced the boards? A. Yes.

20 Q. How long after it was done was it that you were hurt? A. The Friday after.

Q. What day was it that they finished this job? A. On a Tuesday.

Q. Now, tell us what happened to you with reference to the place at which the boards had been removed on Friday? A. I was getting lunch for my boy; he was going to school. I was getting lunch, and he says to me, "Mother, I have got to be there at one o'clock." I says, "Well, it is early yet; it is only twenty after eleven." So I says, "I will see the time in the dining room," and I just happened to make four or five steps, and I goes through.

30 Q. How far did you go through the floor? A. Well, past my ankle.

Q. What happened to you when your foot went through the floor? A. Well, I could not help myself any way.

40 Q. Did you remain standing or did you fall? A.

Mary Connick, direct.

No, I was caught, the way my ankle was caught between the pipe and the floor.

Q. What happened then while you were caught in that position; what did you do? A. I told the boy—

Mr. Dawson: I object.

10

Q. You cannot tell us what you told your son, tell us what you did yourself? A. I laid there. I says, "My leg is broke," and the boy run through the other—the dining room, and he says, "I will help you, Ma." I says, "My leg is broke," I says, "I cannot move." So he came through the other room and he helped me. I did not know what happened then after that, after they placed me on a chair.

20

Q. I show you a photograph, purporting to be the interior of certain rooms, and ask you if you can identify that floor? A. Yes.

Q. What rooms are they? A. This is my kitchen and this is my dining room.

Q. Calling your particular attention to the object represented at the right-hand side of the photograph, I ask you what is this object? A. That is the new heater.

Q. Is that the heater that was being installed in your home on approximately December 3rd, 1926? A. Yes.

30

Q. And I call your particular attention to a pipe connecting that heater and projecting towards the door, and I ask you what that is? A. It come through here, through here, and connected here (indicating).

Q. Now, I call your attention to a piece directly in front of the door in which there appears some boards, and ask you what that is?

40

Mary Connick, cross.

The Court: What is the effect of all this?

Mr. McCarthy: I am going to show that this was taken on the afternoon.

The Court: Won't you admit it now? It is putting the cart before the horse.

10 Mr. Dawson: It is a picture of the room, but Mr. Lehman says they were not down that way when he saw it. They were pushed the other way, and there was only one board down. That shows three down. With that exception it shows the room.

The Court: I suppose you can ask, Mr. McCarthy, whether that photograph portrays the condition of the flooring immediately after the accident took place.

20 Q. Does it, Mrs. Connick, show the condition of the floor immediately after the accident took place? A. Yes, I never touched it. That is just the way it was taken. I never touched it. I wasn't able.

Mr. McCarthy: Is there any objection if I offer it, or do you want to have me call the photographer?

30 *Cross examination by Mr. Dawson:*

Q. Who took the picture? A. A friend of my son's.

Q. On what day did he take it? A. The day it happened.

Q. Did you send for him? A. No, I did not send for him.

40 Q. Who sent for him? A. My boy. He happened—he was going out to the drug store for me and he met this friend, and he said that I had met with an accident. He said, "Where"? So he told him, he said, well—

Mary Connick, cross.

Q. That is what they told you. You don't know what he said, do you? A. No.

Q. Well, don't tell us anything that you do not know. Did you notice the floor after you— A. No, I did not.

Q. And you don't know whether there was one board or three boards or five boards loosened, do you? A. Well, see— 10

Q. Just a minute, just tell us what you know, won't you, please? A. Well, I was on a chair, and I had a cane.

Q. Did you notice how many boards were removed? A. Yes, I did, because I sat right on the chair near the hole.

Q. Then you did know? A. Yes.

Q. You said you did not. How many boards were loosened? A. Four. 20

Q. You say four were loosened? A. I said four.

Q. And you counted four at that time? A. Yes.

Q. And it was that way when you had the picture taken, was it? A. Yes.

Q. Did you see it after? A. No, I did not see it then when they took it.

Q. You were not there when they took it? A. No.

Q. Who told you it was taken that day? A. My boy. 30

Q. You had oilcloth on the floor? A. No; the workmen cut the oilcloth off to make that hole.

Q. Then the oilcloth was cut away where the hole was cut? A. Right past the hole, because the workmen cut it square.

Q. How big a piece did the workmen cut out? A. Quite a big piece.

Q. Did they put it back again, the oilcloth? A. No, because it was all tore, the way they tore into it. I did not put it back. 40

Mary Connick, direct.

Q. There was no oilcloth on this floor? A. No, sir.

The Court: Is there any objection to the photograph?

Mr. Dawson: I think it is competent from what she says.

Mr. McIntyre: No objection.

(Photograph received in evidence, and marked P-1.)

Direct examination by Mr. McCarthy (resumed):

Q. After you were hurt did you have any doctor or any one come to attend you? A. Yes, Dr. Fink.

Q. And when did Dr. Fink come to see you after this accident? A. He was called up and he came that Saturday afternoon.

Q. How many times did Dr. Fink visit you because of this accident? A. Well, there was a few times he visited me twice a day and then he come once a day.

Q. Did Dr. Fink send you a bill for his services? A. Yes, sir.

Q. And does that represent the number of calls that he made to you at the time of this injury?

A. Yes, but I made a few more that I did not mark down.

Q. Did the doctor do anything besides treat you at your home for the injury? A. Yes, he had X-rays taken of it.

Q. Where was that X-ray taken? A. In the Greenville Hospital.

Q. How long, Mrs. Connick, were you that you were not able to do the usual household duties that you performed? A. From the third of December up to March I was not able to do my own house-

Mary Connick, direct.

work. I could go around but not able to do my work.

Q. Was it necessary for you to employ any one to do that work? A. Yes, I had a woman.

Q. Whom did you employ? A. A woman by the name of Mrs. O'Neill. 10

Q. Did you have to pay her for that? A. Yes.

Q. How many days a week would she come? A. When I was first taken she come three times a week, and then, of course, after I was getting stronger with the foot only once a week she come.

Q. In all how many days did Mrs. O'Neill come to help you during the time you were injured? A. Well, she come of a Monday and Wednesday and Friday. Now, in all, from December 3rd, to March, the following year. 20

Q. When did she come? A. Every Tuesday after I was hurt up to September, in 1928.

Q. She still continued to come? A. She did.

Q. How many times did she visit you, would you say, between December 3rd, 1926, and March of 1927? A. Well, she come three times a week first off, and then twice, and then she dwindled down to once a week.

Q. Can't you approximate for us the number of times she called in all for that period of time? A. Well, I have it down, but the— 30

Q. During the month of December, 1926, how many times did she come during the month of December? A. She come three times a week to me.

Q. During the month of January, 1927, how many times did she come? A. She come three weeks in January and December, and then in February she came twice.

Q. How many times did she visit you each week during January of 1927? A. Three times a week. 40

Mary Connick, direct.

Q. In February of 1927, how many times a week did Mrs. O'Neill visit you? A. Twice a week.

Q. And in March, how far into March did she come? A. Up to around the 17th.

10 Q. How many times do you think she came during March? A. Once a week, because I was getting—

Q. How much did you have to pay Mrs. O'Neill because of this work that she did for you? A. Four dollars a day.

Q. By the way, which leg was it, Mrs. Connick, was it that went into this— A. My left leg.

Q. What was the condition of your left leg and ankle prior to December 3rd, 1926?

20 The Court: Before the accident how was your limb?

The Witness: Fine. I was in the best of health.

Q. How is it now? A. Well, at times I feel it. Before it rains, or any storms I feel it, and I cannot walk very far without I get so tired I have got to rest.

30 Q. Is the ankle now in the same condition it was in in size as of December 3rd, 1926? A. No, it swells.

Q. Would you mind walking down here and walking before the jury? A. I have got a brace on it now.

(Witness exhibits ankle to the jury.)

Q. Will you show the jury which leg it was? A. The left (indicating).

40 Q. And you say the ankle of that leg is different now than it was in December of 1926? A. Yes.

Q. At the time of the accident did you sustain

Mary Connick, cross.

any other injury than the injury to your ankle— were you hurt in any other place besides your ankle? A. The ankle, my hip and knee. The hip—

Q. How is that getting along? A. Very nicely, but I carry a mark on my leg where I fell and the door hit me. 10

Q. When this accident happened in December, 1926, were you able to walk after the accident? A. Well, on a cane and a chair.

Q. How long after were you required to walk with the assistance of a cane? A. Up until around March of 1927.

Q. How long was it that you were required to sit in your home because of this injury? A. From December until March; then after that I got up. 20

Q. When, Mrs. Connick, did Mr. Lehman first visit your house to see this flooring after the accident? A. The day after.

Q. Was he present at any time during the day or night of the same day of the accident? A. No.

Q. What time was it the next day that he came? A. It was around nine o'clock when he came.

Q. What day was it that this picture was taken? A. The same day. 30

Cross examination by Mr. Dawson:

Q. You say you had always been in the best of health prior to December 3rd? A. Once in a while I got indigestion, but that was the only trouble.

Q. Once in a while you had some trouble with your feet? A. No, sir.

Q. You never had a doctor to treat you for anything but indigestion? A. No, sir, that is the only thing. 40

Q. That is the only thing you ever had the matter with you? A. Yes.

Mary Connick, cross.

Q. Weren't you able to be out and around in the latter part of December—weren't you out shopping? A. I tried to get down, but I could not get any further than the stoop, and my son—he had to call my husband, and the both of them helped me upstairs, and then I was in until March.

10 Q. But you did get out—during December you were out? A. I tried to get out, yes.

Q. Who was Mrs. O'Neill, that you speak of? A. A lady that done my work.

Q. Was she a relative of yours? A. No.

Q. Had she ever done work for you before? A. When my children came into the world.

Q. You had known her for a long time? A. Yes.

20 Q. And when did she go to see you after the accident? A. When I sent for her the following Tuesday.

Q. Then you say that she came three times a week for quite some time? A. Yes.

Q. And made the arrangement that you pay her three and a half or four dollars? A. I asked her what she charged. She says, "Well, I charge from three and a half to four dollars," but she done a little bit more than what she should have, and that is the reason I gave her the four dollars.

30 Q. She did not ask for four dollars? A. Yes, she did, but there was times she said, "I will go home a little earlier on account of my children."

Q. Have you paid her? A. Yes.

Q. How often did you pay her? A. I paid her every week.

Q. Every week she came you paid her? A. Yes.

Q. Do you know how much you paid her altogether? A. Of course, I could easily if I counted it up.

40 Q. I say, do you know the total amount? A.

Mary Connick, cross.

Yes. I gave her twelve dollars a week when she came three times a week to me. That was in December and January. Then in February—

Q. You told us that, but do you know how much you paid her altogether? A. Well, I could count it up. 10

Q. Well, you do or you do not? A. I had it down, of course. I have been nervous since that time.

Q. On this day that you fell you say the workmen had been working there that morning? A. Yes.

Q. How many workmen had been there, Mrs. Connick? A. Two.

Q. Do you know who they were? A. I do not know them. 20

Q. You do not know their names? A. I do not know their names, but I know they work for the Craig people.

Q. What did you see them do? A. He said to me that he had to lay this pipe. I said, "Will you have to rip here?" He said, "I have got to rip right through here." I did not see him ripping the floor, because I was doing my work, but I knew—he said to me, "That pipe has got to lead through here." Of course, I went on doing my work, and I did not know how he put it there or anything, and then it was the following Friday that I fell; that is all I know about it. 30

Q. Did he tell you that he was going to rip and tear the oilcloth up and destroy it? A. He told me, he said—"We will have to destroy here, Mrs. Connick." I said, "Well, if you have got to do it you have got to do it."

Q. He told you he was going to destroy it? A. He said he had to cut it, the oilcloth. 40

Mary Connick, cross.

Q. Did you suggest to him that he might just lift it up and cut the board? A. No, I did nothing—when he told me he had to cut it I let him go ahead.

Q. He cut it so that you could not put it back; it was all cut to pieces? A. Yes.

10 Q. Did you say anything to him about that? A. No.

Q. That was all right, was it? A. Yes.

Q. And no oilcloth was put back, was it? A. No, only different pieces I would get around the house I would put it across it.

Q. Then it was covered? A. Not all the time.

Q. What do you mean, after you put the oilcloth down you did not take it up again that day?

A. No.

20 Q. Then it was covered? A. The piece of oilcloth that came out of there I did not use again, but I took a piece of my other covering, and then, of course, when the cleaning was done I would lift it back, but there was none on the day I fell.

Q. Why did you take it off the day you fell? A. I was going to clean.

Q. You took it off to clean? A. Yes.

Q. What time did you say that was? A. That was twenty minutes after eleven, I fell.

30 Q. You had taken it off that morning? A. Yes, because I started my work early. It was around eight or nine o'clock I started to do my work, and then of course, I took the covering from the other part of the kitchen and moved it over, and I was going to hang my clothes outside on the line.

40 Q. Did you send word to Mr. Lehman that something had happened? A. Well, his daughter had come in with receipts of my rent, and I says, "I cannot go there—" I says, "I cannot go quick that way." She says, "What happened, Mrs. Connick?"

Mary Connick, cross.

I says, "I fell this morning." "Oh, where?" So I showed her the hole where I fell. She says, "My God, you could have been killed. I will telephone to my father and he will fix it up."

Q. How was it going to kill you, do you think, Mrs. Connick? A. She said that, "You could have been killed." 10

Q. The board went down about three inches, didn't it? A. The three boards fell.

Q. I know, but it went down about three inches, didn't it? A. The board went down and slipped, and my foot was caught there.

Q. And your foot could only go down about three inches, couldn't it? A. What say?

Q. Your foot could only go down about three inches? A. Well, it went down in the space, because I was caught across here from where they set it. 20

Q. And the board stayed right there, didn't it, after your foot was taken out? A. Well, they helped me out.

Q. Only one end of the board was pushed out? A. No, it went right down; the three boards did.

Q. The whole of the three boards went down? A. Yes, they separated. 30

Q. Which way were you walking, towards the door? A. Toward the dining room.

Q. What made all four boards go down? A. I suppose the weight of me.

Q. Your foot could not touch more than one board at a time? A. My foot went between. I will show you if you will let me see the picture, please.

Q. Yes, just show us. There are five boards out there. A. Here, my foot went in between these two, and I went down, and I was caught between the pipe and here (indicating). 40

Mary Connick, cross.

Q. Yes, but what took all five boards down? A. There was nothing to hold it here, because they set it right across there.

Q. Which end went down? A. Here.

Q. The end towards the— A. Dining room.

10 Q. That went down and let the other boards down? A. Yes, just because there was nothing to hold it here at all, because they set them right across that way, and there was nothing to hold it.

Q. That does not seem to have the piece that was nailed in. Do you know what they did with that? A. I don't know. The only thing I know Mr. Lehman came in Saturday night after the other workmen came in.

20 Q. Won't you answer that, please? When this picture was taken—this was taken the same day? A. Yes.

Q. Mr. Lehman had not seen it by that time? A. No.

Q. Where is that two by four; you say, the piece that was nailed in, that does not show at all. A. The piece that was nailed in?

Q. Yes. A. Here, it is here (indicating) and then there was a piece on this side here.

30 Q. There is a piece in there, a two by four? A. A piece about that thick and that thick (illustrating).

Q. Where was that nailed? A. Right in here, and the other piece was put over here.

Q. That was what came loose? A. There was nothing there at all. He done that after the accident. He nailed—

Q. We are not talking about that. I am trying to find out what caused you to fall? A. Right here.

40 Q. What happened there? A. My foot went through here and separated those.

Mary Connick, cross.

Q. It was not that way when you walked over it, was it? A. When I fell through?

Q. No, when you saw it. You said the oilcloth was off, and there was a place there where some boards had been nailed. You say you saw them nail the boards in? A. No, I did not say that.

10

Q. What did you say about nailing them in? A. After—

Q. How did you find out they were nailed in? A. Because my son told me the boards were nailed in after. He says to see that this is fixed so nobody else will be hurted. There was nothing there to hold it at first, only just here (indicating).

Q. What do you mean by "only just here"? Up towards the door? A. You see, it was cut straight, and then, of course, the small little piece went down with it.

20

Q. You know that, do you? A. I saw it when I sat on the dining room chair.

Q. You say there was a piece loose and let it down? A. Yes, because it was not fixed the next day.

Q. That was still that way the next day? A. Yes.

Cross examination by Mr. McIntyre:

30

Q. What day of the week was it the accident happened? A. December 3rd.

Q. What day? A. On a Friday.

Q. When had the boards been nailed on, what day of the week? A. On a Tuesday.

Q. How many were there in your household; how big is your family? A. I have got three living.

Q. And yourself and your husband? A. Yes.

Q. That is five? A. Yes.

40

Mary Connick, cross.

Q. And this floor was, or the part of the floor where you fell, was between the kitchen and the dining room? A. Yes.

10 Q. And you folks had passed over that during Tuesday and Wednesday and Thursday, and on Friday, around noon, the accident happened? A. Yes, sir.

Q. May I ask you about how heavy you were about that time? A. I weighed two hundred and twenty pounds.

Q. Did the boards break as you fell on them? A. Yes.

Q. They broke? A. Well, they separated like.

Q. They broke, did they? A. Yes.

20 Q. What day did the men leave? A. They left on a Tuesday.

Q. How many men were working there, do you remember? A. Two.

Q. I suppose they walked up and down over this place? A. They told me everything was in good condition.

30 Q. Did you know Mr. Cregan, that is, this gentleman sitting down here—stand up, Mr. Cregan, please. Do you remember his working in your home? A. Yes.

Q. He is the man who put the boards down, isn't he, that had been removed? A. Yes, now, I remember.

Q. You spoke to him before he left, didn't you? A. I asked him if everything was all right.

Q. And you say he fixed the boards and stamped on them; they were all right then? A. Well, I was doing my work, but I knew he fixed up the hole.

40 Q. And he went so far as to walk on them and stamp on them himself? A. Yes he did.

Q. And you wanted to be sure they were safe on Tuesday? A. Yes.

Aloysius Connick, direct.

Q. You spoke to Mr. Cregan at that time? A. Yes, I asked him if everything was O. K., to please light the furnace on account of being a new one.

Q. Did he light the furnace? A. Yes, he said everything was in good condition.

Q. Even including the floor, he fixed that? A. Yes, sir. 10

Q. And you had used that floor Tuesday, Wednesday and Thursday and even Friday up to noon, five of your family walked over it continuously? A. Yes.

Q. And you have suffered from varicose veins? A. No.

Q. You never had varicose veins at all? A. No, I did not have nothing until I fell. 20

Cross examination by Mr. Dawson:

Q. How long had you been living in that apartment? A. I was there from May, 1926.

Q. There had never been any other work on the floors there at that time; were the floors taken up for any other occasion? A. Yes, when he was fixing the pipes for the bathroom.

Q. In this same place? A. No.

Q. They had never been touched there before, had they? A. No. 30

ALOYSIUS CONNICK, sworn.

Direct examination by Mr. McCarthy:

Q. You are a son of Mrs. Connick, the plaintiff? A. Yes.

Q. Do you remember December 3rd, 1926? A. Yes.

Q. Were you at home about 11:30 that morning? A. Yes. 40

Aloysius Connick, direct.

Q. Do you remember anything happening or an accident occurring to your mother on that morning? A. Yes.

10 Q. Tell us just what you know from having seen it, and what you yourself— A. I was going to school at the time, and about—for the one o'clock session I was going, and my mother was getting the dinner for me. So at 11:20 she was going inside and saw the time, and then she fell through. She was walking inside and she fell through.

Q. Where were you at the time she fell through the floor? A. I was sitting at the table.

Q. In what room? A. In the kitchen.

Q. Could you see your mother at the time that her foot went through the floor? A. I could.

20 Q. What happened to your mother when her foot went through the floor? A. Well, when her foot went through the floor—I called my father and he came and helped me. My mother was unconscious—was not unconscious at the time till we put her on the chair, and then she became unconscious.

Q. At the time that your mother's foot went through the floor did she fall or did she remain in an upright position? A. She fell.

30 Q. Which way, backwards? A. Frontwards.

Q. On her face? A. Yes.

Q. What did you do when you saw your mother lying on her face with her foot through the floor? A. I tried to help her up, but I could not, and so I went to the adjoining rooms, and I came in the dining room and I hollered for my dad. He was going on night work at the time and he just come home in the morning. He was home from work.

40 Q. What did you and your dad do when your dad came to the scene? A. With the assistance of

Joseph G. Connick, direct.

my dad I helped my mother up and put her on the chair. Then I got the smelling salts.

Q. Did you go to school then? A. Yes.

Q. Was Mr. Lehman or any of Mr. Lehman's family there in your house between the time of the accident and the time you went to school? A. Yes. 10

Q. Who? A. Regina.

Q. Were you there when the photograph was taken? A. No.

Mr. Dawson: No questions.

Cross examination by Mr. McIntyre:

Q. You did not get a doctor, did you? A. No.

Q. When did your mother get a doctor? A. My mother called up for him.

Q. The next day, wasn't it? A. Well, no, the same day. 20

Mr. McIntyre: That is all.

Mr. McCarthy: That is all.

JOSEPH G. CONNICK, sworn.

Direct examination by Mr. McCarthy:

Q. You are the husband of Mary Connick here? 30
A. Yes.

Q. And do you recall December 3, 1926? A. Yes.

Q. Where were you living at that time? A. 166 Magnolia Avenue.

Q. Were you home that morning about 11:30?
A. I drive a truck nights, and I went to bed and was woke up by my son.

Q. What time was that? A. I could not exactly tell the time, but when I woke up it must have been— 40

Joseph G. Connick, direct.

Q. You say your son woke you up? A. Yes.

Q. And when your son woke you up did you get up out of bed? A. I certainly did.

10 Q. And where did you go? A. Right to the adjoining rooms, and came around through the dining room as you call it.

Q. When you got to the entrance between the dining room and the kitchen what did you find? A. My wife was lying there with my son.

Q. What was the position of your wife at the time you got to the scene? A. She had her leg down in the hole. This man says three inches. It was about five foot, I should judge.

20 Q. You saw her? A. Laying back that way; my son pulling her out by putting something on her leg.

Q. Who took her leg out of the hole? A. I guess it must have been Aloysius, she was just coming out as I got there.

Q. Was Mrs. Connick standing or lying, or what position was she in at the time you first reached the scene of the accident? A. She was lying on her side, down, just pulling up to get on the chair.

30 Q. What did you do when you reached the scene of the accident? A. I helped my son to sit her on the chair.

Q. And was Mrs. Connick—could you judge from the expression on her face, and so forth, whether she was suffering? A. I should say she was suffering.

40 Q. And how long after this accident was it that Mrs. Connick was unable to walk without the aid of a cane? A. I could not say how long. The next minute she would get up or an hour after she could not. After she got out of bed she had to use the cane all along all the time.

Joseph G. Connick, cross.

The Court: Does she use it now?

The Witness: No, your Honor.

The Court: When did she give it up?

The Witness: Well, I should say about a month or so ago.

Q. Do you know whether your wife had a doctor at the time this accident occurred? A. I think she sent for Dr. Fink.

10

Q. Did Dr. Fink respond to her call? A. Well, I go out to work, and I do not come home for two or three days sometimes, so I—

Q. I mean, do you know whether Dr. Fink treated her? A. Certainly.

Q. And do you know how many times Dr. Fink came to visit her? A. No, I could not tell you.

20

Q. Did Dr. Fink ever submit a bill to you for the services he rendered? A. No, sir; my wife takes care of all that stuff. I do not bother with that stuff at all.

The Court: Do you work on the railroad?

The Witness: No, your Honor, the market.

Cross examination by Mr. Dawson:

Q. You say the lawyer said her foot went down for five inches, and you think it went down five feet? A. I should think so, looking at the place.

30

Q. What made you think it went down for five feet? A. By living in the house and looking at it every day.

Q. Five feet down the hole? A. I should say about two feet.

Q. Did you hear Mrs. Connick say that her foot went in up to the ankle? A. That is what I am saying, five feet.

40

Joseph G. Connick, cross.

Q. That is what she said. Do you say up to her ankle is five feet? A. Well, it is three feet.

Q. From the floor up to her ankle is three feet?

A. What would you have it?

10 Q. Where is the ankle, where is your ankle? A. Right here (indicating).

Q. No, that is the knee. A. No, there is your ankle, here (indicating); that is about a foot and a half.

Q. There is your ankle down there (indicating), that joint; that is your ankle. Well, now, do you say it was five feet now? A. Well, it looked to me before he closed it up.

20 Q. What is that? A. It looked to me like it was five feet when I looked in it. The hole that she fell into.

The Court: You mean five feet long; five feet wide?

The Witness: No, your Honor, five feet wide and two feet down and five feet wide.

Q. Where did that hole open up to, Mr. Connick?

A. Why, going into the dining room into the kitchen.

30 Q. Where did it go down to, this four or five feet? A. I don't know, maybe it went down to the cellar.

Q. Did you look? A. I looked before they closed it.

Q. And she was down the hole five feet when you went to her aid, is that it? A. No, no, no.

Mr. McCarthy: I think the testimony—

The Court: The objection is sustained.

40 Q. You did not pay much attention to it, did you? A. No, I did not.

Joseph G. Connick, cross.

Cross examination by Mr. McIntyre:

Q. When did the accident happen, Mr. Connick?

A. To tell you the truth I don't know when it happened.

Q. It has been testified to that it happened on December 3rd, 1926, and you say that Mrs. Connick has been carrying a cane until a month ago?

10

A. Well, I don't know. She was in the house there; she hops around yet with it.

Q. Did you state she used a cane from the time of the accident up to about one month ago, is that right? A. Well, in and out.

Q. Do you want the Court and jury here to understand that from the time of this accident which was in December, 1926, up until one month ago Mrs. Connick had to use a cane—yes or no? A. Well, no, not up to the present time.

20

Q. Well, you told us, as I understand it, in your direct testimony, up till a month ago, didn't you? A. On and off, yes.

Q. Well, did she use it constantly since the time of the accident, or simply on and off? A. On and off.

Q. She in fact didn't have to wear a cane since the time of the accident up till a month ago? A. Oh, yes, after the accident she had to use it.

30

Q. And from the accident up till about a month ago she used a cane? A. On and off, I say. Right after the accident she used it all the time. She had to use it.

Q. For how long? A. Well, I should say for about six months. I never kept tabs. Very seldom I am in the house.

Q. I beg pardon. A. I say I don't keep tabs on things like that.

40

Dr. Charles H. Fink, direct.

Q. Well, she is your wife. A. When I go away I don't come home for a week or so maybe.

Q. Sometimes you would not be home for a week? A. No.

10 Q. And every time you came home she was using a cane? A. I go out on Sunday nights, and won't be home maybe until Saturday—

Q. When you did come home up till about a month ago, she used a cane all the time? A. She used it around the house, yes.

Q. Well, when she goes out shopping she does not use it? A. Very seldom she goes shopping.

DR. CHARLES H. FINK, sworn.

20

Direct examination by Mr. McCarthy:

Q. You are a practising physician and surgeon of the State of New Jersey? A. Yes.

Q. And how long have you been such, Doctor? A. Twenty-five years.

Q. Where are your offices located? A. 317 York Street, Jersey City.

30 Q. Prior to entering the practice of medicine here in Jersey City, would you relate just sort of generally your experience in medicine? A. In what way?

Q. What college did you graduate? A. I graduated from Bellevue Hospital Medical College.

Q. And what hospitals have you been affiliated with? A. I was identified with the City, and also with Christ Hospital.

Q. You are practising for twenty-five years? A. Yes.

40

Mr. Dawson: I do not think we will have any dispute about the doctor's qualifications.

Dr. Charles H. Fink, direct.

Q. Did you on or about December 3rd, 1926, treat Mrs. Connick of 166 Magnolia Avenue? A. Yes.

Q. Do you recall, Doctor, what you treated her for? A. Yes.

Q. Would you mind telling us? A. Contusions of the left hip, knee and ankle. 10

Q. What was the nature of the contusions, were they slight, or— A. Well, I should call them bad contusions.

Q. Calling your attention, Doctor, particularly to the ankle, what was the condition of the ankle? A. Well, it was contused or sprained.

Q. Was that a slight or a bad sprain? A. A bad sprain.

Q. Doctor, how many times did you visit Mrs. Connick either at her home or treat her at your office because of these injuries? A. I believe twenty-six times. 20

Q. Do you recall between what dates these treatments were? A. I believe between December 4th, 1926, and February 19, 1927.

Q. And Doctor, did you obtain for your assistance and diagnosis or treatment any assistance other than— A. I had an X-ray taken.

Q. Do you know where it was taken? A. I do not just remember. 30

Q. And the X-ray was negative? A. Negative.

Q. What did you charge Mrs. Connick? A. Three dollars for a call.

Q. Per week, and it is a total of— A. Twenty-six calls.

Q. Did you consider that a reasonable charge? A. Yes.

Q. Have you examined Mrs. Connick recently? A. No. 40

Dr. Charles H. Fink, cross.

Mr. McCarthy: Mrs. Connick, please would you walk up there to Dr. Fink.

(Witness walks up to Dr. Fink.)

Mr. Dawson: I object to an examination like this.

10 Mr. McCarthy: I am going to ask the Doctor to indicate if he will for me the ankle which he says had a severe sprain.

Mr. Dawson: He has indicated that.

Q. Doctor, were you the family physician of the Connick's? A. Yes.

Q. How long have you been such? A. Oh, I guess I am ever since I have started to practice medicine.

20 Q. Did you have any occasion at any time during your practice in Jersey City to treat Mrs. Connick for any trouble of the left leg? A. No, sir.

Q. Or left knee? A. No, sir.

Q. Or hip? A. No, sir.

Q. And did you ever at any time have any occasion to treat her for varicocele or anything of that nature? A. No, sir.

Q. Or for any injury to the ankle? A. No, sir.

Cross examination by Mr. Dawson:

30 Q. Doctor, what had you treated Mrs. Connick for during this period of twenty years? A. I beg your pardon?

Q. What— A. I do not remember.

Q. You do not ever remember treating her for anything? A. Oh, yes, I remember, but I was the family physician going in and out for twenty years, and I do not remember what I treated her for.

40 Q. You say you saw the X-ray picture? A. I am not sure whether I did or not. I believe I did. I think they were negative.

Joseph F. Connick, direct.

Q. But you are positive they were negative? A. Yes, they were negative.

Q. That meant there was no fracture? A. Absolutely not.

Mr. Dawson: That is all.

10

The Court: Over how long a period, Doctor, had your course of treatment taken?

A. From December 4th, 1926, to February 19th, 1927.

Cross examination by Mr. McIntyre:

Q. There were no bones at all broken, were there, Doctor? A. No.

Mr. Dawson: That is all.

Mr. McIntyre: That is all.

20

JOSEPH F. CONNICK, sworn.

Direct examination by Mr. McCarthy:

Q. Joseph, you are a son of Mrs. Connick, the plaintiff in this action? A. I am.

Q. Do you remember December 3rd, 1926? A. I do, yes.

Q. Is that the day on which your mother was injured? A. Yes, I was telephoned for. 30

Q. You are the boy that had the picture taken? A. Yes.

Q. What time of the day was that? A. Shortly after the accident my brother called me, and then Dr. Fink put on a prescription, and I was going around to the drug store and I met this friend of mine. I used to travel around with him. He is in the photographing business. So I told him that my mother met with an accident— 40

Mr. Dawson: I object to the conversation.

Joseph F. Connick, direct.

Q. Never mind about the taking of the photograph. What I want to get at is this: This photograph which she showed us here, is that an exact reproduction?

10 The Court: It is offered in evidence without any objection.

Q. What was the condition of your mother after the accident, do you know, Joseph? A. Yes, she was laying for some time. The night after the accident I was called up by my sister, and when I looked at the spread on the bed it was covered with blood.

Q. When was that, Joseph? A. Well, I would say the night after.

20 Q. That was about December 4th or 5th? A. Yes, that it started to bleed.

Q. How long was it that your mother had to use a cane to assist her in walking? A. About a month or two after.

Mr. Dawson: No cross examination.

Mr. McIntyre: No cross examination.

Mr. McCarthy: We rest.

30

Mr. Dawson: If your Honor pleases, since the plaintiff has rested I move for a nonsuit as to the defendant Lehman. The defendant Lehman was under no obligation to repair the property, and the work that he had done was apparently done by some workmen who were plumbers. Mrs. Connick said the Craig men did the work there. There is nothing to show that Lehman did anything with the floor, and there was no obligation certainly on his part to do any-

40

Motion for Nonsuit.

thing with the floor. It does not appear that he ever touched the floor.

The Court: There is this in the case, that Mr. Lehman was the owner of the house, and it was undoubtedly his act to have this heating plant installed. Now, whether or not the testimony will develop that John F. Craig, Incorporated, was an independent contractor, or whether the testimony will not develop that, remains to be seen. I feel at this time, Mr. Dawson, that there is at least cast upon the defendant Lehman the burden of going forward with the evidence. 10

Mr. Dawson: Exception.

Mr. McIntyre: I move respectfully now for a nonsuit as to the defendant John F. Craig, Incorporated, upon the ground, first, that there is no negligence proven on the part of that defendant; secondly, the plaintiff is guilty of contributory negligence; third, there is no evidence of any negligence upon the part of the defendant Craig which was the proximate cause of the accident, and on these grounds I respectfully submit that this defendant is entitled to a judgment of nonsuit. 20 30

The Court: The motion is denied.

Mr. McIntyre: Exception.

Mr. McCarthy: I would like to make a motion, if I may, with the consent of counsel. It was testified to by Mr. Connick, that he never disposed of any money or anything of that kind, for the payment of doctors, that it was all paid to his wife, and that she spent it. The complaint filed here is 40

William J. Arlitz, direct.

10 for him to recover the money necessarily expended because of the injuries. Now, if it is agreeable to counsel I ask the direction of the Court that he be eliminated from the matter entirely, and allow her to recover for the necessary expenses.

The Court: Well, of course, it was his money. He is one of those husbands that turn over his pay to his wife and let the wife run the house.

Mr. McCarthy: If that is the Court's attitude, I do not care to press this matter.

20 The Court: He is entitled under the law, if this case goes to the jury, to recover whatever the jury thinks, in the event that they award a verdict to the plaintiff's wife, he is entitled to.

DEFENDANT'S TESTIMONY.

WILLIAM J. ARLITZ, sworn.

Direct examination by Mr. Dawson.

Q. You are a practicing—

30 Mr. McCarthy: I will admit the qualifications of the doctor.

Q. You are a practicing physician, and have been so for how long? A. Thirty-eight years.

Q. And your office is in Hoboken? A. Yes.

Q. Did you make an examination of Mrs. Connick, the plaintiff in this case? A. I examined her on the 22nd of December, 1926.

40 Q. Were you told that she had received some injury to her ankle, or some part of her body?

William J. Arlitz, cross.

A. Yes, I found at that time that Mrs. Connick had sustained a spraining of her left ankle; the ankle was done up in adhesive strips. It was somewhat enlarged, somewhat swollen. My belief was at that time that she had sustained a spraining of her external lateral ligament, and that she would be disabled for about four weeks from that time.

10

The Court: What date was that, Doctor?

Q. What date was that, Doctor? A. It was on the 22nd of December, 1926. That was the only time I saw her.

Q. And you figured there would be some lameness there for a period of about four to six weeks? A. In the ordinary sprain to the ankle the disability runs from two to eight weeks.

20

Q. Was there anything about the ankle that you examined to indicate that there was anything out of the ordinary? A. I assumed it was just a sprained ankle.

Q. Well, you assumed that from your examination, didn't you? A. Yes.

Mr. McIntyre: No questions.

Cross examination by Mr. McCarthy:

30

Q. There is nothing, Doctor, that leads you to hold to a certainty any such thing as that, though, is there? A. Well, I said I saw her on the 22nd of December, some few days after her accident, and any conclusion that I would arrive at is based upon my experience in that line of work.

Q. But it does not follow— A. Do you mean that I am absolutely accurate—no, it does not.

40

Nicholas F. Feury, direct.

NICHOLAS F. FEURY, sworn.

Direct examination by Mr. McIntyre:

Q. How long have you been practicing as a physician? A. Thirty-two years.

10 Q. Did you examine Mrs. Connick? A. I did.

Q. Do you recall about the time you made the examination? A. The examination was made on the 16th day of June, 1927, and it was approximately six months after the accident.

20 Q. What was your diagnosis? A. I examined her left ankle, which she claimed she had injured, and it was my opinion that she had had a sprain of that ankle. It was based a great deal upon her say-so. She had full motion at the time I examined her. There was a slight puffiness around that ankle. I would expect to find that in a heavy person, such as she is. My opinion as to the disability was about four weeks.

Q. There were no bones broken at all? A. I found no evidence of it.

30 Q. And when you say sprain, tell the court and jury what you mean by sprain? A. A sprained ankle is generally conceded to be where there is a tearing of the ligaments. This is what we call the external lateral ligament, or the ligament on the outside of the ankle. This definition of sprain is in contradistinction to a strain. A strain simply means it has been put on an extra stretch, but when we have a sprain, we have some destruction of tissue there, a tear of the ligaments which causes more or less hemorrhage, and therefore we get what we call ecchymosis, or discoloration of it.

40 Q. That is black and blue marks? A. Black and blue marks, yes.

Q. There were no black and blue marks present at that time? A. No.

Pearl Bates, direct.

Q. That had disappeared? A. Yes.

Q. Her disability as far as you could determine it was about four weeks? A. That was my opinion, about four weeks.

Q. A temporary disability? A. Yes.

Q. There is no permanent disability? A. No, I think not. 10

Cross examination by Mr. McCarthy:

Q. There had been a tearing of tissue? A. From her description she had a sprain, because she had ecchymosis, which shows that there must have been some tearing of the underlying tissue.

Q. And your examination was made approximately six months after the accident? A. Yes.

Q. And there still remained a puffiness? A. A puffiness. Those sprains leave a puffiness around the ankle. 20

MRS. PEARL BATES, sworn.

Direct examination by Mr. Dawson:

Q. Where did you live in December, 1926? A. 164 Magnolia Avenue.

Q. Did you know Mrs. Connick? A. Not personally. I knew her. 30

Q. You knew her by sight? A. By sight.

Q. Did you see her around and about the place about December 3rd, after the time she was injured? A. Around the holidays.

Q. Did you see her when she went out? A. Yes.

Q. Was she walking with a cane? A. I never saw her walking with a cane, at no time.

Q. How many times did you observe her within the next month or so after that? A. I could not say how many times. 40

Q. Frequently? A. Yes, because I was out with my child at the time. I used to let him go out.

Pearl Bates, cross.

He never went out without me, and that is why I saw her so much, as many times as I did, but I could not say how many.

Q. That was out on the street? A. Yes.

Cross examination by Mr. McCarthy:

10

Q. Where did you live, did you say, at 164? A. Yes.

Q. Magnolia? A. Yes.

Q. And I understood you to say you were out with your child at the time? A. Oh, taking him out for air.

Q. And where had you seen Mrs. Connick? A. Going to and from her house.

20

Q. Can you fix a definite time for us? A. No, I cannot.

Q. And are you here under subpoena? A. No.

Q. Who asked you to come? A. Mr. Lehman.

Q. And did you discuss this matter with him?

A. At the time?

Q. Now? A. No, not just recently.

Q. When did you discuss it with him? A. You mean at the time? Well, after it happened. I remember at the time it happened, and after they told me that they were being sued.

30

Q. And you volunteered to come? A. Yes, I volunteered.

Q. And it was cold weather, of course, during the time that this accident hapened? A. Not so cold, no, because we did not have cold weather until after Christmas that year.

Q. How many times have you come to court voluntarily? A. How many times what?

Q. Have you come to court voluntarily? A. This is the second time.

40

Mr. McCarthy: That is all.

(Adjourned to May 28, 1929, at 10 A. M.)

Mary Curry, direct.

Jersey City, N. J., May 28, 1929, trial of the case resumed pursuant to adjournment.

MRS. MARY CURRY, sworn.

Direct examination by Mr. Dawson:

Q. Where do you live? A. 189 Bantelda Street, Belvidere. 10

Q. In December, 1926, did you work at the Lehman house? A. Yes, sir.

Q. What did you do? A. I cleaned her stairs Friday, every week.

Q. And did you know Mrs. Connick at the time? A. I knew her when she was living in Mrs. Lehman's house.

Q. Did you see her after the accident? A. Well, that morning she came in and told her mother that Mrs. Connick happened with an accident, and Mrs. Lehman says to me, "Mrs. Curry—" 20

Mr. McCarthy: I object.

The Court: She sent you up to Mrs. Connick's house?

The Witness: She sent me in to do the work.

Q. She sent you in to do something. Then what did you do? A. I went up to Mrs. Connick's and I knocked at her door. It was partly opened, I think. When I went in, I said, "Mrs. Connick, Mrs. Lehman sent me in. She is very sorry that it happened, the accident happened." "Oh, thanks be to God," she said, "that I escaped," and she says, "I am not blaming the Lehman's, I am only blaming the carelessness of the workmen." Well, Mrs. Lehman,— "very sorry," she says, "Tell her I am not blaming her or any of them. I am only blaming the carelessness of the workmen." 30 40

Mary Virginia Lehman, direct.

Mr. McIntyre: I move to strike that out on the ground that it was not made in the presence of the defendant Craig.

The Court: I do not know that it is of much value, anyhow.

10 Mr. McCarthy: I consent that it is not binding on Craig.

Mr. McIntyre: I further ask the court to instruct the jury to disregard that testimony.

The Court: Yes, the jury will disregard it.

Q. Did you observe Mrs. Connick at any other time? A. Three weeks from that day again, on the 24th of December, I was cleaning there, and Mrs. Connick was going out, and as she went out she was just about five minutes gone when Dr. Fink came in and he went upstairs and he knocked at Mrs. Connick's door twice and he didn't get no response. I says, "Doctor, that woman is gone out." So he went out too, and I did not see no more of Mrs. Connick until about a week after, and I went in to see her at Christmas, and she told me she was getting along nicely, and told me again nicely, and she said—

30 Q. Don't say what she said. A. That is all she said.

MARY VIRGINIA LEHMAN, sworn.

Direct examination by Mr. Dawson:

Q. You are a daughter of Mrs. Lehman? A. I am.

Q. Do you know the property where this accident occurred? A. I do.

40 Q. Were you over there on the day of December 3rd? A. I was.

Mary Virginia Lehman, cross.

Q. How did you come to be over there? A. My mother sent me in to see how the workmen were getting along with the work.

Q. Did you learn then that Mrs. Connick had received an injury? A. I did.

Q. Did you go see her? A. I did. 10

Q. Where was she then? A. She came to the door and let me in.

Q. What time of the day was that? A. At noon-time.

Q. Did she tell you what had happened? A. Yes, she did.

Q. What did she say as to how the accident happened? A. She said that she was going from the kitchen to the dining room, and her foot went through the board. 20

Q. And were you in that room? A. I was.

Q. Was there any covering over the floor? A. There was.

Q. What was the covering? A. Linoleum.

Q. Did you ever see her after that? A. I did.

Q. Where and when? A. About the house. I went in and saw her.

Q. How soon was that after the— A. The very next day.

Q. Where was she then? A. Walking about the house. 30

Q. When did you next see her? A. I went in several days later, the next day.

Q. Was she still about? A. She certainly was.

Q. Was there ever a time during the times that you were there that you found her in bed? A. Never.

Cross examination by Mr. McCarthy:

Q. Did you see this hole? A. I beg your pardon? 40

Mary Virginia Lehman, cross.

Q. Did you see this hole? A. No, there was not any hole.

Q. You went there on the morning of December 3rd, for the purpose of seeing how this work was progressing, did you? A. I did.

10 Q. In going there you did not look at it? A. I cannot hear you.

Q. Then, after going there you did not look at it? A. I did look at it.

Q. What did you see with reference to the work that was going on at the entrance to the dining room from the kitchen? A. I saw a board there. The board was up and a piece of linoleum over it.

Q. This was immediately after the accident? A. It was at noontime.

20 Q. Do you know what time Mrs. Connick was hurt? A. I beg pardon?

Q. Do you know what time Mrs. Connick was hurt? A. Just before that, she told me.

Q. And at the time you were there the entire hole was covered? A. It was.

Q. Did you move the linoleum or touch anything to see whether there was a hole there? A. She picked up the linoleum to show me. There wasn't any hole.

30 Q. What did you see? A. A board.

Q. Where was it, and what was its position? A. It was up, the board was up, and it was on the kitchen side.

Q. Were there nails protruding from the board? A. It was nailed up. There were not any nails protruding. The board was not down.

40 Q. I didn't ask you that, I asked you whether there were nails protruding from the board. A. No, I did not see any protruding.

Edward Lehman, direct.

Q. Of course, you are the daughter of Mr. Lehman, the defendant, aren't you? A. I am.

Q. And you were sent there by your mother to sort of see how this work was progressing? A. I was.

Q. Was that the first time that you had gone there to see how the work was progressing? A. It was. 10

Q. The work had only started that day? A. I do not know when the work had started.

Q. Did you see any workmen there at the time? A. No, I cannot recall that I did.

Q. Don't you know as a matter of fact that this job was finished before you even went there? A. No, it was not.

Q. When was it finished? A. I do not know when it was finished, but the work— 20

Q. How do you know then that it was finished three days before? A. Mrs. Connick said the workmen were coming back that afternoon.

EDWARD LEHMAN, sworn.

Direct examination by Mr. Dawson:

Q. You are one of the defendants in this case? A. I am. 30

Q. And you own this property on Magnolia Avenue where this alleged injury occurred? A. I did at that time.

Q. What is your business? A. I am an architect.

Q. And where do you do your work, in Jersey City? A. Jersey City, Brooklyn, and New York, in fact all over.

Q. Did you have a heating plant installed in this house? A. I did. 40

Q. In December of 1926? A. I did.

Edward Lehman, direct.

Q. What was the occasion for putting that in?

A. Mrs. Connick wanted other heat than the heat that was in the kitchen. It was an ordinary coal range, so I agreed to put the heat in, and I employed Craig, whom I understood was a responsible concern.

Q. Just a moment; who put it in for you? A. Craig, the Craig Heating Company here in Jersey City.

Q. Had you known them before? A. Yes, they were contractors on a building that I was the architect for in Jersey City, at that time.

Q. What building was that? A. The St. Aedan's Convent.

Q. And they did the steam work for you there?

A. Yes, and that was very satisfactorily done.

Q. Did they do that under written contract with you? A. Yes; it was just merely an acceptance of that bid.

Q. Was that the bid that they gave you? A. Yes.

Q. And that was exactly the work that was done under that bid? A. Yes.

Mr. Dawson: I offer that paper.

Mr. McIntyre: I understand this is the bid, except the pencil notations there. They are not included, are they?

Mr. Dawson: I do not think they mean anything. There are some figures in pencil at the bottom. We will just cross that off.

The Witness: Pardon me. Those are figures that I have not a record of. I would like to have a copy.

Mr. McIntyre: I will put a circle around that, and the jury will be instructed to disregard them, your Honor?

The Court: Yes.

Edward Lehman, direct.

Q. Did you hire anyone to work on that building, under this contract, yourself? A. Any work to be done in that building was to be done by Craig.

The Court: In other words, you hired the Craig Company and let them do the job. 10

The Witness: Yes.

Q. When did you first learn of the accident? A. I believe it was—I am sure it was on a Friday afternoon.

Q. That was the day? A. The day it happened. It happened in the morning, and they reached me by phone at my Brooklyn office, and I came over immediately and I fixed the floor.

Q. What was the condition you found when you got there? A. Well, there was a board loose. It was tilted. The high part was towards the dining room, and the low part towards the kitchen. 20

Q. How long was the board? A. The board is twelve inches long.

Q. And how wide? A. The board is about four and a half inches wide. It is the pine, ordinary floor.

Q. Were there four or five boards out, as shown in this picture, when you got there? A. There were not, no, sir. 30

Q. You say there was one board? A. There was one board, yes.

Q. Can you tell us how the boards had been put in there? A. Why, in order to put the pipe under the floor the plumber had to cut the floor and he cut it on a line with the side of the floor beam, and the floor ended at the threshold or saddle of the door, and he removed that part, which was a part about twelve inches long, and after he installed 40

Edward Lehman, cross.

his pipe he spliced that 2 by 4 on the beam to support the floor, after it was put down, and the other part rested on the other beam. That was a 2 by 4, and it was well spiked.

10 Q. Which end was down? A. The end toward the kitchen. In other words, it was tilted so (illustrating). This is the floor up here, as if there was a weight put on here, and the board went down that way (illustrating), and it rested on the beam going to the dining room. Otherwise there is the floor; there is the 2 by 4, and somebody stepped on that end pushed it down.

20 Q. How deep down was the lower end from the surface of the floor? A. When this part fell the 2 by 4 rested on the sill of a partition below, see; that was a 2 by 4 stud, and the beams are 3 by 8, so it could not be down much more than four inches.

Cross examination by Mr. McCarthy:

Q. What time did you arrive back from Brooklyn? A. I imagine it was some time during the early part of the afternoon.

30 Q. Approximately two or three o'clock? A. Probably that time.

Q. It was approximately four hours after the accident occurred? A. Well, I do not know when the accident occurred. I know I got there the early part of the afternoon.

Q. The accident happened, as I understand the testimony, somewhere in the vicinity of eleven o'clock. A. So I understand.

40 Q. Then you roughly would be about four hours after the accident? A. If it was eleven o'clock I would not call it four hours after.

Q. I mean to say, assuming that it was? A. Yes.

Edward Lehman, cross.

Q. So that you did not see the condition of this place until at least four hours after the accident had occurred? A. Not before, no.

Q. These boards which you mentioned as having been placed near the threshold, that gave way, were they regular flooring boards? A. That is, the board, not the boards. There is only one board. This is an N. C. pine flooring, $\frac{7}{8}$ of an inch N. C. pine floor, about $4\frac{1}{2}$ inches wide. 10

Q. And that flooring, was that a flooring that fits into each other by grooves? A. You see, they had to knock what they call the tongue of the floor off to get it back, you see. Otherwise they could not force it back, so they stripped the tongue of the board, see—the groove was there. 20

Q. What do you call the tongue? A. The tongue is the board that goes into a flooring. You see, there is a groove, and the other part has a tongue, and that fits in. They knocked that tongue off in order to get the flooring down. 20

Q. They had to knock that tongue off in order to put it back? A. Yes.

Q. And that tongue, fitting into the groove, offers support? A. It does not offer support if it is not properly laid, but if it has a rest on each end it naturally would be supported. 30

Q. And just the mere placing of a board on a rest at each end is not ordinarily in construction work considered a secure flooring, is it? A. Well, good construction naturally requires a floor to be nailed.

Cross examination by Mr. McIntyre:

Q. Did you own the property alone? A. At that time I did, yes. 40

Q. Did Mrs. Lehman have anything to do with it? A. Not at that time.

Edward Lehman, cross.

Q. It was not in her name at all, was it? A. No.

Q. Just you alone? A. But I could explain that if you want me to do it.

10 Q. Yes, I would like if you would? A. Chase O'Connor, who was Mrs. Connick's lawyer—I believe he is related to her—is in the same office, or connecting office where I was, and I knew Chase very well, and previous to this accident I was to transfer this property to Mrs. Lehman, and I told O'Connor about it, that I was going to transfer this property. "Well," he says, "I do not know how this case is coming out," see? So it was kept going for some time, I did not know what the outcome would be, and I transferred the property to Mrs. Lehman, but the property was in my name at the
20 time of the accident.

Q. And since the accident you transferred it to Mrs. Lehman? A. Since that time—

Q. Shortly after the accident occurred, isn't that right? A. That is right.

30 Q. Did you delegate Mrs. Lehman to send your daughter down to supervise the work, as your daughter just testified? A. No, not to supervise any work, because she is not capable of any supervision of that kind. She might go in and see how the work was progressing, but not for supervision.

Q. You knew that Mrs. Lehman had either sent your daughter down— A. Did I know? Not until after I reached home.

Q. And you employed Craig to do that work for you? A. I employed Craig, a reliable concern at that time.

40 Q. And you yourself fixed the floor immediately after the accident happened? A. When Mrs. Connick told me that the floor was loose, and she showed me where it was—

John Aloysius Cregan, direct.

Q. I mean you fixed it immediately? A. I fixed the floor, yes; but in addition to that the Craig Company came the next morning, you know, and—

Q. Well, you are an architect, and I suppose a builder; you know something about that work, don't you, Mr. Lehman? A. I think I do. 10

Q. You have been in that business for some thirty years? A. Fully that.

Q. And you are quite capable of replacing and fixing boards like those that were involved in this case, that were damaged? A. Well, in a case of that kind that had to be fixed, I naturally had to fix it for the protection of the—because it was loose, and being a Friday afternoon and the contractors very seldom working Saturdays, I knew that it had to be fastened or secured. 20

JOHN ALOYSIUS CREGAN, sworn.

Direct examination by Mr. Dawson:

Q. By whom were you employed in December, 1926? A. J. F. Craig, Incorporated.

Q. They are plumbing contractors? A. Steam fitting contractors. 30

Q. Did you do some work on the Magnolia Avenue property of Mr. Lehman at that time? A. Yes.

Q. Did you have any part in taking up this floor where this accident occurred? A. Yes.

Q. Did you open the hole and did you then repair the floor? A. Yes, I did.

Q. Speak a little louder, please— A. I said, yes, I did.

Q. When, in reference to the accident which occurred on December 3rd—when had the hole 40

John Aloysius Cregan, cross.

been opened by you? A. I think about four or five days previous to that.

10 Q. What did you do to open it; how was it opened, and what did you do? A. Why, naturally, I had to cut one of the tongues and grooves, and saw along the beam; took up about four boards, three or four boards, if I remember correctly.

Q. How did you put them back? A. I put them back with cleats.

Q. The same day? A. The same day.

Q. How did you fasten it? A. I laid one cleat on one beam, and a cleat on the other.

Q. Did you fasten the boards then? A. Yes, sir.

20 Q. Did you see it after that, after it is alleged to have gone down and broken, did you see it after that? A. Well, I came back there one day to fix it up myself.

Q. What was the occasion of your being back there that day? A. To repair that work.

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

Q. How did you put it back this time? A. Put it back with the same cleats I had there.

Q. Did you nail them fast again? A. Yes.

30 Q. Did you do any other work on the furnace that day that you went back? A. No.

Q. Did you put the door on the furnace? A. I put it on later, I think.

Q. After that? A. Yes, I think it was put on later.

Q. You were employed by Craig, and paid by Craig? A. Yes.

Cross examination by Mr. McCarthy:

40 Q. It was four or five days, as I understand, before the accident, that these three or four boards

John Aloysius Cregan, cross.

were taken up. A. Yes, I think it was three or four days.

Q. When were they put back? A. The same day I had taken them up.

Q. That was three or four days before the accident occurred? I ask you to look at that photograph there, and ask you is that the size of the hole you made for the purpose of laying that pipe, just now with reference to the size, Mr. Cregan.

10

A. That is the hole I made.

Q. That is the hole you made, isn't it? A. Yes.

Q. When was it that you went back to replace these boards after the accident occurred? A. I think it was the following day.

Q. What was the condition that you found there at that time? A. Why, I found that the cleat had been pulled away from the beam.

20

Q. Where was this board, or boards, when you got there that morning? A. Where were they?

Q. Yes. A. Laid in the hole.

Q. They had not been repaired up until that time? A. Sir?

Q. They had not been repaired, I say, up until that time? A. No, not up to that time.

The Court: Does that picture there reveal the condition you found in the morning when you went there?

30

The Witness: No, sir.

Cross examination by Mr. McIntyre:

Q. What is your business? A. Steamfitter.

Q. How long have you been a steamfitter? A. Twenty-two years, with the exception of twenty-one months in the Army.

Q. What was your duty on this job, foreman or workman? A. Foreman.

40

John Aloysius Cregan, cross.

Q. You were foreman of the gang? A. Yes, I was foreman when they had another gang there. Naturally, I being the first man on the job—they generally make the first man foreman.

10 Q. And you removed the boards in question, didn't you? A. Yes.

Q. And you replaced them also, didn't you? A. I beg your pardon?

Q. I say you replaced these boards, didn't you? A. Yes.

Q. Now, I ask you again what operations you used to replace these boards; what did you do and how did you do it? A. Generally when we cut a pocket up like that we generally put a cleat on each side of the beam.

20 Q. When you say a cleat, may I ask you to explain what you mean by a cleat? A. Anything from one inch by an inch and a half to a four-inch stud.

Q. That is a piece of wood? A. Yes.

Q. Why did you have to use cleats? A. To hold the flooring up.

Q. That is, the part of the floor that had been removed? A. Yes, sir.

30 Q. What was the length of the part of the flooring that had been removed; how long is it? A. About eighteen inches, I should judge.

Q. And you used two cleats? A. Yes, sir.

Q. How were the cleats secured to the flooring that had been removed? A. They are nailed and screwed.

Q. Screwed first and then nailed? A. Those that we could not get up we generally screw in.

40 Q. For a space of eighteen inches of floor would two cleats have been enough, or three? A. Two at a time.

John Aloysius Cregan, cross.

Q. What has been your experience in that kind of work, how many years? A. Twenty-two years, I said, except twenty-one months in the Army.

Q. When was this work completed, I mean, the work of replacing the flooring, what day of the week, do you remember, about? A. I could not say offhand. 10

Q. You heard it testified, I believe, that it was Tuesday? A. I think it was a Tuesday.

Q. After you replaced the boards by putting cleats across the bottom and then screwing them on, and then nailing it, did you speak to Mrs. Connick? A. Oh, yes.

Q. What did you say to her to do in respect to this flooring that had been replaced? A. I showed her that the floor was O. K. I walked across it and jumped on it. 20

Q. You walked across it and jumped on it and told her it was all right? A. Yes.

Q. When was the next time you heard about this flooring? A. I think it was the Saturday morning.

Q. The following Saturday, and you went there and saw the floor that had been removed? A. Yes.

Q. Does this photograph represent the situation as you saw it on that Saturday? A. No, the boards were right in the hole. They wasn't taken out of the hole that way. 30

Q. How many boards were out of place, do you remember? A. There were really none of them out of place; they were all sticking down.

Q. How? A. I said the boards were all laying in the hole when I got there. There was none taken out of the hole.

Q. Right about where this flooring was, can you tell us what, if anything, you saw in that corner thereabouts, as you were working there on that 40

John Aloysius Cregan, cross.

corner? A. I know that she had kept coal there in that corner when I went back to fix the floor.

Q. How was the coal kept there, in a scuttle, or bag? A. It was in a bag.

10 Q. What type of a bag? A. One of these regular coal bags that the coal man serves.

Q. What do they weigh, about? A. About a hundred pounds, I should judge.

Q. Had you observed the presence of those bags of coal at any time prior to this accident? A. Yes, we had to move it out of the way.

Q. This range that you installed, the Arcola, was that a coal burner or gas burner? A. Coal burner.

Q. Right in the kitchen? A. Right in the kitchen.

20

Cross examination by Mr. McCarthy:

Q. You mean by that that Mrs. Connick kept the coal bags in the entrance between the kitchen and the— A. She kept it right in the corner. They were in the entrance.

Q. These three boards were out just at the entrance? A. No, just by the entrance. I said one part of the hole was covered up.

30

Q. Isn't the flooring, as shown by this picture, which was taken up directly in front of the doorway—isn't it directly in front of the doorway? A. Yes, but it was taken over to here, see?

Q. And the boards that you see down in the hole, were what boards; when you went there the following day which boards were in the hole? A. In fact, these were all in the hole on this side here (indicating).

40

Q. That is all of those boards to the left? A. Coming into the kitchen.

Mary Connick, cross.

Q. And that is all directly in front of the door, isn't it? A. About eight inches there.

Q. Eight inches is not in front of the door? A. Yes.

Q. And that would leave the remainder directly in front of the door? A. Yes. 10

Q. This flooring, as I understood you to say, was replaced by you by setting these boards upon a clamp, did you call it? A. A cleat.

Q. And this cleat was secured to a beam under the floor? A. No, some were nailed. There was two was nailed; two we could not get down, and we had to screw them in.

Q. And that was the manner in which they were replaced? A. Yes. 20

MARY CONNICK, recalled.

Further cross examination by Mr. McIntyre:

Q. This new heater that you got installed, was a kitchen coal burner? A. Yes.

Q. And you used to get little sacks of coal, hundred pound bags? A. No, I have my coal in the cellar. Did you say that I got my coal—pardon me. I used to take it from the cellar. 30

Q. Through the dumbwaiter? A. No, my boy used to take it up at night; used to leave me so much coal upstairs.

Q. Would he bring it up in the bags? A. No, I had no bags. I had a coal scuttle, and I had a big pan that the boy used to bring up every night for me.

Q. And the boy used to place the coal right inside the doorway when he would come in, wouldn't he? A. No, over near this new heater. 40

Mary Connick, redirect.

Q. And I suppose he would step over this part of the floor that was damaged? A. Over where it was broken, yes.

Q. With the coal? A. Yes.

Q. And he would not step on top of it? A. No.

10 Q. That, I suppose, was because he was laden down with the coal, is that right? A. Yes.

Redirect examination by Mr. McCarthy:

Q. You are talking now with reference to the time after this accident occurred? A. After the accident that he brought the coal up?

Q. Yes. A. Well, I had the coal in before.

20 Q. Yes, but when you were asked with reference to the boy stepping over this portion of the flooring that gave in? A. Yes, he stepped over it.

Q. Was that before the accident or after the accident? A. After.

Mr. McCarthy: No rebuttal.

Mr. McIntyre: The defendant, Craig, rests.

Mr. Dawson: I rest.

30 At this time I would like to ask for a direction of a verdict in behalf of the defendant Lehman?

The Court: The motion is granted.

40 Mr. McIntyre: In behalf of the defendant Craig, we move for a direction of verdict upon the ground, first, that there was no negligence shown; second, that there is no negligence shown that is the proximate cause of the accident; third, the plaintiff is guilty of contributory negligence, and fourth, it has not been shown what the standard of construction the work should be, nor has there been any violation of such

The Court's Charge.

a standard, assuming that one has been shown. Upon these grounds we respectfully submit that the defendant Craig is entitled to a direction of a verdict.

The Court: I feel as to whether or not there was any negligence on the part of the Craig Company in the way that that floor was fixed up after the heater was installed, is a question for this jury to decide. If the jury decides that the workman did everything that a person of ordinary prudence and care would do, in fixing that board and repairing it, it would decide that there was no negligence on the part of Craig. On the other hand, if they decide that there was negligence in the way that that floor was fixed, then of course the verdict would be for the plaintiff. It is purely and simply, as I see it, a jury question. I will deny the motion and allow you an exception. As far as the defendant Lehman is concerned, I will direct the jury to find a verdict in favor of the defendant.

Both sides sum up.

The Court's Charge.

The Court thereupon charged the jury as follows:

Gentlemen of the Jury: This is a suit for damages instituted by Mary Connick and Joseph Connick, her husband, suing as plaintiffs, against John F. Craig & Company, Incorporated, a corporation, as defendant. Upon examining the papers filed in this suit you will find two defendants specified therein, Edward Lehman and Mary Lehman, and

The Court's Charge.

John F. Craig, Incorporated, defendants. By direction of the court you have rendered a verdict in favor of the defendants Edward Lehman and Mary Lehman, so that so far as they are concerned they are eliminated from this case, and the only
10 defendant for you to consider in this case is the defendant John F. Craig, Incorporated.

Now, this suit arises out of an accident which occurred on December 3rd, 1926. The plaintiff Mary Connick at that time with her husband resided at 166 Magnolia Avenue, Jersey City, on property which was owned by Mr. Lehman, and Mr. Lehman was having a heating plant installed in the premises occupied by Mr. and Mrs. Connick at that address.

20 When Mr. Lehman set out to have this heating plant installed, he went to the defendant John F. Craig, Incorporated, which corporation is a corporation engaged in this line of work, and entered into a contract with the defendant company whereby, for a specified sum, the Craig Company was to install this heating plant in the premises at 166 Magnolia Avenue.

30 There is no dispute about the fact that Cregan and several of Craig's workmen came to 166 Magnolia Avenue on the day in question, and that they did install this heating plant. The testimony on both sides shows that in order to install the plant it was necessary for Cregan and the other workmen to remove a certain section of the flooring in the dining room, near the entrance of the dining room, into the kitchen of the apartment. After the heating plant was installed the workmen replaced the flooring, and three or four days after that was done the plaintiff, Mrs. Connick, while walking
40 across the floor, testified that the flooring gave

The Court's Charge.

way, that her left foot went down into the opening, and that she thereby sustained injuries.

The defendant does not admit that the accident happened in the way that Mrs. Connick testified it did. The defendant, of course, disputes that, but is not in a position to offer any proof to contradict Mrs. Connick on that matter. The defendant's position is that if you believe Mrs. Connick, that if you believe the accident happened in the way that she has described, it still contends that it is not liable for any injuries that you may find were sustained by her as the result of the accident. Cregan, who apparently was the man in charge of the installation of the heating plant, testified that when the plant was installed he replaced the flooring, and that in replacing the flooring he attached wooden cleats by means of screws and nails into the beam at the opening, and then replaced the flooring on top of those cleats. He says that when the job was finished that he jumped on the flooring, apparently to see if it was fixed in securely, and in that respect he is corroborated by Mrs. Connick who frankly says that when the flooring was replaced, that one of the workmen,—she does not know whether it was Cregan or not, according to my recollection of the testimony—did jump on the flooring, and that at that time it was secure. Despite that fact Mrs. Connick says that three or four days afterwards, while she was walking through the dining room apparently into the kitchen, as the court recalls the testimony, to prepare her son's lunch, who was to go over to school at one o'clock, she walked on this part of the flooring that had been replaced, the flooring gave way, her left foot sank into the opening, and she was thereupon injured.

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The Court's Charge.

The burden of proof is cast upon the plaintiff in this case, as in all cases of negligence, to establish to the satisfaction of the jury that the defendant was negligent, and that the defendant's negligence was the proximate cause of this accident.

10 Now, if you find that the defendant was negligent, that the defendant's negligence was the proximate cause of this accident, then you must go a step further and you must satisfy yourselves as to whether or not there was any contributory negligence upon the part of the plaintiff, Mrs. Connick. It is necessary for me to charge you that if you should find from any facts in this case that there was any contributory negligence on the part of

20 Mrs. Connick, that that would bar the plaintiff's right to recover in this suit. It would not only bar her right to recover but it would bar any right of recovery on the part of her husband.

Now, the burden to establish contributory negligence is cast upon the defendant, to establish to your satisfaction by the preponderance or the greater weight of the evidence, that Mrs. Connick was guilty of contributory negligence, and in that regard, gentlemen of the jury, while you are the sole judges of the facts, and while the Court is

30 leaving all the facts in your hands for you to decide and determine, the Court says to you very frankly that nothing has been adduced here, to the best of the Court's recollection, which would in any way indicate that there was any contributory negligence on the part of Mrs. Connick. In other words, as far as the Court recalls there was nothing brought out in the testimony in this case— not any fact which would indicate that Mrs. Con-

40 nnick had done anything or committed any act which could be attributed to her as being con-

The Court's Charge.

tributory negligence. Of course, as the Court said before, the Court is leaving all the facts in your hands for you as the judges of the facts to decide and determine, but the Court thinks under all the circumstances that the comment of the Court is perfectly proper.

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Now then, in deciding whether there was any negligence on the part of the defendant you will decide and determine whether Cregan and the other workmen in replacing that flooring used that degree of care which an ordinary prudent person—workmen of their type—would use under the same circumstances. If you decide that that degree of care was used, then there was no negligence on the part of the defendant Craig, and your verdict under those circumstances would have to be for the defendant. On the other hand, if you decide that in the methods that they used in replacing that flooring, or the manner in which they replaced it, that they did not use that degree of care which the ordinarily prudent workman would have used under the circumstances, then there was negligence on the part of the defendant Craig, and it would be proper for you so to find.

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Now keep in mind that there was no dispute about the fact that Cregan jumped on the floor, after the floor was fixed, on the day that the plant was installed. Also keep in mind the fact that apparently there is no dispute about the fact that the flooring did give way three or four days after the accident occurred, and while the defendant does not concede that the flooring gave way in the manner in which Mrs. Connick describes, nevertheless the defendant does concede that when Cregan arrived there at 166 Magnolia Avenue the day after the alleged accident occurred, Cregan

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The Court's Charge.

10 did find that this cleat that he had inserted in the beam to hold up this flooring had given way, and he says that he fixed the flooring by using the same cleat, and again nailing it up and securing it up and putting the flooring on it, and that apparently after that time, after Cregan fixed it the second time, the flooring did not give way again. Now, it is proper for you to consider all those facts and all those circumstances in deciding and determining whether or not there was any negligence on the part of the defendant Craig in fixing or replacing that floor after the heating plant was installed.

20 Now, if you decide that the defendant was negligent, and that the negligence of the defendant was the proximate cause of the accident, and you further decide that there was no contributory negligence on the part of Mrs. Connick, under those circumstances your verdict will be for the plaintiff, and under those circumstances you will come to and you will consider the question of what damages should be awarded by you to the plaintiff.

30 So far as Mrs. Connick is concerned she would be entitled to be compensated by you for whatever pain and suffering you find that she was compelled to endure, is enduring, and is likely to endure as the result of this accident. You will have to keep in mind in that respect what she says the extent of her injuries were, what her doctor says the extent of her injuries were, and what the members of her family say she has sustained as the result of this accident, and, of course, you will also have to keep in mind the testimony offered by the defendants as to the extent of her injuries. The defendants have produced here two

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The Court's Charge.

doctors, one of whom testified that at the time that he examined Mrs. Connick he found that her injury was a sprain, and that the ordinary period of disability would be from two to eight weeks. On cross examination the doctor frankly stated that, of course, he was not setting that as a hard and fast rule; he was simply giving you his opinion in the light of all his experience, and could not say that it was possibly the extent of the woman's injuries in this case. Dr. Feury, who testified for the defendant Craig, testified that he examined the woman, if the Court recalls the testimony correctly, in the month of June following the accident, and that his analysis or diagnosis of the case was, that the plaintiff, Mrs. Connick, had suffered from a sprain, and that she had made a full recovery at the time that he saw her, probably in about a period of four weeks after the accident had taken place. The other witnesses have testified, the daughter of Mr. Lehman testified that she went to see Mrs. Connick on the day the accident occurred, and that Mrs. Connick came to the door and let her in; that she went to see Mrs. Connick the next day, that Mrs. Connick let her in and that she saw Mrs. Connick up and around the house; and there was another witness yesterday who testified that Mrs. Connick went out of the house sometime around the Christmas holidays immediately following the accident on December 3rd.

So that gentlemen of the jury, you will have to take and consider all the facts that have been offered on both sides. You will not only take the plaintiff's, Mrs. Connick's testimony, as to the extent of her injuries, and the testimony of her doctor, who says that he treated her some twenty-

The Court's Charge.

six times over a period running up into the month of February, and the testimony of her family, but you will also take the testimony of the doctors who testified on behalf of the defendant, and the testimony of the other witnesses who inferentially testified as to the extent of Mrs. Connick's injuries.

10 So that if your verdict is for the plaintiffs, let me again say to you that Mrs. Connick will be entitled to be compensated by you for any pain and suffering which she has endured, which she is enduring now, which she is likely to endure in the future, and if you find that she has suffered any disability, and, of course, you can only find that from the testimony offered in this case, but if you find that she has suffered any disability which is

20 either permanent or likely to continue for any length of time, she is entitled to be compensated at your hands for that part of the damage.

Now, the husband's case, of course, is tied up with the case of Mrs. Connick. Unless you give her a verdict you cannot give him a verdict. If you find in favor of the plaintiff, so far as Mrs. Connick is concerned, you are necessarily bound to find in favor of the plaintiff so far as Mr. Connick is concerned, because you cannot find damages for him and not award a verdict to the plaintiff so far as Mrs. Connick is concerned. The husband can not make any recovery unless you find that the wife has a cause of action. The husband would be entitled to be compensated by you for any doctors' bills paid out by this family, to pay Dr. Fink, and for any medical expenses, and the husband would also be entitled to be compensated by you for whatever amount of money you find it was necessary for this family to pay to this Mrs. O'Neill, whom Mrs. Connick testified it was neces-

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The Court's Charge.

sary for her to employ at four dollars a day for a certain number of days. Now, you will recall what the testimony was in so far as Mrs. O'Neill was concerned. So far as the Court can recall Mrs. Connick claims that immediately after the accident she had to use her more frequently than she did subsequently, and that the services of Mrs. O'Neill were continued at least once a week up until some time in the month of March. Now, for any outlay that you find that this family had to pay to Mrs. O'Neill, the husband is entitled to be compensated for at your hands. If you find that there was any loss of services or any loss of association on the part of Mr. Connick, so far as Mrs. Connick was concerned, as the result of this accident, he is also entitled to be compensated at your hands for that element of the damage:

Now, gentlemen of the jury, take this case and give it your best and most honest and conscientious determination. It is an important case. Every case that you are going to be called upon to decide is an important case. Keep in mind, gentlemen, that under the jury system which prevails, that you as residents and citizens of this county are drawn from your various lines of work to serve here in the Court House for a period of two weeks, to help carry on the administration of justice, not only in civil cases, but in criminal cases, and if you will have the feeling, gentlemen of the jury, when you have been accepted as a juror in any case, and you put your hand on the Bible, and you take your oath to God that you are going to administer justice in that case in accordance with the light that Almighty God gives you to view the testimony, and in accordance with the instructions so far as the law is concerned laid down by the

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Rule for Judgment.

10 Court, then you are looking upon your duty as a juror in the light that the Court would like every juror to look upon his duty. You are twelve judges of the facts in this case. Your duty to administer justice in this case, and in every case that you will sit upon as jurors, is just as sacred and just as binding on each one of you, as the duty which this Court has devolved upon it to administer justice in any case which comes before this Court.

Now keep that in mind, gentlemen, so that when you return from the jury room with your verdict you may have the feeling in your bosoms that you have taken up your duty in this case and you have discharged it honestly and conscientiously.

20 Mr. McIntyre: No exception.

Mr. Dawson: No exception.

Mr. McCarthy: No exception.

The Court: Is there anything further, gentlemen?

Mr Dawson: No.

Mr. McIntyre: No.

Mr. McCarthy: No, sir.

Rule for Judgment.

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(Filed June 3, 1929.)

This action was tried before Judge Robert V. Kinhead and a jury in the Hudson County Court of Common Pleas on May 28th, 1929.

40 This cause having been heard and submitted to the jury against the defendant John F. Craig, Inc., a corporation of the State of New Jersey, a non-suit having been directed to the defendants Edward Lehman and Mary Lehman, the Jury returned the verdicts against the defendant John F. Craig, Inc., a corporation, as follows:

Rule for Judgment.

“They find in favor of the plaintiff Mary Connick as against the defendant John F. Craig, Inc., a corporation, the sum of One Thousand (\$1,000.00) Dollars and in favor of the plaintiff Joseph Connick as against the defendant John F. Craig, Inc., a corporation, the sum of Five Hundred (\$500.00) Dollars.” 10

WHEREUPON, it is ORDERED that judgment final be entered against the defendant John F. Craig, Inc., a corporation, in favor of Mary Connick, in the sum of One Thousand (\$1,000.00) Dollars and also against the defendant John F. Craig, Inc., a corporation, in favor of the plaintiff Joseph Connick, in the sum of Five Hundred (\$500.00) Dollars, together with costs to be taxed. 20

ROBERT V. KINKEAD,
Judge.

On motion of:

MCCARTHY & McTAGUE,
Attorneys for Plaintiffs.

Rule actually entered June 3rd, 1929.
Filed Clerk's Office, June 3, 1929, Hudson County, N. J. 30

JOHN J. MCGOVERN,
Clerk.

Final Judgment Entered June 3, 1929.

HUDSON COUNTY COURT OF COMMON PLEAS.

10	<p align="center">MARY CONNICK and JOSEPH CONNICK, <i>Plaintiffs,</i></p> <p align="center"><i>v.</i></p> <p align="center">EDWARD LEHMAN and MARY LEH- MAN, and JOHN F. CRAIG, INC., a corporation, <i>Defendants.</i></p>	<p>Judgment entered June 3rd, 1929.</p> <p>Damages</p> <p>Mary Connick \$1,000.00</p> <p>Joseph Connick 500.00</p> <p>Costs 74.80</p> <hr style="width: 100px; margin-left: auto; margin-right: 0;"/> <p>Total \$1,574.80</p> <p>McCARTHY & McTAGUE, Attorneys of Plaintiff.</p>
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20 Judgment in the above entitled cause was entered in this Court on the 3rd day of June in the year of our Lord One Thousand Nine Hundred and Twenty-nine in favor of the plaintiffs Mary Connick and Joseph Connick and against the defendant John F. Craig, Inc., a corporation, in a plea of Action at Law in the sum of One Thousand Dollars (\$1,000.00) in favor of Mary Connick and Five Hundred (\$500.00) Dollars in favor of Joseph Connick damages, and Seventy-four Dollars and Eighty Cents, costs of suit.

30 Judgment was signed this 3rd day of June A. D., 1929.

JOHN J. MCGOVERN,
Clerk.

Notice of Appeal.

(Filed July 19, 1929.)

To Messrs. McCARTHY & McTAGUE,
Attorneys of Plaintiffs.

SIRS:

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TAKE NOTICE, that the defendant, John F. Craig, Inc., appeals to the Supreme Court from the whole of the judgment entered in this cause.

Dated July 5, 1929.

Respectfully,

COLLINS & CORBIN,
Attorneys of Defendant,
John F. Craig, Inc.

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Service of copy of within notice hereby acknowledged this 8th day of July, 1929.

McCARTHY & McTAGUE,
Attorneys of Plaintiffs.

Grounds of Appeal.

(Filed July 26, 1929.)

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The appellant John F. Craig, Inc., states the following grounds of appeal:

1. The trial court denied motion for nonsuit in favor of defendant-appellant when thereunto moved, whereas said motion should have been granted upon the following grounds:

(a) No negligence was proven on the part of defendant John F. Craig, Inc.

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Grounds of Appeal.

(b) No negligence was proven on the part of defendant John F. Craig, Inc., that was the proximate cause of the accident.

(c) Plaintiff Mary Connick, was guilty of contributory negligence.

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2. The trial court refused to direct a verdict in favor of defendant-appellant when thereunto moved, whereas said motion should have been granted upon the following grounds:

(a) No negligence was proven on the part of defendant John F. Craig, Inc.

(b) No negligence was proven on the part of defendant John F. Craig, Inc., that was the proximate cause of the accident.

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(c) Plaintiff Mary Connick, was guilty of contributory negligence.

3. There was no proof of what the standard of construction of the work was, and assuming such standard was proven, there was no evidence of any violation of said standard of construction.

Dated July 24, 1929.

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COLLINS & CORBIN,
Attorneys of Defendant-Appellant.

Service of copy of within grounds of appeal hereby acknowledged this 25th day of July, 1929.

MCCARTHY & McTAGUE,
Attorneys of Plaintiffs-Respondents.

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Judgment of Supreme Court.

(Filed March 20, 1930.)

NEW JERSEY SUPREME COURT.

No. 20, OCTOBER TERM, 1929.

MARY CONNICK and JOSEPH
CONNICK,
Plaintiffs,

v.

JOHN F. CRAIG, INC.,
Defendant.

Action at Law.
On Appeal from
Common Pleas
Court of Hudson
County.

RULE OF AFFIRM-
ANCE OF JUDG-
MENT AND
REMITTITUR.

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This cause having been duly argued at the
October Term, 1929, of this Court by Edward A.
Markley of Collins & Corbin, of counsel with the
defendant-appellant, and Frank P. McCarthy, of
McCarthy & McTague, of counsel for plaintiff-
respondent, and the Court having considered the
argument and briefs of the respective parties, and
finding no error in the record or proceedings in
the Common Pleas Court of the County of Hudson;

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It is on this 20th day of March, 1930, ORDERED
and ADJUDGED, that the judgment of the Common
Pleas Court of Hudson County be affirmed, with
costs, and that the record be remitted to the Com-
mon Pleas Court of Hudson County, to be pro-

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Opinion of Supreme Court.

ceeded with in accordance with said judgment and proceedings of said Court.

Entered March 20th, 1930.

On motion of

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McCARTHY & McTAGUE,
Attorneys for Plaintiff-Respondent,
By FRANK P. McCARTHY,
Of Counsel.

A true copy.

FRED L. BLOODGOOD,
Clerk.

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Opinion of Supreme Court.

(Filed March 19, 1930.)

NEW JERSEY SUPREME COURT.

No. 20, OCTOBER TERM, 1929.

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MARY CONNICK and JOSEPH
CONNICK,
Plaintiffs-Respondents,

v.

JOHN F. CRAIG, INC.,
Defendant-Appellant.

Submitted October 11, 1929; Decided March 19, 1930.

On appeal from the Hudson County Court of Common Pleas.

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Before—Justices TRENCHARD, LLOYD and CASE.

Opinion of Supreme Court.

For the appellant, COLLINS & CORBIN
(EDWARD A. MARKLEY, of Counsel).

For the respondents, MCCARTHY & MC-
TAGUE (FRANK P. MCCARTHY, of Coun-
sel).

Per Curiam:

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This is an appeal from the Hudson County Court of Common Pleas where the plaintiffs had a verdict and judgment against the defendant John F. Craig, Inc., a nonsuit having been granted as to the other defendants.

At the trial it appeared that plaintiffs were the tenants of defendants Lehman. The Lehmans by written contract employed defendant John F. Craig, Inc., to install a heating system on the premises. The Craig Company removed the flooring of the kitchen, for the purpose of laying pipes, by cutting the tongues and grooves and sawing along the beam and taking up four boards. In relaying this flooring the evidence indicates that the work was done negligently, although the company's foreman tried the boards after they had been relaid and assured Mrs. Connick that they were all right for use. Mrs. Connick undertook to use the floor for passage from the kitchen to the dining room, when the boards gave way and she went through and injured her leg, and this suit was brought to recover for such injuries.

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The evidence indicates that the flooring, as we have indicated, was not properly replaced. The old boards were used and were rested upon cleats supposed to be fastened to the beam, and the flooring gave way because the cleats placed by the company's workman on the beam had pulled away from the beam, not being properly fastened. There

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Opinion of Supreme Court.

was expert testimony at the trial that this was bad workmanship.

10 We believe that the evidence supports the allegation of negligence on the part of the Craig Company and that such negligence was the proximate cause of the accident. That being so, the motions for nonsuit and for a direction of a verdict for the defendant Craig Company were properly denied.

It is also argued that the plaintiffs cannot recover because the negligence was that of an independent contractor. But in *Sarno v. Gulf Refining Co.*, 99 N. J. L. 340, affd. 102 N. J. L. 223, it was said:

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

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The application of that rule to the present case results in an affirmance of the judgment, with costs, and it is so ordered.

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Notice and Grounds of Appeal.

(Filed April 28, 1930.)

NEW JERSEY SUPREME COURT.

<p>MARY CONNICK and JOSEPH CONNICK, <i>Plaintiffs-Respondents,</i></p> <p style="text-align: center;"><i>v.</i></p> <p>EDWARD LEHMAN and MARY LEHMAN, <i>Defendants,</i></p> <p style="text-align: center;">and</p> <p>JOHN F. CRAIG, INC., a corporation, <i>Defendant-Appellant.</i></p>	<p>Action at Law. On Appeal from Supreme Court.</p> <p>NOTICE AND GROUNDS OF APPEAL.</p>	<p>10</p> <p>20</p>
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To

Messrs. MCCARTHY & McTAGUE,
Attorneys of Plaintiffs-Respondents.

SIRS:

TAKE NOTICE, that the defendant-appellant John F. Craig, Inc., appeals to the New Jersey Court of Errors and Appeals from the whole of the judgment entered in this cause upon the following ground:

The Supreme Court of New Jersey erred in giving judgment for the plaintiffs-appellants instead of for the defendant-appellant, John F. Craig,

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Notice and Grounds of Appeal.

Inc., for one or more of the grounds of appeal urged in said court.

Dated April 26, 1930.

Respectfully,

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COLLINS & CORBIN,
Attorneys of Defendant-Appellant,
John F. Craig, Inc.

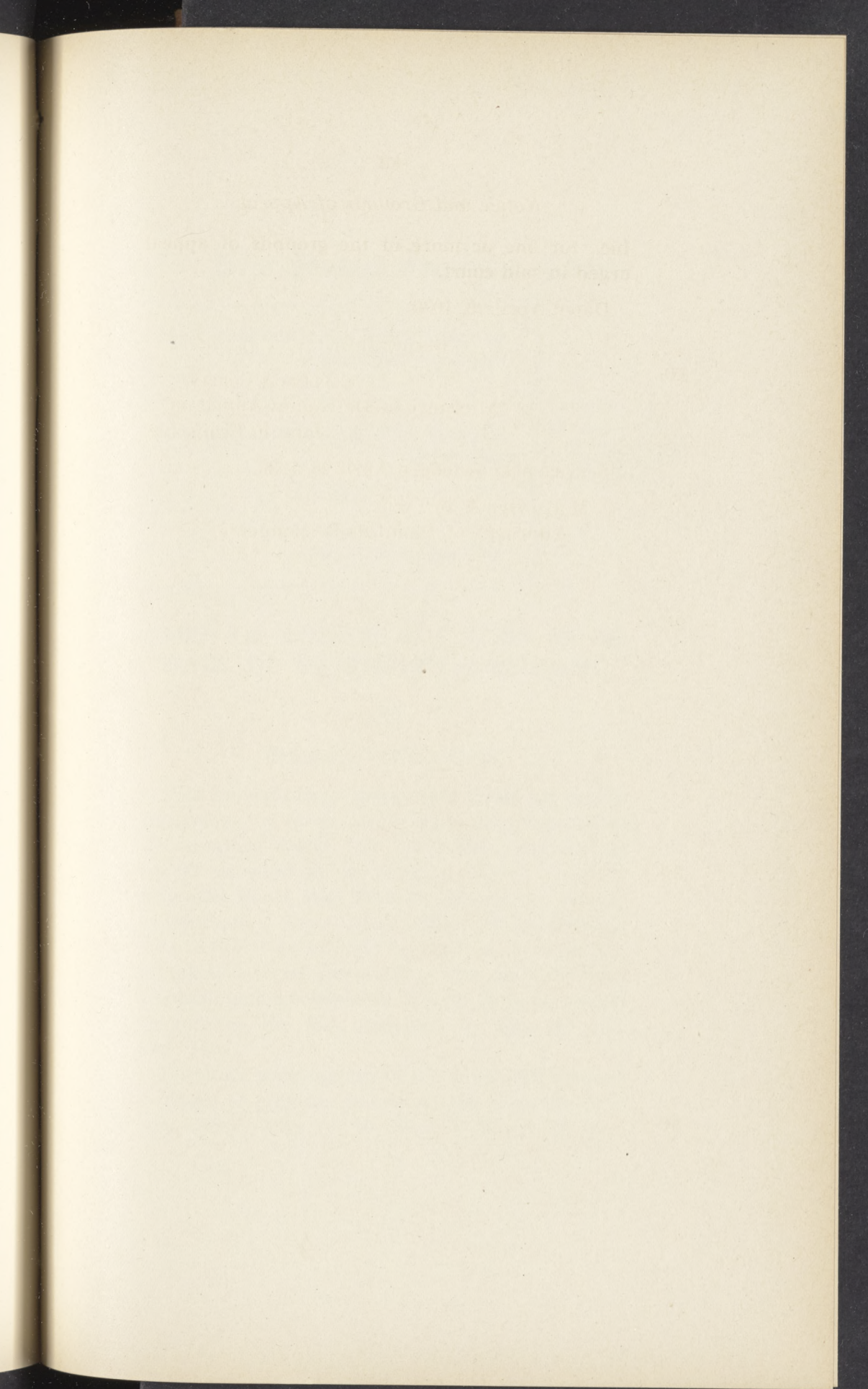
Service acknowledged April 26, 1930,

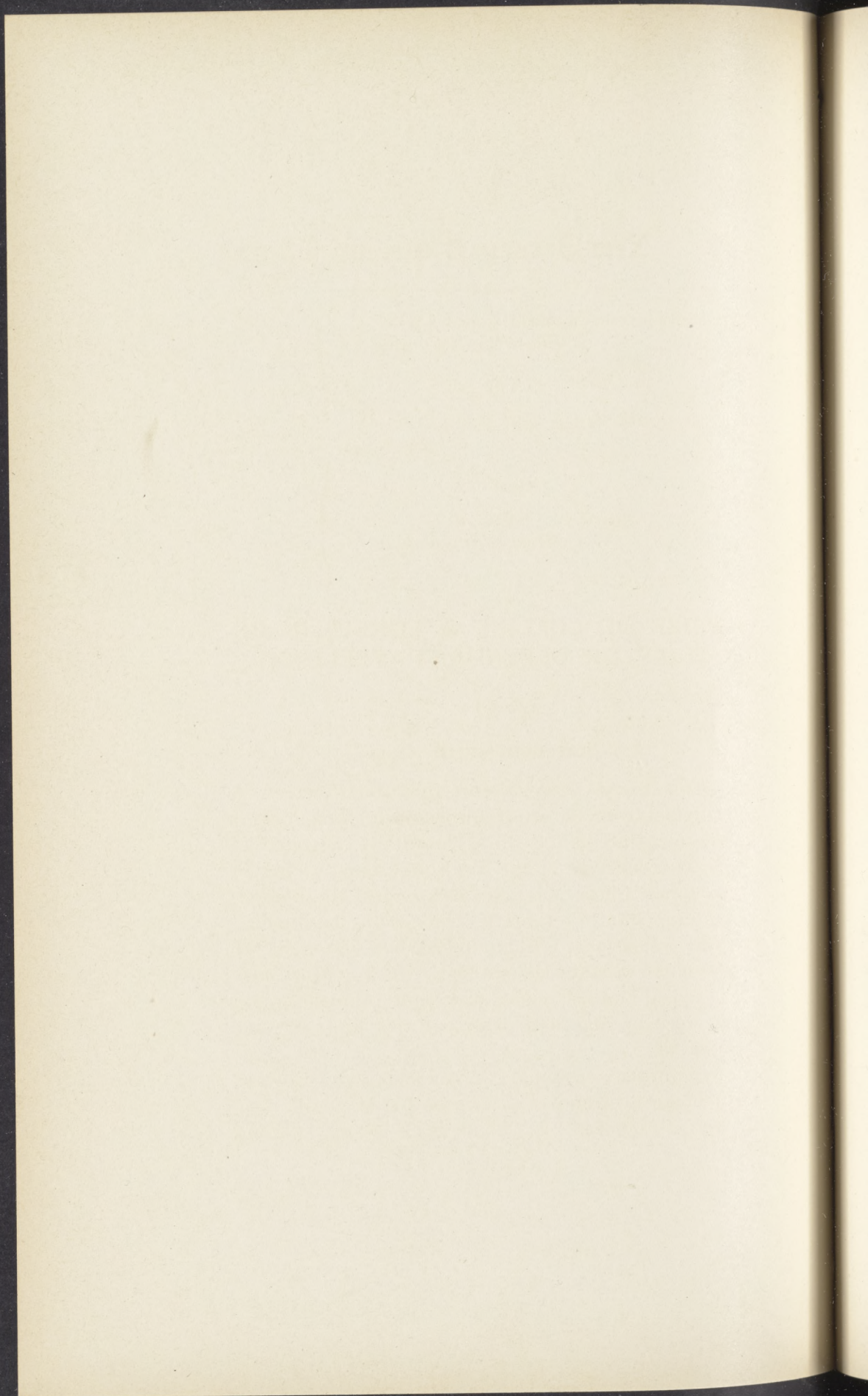
MCCARTHY & MCTAGUE,
Attorneys of Plaintiffs-Respondents.

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New Jersey Supreme Court

MARY CONNICK and JOSEPH CONNICK,
Plaintiffs-Respondents,

v.

EDWARD LEHMAN and MARY LEHMAN,
Defendants,

and

JOHN F. CRAIG, INC.,
Defendant-Appellant.

Action at Law.
On Appeal from
Hudson County
Court of Com-
mon Pleas.

BRIEF OF COLLINS & CORBIN IN BE- HALF OF DEFENDANT-APPELLANT.

(1)

Statement of the Case.

This appeal brings before this Court for review judgments in favor of the plaintiffs-respondents (hereinafter called the plaintiffs), aggregating \$1,500 rendered in the Hudson County Court of Common Pleas, May 28, 1929, against the defendant-appellant (hereinafter called the defendant). The action was brought to recover damages for personal injuries sustained by the plaintiff Mary Connick, and her husband, Joseph Connick, sought to recover the loss sustained by him as such (pp. 1-4).

Plaintiffs were tenants of the defendant Edward Lehman at premises known as 166 Magnolia Avenue, Jersey City (p. 10, lines 38-40; p. 11, lines

1-3). In the month of December, 1926, Lehman, by a written contract, employed defendant John F. Craig, Inc., to install a heating plant in the premises (p. 49, lines 39-41; p. 50, lines 25-41; p. 51, lines 1-10). As part of the operation of installing the heating plant, piping was laid under the floor of the Connick apartment from the dining room to the kitchen and part of the flooring in the kitchen at the threshold of the dining room was taken up so that the piping might be laid (p. 11, lines 20-36). Three or four boards about four and one-half inches wide each (p. 51, lines 26-28), twelve inches long (p. 51, lines 23-26), were taken up (p. 56, lines 10-11). After the work was done, these boards were replaced the same day with cleats (p. 56, lines 11-14). The cleats were nailed and screwed to the flooring that had been removed (p. 58, lines 33-35), and after the flooring was so replaced, the foreman of Craig Company "showed her (Mrs. Connick) that the floor was O. K.," by walking across it and jumping on it (p. 59, lines 18-23). The flooring was replaced on Tuesday and on the following Friday, Mrs. Connick, in walking from the kitchen to the dining room, went through the flooring up to her ankle (p. 12, lines 31-34), and thereby sustained personal injuries, for which this action was brought.

At the close of the plaintiffs' case, counsel for each defendant moved for a nonsuit and those motions were denied and exceptions duly noted (p. 38, lines 30-40; p. 39, lines 1-32). At the close of the entire case, the Trial Court directed a verdict in favor of defendants Edward and Mary Lehman, on motion of their attorney (p. 62, lines 28-31). Motion for a directed verdict was made in behalf of defendant John F. Craig, Inc., and the same was denied and an exception allowed

(p. 62, lines 31-40; p. 63, lines 1-28). The grounds of appeal raise the question whether or not the Court erred in refusing to nonsuit plaintiffs or direct a verdict in favor of defendant John F. Craig, Inc.

(2)

Grounds of Appeal.

The grounds of appeal which will be urged, are as follows (p. 75, lines 30-40; p. 76, lines 1-28):

1. The Trial Court denied the motion for nonsuit in favor of defendant when thereunto moved, whereas said motion should have been granted upon the following grounds:

(a) No negligence was proven on the part of defendant John F. Craig, Inc.

(b) No negligence was proven on the part of defendant John F. Craig, Inc., that was the proximate cause of the accident.

2. The Trial Court refused to direct a verdict in favor of defendant when thereunto moved, whereas said motion should have been granted upon the following grounds:

(a) No negligence was proven on the part of defendant John F. Craig, Inc.

(b) No negligence was proven on the part of defendant John F. Craig, Inc., that was the proximate cause of the accident.

(3)

BRIEF OF THE ARGUMENT.

I.

There was no evidence of any negligence on the part of the defendant John F. Craig, Inc., as alleged in the complaint, which was the proximate cause of the accident.

The negligence charged in the complaint as to this defendant, was as follows (p. 3, lines 13-26) :

“That it failed to employ competent workmen to make the alterations or repairs; that it permitted the said alterations and repairs to be done in a careless and unworkmanlike manner; that it neglected to inspect the said work and to see that the same was properly completed so that the tenants might occupy the said premises with safety to their life and limb; that it permitted defective and inferior material to be used in connection with the said alterations and repairs, and that it was otherwise negligent and careless in providing for the safe and proper completion of the work according to law.”

Considering the plaintiffs' case from its most favorable aspect, it appears that the Connicks were tenants of Edward Lehman in premises owned by him at 166 Magnolia Avenue, Jersey City (p. 10, lines 38-41; p. 11, lines 1-3), and at the request of Mrs. Connick the landlord installed a new heating system in the house (p. 49, lines 38-41; p. 50, lines 1-6). Defendant John F. Craig, Inc., by written contract with Lehman, was retained to do the work (p. 50, lines 21-27; p. 51, lines 1-10). The piping was run on the floor of the Connick apartment from the dining room to the kitchen stove and to

do this work it was necessary to remove part of the kitchen flooring at the threshold of the dining room (p. 11, lines 18-31). When the piping was connected and the work completed, the part of the floor removed, three or four boards about 4½ inches wide each and 12 inches long (p. 51, lines 23-26), was replaced the same day (p. 11, lines 32-40; p. 12, lines 1-19). The job of removing and replacing these boards was finished on a Tuesday and on the following Friday, Mrs. Connick was hurt (p. 12, lines 20-23). On the day of the accident (Friday), at about 11:20 A. M., she was in the kitchen preparing luncheon for her boy who was about to go to school, and in going from the kitchen to the dining room to determine the exact time, she took four or five steps and her foot up to her ankle went through the floor (p. 12, lines 27-36). There were five in the Connick household (p. 25, lines 36-40). All the members of the family had used the part of the floor in question continuously and had walked over it on Tuesday, the day the work was completed, Wednesday, Thursday and Friday, up to the time the accident happened (p. 27, lines 11-14). At the time of the accident Mrs. Connick weighed 220 pounds (p. 26, lines 12-14). She admitted that her own weight caused the boards to go down (p. 23, lines 32-33). Mr. Cregan securely replaced the boards that had been removed. She spoke to him when the job was finished. Before he left the house he fixed the boards securely, and stamped and jumped on them in her presence to test them and they were all right. She so testified (p. 26, lines 25-41).

Cregan, called by co-defendant Lehman, testified that he was employed by the defendant John F. Craig, Inc., steamfitting contractors; he personally had over twenty years' experience as a steamfitter. He was foreman on the job (p. 57, lines 39-

41). He opened the hole in the floor and repaired it (p. 57, lines 25-30). He cut one of the tongues and grooves and sawed along the beam; took up about three or four boards and after the work was done, the same day replaced the boards with cleats and fastened them by laying one cleat on one beam and one cleat on the other (p. 56, lines 8-10). He secured the cleats to the flooring first by screws and then by nails. For the space of 18 inches of flooring which had been removed two cleats would have been sufficient to secure the part of the floor replaced (p. 58, lines 39-41). After the flooring was thus replaced, he showed Mrs. Connick that the floor was securely replaced. He walked across it and jumped on it and she saw that it was all right (p. 59, lines 18-23).

We quote from the testimony of Edward Lehman, a co-defendant, owner of the premises in question and an architect and builder of at least thirty years' experience (p. 55, lines 8-13) as follows (p. 53, lines 31-36):

“Q. And just the mere placing of a board on a rest at each end is not ordinarily in construction work considered a secure flooring, is it? A. Well, good construction naturally requires a floor to be nailed.”

May we quote from the Court's charge as follows (p. 65, lines 23-32):

“He (Cregan), says that when the job was finished that he jumped on the flooring, apparently to see if it was fixed in securely, and in that respect he is corroborated by Mrs. Connick who frankly says that when the flooring was replaced, that one of the workmen,—she does not know whether it was Cregan or not, according to my recollection of the testimony—did jump on the flooring, and at that time it was secure.”

Finally, we quote from the Court's charge as follows (p. 67, lines 29-32):

"Now, keep in mind, that there was no dispute about the fact that Cregan jumped on the floor after the floor was fixed on the day that the plant was installed."

The foregoing presents the uncontradicted facts and they do not sustain any one of the allegations of negligence set forth, *supra*. It is elementary that negligence is a fact which must be shown. It will not be presumed. There is always a presumption against negligence. *Ryan v. Public Service Rwy. Co.*, 101 L. 361, citing *McCombe v. Public Service Rwy. Co.*, 95 L. 187.

The first question that presents itself is, what duty, if any, did this defendant, the contractor, owe to the tenant with respect to the replacement of the flooring? There is no question that the landlord was under a duty to the tenant, when he assumed to repair the flooring or replace it, to use reasonable care to make it reasonably safe. That duty arose out of the agreement between the landlord and tenant with respect to the installation of this heating system. That duty of the landlord could not be delegated by him so as to relieve himself from liability to the tenant. The doctrine of independent contractor does not enter in so far as the landlord is concerned, because he is under a contractual relation to the tenant, which he cannot dispose of by contracting with some third person to do what he is under obligation to do. The doctrine of independent contract only applies when a third person, who has no contractual relation with the landlord, is injured by the act of the contractor. In those cases it must be shown that there is a duty owing to the third person by the contractor. *Schutte v. The United Electric Co.*, 68 N. J. L. 435.

The rule is very clearly stated by VAN SYCKEL, J., in the foregoing case, speaking for this Court on page 437, where he lays down the rule as follows:

“It is the recognized law of this state that one who is not a party to a contract cannot sue in respect of a breach of a duty arising out of the contract. *Appleby v. State*, 16 Vroom 165; *Styles v. Long Co.*, 38 *id.* 413; *Marvin Safe Co. v. Ward*, 17 *id.* 19.

“But Mr. Justice DEPUE, in his able review of the cases on that subject, was careful to limit the application of the rule, as follows:

“There is a class of cases in which a person performing services or doing work under a contract may be held in damages for injuries to third parties, occasioned by negligence or misconduct in the execution of the contract; but these are cases where the duty or liability arises independent of the contract, and in such cases the plaintiff must count upon a wrongful act or negligence—a tort as distinguished from a mere breach of contract.’

“The same distinction is observed by Chief Justice BEASLEY, in delivering the opinion of the Supreme Court in *Van Winkle v. American Steam Boiler Co.*, 23 Vroom 247, where he says:

“‘And it would seem that there is a broader ground than the one above defined on which the present case can be based. It is this, *that in all cases in which a person undertakes the performance of an act which, if not done with care and skill, will be highly dangerous to the person or lives of one or more persons, known or unknown, the law, ipso facto, imposes as a public duty the obligation to exercise such care and skill.*”

This case has been repeatedly followed and is the settled law of our state. It is, therefore, clear

that the Trial Court erred when he directed verdict in favor of the owner of the premises. It will be remembered that in this case the injury to the plaintiff was caused by the breaking of the boards which formed part of the replaced flooring. There was no proof in the case at bar that the defendant, who contracted to put in the heating plant, was under any obligation to provide new flooring or new boards for the flooring. There was no proof in the case of his obligation under his contract with the landlord, except the inference to be drawn from the fact that he was installing the heating plant, and it was necessary to take up part of the flooring. Such proof is not sufficient to prove that the contractor was under a duty to provide new flooring, and for a breaking of the boards only the landlord would be responsible under such circumstances. The plaintiff herself testified (p. 26, lines 10-20) that the cause of her fall was a breaking of the boards. There was no proof in the case that the boards were insecurely replaced or fastened, but on the contrary the proof was uncontradicted that the boards were properly secured by nails and screws. The only proof in the case with respect to the standard of care involved was that all that was necessary for the replacing of boards under such circumstances was to nail them. Here they were nailed and screwed down. In addition to that it was uncontradicted that the contractor, to prove that they were secure, jumped on them and stamped on them in the presence of the plaintiff, who admitted that under such pressure they remained secure.

A recent case in point with the case at bar is *Holmes v. Pelligrino*, 102 N. J. L. 697, where the Court of Errors and Appeals clearly points out that there is no liability in a case of this kind.

There a plank or board, upon which a workman of an independent contractor was standing, broke. The board was provided by the owner of the building for the scaffold upon which the workman was standing. That Court, in the unanimous opinion sustaining a nonsuit for the plaintiff, held (*italics ours*):

“As a result of the accident, Holmes brought suit against the defendant, Pelligrino. Cornelius Schlossman was an independent contractor and had a contract with the defendant. Abram Holmes and Peter Schlossman were employes of the said Cornelius Schlossman, the independent contractor. The complaint alleges that the defendant failed to use reasonable care to maintain the scaffold in a reasonably safe condition, and should have known that the scaffold was not in a reasonably safe condition for the purpose for which it was intended to be used, and, therefore, that it was the defendant’s negligence which caused the injury to the plaintiff. There was no evidence produced on behalf of the plaintiff as to what defect, if any, existed in the plank to cause the accident. The plaintiff urges that the doctrine of *‘res ipsa loquitur’* applies, and cites the following cases: *Van Winkle v. American Steam Boiler Co.*, 52 N. J. L. 240; *Piraccini v. Director-General*, 95 *Id.* 114, and *Heckel v. Ford Motor Co.*, 101 N. J. L. 385, and several other similar cases.

“The defendant, however, claims that there was no breach of any duty owing by the defendant to the plaintiff, citing the case of *Bahr v. Lombard, Ayres & Co.*, 53 N. J. L. 233, and also the case of *Levendusky v. Empire Rubber Manufacturing Co.*, 84 *Id.* 698. In the last mentioned case the plaintiff was injured by the explosion of a machine while he was employed by the defendant, and was walking along a highway on his way to work. The plaintiff, in that case, offered no other evidence than the mere occurrence of the acci-

dent, and contended that this was sufficient to establish a *prima facie* case.

"The court, in disposing of a motion for nonsuit in the case under review, held that the duty of the defendant did not go beyond the reasonable inspection of the material that he furnished, and that there was no proof that such a reasonable inspection would have disclosed any defects in the plank. There was nothing in the evidence to show that it was the duty of the defendant to erect the scaffold. As a matter of fact, the scaffold was erected by a fellow-servant of the plaintiff, which fellow-servant was an employe of the independent contractor, Cornelius Schlossman. The most that can be inferred from the testimony is that the defendant supplied the lumber with which to construct the scaffold. It was admitted by the plaintiff that this lumber was of the usual character with which such scaffolds are erected, the plank used being two inches thick and from eight to ten inches wide, and fully capable of sustaining the weight of the plaintiff unless some defect existed therein. The plaintiff admitted that each of these planks used in the construction of the scaffold had sustained his weight on January 16th, and had also sustained the weight of his fellow-servant, Peter Schlossman, who erected the scaffold. The scaffold had been moved about during the progress of the work from one position to another. The plaintiff admitted that he had made no inspection of the planks, and that no one else, as far as he knew, had inspected them.

"We are therefore of the opinion that, under the circumstances shown by the evidence in this case, the trial judge ruled correctly in granting a nonsuit.

"The thing which caused the accident in this case—that is, the plank, was, of itself, not a highly dangerous instrumentality. The scaffold was not erected by the defendant. Assuming that it was the duty of the defendant to use reasonable care in the furnishing of the

planks, it was for the plaintiff to establish that the breaking of the plank was due to some defect in the wood which could have been discovered by inspection in the use of ordinary care. There is no evidence that the plaintiff attempted to examine the defendant before trial, or that he called for the production of the plank on a bill of particulars, or submitted interrogatories.

"In the case of the *Essex County Electric Co. v. Kelly*, 57 N. J. L. 100, Mr. Justice MAGIE, in speaking for the Supreme Court, says: 'When a servant receives an injury by reason of a latent defect in the appliances with which or the places in which he is employed, to establish the liability of the master the evidence must justify the inference that the master either knew, or, by the exercise of the care and diligence required of him by the rule, might have known of the defect.'

"It does not seem to us that it was the duty of the defendant to place at the disposal of Cornelius Schlossman planks, every one of which should be perfect for the making of the scaffold. It was his duty, however, to exercise reasonable care in this respect, and there is nothing to show that reasonable care was not exercised, and the mere breaking of the plank of itself is not sufficient to infer negligence on the part of the defendant. Of course, the plaintiff, as an employe of Cornelius Schlossman, had a claim against him under the Employers' Liability act.

"In the case of *Fukare v. Kerbaugh*, 72 N. J. L. 254, this court said, in a case where a servant was injured by the breaking of a plank on a platform which was used from which to dump cars: 'The duty of the master in this connection was to use reasonable care that proper material in sufficient quantities for the construction of this platform be provided, and there being nothing in the evidence to show that there was any failure on his part in this respect, the plaintiff has failed to make out a case for recovery.'

"We also call attention to *Baldwin v. Atlantic City Railroad Co.*, 64 N. J. L. 232, and *Atz v. Manufacturing Co.*, 59 *Id.* 41.

"For the reason, therefore, that the plaintiff failed to show what defect, if any, caused the breaking of the plank, or that the defendant failed to make a proper inspection of the plank, and for the further reason that the maxim of 'res ipsa loquitur' is not applicable to the circumstances in this case, the judgment of nonsuit of the court below is affirmed."

It will be noted in the foregoing case, that the Court held, that the doctrine of *res ipsa loquitur* did not apply, and that the mere breaking of the board was no evidence of negligence. The Court also held, that the thing which caused the accident, the plank, was of itself not a highly dangerous instrumentality. In that case the plank was provided by the owner of the premises, although it was being used by the contractor who employed the plaintiff. The law in the absence of an agreement raises no duty in favor of the third person where the instrumentality is not highly dangerous. Here, likewise, there was no highly dangerous instrumentality involved so as to bring the case within *Van Winkle v. American Steam Boiler Co.*, 23 Vroom 327, *supra*.

We, therefore, submit that under *Holmes v. Pelligrino*, 102 N. J. L. 697, *supra*, there was no duty cast upon the defendant in the case at bar to make the planks or boards reasonably safe for the plaintiff. Unless a duty is proven, there can be no liability as the Court of Errors and Appeals said in the recent case of *Morril v. Morril*, 104 N. J. L. 557, 559:

"To create a legal liability upon the part of a defendant there must be something more apparent in the case than mere physical damage; there must exist under the well-settled

rule of tort liability legal damages resulting from what has been scientifically termed a legal injury. In other words, the two elements of tort feissance according to the civil and common law commentators must concur, *damnum et injuria*. It is upon the recognition of that fundamental rule that the uniform rule of English and American law has been predicated, that the mere occurrence of physical injury involves no presumption of a legal injury with its consequent legal liability. This basic conception of the law has also given rise to the rule of *damnum absque injuria* under which the physical damage is apparent, but the legal injury is not apparent. *Hummer v. Lehigh Valley Railroad*, 75 N. J. L. 703; *Kingsley v. Delaware, Lackawanna and Western Railroad Co.*, 81 *Id.* 536; *Fielders v. Railway Co.*, 68 *Id.* 343; *Johnson v. Railway Co.*, 83 *Id.* 647.

“Thus observes Blackstone:

“‘Though there may be damages sufficient, yet if the fact be true it is *damnum absque injuria*, there is no injury (legal), the law gives no remedy.’ 3 Com. 125. So, Dr. Luddington, an eminent commentator upon English law, recognized by Kent and others, observes: ‘It is essential to an action in tort that the act complained of should under the circumstances be legally wrongful as regards the party complaining—that is, it must prejudicially affect him in some legal right. Merely that it will, however, directly do him harm, is not enough. Cases are of daily occurrence in which the lawful exercise of a right operates to the detriment of another without being actionable.’ Citing *Rogers v. Raymond*, 8 Mo. Ind. App. 103. In consonance with this basic theory of legal injury American commentators have similarly declared: ‘The law does not infer that merely because one man has suffered harm he must have compensation and some other must pay. The monstrous

task of ensuring against all loss has not been undertaken. On the contrary, not only have large and important classes of losses been denied judicial recognition, but the very nature of many admitted rights necessitates that much harm should go uncompensated.' 1 *Jaggard Torts* 89; citing *Tucker v. Drake*, 11 Allen (Mass.) 145; *O'Donnell v. Segar*, 25 Mich. 367; 1 *Cooley Torts* 82, and cases."

We, therefore, submit that there was no duty owing by this defendant to the tenant to provide the tenant with new boards which would not break. All that the proof indicates is, that the defendant replaced the boards which were necessarily taken up in putting in the new heating system. There is no proof, that in the replacement of the boards the defendant, as contractor, in any way violated his agreement with the owner of the premises, but on the contrary the owner testified, that they were replaced properly. Therefore, we respectfully submit, that because there was no duty owing to the plaintiff by this defendant, that the defendant cannot be charged with negligence. However, assuming that the Court should conclude that there was a duty owing, we shall now proceed to argue that there was no evidence, even if a duty were owing by the defendant to the plaintiff to exercise reasonable care.

For the plaintiffs to succeed here, it is incumbent upon them, in the absence of direct evidence, to show not only the existence of possible responsibility, but the existence of such circumstances as would justify the direct inference that the injury was caused by the wrongful act of the defendant and which would exclude the idea that it was a cause with which the defendant was unconnected. *Suburban Electric Co. v. Nugent*, 68 N. J. L. 658; *Austin v. P. R. R. Co.*, 82 L. 416.

Proof of the occurrence of an accident does not raise a presumption of negligence.

Bahr v. Lombard, Ayres & Co., 53 L. 233. In that very familiar case most frequently cited for the proposition stated above, the principle involved in the case *sub judice*, is set forth in the opinion of the Court by GARRISON, J., at page 237, as follows:

“The principle is quite institutional, that whenever a right of action springs from the conduct of a defendant the plaintiff must present proof of the facts necessary to the recovery which he seeks. It is, furthermore, the general rule of law, that the mere proof of the occurrence of an accident raises no presumption of negligence. These doctrines, which, if strictly applied, would lead to a nonsuit in every case in which the plaintiff’s proof failed to demonstrate the specific acts of negligence which he deemed the proximate cause of his injuries, have in practice an application which, while not losing sight of their normal character, leads to an intelligent adaptation in keeping with the requirements of the modern law of negligence.”

See also

Higgins v. Goerke-Crich Co., 91 L. 464, at 468;

Hoff v. Public Service Rwy. Co., 91 L. 641, at 644.

Defendant employed competent workmen undeniably. The work of removing and replacing the flooring was done by Cregan, the foreman, a man of more than twenty years’ experience in the line of work involved. Edward Lehman, an architect and builder of over thirty years’ experience, as shown by testimony referred to *supra*, was of the opinion that proper construction in

replacing the floors required merely nailing the boards that were replaced. Here the undisputed testimony is, that Cregan not only replaced the boards by putting cleats across the bottom, but then also screwed and nailed them in. As a further precaution, Mrs. Connick herself admitted, and the Court twice in its charge to the jury referred to the fact, that Cregan in the presence of plaintiff stamped and jumped on the floor before he left the job, and at that time the boards were secure. Mrs. Connick herself ascribes the accident to her own weight, as causing the boards to collapse. She admitted that at the time of the accident she weighed 220 pounds. Further, there were five in her household and almost four days had elapsed, during which time all the members of the Connick household passed to and fro continuously on the part of the floor where the accident occurred.

It is elementary that, to establish a case of negligence and fix the liability on the defendant, it is the burden of the plaintiff to prove some fact which is more consistent with negligence of the defendant than with the absence of it, and when the plaintiff's evidence is equally consistent with the absence as with the existence of negligence on the part of the defendant, the plaintiff must fail, because there is always a presumption against negligence and in favor of innocence.

McCombe v. Public Service Rwy. Co., 95 L. 187;

Ryan v. Public Service Rwy. Co., 101 L. 361.

In *Alvino v. Public Service Rwy. Co.*, the Court of last resort held:

"1. To establish a case of negligence and fix the liability of the defendant, it is in-

cumbent on the plaintiff to prove some fact which is more consistent with negligence of the defendant than with the absence of it. When the plaintiff's evidence is equally consistent with the absence as with the existence of negligence on the part of the defendant, the plaintiff must fail. A probability is not sufficient.

"2. Negligence is a fact which must be shown. It will not be presumed. There is always a presumption against negligence and in favor of innocence."

The mere fact that Mrs. Connick fell raised no presumption of negligence on the part of defendant.

Garland v. Furst Store, 93 L. 127;

Rom v. Huber, 93 L. 306;

Maphet v. Hudson & Manhattan R. R. Co.,
98 L. 369.

In view of the facts as outlined *supra*, and more particularly the admitted evidence of the manner in which Cregan performed the work and that he not only replaced the boards with cleats, but also used nails and screws to make the replaced boards secure, and went considerably further by stamping and jumping on the boards, in the presence of Mrs. Connick, certainly there could be no immediate inference of any negligence on the part of defendant or that, to paraphrase the charge of the Court, Cregan and the other workmen, agents and servants of the defendant, in replacing the flooring did not use that degree of care which ordinarily prudent persons—workmen of their type—would use under the circumstances.

Here the alleged proof of negligence is circumstantial and not direct, and in that event the evidence should be such as to exclude all theories

of accounting for the accident which would be inconsistent with the defendant's negligence.

Suburban Electric Co. v. Nugent, 68 L. 658;

Cass v. Sanger, 77 L. 413.

Nor does the doctrine of *res ipsa loquitur* apply.

In *Cass v. Sanger*, *supra*, the facts were briefly as follows: Plaintiffs were tenants of a store on the ground floor of the building. The defendant was a tenant of the third floor of the building. The plaintiffs on Saturday evening locked their store with its contents in good condition. On Monday morning, upon opening the store, water was found trickling from the ceiling above upon their stock. An examination disclosed the water coming from the third floor over the second floor, and upon the third floor, for a distance of about 16 feet around a water sink, was sawdust damp and covered with water. The ceiling of the third floor was not wet. The water was not running from the faucet at the sink. Held, that in order to apply the doctrine of *res ipsa loquitur*, the burden rested upon the plaintiffs to show that the damage did not result in any way other than from the faucet or the fixtures within the defendant's control. The Court below denied motion for nonsuit and refused to direct a verdict for the defendant and plaintiff recovered a judgment which was reversed. VOORHEES, J., in writing the opinion for the Court, wrote as follows:

"In order to apply the rule of *res ipsa loquitur*, the burden rested upon the plaintiffs to show that the damage did not result in any other way than from the faucet or the fixtures within the defendant's control. Because the defendant had not shown that the damage resulted from some other cause than the faucet, the court erroneously applied the doctrine.

“The plaintiffs, if they had gone further and excluded the idea that the defect was in the supply pipe, by showing that no water was flowing from it and that it had not been repaired since the Saturday preceding, then the doctrine might have been invoked.”

There were further facts developed on cross examination of Mary Connick. The new heater that was installed by defendant was a kitchen coal burner and she kept her coal in the cellar. She did not, however, bring the coal to her apartment through the dumbwaiter, but her boy used to take it up at night in a coal scuttle and a big pan. In the evening the boy would bring up the coal and throw it over near the new heater. He would step or walk with his load on the part of the floor that had been repaired (p. 61, lines 25-40; p. 62, lines 1-21). The witness Cregan said that in the corner of the kitchen where the flooring had been replaced there was a 100-pound bag of coal and that he had observed the presence of bags of coal in this place prior to the accident and in fact had to move them out of the way. The coal bags were kept in the entrance between the kitchen and the dining room, right in the corner, and the boards that had been removed were right at the entrance (p. 59, lines 38-40; p. 60, lines 1-24).

Undoubtedly the 100-pound bags of coal when delivered to her were dropped on the part of the floor that had been replaced, which was at the entrance of the kitchen door. The throwing of such a load on any floor would tend to weaken it and make it insecure especially if the 220-pound plaintiff and the coal were at the same place at the same time. We urge under the case of *Egan v. Kruger*, 103 L. 474, that the floor of an apartment house was not designed for the use it was put to by Mrs. Connick. The accident resulting in her injury did not

result from the failure of the defendant to perform any duty which it owed.

Gavin v. O'Connor, 99 L. 162;
Saunders v. Easterly Hydraulic Brick Co.,
 63 L. 554.

On the doctrine of *res ipsa loquitur*, Mr. Justice KALISCH, writing the opinion for the Court of Errors and Appeals, in the case of *Conover v. D. L. & W. R. R. Co.*, 92 L. 602, at 604, says (*italics ours*):

“In well considered cases resting upon the application of the doctrine of *res ipsa loquitur*, as tending to establish *prima facie* negligence and where liability was upheld, it will be invariably found that in every instance there was an essential element present, that is, proof of the existence of the cause or thing which was alleged to have been the negligent act which produced the injury, or proof of such facts from which the existence of such cause or thing constituting the alleged negligent act was the only reasonable inference that could be properly drawn, and that such negligent cause or thing producing the injury was in the possession of and under the control or management of the person charged with negligence or of his servant.” Citing many authorities.

The leading case in this State is *Bahr v. Lombard, Ayres Co.*, 53 L. 233. Mr. Justice GUMMERE, in *Sheridan v. Foley*, 58 L. 230, 232, fully discusses the doctrine of *res ipsa loquitur* with its limitations.

There is no proof for the plaintiff that the work of replacing the boards was done contrary to the proper and accepted standard for the doing of such work. The defendant's proof was uncontradicted that that work was strictly in accordance with the expert way of doing it. That question could not, therefore, be left to the caprice of the

jury. That principle is settled in the following cases:

Feil v. West Jersey and Seashore R. R. Co., 77 L. 502;

Halm v. Freeholders of Hudson County, 78 L. 712;

Kingsley v. D. L. & W. R. R. Co., 81 L. 536;

Zabrowski v. Warner Sugar Refining Co., 83 L. 558;

Raub v. L. V. R. R. Co., 87 L. 603.

The complaint is sounded in tort on negligence and we contend that there has been no proof whatsoever to support any allegation thereof. We have shown indisputably that the defendant employed competent workmen (Cregan had over twenty years' experience), and that the alterations and repairs were not done in a careless and unworkmanlike manner, but on the contrary greater precaution and care was exercised in performance of the work, than that ordinarily exercised by workmen of their type and, further, that the workmen did not neglect to inspect said work after it was completed, but on the contrary, in the presence of the plaintiff, stamped and jumped on the boards to make certain that they were secure. There was no proof whatsoever that the material used in connection with the work was inferior, and even assuming that the proof was to that effect, the defendant would not be responsible for it was the owner's duty to provide proper material for the floor.

The law is settled, that where in the trial of an action for negligence there are no disputed facts, there is nothing of an issuable character for the jury to decide, and it devolves upon the Court to declare the judgment which the law imposes. *Morril v. Morrill*, 104 N. J. L. 557.

In *Okin v. Essex Sales Co.*, 103 N. J. L. 218, affirmed on opinion of this Court, 138 Atl. 922, it is held by this Court, that where the facts upon which liability is predicated are undisputed, that is, the proof is uncontradicted, and they fail to show liability, the verdict should be directed in favor of the defendant. See also *Cronecker v. Hall*, 92 N. J. L. 450.

We respectfully submit that the Trial Court erred in refusing to direct a verdict in favor of the defendant.

II.

Comment on Opinion of Supreme Court.

The Supreme Court in its opinion says (middle of second paragraph to the end of third paragraph):

“* * * The Craig Company removed the flooring of the kitchen, for the purpose of laying pipes, by cutting the tongues and grooves and sawing along the beam and taking up four boards. In re-laying this flooring the evidence indicates that the work was done negligently, although the company's foreman tried the boards after they had been relaid and assured Mrs. Connick that they were all right for use. Mrs. Connick undertook to use the floor for passage from the kitchen to the dining room, when the boards gave way and she went through and injured her leg, and this suit was brought to recover for such injuries.

“The evidence indicates that the flooring, as we have indicated, was not properly replaced. The old boards were used and were rested upon cleats supposed to be fastened to the beam, and the flooring gave way because the cleats placed by the company's workman on the beam had pulled away from the beam, not being properly fastened. There was expert testimony at the trial that this was bad workmanship.”

It is respectfully submitted, that the facts outlined in the opinion of the Supreme Court do not accurately represent the situation. Mary Connick testified the accident happened on Friday, December 3rd (p. 25, lines 31-33), at about 11:20 A. M. (p. 12, lines 29-33), and the workmen finished the job on the Tuesday previous at about 11:20 A. M. (p. 11, lines 37-40; p. 25, lines 34-35). She testified that there were five in her household and that all the members of her family had passed over the part of the floor that was replaced, on Tuesday, Wednesday and Thursday, up to the day the accident happened, which was on Friday (p. 25, lines 37-40; p. 26, lines 4-7). She said they (the workmen) *nailed* the boards (p. 12, lines 14-18; p. 25, lines 34-35). The boards were not merely "re-laid" or "rested upon cleats supposed to be fastened to the beam," as stated in the opinion. Mary Connick herself testified, that they (the workmen), *nailed* the boards to the beam (p. 12, lines 14-18; p. 25, lines 34-35), and further, that the boards did not "pull away from the beam," but rather they broke (p. 26, lines 15-18).

The opinion further says, that there was expert testimony at the trial that the workmanship was bad. This is not so. The defendant Edward Lehman, an architect and builder of thirty years' experience (p. 55, lines 8-12), testified: "Well, good construction naturally requires a floor to be nailed" (p. 53, lines 33-35). Mrs. Connick herself testified *supra*, that the boards were nailed and the testimony of Cregan is undisputed that the boards not only were nailed, but in addition were screwed and further, Mrs. Connick herself admitted that when the operation of replacing the boards was completed, Cregan not merely as the opinion says "assured Mrs. Connick that they were all right for use," but he stamped and jumped

on the boards to show that they were securely fastened.

Finally, the opinion says: "It is also argued that the plaintiffs cannot recover, because the negligence was that of an independent contractor." Appellant made no such argument in its brief, as an examination of the same will disclose. It was urged in the Supreme Court in appellant's brief (pp. 8-9), and here repeated, that the appellant was under no duty to provide new flooring and for the breaking of the boards only the landlord would be responsible. It was not argued that the negligence was that of an independent contractor, because to do so would be admitting that appellant was negligent, whereas Point I of the argument was to the effect that there was no evidence of any negligence on the part of the appellant.

The Supreme Court cites the case of *Sarno v. Gulf Refining Co.*, 99 N. J. L. 340, affirmed 102 N. J. L. 223, but we contend that it has no application to the case *sub judice*. In the *Sarno* case the negligence on the part of the independent contractor through his employees and agents in that they allowed gasoline to spread on a public street in a thickly inhabited environment where a fire is apt to be generated by the unsuspecting wayfarer, or where curious and ignorant children are apt to be attracted by its presence as a means of pastime and amusement, so as to be the proximate cause and superinducing condition of public danger and provide injury, was proven. Here there was no evidence whatsoever of negligence on the part of the appellant's agents or employees, but, on the contrary, expert testimony was to the effect that the work was properly performed.

III.

Conclusion.

For these reasons we respectfully submit, that the judgment of the Supreme Court should be reversed with direction that *venire de novo* be awarded.

Submitted May Term, 1930.

EDWARD A. MARKLEY,
Of Counsel with Appellant.

COLLINS & CORBIN,
Attorneys of Defendant-Appellant.

New Jersey Court of Errors and Appeals

MARY CONNICK and JOSEPH
CONNICK,
Plaintiffs-Respondents,

vs.

EDWARD LEHMAN and MARY
LEHMAN,
Defendants,

JOHN F. CRAIG, INC.,
Defendant-Appellant.

Action at
Law.

On Appeal
from
Supreme
Court.

BRIEF OF McCARTHY & McTAGUE IN BEHALF OF PLAINTIFFS-RESPONDENTS.

This appeal brings before this Court for review a judgment obtained in the Hudson County Court of Common Pleas in favor of the plaintiffs-respondents rendered therein by a jury against the defendant-appellant. The action is for personal injuries sustained by the plaintiff and loss to her husband because of her incapacity and expenses incurred.

Facts.

The plaintiffs resided at 166 Magnolia Avenue, Jersey City, New Jersey, at the time of the accident (pp. 10 and 11, ll. 3 to 10). The building was owned by the defendants Lehman (p. 11, ll. 1 to 3). The defendants Lehman by written contract, employed the defendant, John F. Craig, Inc., to install a heating system in the said premises (p. 51, ll. 1 to 10; p. 49, ll. 39 to

41). John F. Craig, Inc., in the course of its work, removed the flooring in the kitchen directly in front of the threshold leading to the dining room (p. 11, ll. 26 to 31; p. 61, ll. 1 to 10) in the following manner:

By cutting one of the tongues and grooves and sawing along the beam and taking out about four boards (p. 56, ll. 8 to 11).

The said flooring was replaced after work was completed in the following manner:

By putting a cleat, *i. e.*, a piece of wood measuring one inch by one inch and one and a half inch to four inches on each side of the beams and upon these cleats the flooring that was previously removed was replaced, minus the tongue and grooves which had been cut in removing, and the three or four boards were replaced by merely setting these boards upon the cleats which had been previously secured to the beams (p. 61, ll. 10 to 20; p. 58, ll. 15 to 30). This work was completed on Tuesday and on Friday the plaintiff, Mary Connick, while preparing lunch for her son, walked across the flooring and the said flooring gave way because a cleat placed by the defendant, Craig, Inc., on the beam had pulled away from the beam (p. 57, ll. 19 to 22).

The boards which had been replaced did not break but fell into the hole when the cleat gave way (p. 23, ll. 12 to 22), and were used again in making the repairs (p. 56, ll. 24 to 29).

Because of the aforesaid accident, plaintiff, Mary Connick was severely injured (p. 12, ll. 25 to 35; p. 25, ll. 30 to 35).

The grounds of appeal by the defendant-appellant raises the question as to whether or not the Court erred in refusing to non suit the plaintiff or direct a verdict in favor of the defendant-appellant.

Argument.

The defendant-appellant urge as causes for reversal in their brief filed the following grounds:

1. That the Trial Court denied motion for non suit in favor of the defendant-appellant when thereunto moved, whereas said motion should have been granted upon the following grounds.

A. No negligence was proven on the part of the defendant John F. Craig, Inc.

B. No negligence was proven on the part of the defendant, John F. Craig, Inc., that was the proximate cause of the action.

C. Plaintiff, Mary Connick, was guilty of contributory negligence.

2. The Trial Court refused to direct a verdict in favor of defendant-appellant when thereunto moved, whereas said motion should have been granted upon the following grounds; the same reasons as given under No. 1 are given here also, namely, A. B. and C. as mentioned above.

3. That there was no proof of what the standard of construction of the work was, and assuming said standard was proven, there was no evidence of any violation of said standard of construction.

The above three reasons were argued together in the defendant-appellant's brief and will likewise be argued together in our brief.

BRIEF OF THE ARGUMENT.

There was sufficient evidence of negligence on the part of the defendant John F. Craig, Inc., as alleged in the complaint which was the proximate cause of the accident.

The complaint as filed by the plaintiffs-respondents herein charged the defendant with negligence as follows:

“That it failed to employ competent workmen to make the alterations or repairs; that it permitted the said alterations and repairs to be done in a careless and unworkmanlike manner; that it neglected to inspect the said work and to see that the same was properly completed so that the tenants might occupy the said premises with safety to their life and limb; that it permitted defective and inferior material to be used in connection with the said alterations and repairs, and that it was otherwise negligent and careless in providing for the safe and proper completion of the work according to law.”

Considering the testimony of the whole case, it appears that the plaintiffs-respondents herein were tenants of the defendants Lehmans, in the premises known as 166 Magnolia Avenue, Jersey City, N. J. (p. 10, ll. 38 to 41; p. 11, ll. 1 to 3). The landlord installed a new heating system in the apartment occupied by the plaintiffs-respondents herein (p. 49, ll. 38 to 41; p. 50, ll. 1 to 6).

The defendant, John F. Craig, Inc., by written contract with the defendants Lehmans, were retained to do the work (p. 20, ll. 21 to 27; p. 51, ll. 1 to 10). The pipe connecting the heater with the various rooms were laid on the floor of the Connick apartment running from the kitchen to

the dining room (p. 11, ll. 18 to 27). Three or four boards each about $3\frac{1}{2}$ inches wide and approximately 12 inches long were removed from the floor (p. 51, ll. 23 to 27) and the said boards were removed in the following manner:

By cutting one of the tongues and grooves and sawing along the beam and taking out about 4 boards (p. 56, ll. 8 to 11).

The said boards were replaced the same day (p. 11, ll. 32 to 40, and p. 12, ll. 1 to 19) in the following manner:

By putting a cleat, *i. e.*, a piece of wood measuring one inch by one inch and $1\frac{1}{2}$ inches to 4 inches on each side of the beams and upon these cleats the flooring that was previously removed was replaced minus the tongue and grooves which had been cut in removing and the three or four boards were replaced and by merely setting these boards upon the cleats which had been previously secured to the beams (p. 61, ll. 10 to 20; p. 58, ll. 15 to 30). The testimony of Mrs. Connick, a plaintiff-respondent, discloses the fact that in her opinion, it was not necessary to remove these boards (p. 11, ll. 18 to 23) because the pipes were laid on the floor (p. 11, ll. 23 to 25). This testimony is nowhere contradicted. The testimony further shows that the flooring was replaced on two pieces of wood which were approximately 2 by 4. The said pieces of wood were nailed or screwed on the beam and the said boards were simply placed on the said two pieces of wood called cleats without being nailed (p. 24, ll. 24 to 38) and that the said boards were nailed in after the accident had occurred to prevent further damage (p. 25, ll. 2 to 15).

John A. Cregan, called by the co-defendant Lehman, testified that he was employed by John F. Craig, Inc., and that he was a steam fitter of

20 years' experience and that John F. Craig, Inc., were steamfitters (p. 57, ll. 39 to 41) and that he removed the boards from the floor and replaced them (p. 57, ll. 25 to 31). His testimony is that he cut one of the tongues and grooves from the boards and sawed them along the beam and removed 3 or 4 boards and later, the same day, replaced them by inserting two cleats, one on one beam and the other on the opposite beam (p. 56, ll. 6 to 10) and that he secured the cleats to the beams by screws and nails (p. 56, ll. 27 to 29) and that these cleats were secured to the beams under the floor and that the flooring was then replaced by setting the boards upon the cleats (p. 61, ll. 10 to 14), and that he returned to the Connick apartment the day after the accident and found that the cleats had pulled away from the beam and that the boards which he had replaced were laid in the hole (p. 57, ll. 16 to 30). And he further testified that he had cut one of the tongues and grooves from the boards (p. 56, ll. 7 to 11).

The co-defendant Lehman testified that he was an architect and builder of at least thirty years' experience (p. 56, ll. 8 to 11) and that the replacing of boards on a rest or cleat at each end is not ordinarily, in construction work, considered a secure flooring (p. 53, ll. 31 to 36).

To quote his testimony exactly as given:

“Q. And just the mere placing of a board on a rest at each end is not ordinarily, in construction work, considered as secure flooring? A. Well, good construction naturally requires a floor to be nailed.”

Referring to the above testimony, we respectfully submit that the jury could have found that

the said flooring was not nailed and had been placed upon the cleats and that such construction is not good construction.

Mr. Lehman further testified that the tongue fitting into the groove which the defendant Craig, Inc., had cut off the boards, fitted into each other and offered support when properly laid, and that the mere placing of a board upon a rest is not ordinarily, in construction work, considered a secure flooring (p. 53, ll. 20 to 35).

The defendant-appellant, on page 9 of the brief filed herein, urges that the plaintiff sustained injuries because of the breaking of the boards. Such is not the fact. The testimony shows that the boards simply gave way when the cleat pulled out and fell into the hole (p. 23, ll. 10 to 16; p. 57, ll. 10 to 24) and the jury had before it a photograph showing the exact condition of the flooring as of the day of the accident (p. 16, ll. 10 to 13; p. 14, ll. 20 to 24).

The defendant-appellant in his brief on page 17 states that negligence is a fact. It must be shown and will not be presumed, citing cases therein. We agree with the contention of the defendant-appellant that negligence is a fact and that it must be shown, but we submit that it is for the judge to say when negligence can be legitimately inferred from the facts and evidence, and if the judge decides that negligence can be legitimately inferred from the said facts and evidence, then it becomes a question for the jury to say whether negligence ought to be inferred under the particular circumstances.

*Lambert vs. Trenton & Mercer Traction
Company, 145 Atlantic 8;
Steinberg vs. Bogatin, 144 Atlantic 448;*

Met. R. R. Co. vs. Jackson, 47 L. J. H. L.
303;

Mayes vs. Splitdorf Electrical Company,
94 N. J. Law 460.

A motion was made by the defendant-appellant at the close of the plaintiff's case for a non-suit and at the close of the entire case for a direction of a verdict. We submit when such motions are made the plaintiff's evidence and every inference of fact legitimately deductible from his case is admitted, and it is up to the Court to decide whether facts are established from which negligence may be inferred, leaving it of course to the jury to decide whether negligence ought to be inferred, so that we further say in this case that the Trial Judge was justified in submitting this case to the jury, because facts being admitted, the Trial Court was correct in submitting the case to the jury for its determination.

Kerner vs. Zerr, 103 N. J. Law 424;

Lambert vs. Trenton & Mercer Traction Corp., 145 Atlantic 8;

Steinberg vs. Bogatin, 144 Atlantic 448;

Mayes vs. Splitdorf Electrical Company,
94 N. J. Law 460.

The defendant-appellant in his brief on page 9 relies upon the case of *Holmes vs. Pelligrino*, 102 N. J. Law 697. The facts briefly are these:

The plaintiff was an employee of the independent contractor, the independent contractor made a contract with the defendant to construct a ceiling for the defendant. The defendant in order to speed the work brought to the building planks to be used in the construction of a scaffold. He also brought wooden horses upon which the said planks

were to be placed. The employees of the independent contractor made the scaffolds himself, the defendant had nothing to do with the arranging of the said scaffold. The plaintiff offered no evidence other than the mere occurrence of an accident and contended that that was sufficient to establish a *prima facie* case.

The Court in its decision said:

“It was the duty of the defendant to use reasonable care that proper material was furnished and there being no evidence to show that there was any failure on his part in this respect, the plaintiff had not made out a case for recovery.”

The case at bar differs from the case of *Holmes vs. Pelligrino* in that there were ample facts and evidence shown to enable the Trial Judge to infer negligence, which makes it compulsory for him to submit the case to the jury and for the jury to decide whether negligence ought to be inferred from the circumstances.

(See citations above.)

The defendant-appellant on page 7 of his brief contends that the independent contractor in this particular case, did not owe any duty to the third party by reason of his contract with the defendants Lehmans, who were the owners of the building, and that the landlord cannot relieve himself from liability to the tenant by contracting with the said defendant-appellant for work to be done.

Justice Minturn in the case of *Sarno vs. Gulf Refining Company*, 124 Atlantic 145, applying the rule applicable to such cases said:

“The rule is now finally established that when the owner of lands undertakes to do work which in the ordinary mode of doing it

is a nuisance, he is liable for any injury which may result from it to third persons, though the work is done by a contractor exercising an independent employment and employing his own servants. BUT WHEN THE WORK IS NOT IN ITSELF A NUISANCE AND THE INJURY RESULTS FROM THE NEGLIGENCE OF SUCH CONTRACTOR OR HIS SERVANT IN THE MANNER OF EXECUTING IT, THE CONTRACTOR ALONE IS LIABLE UNLESS THE OWNER IS IN DEFAULT IN EMPLOYING AN UNSKILLFUL OR IMPROPER PERSON AS A CONTRACTOR."

Simon vs. Henry, 62 N. J. Law 487;

Reisman vs. Public Service Corporation,
82 N. J. Law 467;

Schutt vs. United Electric Company, 68
N. J. Law 437;

Otmer vs. Perry, 94 N. J. Law 75.

The defendant-appellant further cites the cases of *Baldwin vs. Atlantic City Railroad Company*, 46 N. J. Law 232, and *Altz vs. Manufacturing Company*, 59 I. D. 41. These two cases differ from the case at bar in that there is in the above cited cases the mere showing of an accident and injuries resulting therefrom, whereas in the case at bar, there was the showing of an accident and injuries sustained and a sufficient amount of negligence to warrant the court submitting the case to the jury.

The defendant-appellant further contends that the doctrine of *res ipso loquitur* does not apply because the plaintiff-respondent merely proved the breaking of a board.

The plaintiff-respondent did not prove the breaking of a board. The testimony shows that the boards simply gave way when the cleat pulled out and fell into the hole (p. 23, ll. 10 to 16; p. 57, ll. 10 to 24), and further shows that there never had been any other work on the floors in that house (p. 27, ll. 20

to 30); and the testimony also shows that the flooring was removed by the defendant (p. 55, ll. 30 to 40 and p. 56, ll. 1 to 11); and that the defendant also replaced the flooring (p. 56, ll. 12 and 13); and therefore we are of the opinion that the defendant-appellant is in error.

We further submit that the doctrine of *res ipsa loquitur* applies. It is well settled that whether or not the question of *res ipsa loquitur* applies is a question for the trial court and if the trial court finds that the theory of *res ipsa loquitur* applies, then it is a question of fact for the jury to decide as to whether or not there was any negligence in a particular case. The principle of the doctrine is that where through any instrumentality or agency under the management or the control of the defendant or his agent, servant or employee, there is an occurrence injurious to the plaintiff which in the ordinary course of things would not take place if the person in control were exercising due care. The occurrence itself in the absence of explanation by the defendant affords *prima facie* evidence that there was want of due care. It is an extraordinary happening and one which would not take place if the defendant, his agent, servant or employee, had exercised due care. It is certainly an occurrence in the absence of any explanation which would give cause for a reasonable man to infer that such due care was not used.

*National Sheet Metal Roof Company vs.
New York Telephone Company*, 137 Atlantic 409;

Law vs. Morris, 133 Atlantic 427 and cases cited therein;

Rapp vs. Butler Newark Bus Company, 137 Atlantic 524.

In fact, our Honorable Court of Errors and Appeals in the case of *Forte vs. Reid Ice Cream Company*, 119 Atlantic 638, affirming a *per curiam* opinion of the Supreme Court in a case based upon the following facts where an elevator shaft was left open in a dark passageway and a contractor delivering materials fell, the Court said:

“We have no hesitation in saying that under the circumstances the jury were clearly entitled to say that he was invited there, and were entitled to infer negligence of the defendant from the fact that the elevator was not in place and that no provisions were made to guard against anyone falling into the shaft when it was out of place.”

In the case of *Lambert vs. Trenton & Mercer Traction Company*, 145 Atlantic 8, a personal injury case, the Court said:

“In a case of this character, if there are facts and circumstances from which negligence may be drawn and inferred and upon which the conclusions to be drawn by reasonable persons may differ, then a case is presented for a jury to pass upon and not the trial judge.”

Assuming there be merit to the defendant-appellant's contention that the Court erred in refusing to non suit, it cannot be said that there was not at the close of the case proofs offered upon which the plaintiff was entitled to recover, and, such being so, the refusal to non suit is not reversible error, for this Honorable Court, in the case of *Lambert vs. Trenton & Mercer Traction Company*, 145 Atlantic 8, said:

“If a motion to non suit is refused and the testimony at such time presents no proof upon which the plaintiff is entitled to recover and

such facts so lacking are subsequently supplied, such refusal to non suit is not reversible error."

It is for the Judge to say when negligence can be legitimately inferred from the facts and evidence, and it is for the jury to say whether it ought to be inferred under the circumstances.

Steinberg vs. Bogatin Cleaners & Dyers,
144 Atlantic 448;

Mayer vs. Splitdorf Electrical Company,
95 N. J. Law 460.

We further submit the Court did not err in submitting this case to the Jury.

Kerner vs. Zerr, 103 N. J. Law, 424.

There is no question that had not the boards been taken out and subsequently replaced in an insecure manner, this accident would not have occurred, and the proof showing the failure of properly replacing the boards was sufficient in itself to warrant the Trial Court in submitting the case to the jury as a purely factual one.

The defendant-appellant on page 20 of his brief refers to the fact that a one hundred pound bag of coal was brought upstairs and placed on the floor where the repairs were made. Referring to the testimony, it should be noted that the accident occurred directly in front of the entrance leading from the kitchen to the dining room, and it is absurd to say that coal bags would be kept in the doorway or directly in front of the doorway; in fact, the defendant's own witness Cregan testified that the coal was in the corner (p. 60, ll. 20 to 25).

We therefore respectfully submit that the Trial Court did not err in denying a non suit or in re-

fusing to direct a verdict, and that the case was a case for a Jury to determine.

Comment on Opinion of Supreme Court.

The Supreme Court in its opinion cited part of the opinion in the case of *Sarno vs. Gulf Refining Co.*, 99 New Jersey Law 340, affirmed 102 New Jersey Law 223, for the principle now well established that a contractor exercising an independent employment in employing servants when the work is not in itself a nuisance and injuries result from the negligence of such contractor or his servant in the execution of the work, the contractor alone is liable, unless the owner is in default in employing an unskillful and improper person as the contractor.

The Supreme Court in its opinion sets forth a brief recital of the facts which are entirely justifiable and in strict accordance with the proof.

The opinion says—the defendant Lehman by written contract employed the defendant, John F. Craig, Inc. (p. 20, ll. 21 to 27; p. 51, ll. 1 to 10), to install a heating system on the premises (p. 49, ll. 38 to 41; p. 50, ll. 1 to 6; p. 11, ll. 18 to 27). The Craig Company removed the flooring from the kitchen for the purpose of laying the pipes by cutting the tungs and grooves and sawing along the beams and taking up four boards (p. 50, ll. 23 to 27; p. 56, ll. 8 to 11) and in relaying this flooring, the work was done negligently (p. 61, ll. 10 to 20; p. 58, ll. 15 to 30; p. 11, ll. 18 to 23; p. 24, ll. 24 to 38; p. 25, ll. 2 to 15; p. 56, ll. 6 to 10; p. 61, ll. 10 to 14; p. 57, ll. 16 to 30; p. 56, ll. 7 to 11). Mrs. Connick used the floor in walking from the kitchen to the dining room, and the boards gave way and went through and injured her leg (p. 12, ll. 27 to 36). The Supreme Court in its opinion further says that the evidence indicates that the flooring was not prop-

erly replaced which is entirely justified by both the finding of the jury in the Common Pleas Court and the Supreme Court upon the consideration of the appeal from the testimony before them and set forth in the state of the case on page 51, lines 23 to 27; page 56, lines 8 to 11; page 11, lines 32 to 40; page 12, lines 1 to 19; page 61, lines 10 to 20; page 58, lines 15 to 30; page 11 lines 18 to 23; page 11, lines 23 to 25; page 24, lines 24 to 28; page 25, lines 2 to 15; page 56, lines 6 to 10; page 56, lines 27 to 29; page 61, lines 10 to 14; page 57, lines 16 to 30; page 56, lines 7 to 11; page 56, lines 8 to 11; page 56, lines 31 to 36. The old boards were used and rested upon cleats supposed to be fastened to the beam and the flooring gave way because the cleats placed by the company's workman on the beam had pulled away from the beam not being properly fastened; page 11, lines 32 to 40; page 12, lines 1 to 19; page 61, lines 10 to 20; page 58 lines 15 to 30; page 24, lines 24 to 38; page 25, lines 2 to 15; page 57 lines 25 to 31; page 56, lines 6 to 10; page 56, lines 27 to 29; page 61, lines 10 to 14; page 57, lines 16 to 30; page 56, lines 7 to 11. There was expert testimony at the trial that this was bad workmanship; page 53, lines 31 to 36, and to quote the testimony exactly, is as follows:

“Q. And just the mere placing of a board on a rest at each end is not ordinarily in construction work considered as secure flooring?
A. Well, good construction naturally requires a floor to be nailed.’

This is the opinion of the defendant Lehman, an architect and builder of 30 years' experience; page 56, lines 8 to 11.

CONCLUSION.

For these reasons, we respectfully submit that the judgment of the Supreme Court should be affirmed with costs.

Submitted, May Term, 1930.

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