INDEX

WITNESSES.

Plaintiffs':

EXHIBITS.

New Jersey Supreme Court

ESSEX COUNTY

Notice of Appeal.

WILMA L. BODINE and HARRY L. BODINE, her husband,
Plaintiffs,

vs.

THE GOERKE COMPANY, a corporation of the State of New Jersey,
Defendant.

To Abe J. David, Attorney of Plaintiffs:

Take notice that the defendant, The Goerke Company, a corporation of the State of New Jersey, hereby appeals to the New Jersey Court of Errors and Appeals from the whole of the judgment rendered November Thirteenth, One Thousand Nine Hundred and Twenty-five, in this action.

Yours respectfully,

FRANK G. TURNER,
Attorney of Defendant.

Complaint.

NEW JERSEY SUPREME COURT

ESSEX COUNTY

WILMA L. BODINE and HARRY J. BODINE, her husband, Plaintiffs, vs. THE GOERKE COMPANY, a corporation of the State of New Jersey, Defendant.	Action at Law.

The plaintiffs, residing at the City of Asbury Park, in the County of Monmouth and State of New Jersey, complain of the defendant and say:

FIRST COUNT.

1. On the 24th day of January, 1923, the defendant was the owner and occupant of a building on the northwest corner of Cedar and Broad Streets, in the City of Newark, in this state, in which it conducted a retail department store.

2. The entrance to the said store located at the northwest corner of Cedar and Broad Streets, in the City of Newark aforesaid, had at the time aforesaid, an approach leading at an incline into the entrance of the said store, as part thereof, and constructed of and with a smooth surface.

3. On the morning of the said day, snow fell as well as rain and covered the smooth surface

of the approach and incline leading to the said entrance of defendant's building, and which snow and rain made the said approach slippery and dangerous. And the defendant allowed the said snow to remain on the said approach for an unreasonable length of time, although aware thereof, and having notice thereof, and was aware, or should have been aware, that the said approach and the surface under the said snow so remaining for an unreasonable time was, and would be slippery and dangerous to persons using the same.

4. On the day and year aforesaid, after the said snow had covered the said surface of the approach to the defendant's store and had remained there for an unreasonable length of time, and the said approach, and surface thereof, into the said store had become slippery and dangerous, the plaintiff, Wilma L. Bodine, not knowing the slippery surface under the said snow and the dangerous condition of the said approach into the entrance of the defendant's store, attempted to walk into the defendant's store for the purpose of making purchases therein, and while attempting to walk over the said approach so covered by snow and rain and not knowing the dangerous and slippery condition thereof, by reason of the said smooth surface being made slippery and dangerous by the said snow and rain, the plaintiff, Wilma L. Bodine, while so attempting to walk over the said approach, was caused to slip and fall, due to no fault of her own, and thrown to the ground.

5. Said plaintiff, Wilma L. Bodine, thereupon and thereby sustained severe injuries to her body,

both externally and internally, some of which injuries are permanent. And said plaintiff suffered and will suffer pain therefrom for a long period of time, and was rendered, and still is nervous, in all to her damage $25,000.00.

The plaintiff, Wilma L. Bodine, demands damages in the sum of $25,000.00 on the first count.

SECOND COUNT.

6. The plaintiff, Harry J. Bodine, alleges that he is the husband of the plaintiff, Wilma L. Bodine.

7. Said plaintiff repeats each and every allegation contained in Paragraphs Nos. 1, 2, 3, 4 and 5 of the First Count and makes them part hereof.

8. By reason of the injuries sustained by the plaintiff, Wilma L. Bodine, the plaintiff, Harry J. Bodine, lost the society and consortium of his wife, the said Wilma L. Bodine, for a long period of time, and was compelled, and is compelled to lay out large sums of money for clothes, medicines, doctors' bills, hospital bills, nurses and help, in all to his damage $5,000.00.

The plaintiff, Harry J. Bodine, demands damages in the sum of $5,000.00 on the Second Count.

ABE J. DAVID,
Attorney of Plaintiffs.

Answer.

NEW JERSEY SUPREME COURT

ESSEX COUNTY

WILMA L. BODINE and HARRY J. BODINE, her husband,
Plaintiffs,

vs.

THE GOERKE COMPANY, a corporation of the State of New Jersey,
Defendant.

The answer of the defendant, a corporation of Newark, New Jersey, to the plaintiffs' complaint:

1. Defendant denies the allegations of the complaint.

FIRST SEPARATE DEFENSE TO FIRST AND SECOND COUNTS.

1. Defendant says that the plaintiff, Wilma L. Bodine, was guilty of contributory negligence at the time and place of the alleged accident charged in the complaint, as follows:

2. The said plaintiff failed to use due care for her own safety and failed to observe where she was walking. She allowed her feet to become covered with snow and ice before entering the said entrance referred to in the complaint. By her own acts, she caused any alleged accident from which she suffers.

Replication

SECOND SEPARATE DEFENSE TO FIRST AND SECOND COUNTS.

1. The said alleged accident charged in the complaint was caused by the sole negligence of the plaintiff, Wilma L. Bodine, as follows:

2. Defendant repeats the second paragraph of the First Separate Defense to the First and Second Counts.

FRANK G. TURNER,
Attorney of Defendant.

Replication.

NEW JERSEY SUPREME COURT

ESSEX COUNTY

WILMA L. BODINE and HARRY J. BODINE, her husband, Plaintiffs, vs. THE GOERKE COMPANY, a corporation of the State of New Jersey, Defendant.	Action at Law.

Replication to First Separate Defense:

1. Paragraph No. 1 is denied.

2. Paragraph No. 2 is denied.

Replication to Second Separate Defense:

1. Paragraph No. 1 is denied.

2. Paragraph No. 2 is denied.

ABE J. DAVID,
Attorney of Plaintiffs.

Judgment.

NEW JERSEY SUPREME COURT

WILMA L. BODINE and HARRY J. BODINE, her husband, Plaintiffs, vs. THE GOERKE COMPANY, a corporation of the State of New Jersey, Defendant.	Action at Law. Postea. $1500.00 W. L. B. 1000.00 H. J. B. $2500.00 48.38 $2548.38

It is ordered that judgment be and hereby is entered against the defendant and in favor of Wilma L. Bodine, plaintiff, for the sum of fifteen hundred dollars, and in favor of Harry J. Bodine, plaintiff, for the sum of one thousand dollars, besides costs to be taxed nisi.

Entered November 14, 1925.

On motion of
ABE J. DAVID,
Attorney.

A true copy.
EDWARD J. KELLEHER,
Clerk.

Postea.

NEW JERSEY SUPREME COURT

ESSEX COUNTY

WILMA L. BODINE and HARRY J. BODINE, her husband, Plaintiffs, vs. THE GOERKE COMPANY, a corporation of the State of New Jersey, Defendant.	Action at Law.

This case came duly on to be heard before Honorable William A. Smith, Circuit Court Judge, and a jury, to whom it had been referred for trial by order of Honorable William S. Gummere, Chief Justice of the Supreme Court holding the Essex Circuit, on the Twelfth day of November and on the Thirteenth day of November, 1925. The jury returned a verdict in favor of the plaintiff, Wilma L. Bodine, and against the defendant, The Goerke Company, in the sum of Fifteen Hundred ($1500) dollars, and also a verdict in favor of the plaintiff, Harry J. Bodine, against the defendant, The Goerke Company, in the sum of One Thousand ($1,000) dollars.

Dated, November 13, 1925.

WM. A. SMITH,
Circuit Court Judge.

A true copy.

EDWARD J. KELLEHER,
Clerk.

Grounds of Appeal.

NEW JERSEY COURT OF ERRORS AND APPEALS

WILMA L. BODINE, *et al.*, Plaintiffs, vs. GOERKE COMPANY, a corporation, Defendant.	Action at Law.

To the plaintiffs and A. J. David, their attorney:

The following are the grounds of appeal assigned by the defendant herein:

1. The Trial Court erroneously refused to order a judgment of non-suit in favor of defendant, on the ground that no negligence has been shown on the part of the defendant.

2. The Trial Court erroneously refused to order a judgment of non-suit in favor of the defendant on the ground that the plaintiff, Wilma L. Bodine, has been guilty of contributory negligence.

3. The Trial Court erroneously refused to direct a verdict in favor of the defendant on the ground that no negligence has been shown on the part of the defendant.

4. The Trial Court erroneously refused to direct a verdict in favor of the defendant on the ground that the plaintiff, Wilma L. Bodine, had been guilty of contributory negligence.

Grounds of Appeal

5. The Trial Court erroneously admitted in evidence a certain X-ray print that was marked Exhibit P-1.

6. The Trial Court erroneously admitted in evidence a certain X-ray print that was marked Exhibit P-2.

7. The Trial Court erroneously admitted in evidence a certain X-ray print that was marked Exhibit P-3.

8. The Trial Court erroneously admitted in evidence a certain bill dated June 18th, 1923, for $150, by F. W. Haussling.

FRANK G. TURNER,
Attorney of and Counsel for Defendant.

Testimony.

NEW JERSEY SUPREME COURT

WILMA L. BODINE, *et al.*, Plaintiffs, vs. GOERKE COMPANY, a corporation, Defendant.	Action at Law.

Thursday, November 12, 1925.

Before Hon. William A. Smith, Judge, and a jury.

For the plaintiff appears Abe J. David (by Joseph Steiner of counsel).

For the defendant appears Frank G. Turner.

A jury is called and sworn.

Mr. Steiner opens for the plaintiffs.

Mr. Turner opens for defendant.

Adjourned until Friday, November 13, 1925, at ten o'clock A. M.

SECOND DAY

Friday, November 13, 1925.

Continued pursuant to adjournment.
Present, counsel as before stated.

RUDOLPH ULLRICH sworn in behalf of the plaintiffs:

Direct-examination by Mr. Steiner:

Q. Mr. Ullrich, what is your occupation? A. I am technician and X-ray man at the Newark Memorial Hospital.

Q. Were you there on the 25th day of January, 1923? A. I was there.

Q. I show you what purports to be a print of an X-ray taken of an arm and call your attention to the words "Wilma Bodine" and ask you whether you took the X-ray of which that is a print? A. It is what I took.

Q. Are the words, "Wilma Bodine" in your handwriting? A. Yes, sir.

Q. Did you write those words on the plate when you took that X-ray? A. Yes, sir.

CROSS-EXAMINATION by Mr. Turner:

Q. Did you develop the X-ray plate? A. Yes, sir.

Q. Did you develop this print? A. That is a copy of the plate I took.

Q. Who made the print? A. I don't know.

By Mr. Steiner:

Q. Do you recognize that as a copy of the plate you took? A. That is my writing.

By Mr. Turner:

Q. Where is your plate? A. I guess Mr. Bodine has the plates.

(Defendant's counsel objects to admission in evidence of the X-ray print as not properly proved.)

The Court: Did the physician prove that print?

Mr. Steiner: Dr. Haussling used it and we will have him identify it. I offer the print in evidence.

The Court: I will admit it.

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

Exception noted as ground of appeal.

(The paper referred to is received in evidence and marked Exhibit P-1.)

RE-DIRECT-EXAMINATION by Mr. Seiner:

Q. I show you another print and call your attention to the name "Wilma Bodine" and ask you whether the words "Wilma Bodine" are in your handwriting? A. It is.

Q. Do you recognize that print as the print of the plate you took? A. I remember the case very well.

Q. You recognize that as a print of the plate you took. A. Absolutely.

Q. That was taken subsequently to January 25, 1923? A. Yes, about the 27th.

RE-CROSS EXAMINATION by Mr. Turner:

Q. These words "Wilma Bodine" written here are a copy of the plate? A. Yes.

Q. You haven't the plate here? A. No.

Q. You didn't develop this print? A. I don't develop the print.

Q. Do you know whether the doctor used the plate? A. Yes.

Q. Do you recognize the print as being a true copy of the plate? A. I remember the case very well; it is the same as the print for the plates that I do.

By the Court:

Q. Would the print show up the lines of the fractures as they existed in the plates? A. Just the same.

Mr. Steiner: I offer the print in evidence.

(Defendant's counsel objects to the admission of the print in evidence as not properly proved).

Objection overruled.

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

Exception noted as ground of appeal.

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

RE-DIRECT EXAMINATION by Mr. Steiner:

Q. I show you what purports to be a print of an x-ray plate and call your attention to the words "Wilma Bodine" and ask you if those words are in your handwriting? A. It is.

Q. You recognize the words as being the same as those you placed on the original plate? A. Absolutely.

Q. Is that an exact reproduction of the plate? A. Yes, it is a later plate.

Q. How much later? A. We took an x-ray every three or four days.

Q. Under whose instructions did you do that? A. Dr. Haussling.

CROSS-EXAMINATION by Mr. Turner:

Q. You didn't make this print yourself, did you? A. No.

Q. The wording on this print is not in your handwriting? A. No.

Q. You never saw this print before? A. I never did.

By the Court:

Q. I suppose what you say about the other prints is the same now; it is a duplicate of the plate? A. Yes, sir.

Mr. Steiner: I offer the print in evidence.

(Defendant's counsel objects to the admission of the print in evidence as not properly proved).

Objection overruled.

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

Exception noted as ground of appeal.

(The paper was received in evidence and marked Exhibit P-3).

WILMA BODINE, one of the plaintiffs, sworn in her own behalf.

Direct-examination by Mr. Steiner.

Q. Mrs. Bodine, on the 24th day of January, 1923 where did you live? A. 1007 Banks Avenue, Asbury Park, New Jersey.

Q. Were you in Newark at any time on that day? A. Yes, I came to Newark that day to do some shopping.

Q. Did you go to the northwest corner of Broad and Cedar Streets in Newark on that day? A. I did.

Q. Is there a store there? A. Yes, Goerke's Department Store.

Q. Did you go to the store? A. Yes, I went to the store.

Q. What took you there? A. I wanted to do some shopping.

Q. What time did you arrive at the Goerke store? A. I figured it was about 12:20.

Q. How do you know it was 12:20? A. I went to another store first and I looked at my wrist watch when I came out and it was 12:15.

Q. Did you have any other engagement that day? A. Yes, I had an engagement.

Q. At about 12:20 what was the condition of the weather? A. It had snowed when I got off the train.

Q. What time did you get off the train? A. About ten minutes of eleven.

Q. What time does that train leave Asbury Park? A. 9:09.

Q. Was that a Pennsylvania Railroad train or a Central train? A. Pennsylvania.

FRANCIS R. HAUSSLING sworn in behalf of the plaintiff.

Direct-examination by Mr. Steiner:

Q. Doctor Haussling, did you have occasion to attend Mrs. Wilma M. Bodine professionally about the 24th day of January, 1923? A. I did.

Mr. Steiner: Do you admit the Doctor's qualifications?

Mr. Turner: Just as a general practitioner.

Mr. Steiner: The qualifications of the Doctor are admitted, I understand.

By Mr. Steiner:

Q. What was wrong with Mrs. Bodine? A. She had a broken arm.

Q. I show you Exhibits P-1, P-2 and P-3 and ask you whether these prints of X-rays were before you at the time that you attended this lady. A. Yes.

Q. Do you know where they were prepared? A. The pictures were taken at the Newark Memorial Hospital.

Q. Do you know the writing of the attendant, Mr. Ullrich, at the hospital? A. I am not positive.

Q. Would you recognize it if you saw it? A. I think so.

Q. You recognize the prints? A. Yes.

By the Court:

Q. You recognize the print of the plate you used in treating this case? A. Yes, sir.

By Mr. Steiner:

Q. Did you see this fracture? A. Yes.

Q. What was the general condition of Mrs. Bodine's health aside from this fracture? A. She was pregnant.

Q. Were you able to set this arm on the 24th of January, 1923? A. We made several attempts to reduce the fracture without an anesthetic because of her condition.

Q. Why was an anesthetic objectionable? A. Because she was pregnant and she was supposed to be pregnant about seven and a half months; we weren't positive the child was viable, that is, whether the child would live, and an anesthetic might bring on premature delivery.

Q. Did you see Mrs. Bodine subsequently to January 24, 1923? A. I had her in the hospital thirty-one days; she then came to my office several times; I think it was early in the spring while on my way to Spring Lake, I stopped at Asbury Park to see whether she was doing what I wanted her to do.

Q. Was she following your instructions? A. I think she was.

Q. Was she suffering pain? A. Yes.

Q. Would you say she was suffering constant pain? A. Yes.

Q. Was she suffering pain for the thirty-one days she was in the hospital? A. She had a great deal of pain at first because we made four or five attempts to get it in position without an anesthetic.

Q. Did you render a bill for your services? A. Yes.

Q. I show you a bill dated June 13, 1923, for $150 and signed "payment received F. W. Haussling." Is this your bill? A. Yes, sir.

Francis R. Haussling—Cross

By the Court:
Q. I suppose this bill is paid? A. Yes, sir.

By Mr. Steiner:
Q. This is your signature? A. Yes.
Mr. Steiner: I offer the bill in evidence.
Objected to as incompetent.

By the Court:
Q. Is that a reasonable charge? A. I think so.
Objection overruled.
Defendant's counsel prays an exception to this ruling of the Court.
Exception noted as ground of appeal.

CROSS-EXAMINATION by Mr. Turner:
Q. Did you eventually set the lady's arm? A. Every time that we manipulated this arm it was setting the arm; we could not give her an anesthetic, therefore, we could not set it as well as we could have could we have given her an anesthetic.
Q. In your treatment you did set the arm? A. We set the arm.
Q. Was it set at the end of the thirty-one days, or before she left the hospital? A. We made the last attempt to reduce or set the arm, several days, perhaps two weeks before that.
Q. She was in the hospital two weeks after you had set the arm? A. She had been in two weeks.
Q. These photographs of x-rays represent the arm before it was set? A. I can't answer that because the arm—each one of those x-rays had been taken after the arm had been set but not perfectly set.
Q. These x-rays don't show the callus that

formed after setting? A. No, callus grew slowly in her case.

Q. What is callus made up of? A. First of cells that are sent out and worked out from the inside of the bone and form the covering of the bone, into the blood clot that forms, and these cells gradually change into bony tissue.

Q. In her case to what extent did the bony tissue grow? A. When union takes place as it should it always make a thicker area there comparable to the whipping on a lead pipe; it is thicker at that point.

Q. As time goes on after the bone heals what takes place with the callus? A. It gets somewhat smaller again.

Q. And the bone grows more nearly normal? A. Yes.

Q. When did you last treat her in Newark? A. She left the hospital on February 25th; she then came to my office.

Q. You visited her once in Asbury Park? A. Yes.

Q. Your last treatment of her was when she visited you at your office in Newark? A. She was following out my treatments; the joints when an arm is fractured grow stiff because of no use; she had a lot of stiffness in the elbow joint. The reason I stopped at Asbury Park was to see that she had been doing the calisthenics and the swinging on rings and so forth.

Q. To limber up this joint? A. Yes.

Q. And she was following your instructions as far as you could find out? A. She had the rings hung up.

RE-DIRECT EXAMINATION by Mr. Steiner:

Q. Mrs. Bodine stayed at the hospital until the 25th of February? A. Yes.

Q. Assuming that this arm is now completely set and healed, would she feel any pain or suffering at the present time? A. Some do and some do not; some complain of pain in bad weather; it is a subjective symptom and the patient is the only one who could answer.

Q. But it is nothing unusual in your experience to have loss of motion? A. Yes.

By the Court:

Q. What is the result of your treatment? A. The last time I saw her in Asbury Park, as I remember, her elbow joints which had given us a lot of trouble, was pretty well. Whether she can do everything with it now I could not state. The reduction was only fair; and it was a difficult fracture to reduce without an anesthetic.

Q. Has it interfered with the movement of her arm? A. Since? I can't answer.

By Mr. Turner:

Q. To what extent had she recovered the use of her elbow joint? A. She could get it to about here (indicating) when I last saw it. At first she could not, but she had, by perserverance succeeded, but she didn't have full extension.

Q. This stiffness comes from the arm being kept in a quiet position? A. Yes.

By the Court:

Q. What bone was it? A. The humerus of the left arm.

By Mr. Turner:

Q. Is that the lower part or the upper part of the arm? A. It is the lower third, with a chip off.

Q. Will you indicate it, please? A. (The witness does as requested.)

By the Court:

Q. The lower part of the bone between the elbow and the shoulder? A. Yes.

WILMA BODINE, re-called.

Direct-examination by Mr. Steiner:

Q. You told us you left Asbury Park on the 9:09 train? A. Yes.

Q. Was it a Pennsylvania local? A. Yes, sir.

Q. Making all stops? A. Yes, sir.

Q. When you arrived at Newark you went from place to place and eventually came to the Goerke store? A. Yes.

Q. What time did you say it was that you arrived at the Goerke store? A. About 12:20.

Q. What was the condition of the weather in Newark? A. It was snowing when I got off the train and by that time it turned into a fine rain.

Q. Did you enter the Goerke store? A. Yes, I had left the pavement; I was in the entrance to the Goerke store.

Q. Tell us what happened. A. There is a show case there and I had just passed it when I fell.

Q. Did you notice the floor of the entrance? A. It was very slushy; like dirty snow.

Q. Was it paved or unpaved? A. It is tiling.

Q. Is it a straight entrance or sloped? A. It slopes a bit.

Q. You mean by that that it sloped a bit on January 24, 1923. A. I remember when I fell and cut my wrist on the tiling.

By the Court:

Q. Was the slope downward toward the street or downward toward the inside of the store? A. Going in it sloped up.

By Mr. Steiner:

Q. You say there was a show case? A. Yes.

Q. Is there a standard door or a revolving door there? A. You come to the revolving door.

Q. When you fell were you in the store or in the vestibule? A. I was in the vestibule, because my head was near the revolving door.

Q. Did you happen to look up at the time? A. I looked to see if I was under shelter.

Q. Is there a roof over it? A. Yes.

Q. What position did you fall in when you fell? What did you hit? A. I went more on my left side and I fell right on the tiling.

Q. Did you break an arm? A. Yes, and I had a wrist watch on and the clasp cut me and it was bleeding.

Q. Which arm did you break? A. The left arm.

Q. Did you notice the condition of the footing on which you were stepping as you came into the entrance? A. It was like slush; it was dirty because my clothes were dirty afterwards.

Q. Did it look like the natural fall of snow? A. No, it looked pretty dirty.

Q. Were your clothes dirty? A. Yes, muddy-looking.

Q. What was the condition of your health on the 24th day of January, 1923? A. I was about to become a mother.

Q. When did you expect to become a mother? A. In about two months.

Q. What happened to you after you fell? Where were you taken? A. They took me in the revolving door and sat me to the right of it in a chair.

Q. Were you conscious? A. Yes.

Q. Were there many people in the store? A. Yes.

Q. They were shopping, I suppose. A. Yes; and near the door there were a lot of people.

Q. What hospital were you finally taken to? A. To the City Hospital.

Q. Then where? A. To a friend's house, on High Street because Dr. Haussling wanted to come there.

Q. Where did Dr. Haussling order you removed? A. To the Newark Memorial Hospital.

Q. How long were you in the Newark Memorial Hospital? A. About four weeks.

Q. Did Dr. Haussling attend you there? A. Yes.

Q. How often did he visit you at the Newark Memorial Hospital? A. Every morning and every day towards evening.

Q. Did you rest? A. I walked the floor nights; I couldn't sleep.

Q. For about four weeks? A. Yes.

Q. Did Dr. Haussling advise you against setting the arm?

Objected to.

Objection sustained.

Q. Did you take any ether during the four weeks you were there? A. No.

Q. Why not?

Objected to because the witness is not qualified to answer.

Objection sustained.

Q. Do you know why no anesthetic was given you for the purpose of setting the arm?

Objected to on the same ground.

Objection sustained.

Q. When was that arm finally set, if you know? A. I should judge—

Answer objected to.

By Mr. Steiner:

Q. If you know. A. Probably between two and three weeks.

By the Court:

Q. Fix the date as near as you can? A. I don't know the exact date.

Q. Do you know whether it was set at any time? A. Yes.

Q. Give the approximate date. A. About three weeks after.

By Mr. Steiner:

Q. Were you treated for that arm after the birth of your baby? A. Yes.

Q. Do you have any pain or suffering now? A. On rainy days and when I lift anything heavy, and various other times.

Q. Were you able to use that arm with the baby? A. No, I couldn't lift the baby to the bath-tub.

Q. When was the baby born? A. March 10th.

Q. Were you obliged to procure help in your house? A. Yes.

Q. You were away from your house for four weeks? A. Yes.

Q. Were you in the habit up to that time of looking after your household duties? A. I always did my housework up to that time.

Q. Do you know whether extra help was procured during your absence? A. Yes.

Q. Did you have help after your baby was born? A. Yes.

Q. You weren't able to lift anything? A. I couldn't bathe the baby; I couldn't stand the weight on that arm.

CROSS-EXAMINATION by Mr. Turner:

Q. Mrs. Bodine, on the day of this accident you said you looked up first to see if there was a shelter because it was raining hard? A. Yes, sir.

Q. You said you stepped into this entrance to get out of the rain? A. I was going into the store.

Q. Why did you look up to see if there was a shelter if you intended to go into the store anyhow? A. I had no umbrella and naturally I looked up.

Q. You were at the entrance to the store? A. I was in the vestibule.

Q. I can't understand. If you were at the entrance and were going into the store why did you look up to see whether there was a shelter? A. I think that it is natural to look up; I did that day.

Q. If you were going in you would be in the

shelter any way? A. But I didn't know whether I would be under shelter in the vestibule.

Q. And is that vestibule on the Broad Street side? A. It is on the corner but I went in from Broad Street.

Q. There was a show case at your left? A. Yes.

Q. Does this photograph show where you went in and does it show the show case you refer to?

Objected to.

The Court: It has not yet been offered.

Witness: Is this the Broad Street side?

By the Court:

Q. Do you recognize that as the entrance where you went in?

By Mr. Turner:

Q. Was the show case at your left? A. Yes, to my left.

Q. Does that show the show case where you went in to the entrance? A. Yes. I didn't know exactly how the show case was; I knew there was something to my right.

Q. Does this picture show the vestibule as it was when you went in? A. Yes, it looks very much like it.

Q. Does it show the vestibule where you fell? A. Yes.

Q. Can you point out where you fell in that entrance? A. Yes.

Q. Put the letter B on the photograph where you fell. A. I should judge just about there.

Q. On this photograph I have shown you you have written the letter B and it shows where you fell? A. Yes.

Mr. Turner: I ask that the photograph be marked for identification.

(The same was marked Exhibit D-1 for identification.)

By Mr. Steiner:

Q. I understood you to say that you had no umbrella on the day of the accident? A. No, I did not.

Q. You had reached Newark at what time? A. At about ten minutes of eleven.

Q. How much of that time—from ten minutes of eleven to the time of the accident—did you spend out of doors? A. I took a taxi when I seen it was snowing; I went right to Bamberger's where I spent about a half hour.

Q. You walked from the station? A. No, I took a taxi from the station to Bamberger's.

Q. How did you get from Bamberger's to Goerke's? A. I walked down to Broad Street and then to Plaut's; first I stopped in a flower shop, then I went into Goerke's.

Q. So you hadn't come prepared for snow and rain? A. It was clear when I left home.

Q. You had no umbrella and no rubbers? A. No.

Q. What kind of shoes did you have on? A. I wore a medium heel; I couldn't wear high heels.

Q. What kind of shoes did you wear? A. Low shoes.

Q. Slippers, oxfords or pumps? A. Pumps.

Q. Made of what? A. Black satin.

Q. So you had walked in your black satin pumps from Bamberger's to Plaut's through the snow and from Plaut's to Goerke's through the snow? A. Yes.

Q. And, of course, your black satin pumps were wet when you reached Goerke's? A. I guess they were.

Q. Were your feet wet? A. No.

Q. When you had walked in the snow from Bamberger's and Plaut's was there snow and slush along the sidewalk? A. It was like a slush.

Q. Snow and slush wasn't it? A. Yes.

Q. When you had walked from Plaut's to Goerke's was there still snow and slush on the sidewalk? A. It was raining then.

Q. That had turned the snow into slush? A. Yes.

Q. How deep was the slush on the sidewalk? A. I didn't particularly notice that.

Q. You must have some idea. Was it a foot deep? A. It couldn't have been very deep.

Q. Would you say it was three inches deep? A. I couldn't possibly say.

Q. How deep was it? A. I don't know.

Q. When you say slush, you mean it was soft; rain mixed with the snow? A. Yes.

Q. About how deep was it in inches? A. Probably about an inch and a half, maybe two.

Q. Would you say it was about an inch and a half deep when you went from Bamberger's to Plaut's and then to Goerke's? A. It was still raining.

Q. And it was getting slushier all the time, wasn't it? A. Yes.

Q. Were you alone all this time? A. Yes.

Q. The place that you have indicated on this photograph, Exhibit D-1 for identification, was right close to the show case, wasn't it? A. It was the far end of the show case.

Q. At the corner of the show case nearest to the door? A. Nearest to the revolving door.

Q. The revolving doors that you speak of are underneath that part that reads, "Goerke Company" over the door? A. Yes.

Q. Goerke Company is written over the door and the revolving doors are underneath. A. Yes.

Q. You hadn't gotten into the store? A. I was in the vestibule and hadn't gone in the revolving doors as yet.

Q. As you went into the store did any of the people go in just ahead of you? A. There were a lot of people going in and out all the time.

Q. In and out of this entrance from the sidewalk into the store and from the store on to the sidewalk and you could see them? A. Yes.

Q. And they were still going in and out as you started to go in, weren't they? A. Yes.

By Mr. Steiner:

Q. Did you notice whether there was a mat at this entrance as you went in?

Objected to because the witness said there was tiling there.

Objection sustained.

MARGARET LYONS sworn in behalf of the plaintiff.

Direct-examination by Mr. Steiner:

Q. Mrs. Lyons, do you recall the 24th day of January, 1923? A. Why, yes.

Q. Do you know what kind of a day it was? A. It started to snow about ten o'clock and it had turned into rain about twelve o'clock.

Margaret Lyons—Direct

Q. Did you have occasion to visit the Goerke store that day? A. Yes.

Q. At what time? A. About ten minutes to twelve I went into the Goerke store.

Q. What did you observe as you went in with respect to the entrance? A. I noticed it was very slushy and they didn't have a mat under it.

Defendant's counsel moves that the answer be stricken out.

Stricken out.

Q. Tell us what you saw? A. Rain and snow; slushy.

Q. What time was it? A. About ten minutes after twelve.

Q. What time did you come out? A. About five minutes later.

Q. Did you go in to shop? A. No, I went in to see a friend of mine.

Q. Where did you go from there? A. To Hahne & Company.

Q. Did you have occasion to visit the Goerke store again? A. I stopped on my way back.

Q. What time was it? A. About one o'clock.

Q. Did you notice the entrance of the store?

Objected to as immaterial and incompetent and as being after the time of the accident.

Objection sustained.

Q. Why did you go into the store the second time?

Objected to as immaterial and incompetent and as being after the time of the accident.

Cross-examination waived.

HARRY J. BODINE sworn in behalf of the plaintiff.

Direct-examination by Mr. Steiner:

Q. Mr. Bodine, you are one of the plaintiffs in this case? A. Yes.

Q. And you are the husband of Mrs. Wilma Bodine? A. Yes.

Q. Did anything happen to your wife to your knowledge on the 24th day of January, 1923? A. I learned she broke her arm going into Goerke's store.

Defendant's counsel moves that the last answer be stricken out.

Stricken out.

Q. Where had your wife been living prior to January 24th, 1923? A. With me at Asbury Park.

Q. Was she in the habit of doing the household duties? A. Yes.

Q. Was she able to do them after the 24th of January, 1923? A. No.

Q. Where was she during the first week subsequent to January 24, 1923? A. At the Newark Memorial Hospital.

Q. I show you a bill made out to Mrs. Wilma Bodine, Newark Memorial Hospital, in the amount of—

Defendant's counsel objects to plaintiff's counsel reading the bill.

Q. Did you pay the Newark Memorial Hospital? A. Yes, sir.

Q. How much did you pay them?

Objected to unless it is proved as a reasonable charge.

Q. What business are you in? A. In the undertaking business.

Q. Have you as the result of experience in your business been enabled to tell us the reasonable charge of a hospital for a patient? A. They fluctuate too much.

Q. How much? A. Anywhere from $50 to $150 a week.

Defendant's counsel moves that the last answer be stricken out.

Answer allowed to stand.

Q. You paid hospital bills for your wife at Spring Lake, did you not? A. After this accident? Yes.

Q. Your baby was borne at the Spring Lake Hospital? A. Yes. I have been paying her hospital bills for twenty-five years.

Q. How many hospitals have you visited? A. Probably twenty-five. My mother was sick—blind for years.

Q. Can you tell us whether $45 a week is a reasonable charge?

Objected to on the ground that the question is leading and on the further ground that the witness is not qualified to answer this question.

Objection sustained.

Plaintiff's counsel prays an exception to the Court's ruling on the ground that the witness is not qualified.

Exception noted as ground of appeal.

Q. You paid Dr. Haussling's bill, did you not? A. Yes.

Q. Did you have any extra help in your house

while your wife was away? A. I had to get a woman to do the work.

Q. How much did you pay her? A. $15 a week.

Q. How many weeks did you have her? A. The wife was in the hospital pretty near five weeks; on the 10th day of March she went to Spring Lake to have the baby; she wasn't able to do anything then with the arm in her condition.

Q. How long did you keep the woman then? A. About eight weeks—taking the two weeks off, about six weeks; four weeks while the wife was in the hospital in Newark and two in Spring Lake.

Q. Did you pay a nurse? A. Yes.

Q. How much? A. I couldn't tell you without the bills.

Q. Did you visit Mrs. Bodine at the hospital? A. Yes.

Q. How many times? A. Every day.

Q. How much is the fare every day?

Objected to on the ground that there is no claim for it in the complaint.

Objection sustained.

Q. Did your wife ever complain of the condition of her arm?

Objected to as incompetent, irrelevant and immaterial.

Objection sustained.

Cross-examination waived.

Plaintiff rests.

Defendant's counsel moves that plaintiff be nonsuited upon the following grounds.

1. That no negligence has been shown on the part of this defendant.

2. That the plaintiff Wilma L. Bodine was guilty of contributory negligence.

Motion denied.

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

Exception noted as ground of appeal.

Mr. Turner: I offer in evidence Exhibit D-1 for identification.

(The same was received in evidence and marked Exhibit D-1.)

WILLIAM WIENER sworn in behalf of the defendant.

Direct-examination by Mr. Turner:

Q. You are connected with the United States Government? A. I am City Meteorologist.

Mr. Steiner: I will admit Professor Wiener's qualifications.

Q. In the month of January, 1923, on the 24th day of January, did you keep the United States weather observations? A. For the City of Newark.

Q. Newark and vicinity? A. Yes.

Q. You have your records here covering that period? A. Yes, sir.

Q. You keep them in your own handwriting? A. Yes, sir.

Q. Will you turn to your records of January

24, 1923. Will you tell us what the weather was on that date as to rain or snow? A. According to the records it began to snow at nine a. m. and stopped at three p. m.

Q. It was snowing from nine to three? A. Yes, sir.

Q. Have you the records for the two weeks prior to that date? A. Yes.

Q. What was the condition of the weather for that period as to snow?

Objected to.

Q. Take the day prior to January 24th and tell us what the weather was as to snow.

Objected to on the ground that it is the defendant's duty to keep the entrance clear regardless of the condition of the weather.

The Court: I will allow it because I think it is proper for the jury to know the condition of the weather.

Plaintiff's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

Q. What was the weather on the 23rd of January, the day before the accident? A. It was clear.

Q. And the 22nd of January? A. There had been snow and rain.

Q. On January 21. A. Clear.

Q. On January 20. A. I beg your pardon, the 21st was rain and the 20th was rain.

Q. And the 19th? A. Clear.

Q. The 18th? A. Clear.

Q. The 17th? A. Clear.

Q. The 16th? A. Clear.

Q. The 15th? A. Clear.

Q. Snow commenced on what date? A. The 3rd of January.

Q. How much snow fell up to January 24th?

Objected to.

Q. Do you know how much snow fell on the 24th of January, 1923? A. One and three-quarter inches.

Q. That was fresh snow that fell? A. Yes.

CROSS-EXAMINATION by Mr. Steiner:

Q. Professor Wiener, snow is apt to be accompanied by rain and slush?

Objected to on the ground that it is too remote.

Q. Does your office make the observations by minutes or just generally? A. They indicate the various changes if there are changes; if the weather varies we have the hours of variation.

Q. You haven't them all over Newark? A. The official records.

Q. Taken where? A. The corner of High Street and New.

Q. You don't go any further than that? A. I don't know what you mean.

Q. On the 24th day of January, 1923, when you took the observations, did you personally go out to High Street and New and come in and make an entry? A. Yes.

Q. How often were you out on that corner? A. I can't say how often; I couldn't tell you that—a number of times—that, of course, I haven't recorded.

Mr. Steiner: If the Court please, I move to strike out the entire testimony of this

witness on the ground that the facts of the plaintiff's case are concerned with what happened at the entrance to the Goerke store at Broad and Cedar Street under a covered roof and we are not concerned with the general weather conditions.

Motion denied.

Plaintiff's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

By the Court:

Q. Professor, do you make any indication as between snow and rain? A. Yes, sir.

Q. What change do you note? A. On that day there was a change from snow to rain.

Q. Sometimes there is some different designation from snow or rain, designating something between the two; I don't mean about this particular day. A. In making the observations we report the rain by itself and the snow by itself and double the measurement, the sum of the two figured in terms of rain and snow.

Q. How do you show the difference? A. There is a tipping of the bucket which records each one-hundredth of an inch on the gauge. The rain gauge indicates the measurement automatically and the snow is taken from actual measurement and not from the gauge.

Q. Would there be anything between the snow and rain when it would still be snow but would not show on the snow gauge and would on the rain gauge? A. It would show then on the rain gauge.

William Wiener—Cross

Q. There might be some snow on the rain gauge due to melting? A. No, maybe recorded as some rain according to the temperature.

Q. Did you have any rain that day? A. From three p. m. to midnight; 78 hundredths of an inch.

By Mr. Turner:

Q. But from nine in the morning until three in the afternoon it was snow. A. Until three o'clock it was snow.

By Mr. Steiner:

Q. Referring to your record, could you tell us how many times between nine in the morning and three in the afternoon you made your observation? A. I can say definitely that at noon—

Q. No. A. You asked me to tell you from my record—

Q. I asked you how many times during that interval you had made observations? A. At least three from this record, and there certainly were more—

The Court: The answer is at least free from the record.

Defendant rests.

Peter J. Brehony—Direct

PETER J. BREHONY sworn in behalf of the plaintiff in rebuttal.

Direct-examination by Mr. Steiner:

Q. Mr. Brehony, do you remember the 24th day of January, 1923? A. Yes, sir, I do.

Q. Do you know whether it was raining at all in the morning of that day? A. Yes, sir.

Q. Had it started to snow first? A. Yes, sir.

Q. What was the condition of the weather? A. At ten o'clock that morning it started to snow.

Q. Was there any change?

By the Court:

Q. I suppose this is in reference to Newark? A. Yes, sir.

By Mr. Steiner:

Q. Were you on Broad Street that morning? A. Yes, sir.

Q. Were you in the neighborhood of the Goerke Company during that morning? A. Yes, sir, I was.

Q. What time did it start to snow that morning, if you know? A. Around ten o'clock.

Q. What was the condition of the weather, if you know, at noon? A. Around 11:30 or 12 o'clock it started to rain.

Q. You are sure of that? A. Positively.

Cross-examination waived.

MILDRED YOUNG sworn in behalf of the plaintiff in rebuttal.

Direct-examination by Mr. Steiner:

Q. Miss Young, do you remember the 24th day of January, 1923? A. I do.

Q. Were you in Newark on the morning of that day? A. Yes, sir.

Q. Where were you at nine o'clock in the morning of that day? A. In the Goerke Company's store.

Q. What was the condition of the weather? A. Very, very sloppy and slushy, and snowing at nine.

Q. What time did you come out? A. About 12:40.

Q. Had there been any change in the condition of the weather? A. The weather had softened and it was raining at the time.

Cross-examination waived.

Plaintiff rests.

Defendant's counsel moves for the direction of a verdict in favor of the defendant on the ground that no negligence has been shown on the part of the defendant, and secondly, that the plaintiff, Wilma L. Bodine, was guilty of contributory negligence.

Motion denied.

Mr. Turner sums up in behalf of the defendant.

Mr. Steiner sums up on behalf of the plaintiffs.

Charge.

The Court charges the jury as follows:

SMITH, J.

Members of the jury. This action arose out of an accident which occurred between twelve and one o'clock mid-day, January 24, 1923, in the entrance of the Goerke store at the northwest corner of Cedar and Broad Streets in the City of Newark, as Mrs. Bodine was entering the store.

There is testimony here that it was raining or snowing at the time and when she got into the entrance, which was slightly inclined upward, and that it was more or less covered with dirty slush; and that she slipped and fell with the result that her arm was broken and she claims that the defendant is responsible in damages to her and her husband for not keeping this entrance in a reasonably safe condition.

The defendant's contention is that the entrance was kept in a reasonably safe condition and if it was not they had no notice that it was not reasonably safe; that the weather had been clear up to nine o'clock in the morning when the snow had started and it hadn't stopped at the time of the accident.

Mrs. Bodine testifies that she was on her way into the store to shop and she is what is called an invitee, that is, she was impliedly invited by the store to come in and that they therefore owed it to her to keep the entrance in a reasonably safe condition, that is, to use care to keep it so. This was the duty the defendant owed to the invitee,

to keep the entrance safe with a reasonable degree of care.

Reasonable care is such care as a reasonable person exercises in view of all the circumstances presented to him—such care as an ordinarily prudent person would exercise under the conditions at the time he is called upon to act.

To hold the defendant liable for a lack of reasonable care you must find that the condition of the entrance way at the time of the accident was not in a reasonably safe condition and that the defendant had notice of the condition and did nothing to remedy it within a reasonable time under the circumstances or that the condition had existed for such a length of time as to charge the defendant with notice of such condition. If you find that the entrance-way was not in a reasonably safe condition then you must find in addition that the department store keeper had notice of it, or that the condition had existed for such a length of time as to charge him with notice of such an unsafe condition.

On the question as to the condition testified to by plaintiff having existed for so long as to charge the defendant with notice, the jury should consider the facts and come to the conclusion as to whether or not such a length of time had elapsed as to charge the defendant with notice. Consideration should be given to the fact that this condition was largely due to the natural elements; and consideration should also be given to the length of time it had snowed or rained, and the use which had been made of the entrance. I

am not limiting you to these conditions but they are to be considered.

You are to consider the plaintiffs' claim that the defendant was negligent. Negligence in this case would be the failure to use reasonable care to keep the entrance way safe. You must find that this negligence was the proximate cause of the accident. These things the plaintiffs must establish by a fair preponderance of the evidence.

It is for the jury to determine the facts in which a question existed upon which it may base its verdict. It is not my province to dispose of the questions of fact. These are things for the jury to determine.

There is a defense here of what we call contributory negligence, that is, that the plaintiff, by her own act, contributed to the injury.

To conclude the plaintiff from maintaining her action, her conduct must have been negligent, and her negligence must have contributed to the injury in such a way that, if she had not been negligent she must have received no injury from the negligence of the defendant. Ordinary care is required which a prudent person would take under the existing circumstances. The burden of proof of this defense is upon the defendant as it is an affirmative defense, so the defendant must therefore establish that defense by a fair preponderance of the evidence.

All of the evidence adduced in the case may be considered in determining the question of contributory negligence. Under this defense it

is important for you to consider that a person walking must use ordinary care in doing so. Everyone knows the danger of walking on snow, ice, slush, wet sidewalks, or tiling, and it is for you to consider in passing on this defense whether this plaintiff used ordinary care in walking into this entrance.

If, after a consideration of this case you come to the conclusion that the defendant was not negligent, your verdict will be for the defendant. If you come to the conclusion that the defendant was negligent and that that negligence was the proximate cause of the plaintiff's injury and that the plaintiff herself was guilty of contributory negligence, then your verdict will be for the defendant. If it was a mere accident and nobody was responsible, you will find for the defendant. But, if you find that the defendant was guilty of negligence and that that negligence was the proximate cause of the plaintiff's injury and that she was not guilty of contributory negligence then your verdict should be for the plaintiff.

If you arrive at that verdict you should then, and not until then, consider the question of what damages to award. You should first determine the question of liability before you pass on the question of damages. If you do not determine the liability, you do not have to pass on the question of damages.

If you find for the plaintiff you should bring in two verdicts, one for the wife and one for the husband. The wife would be entitled to compensation in money damages, insofar as money

can compensate, for the bodily injuries sustained; the pain and suffering undergone; the effect on the health of the plaintiff according to its degree and probable duration. You will take into consideration the evidence here that she suffered a fracture of the lower third of the upper left arm; that it was painful is considered; that it took several weeks, two or three weeks, to get the arm set due to the fact that the doctor would not give this plaintiff an anaesthetic to more adequately set it. She was in hospitals at Newark until February 25th and then went to her home and she had to treat her arm thereafter and she complains she still feels some pain from bad weather or when putting her arm to use.

The husband would be entitled to your verdict for the expenses incident to the attempts to cure or lessen the amount of the injury which was proximately due to the accident, also sums expended to employ persons in his household to do the work which his wife did theretofore, provided during such time that the wife's inability to do it was due to these injuries which she received, again provided, of course, that the compensation he paid was reasonable. He is entitled to compensation also for loss of consortion, which is the companionship of the wife to the husband, she was compelled to stay in hospitals in Newark from the day of the accident until February 25th.

Exhibit D-1.

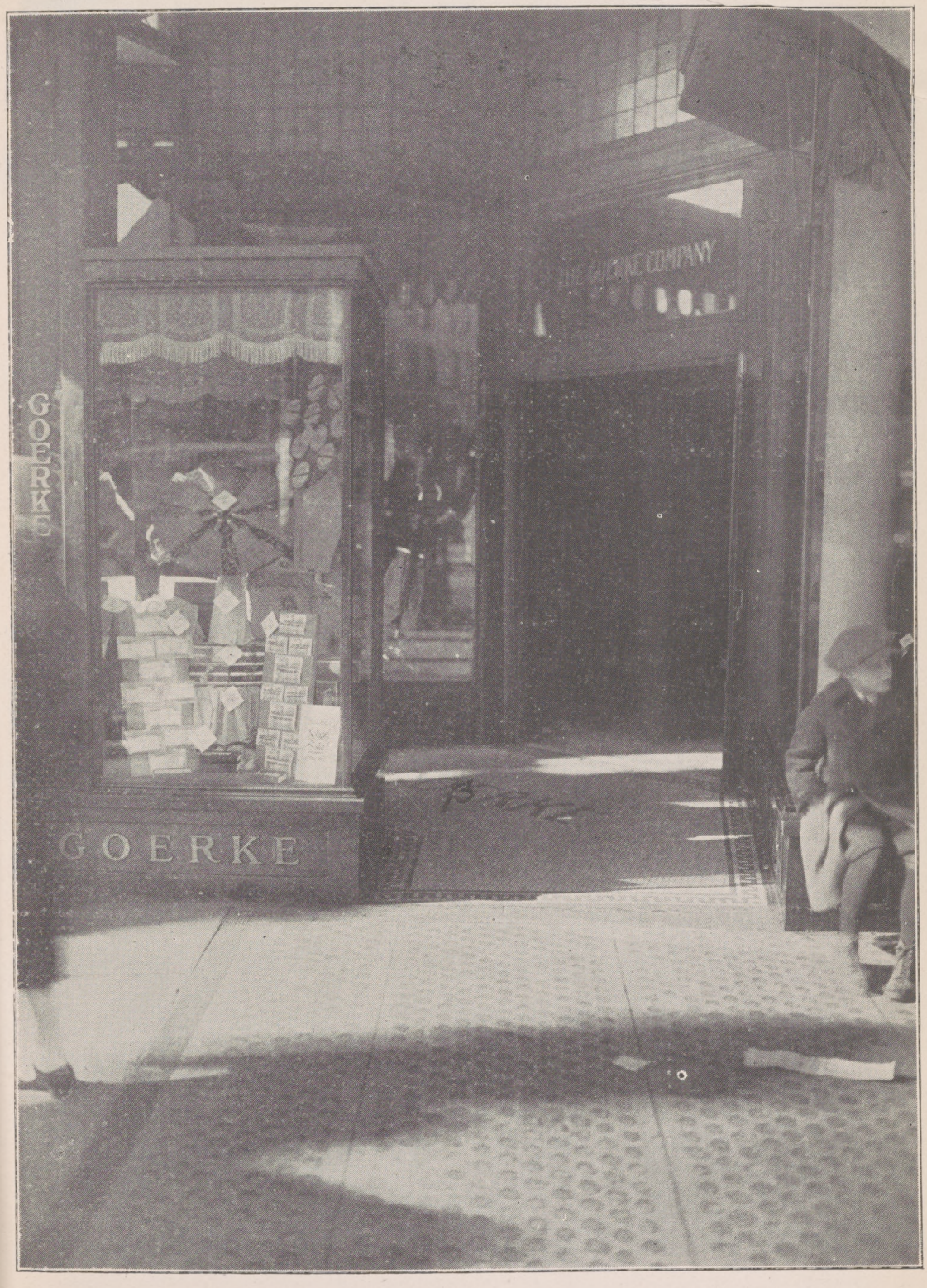

Exhibit P-1.

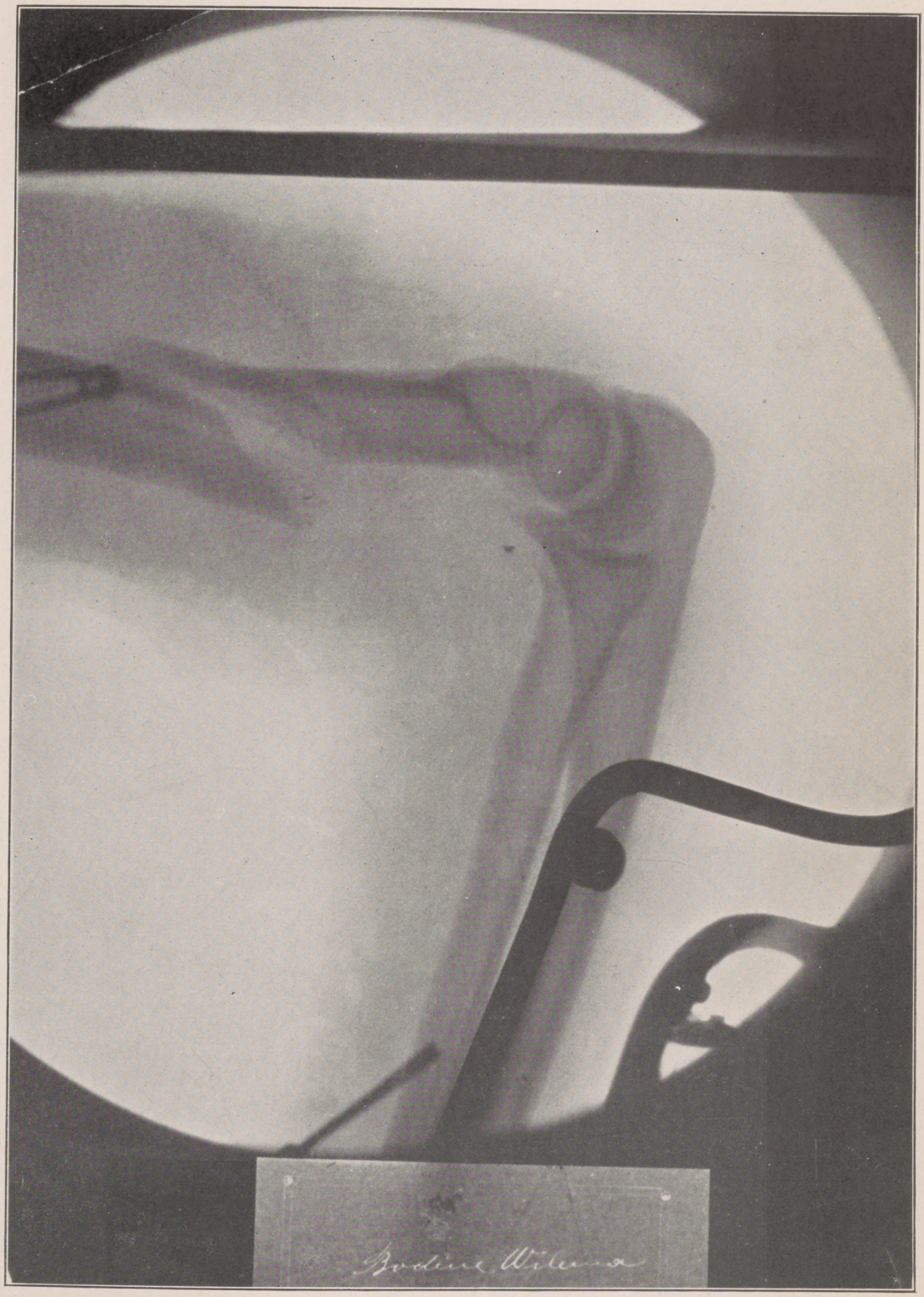

Exhibit P-2.

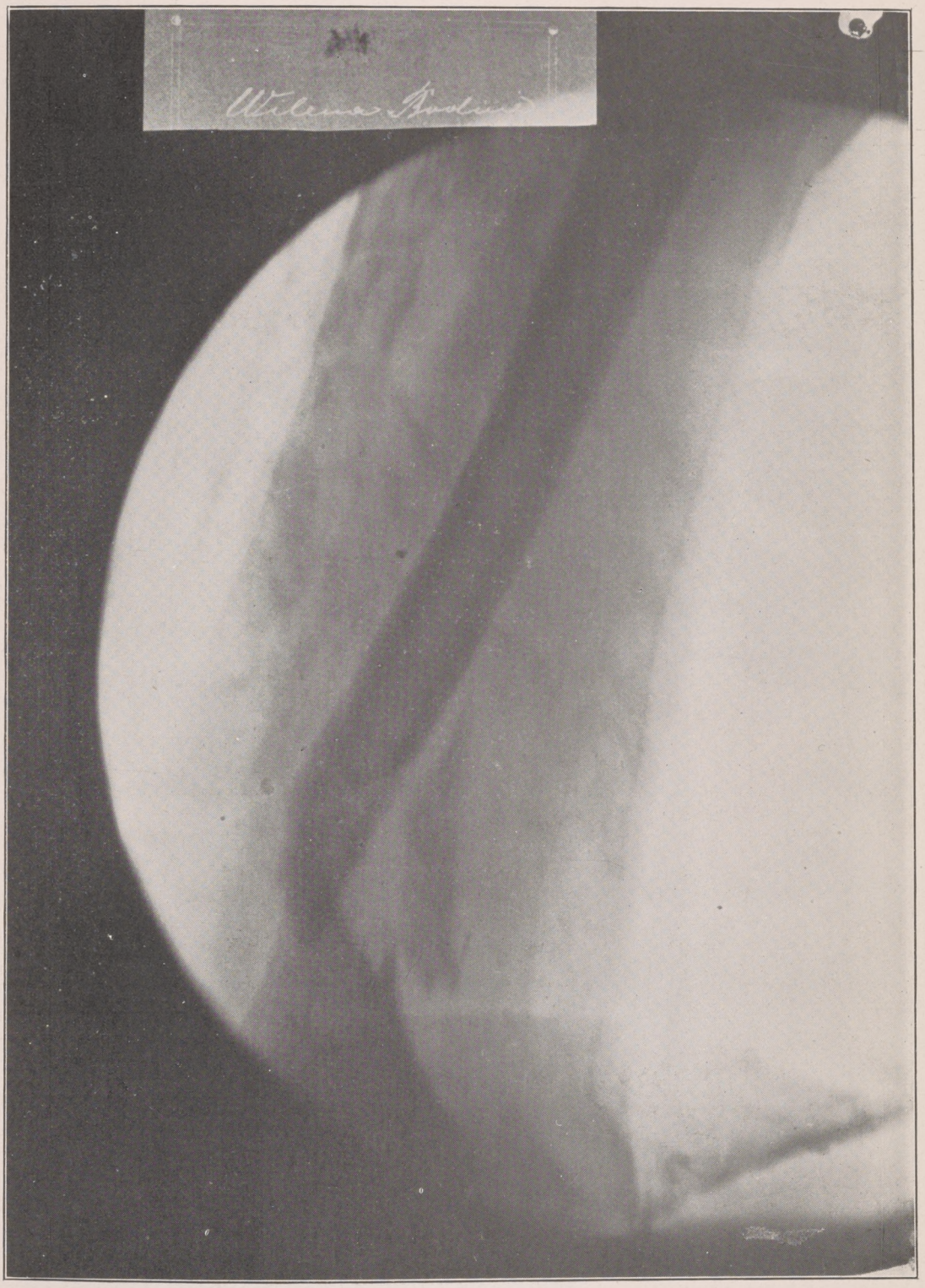

Exhibit P-3.

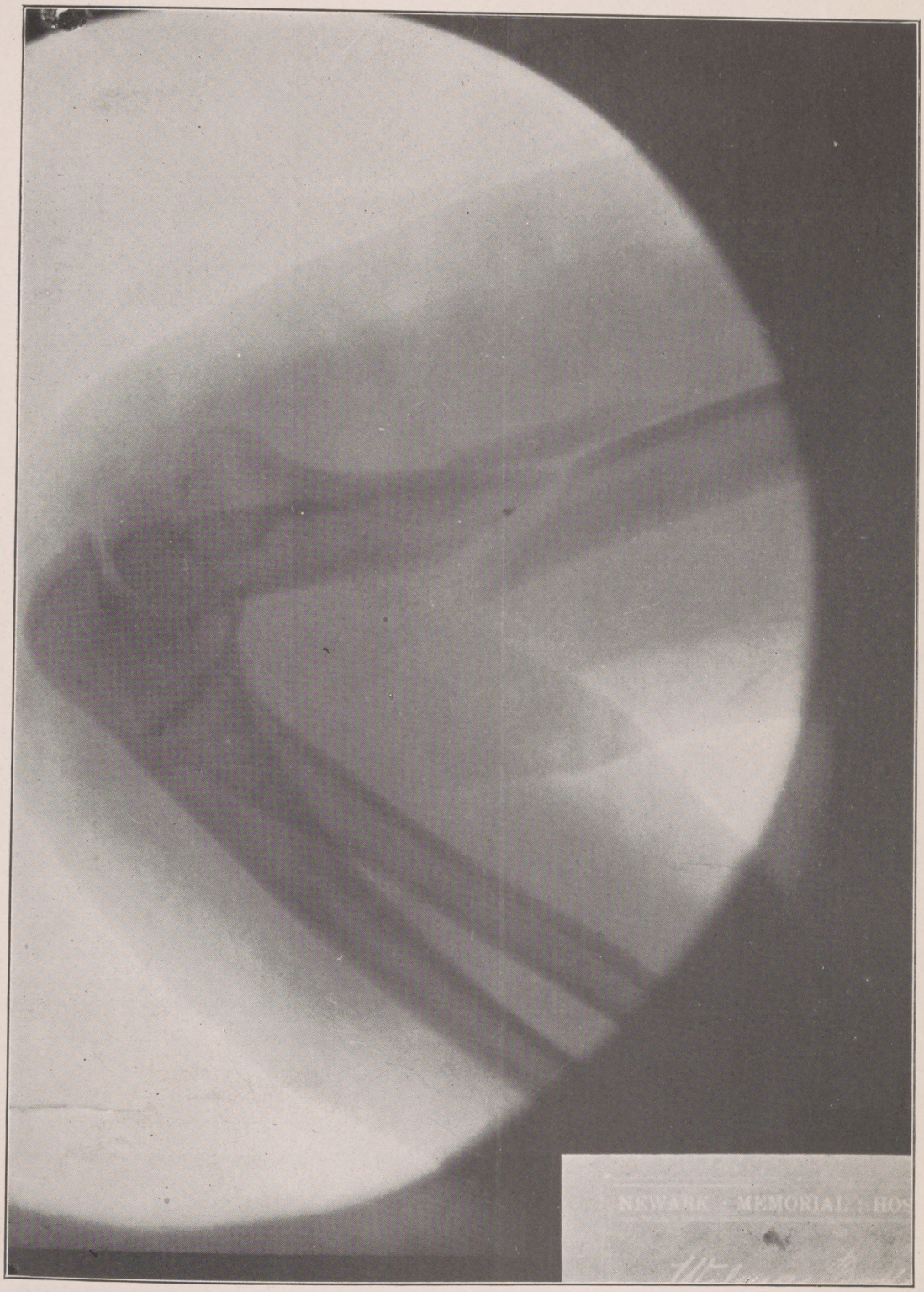

Exhibit P-4.

661 HIGH STREET NEWARK, N. J. June 13, 1923.

Mr. Bodine 1007 Bang A

Asbury Park, N. J.

TO FRANCIS R. HAUSSLING, M. D. DR.

$150.00

Received Payment

F. R. HAUSSLING

Itemized Bill if Desired

New Jersey
Court of Errors and Appeals

WILMA L. BODINE AND HARRY J. BODINE, her husband, Plaintiffs, vs. THE GOERKE COMPANY, a corporation of the State of New Jersey, Defendant.	On Appeal from Supreme Court

BRIEF OF THE DEFENDANT.

The Facts.

This is an action brought to recover damages for personal injuries alleged to have been sustained by the plaintiff Wilma L. Bodine on January 24th, 1923, because of her falling at the corner of Cedar and Broad Street, Newark, N. J. The plaintiff who lived in Asbury Park left that place shortly after nine o'clock in the morning. She reached Newark, at ten minutes of eleven, when she got off the train it was snowing, later the snow turned into rain.

The plaintiff testifies (Case pp. 28-29).

> "Q. How did you get from Bamberger's to Goerke's? A. I walked down to Broad

Street and then to Plaut's; first I stopped in a flower shop, then I went into Goerke's.

Q. So you hadn't come prepared for snow and rain? A. It was clear when I left home.

Q. You had no umbrella and no rubbers? A. No.

Q. What kind of shoes did you have on? A. I wore a medium heel; I couldn't wear high heels.

Q. What kind of shoes did you wear? A. Low shoes.

Q. Slippers, oxfords or pumps? A. Pumps.

Q. Made of what? A. Black satin.

Q. So you had walked in your black satin pumps from Bamberger's to Plaut's through the snow from Plaut's to Goerke's through the snow? A. Yes.

Q. And, of course, your black satin pumps were wet when you reached Goerke's? A. I guess they were.

Q. When you had walked in the snow from Bamberger's and Plaut's was there snow and slush along the sidewalk? A. It was like a slush.

Q. Snow and slush wasn't it? A. Yes.

Q. When you had walked from Plaut's to Goerke's was there still snow and slush on the sidewalk? A. It was raining then.

Q. That had turned the snow into slush? A. Yes.

Q. When you say slush, you mean it was soft; rain mixed with the snow? A. Yes.

Q. About how deep was it in inches? A. Probably about an inch and a half, maybe two."

The plaintiff further testifies (Case p. 22):

"Q. Did you enter the Goerke store? A. Yes, I had left the pavement; I was in the entrance to the Goerke store.

Q. Tell us what happened. A. There is a show case there and I had just passed it when I fell.

Q. Did you notice the floor of the entrance? A. It was very slushy; like dirty snow.

Q. Was it paved or unpaved? A. It is tiling."

The plaintiff further testifies (Case p. 23).

"Q. You say there was a show case? A. Yes.

Q. Is there a standard door or a revolving door there? A. You come to the revolving door.

Q. When you fell were you in the store or in the vestibule? A. I was in the vestibule, because my head was near the revolving door.

Q. Did you happen to look up at the time? A. I looked to see if I was under shelter.

Q. Is there a roof over it? A. Yes.

Q. What position did you fall in when you fell? What did you hit? A. I went more on my left side and I fell right on the tiling.

Q. Did you break an arm? A. Yes, and I had a wrist watch on and the clasp cut me and it was bleeding.

Q. Which arm did you break? A. The left arm.

Q. Did you notice the condition of the footing on which you were stepping as you came into the entrance? A. It was like slush; it was dirty because my clothes were dirty afterwards.

Q. Did it look like the natural fall of snow? A. No, it looked pretty dirty.

Q. Were your clothes dirty? A. Yes, muddy-looking."

The place where the plaintiff says she fell is shown by the photograph on page 47 on the State of the Case. She indicated by the letter B the place where she fell. The tiling of the place where she fell is and was in perfect condition. The plaintiff says that people were passing in and out of the store constantly. There was snow and slush all along the street. She claims that she fell on some snow that to her seemed to be dirty. There was no proof in the case that this snow had been at the entrance of this building for even a single instance before the time when the plaintiff fell. There was nothing to indicate that the plaintiff herself did not bring in the snow on which she fell.

The defendant called no witnesses concerning the accident. There are no disputed facts in the case. On the day of the accident one and three quarter inches of snow fell at Newark. On that day it began to snow at nine o'clock in the morning and stopped snowing at three o'clock in the afternoon.

There was absolutely no proof in the case from which negligence could be inferred on the part of the defendant.

The place where the plaintiff fell is a continuation of the sidewalk. There are no steps between the sidewalk and the entrance of the defendant's store. The defendant did not cause snow to accumulate at the place of the accident. There is no proof that there was any snow except that which the plaintiff herself could have brought in on her shoes. It is a matter of common knowledge that one who has been walking in snow and slush without rubbers on his or her feet may enter upon a dry surface and slip and slide because of the snow and ice and water that remain on the soles of the shoes. A glance at the photograph will at once show this was a modern store entrance kept in first class repair and there was nothing to charge the defendant with notice or knowledge of any condition that would be dangerous to this plaintiff. Nothing that the defendant could have done would have prevented the accident to the plaintiff. The plaintiff asks the court to presume negligence where none exists.

POINT 1.

No negligence was shown on the part of the defendant.

There is no authority that supports the plaintiff's claim of negligence on the part of the defendants. This case does not come within the line of *Cooper vs. Reinhardt,* 91 New Jersey Law 402, where ice was allowed to remain on the steps for three and one-half hours after the snow had stopped falling and where the plaintiff was leaving the premises just after dark. In that case when the guest was leaving the hotel he slipped on a coating of frozen snow or ice. In the case before the Court there was no frozen snow or ice and there is no proof as to the actual thing that caused the plaintiff in the present case to slip and fall, outside of what may have been on the soles of her shoe.

In the case of *Sewall vs. Fox,* 121 Atlantic Reporter 669 this Court has said:

> "Owners and occupants of property are not liable to a pedestrian for injuries resulting from a fall caused by slipping on snow and ice which, due to natural weather conditions, accumulated on the sidewalk in front of the property."

In the case of *Lightcap vs. Lehigh Valley R. R.* 87 New Jersey Law 64, 94 Atlantic Reporter page 35, the court says on pages 36 and 37:

> "It is quite well settled that the landowner owes no duty to a pedestrian to keep the sidewalk clear of ice and snow coming thereon from natural causes or to guard

> against the risk of accident by scattering ashes or using any other like precaution. *Kirby vs. Boylston,* Market Ass'n 14 Gray (Mass.) 249, 74 Am. Dec. 682. All the cases on this subject where the defendant has been held liable, are those where the injury was caused by the creation of a nuisance upon the highway by the defendant, as by the artificial accumulation of ice and snow upon the sidewalk in front of his premises, or upon his premises adjacent thereto, as indicated by this Court."

This case does not come within the rule of *Costello vs. Director General of Railroads,* 112 Atlantic Reporter 861 in which there was proof there had been an accumulation of ice upon the stairway of the defendant company which the defendant had negligently permitted to remain there after the expiration of a reasonable time to charge it with notice of the danger incident to the use of the way in that condition. In the case before the Court there was no proof that there had been snow on the premises of the defendant for a single instant before the accident to the plaintiff.

In the case *Arning vs. Druding* 114 Atlantic Reporter page 158 the New Jersey Supreme Court holds:

> "The sidewalk in front of defendant's property was partly covered with a paved walk; there being a curb along the outer side of the sidewalk and a hedge along the other side. The defendant after a snowstorm, removed the snow from the stone paving and placed it partly along the curb

and partly along the hedge side of the stone walk. During the day the snow melted, and the water ran over the stone paving, which froze during the night. The plaintiff in passing over this walk was thrown by the ice thus formed, and was injured. Held that the act of the defendant was not such an artificial accumulation of snow as to make the defendant liable. *Aull vs. Lee* 84 N. J. Law 155, 85 Atl. 1018, distinguished."

In the case before the court there is no proof that any snow on the premises of the defendant was accumulated artificially.

It is respectfully urged that there should have been a judgment of non-suit on the ground that no negligence was shown on the part of the defendant. Schnatterer v Bamberger 8/21 J L. 5-8

POINT 2

The Court should have ordered a non-suit in favor of the defendant on the grounds that the plaintiff, Wilma L. Bodine, was guilty of contributory negligence.

The testimony of the plaintiff shows that she was entirely familiar with the condition of the sidewalk and with the condition of the vestibule or entrance to the defendant's store.

In the case of *Rooney vs. Siletti* 115 Atlantic Reporter p. 664 The New Jersey Supreme Court holds:

> "In a suit by a tenant against a landlord for injuries from falling on a stairway covered with ice and snow, where the tenant observed the condition of the stairway before entering it and knew the danger she would incur, she assumed the risk of injury, and this having been shown on her own evidence, a non-suit should have been granted."

In the case of *Vorrath vs. Burke,* 63 New Jersey Law 188 the New Jersey Supreme Court holds.

> "The weight counterbalancing a door covering a cellar stairway in a tenement-house became detached without the landlord's knowledge. A girl of twelve years, daughter of a tenant, having full knowledge of this condition, undertook to raise the door and descend the stairway, and in doing so was injured. In a suit by her father to recover for expense and loss of service resulting from such injury—Held, that there could be no recovery."

In the case at bar the plaintiff had been walking through the snow and knew that the snow had been falling and knew that it was either snowing or raining at the time of the accident. She saw the condition of the sidewalk in front of her and she saw the condition of the entrance of the store or vestibule where she was entering. She is charged with knowledge and notice of the condition that was in front of her and was plainly visible.

POINT 3.

The Trial Court erroneously refused to direct a verdict in favor of the defendant and against the plaintiff.

At the close of the entire case there were no disputed questions of fact and the case was one of law for the Court. There was nothing for the jury to decide.

The trial Court erred in refusing to direct a verdict for defendant.

POINT 4.

Illegal Evidence.

It was error on the part of the trial court to admit in evidence the x-ray prints Exhibits P-1, P-2 and P-3. These were incompetent and were not properly proven. See the case of *Joy vs. Flax*, 127 Atlantic Reporter page 596 which holds that the admission of such improper evidence is erroneous and prejudicial to defendant.

It is respectfully urged that the judgment of the Supreme Court should be reversed.

Frank G. Turner

FRANK G. TURNER,
Atty. and of Counsel with
Defendant-Appellant.

The Otsego Press, Cooperstown, N. Y.

Arthur W. Cross, Law Printer, 55-57 Lafayette Street, Newark, N. J.

New Jersey Court of Errors and Appeals

WILMA L. BODINE and HARRY J. BODINE, her husband, *Plaintiffs-Appellees,* *vs.* THE GOERKE COMPANY, a corporation of the State of New Jersey, *Defendant-Appellant.*	*On Appeal from Supreme Court.*

BRIEF OF PLAINTIFFS-APPELLEES.

The Facts.

Although the record in this case is a short one and one which requires very little time to read, counsel for the appellant, in his statement of facts so entirely changes the complexion of this case, that it becomes necessary for us to restate the facts as they actually exist, using as our source the record of the case.

On the first page of appellant's brief, he states that the action was brought by the plaintiff because of her falling at the corner of Broad and Cedar streets, Newark, New Jersey. The record shows that the place where she actually fell was at the entrance and in the lobby of the Goerke store (p. 22, l. 33). It is elementary that if she fell at the corner of Cedar and Broad streets, Newark, New Jersey, that the doctrine of law applicable to a case of that kind is entirely different from the rule of law which applies in the instant case where the accident actually happened in and about the premises owned, operated and controlled by the defendant-appellant. Furthermore, on page 5 of appellant's brief, a very in-

sidious suggestion is made which by coupling the same with the defendant-appellant's Exhibit D. 1 would lead one to believe that the testimony showed that the entrance to the store was in perfect condition on the day of the accident. There is no suggestion anywhere in the case that the photograph which the appellant makes as Exhibit D. 1 reflects the condition of the store *on the day of the accident,* except so far as the physical structure of the entrance is concerned. The photograph was not admitted in evidence but was used merely for the purpose of identification.

POINT I.

There was ample proof shown of defendant's negligence.

Wilma Bodine on direct examination testifies as follows (Case, p. 22, l. 38):

> "Q Did you notice the floor of the entrance? A It was very slushy; like dirty snow."

Peter J. Brehony on direct examination testifies as follows (Case, p. 40, l. 28):

> "Q What time did it start to snow that morning, if you know? A Around ten o'clock.
>
> Q What was the condition of the weather, if you know, at noon? A Around 11:30 or 12:00 o'clock it started to rain."

Mildred Young on direct examination testifies as follows (Case, p. 41, l. 16):

> "Q What was the condition of the weather? A Very, very sloppy and slushy, and snowing at nine.
>
> Q What time did you come out? A About 12:40.
>
> Q Had there been any change in the condition of the weather? A The weather had softened and it was raining at that time."

which contrary to the statement made by defendant-appellant on page 4 of its brief and of its sole witness,

(Case, p. 35, l. 40):

> "Q Will you turn to your records of January 24, 1923. Will you tell us what the weather was on that date as to rain or snow? A According to the records it began to snow at 9 A. M. and stopped at 3 P. M."

presents a sharp question of fact for the jury to decide whether sufficient time had elapsed to charge defendant with notice of the existing perilous condition.

The case of *Timlan* v. *Dilworth,* 76 N. J. L. 568, the Court in discussing when the question of reasonable time is for the jury said on page 571:

> "The question of reasonable time is generally one of fact for the jury, and is always so when it rests upon conflicting inferences as to the mutual effect of the conduct of the parties to the transaction."

Ketcham v. *Newark,* 3 N. J. Misc. Reports 399, it was held that:

> "Jury were further entitled to conclude that permitting a thing of this kind to remain in such a condition even for a half hour, was a negligent act."

That was a case where a bar was permitted to lie across a doorway for a period of one-half hour and the Court rendered the above decision.

The case of *McCarthy* v. *Metropolitan Life Insurance Company,* 75 N. J. L., page 887, stands for the proposition

> "That where fair-minded men might honestly differ as to the conclusions to be drawn from facts, whether controverted or uncontroverted, the question at issue should go to the jury," and again

The case of *Kearns* v. *Waldron*, 76 N. J. L., page 370:

> "The credibility of witnesses is a question for the jury."

Therefore the question as to whom was to be believed was properly submitted to the jury.

As from the very nature of the defendant-appellant's business, patrons were invited to use the entranceway and place where the accident actually occurred and as testified by Wilma L. Bodine (Case, p. 30, l. 12):

> "Q Had you gotten into the store? A I was in the vestibule and had not gone in the revolving doors as yet.
>
> Q As you went into the store, did any of the people go in just ahead of you? A There were a lot of people going in and out all the time.
>
> Q In and out of this entrance from the sidewalk into the store and from the store onto the sidewalk and you could see them? A Yes."

The defendant-appellant was responsible for the artificial accumulation of the snow in their vestibule, and the plaintiff was one who was invited to enter upon the premises of the defendant-appellant and was injured while exercising this right. Her injury arose because of the failure on the part of the defendant-appellant to remove the snow and slush thus accummulated.

The first point made by defendant-appellant in its brief refers to law applicable to liability arising out of accidents, the cause of which was the failure on the part of owners of property to clear their sidewalks from snow and ice, which had naturally accumulated thereon. The case in point is one which has nothing whatsoever to do with the sidewalks as the accident in question occurred in the vestibule of the defendant-appel-

lant's store, and consequently the law applicable to sidewalks is inapplicable here, as an entirely different phase of the law controls the issue.

In the brief of defendant-appellant, on page 5 of its brief, that nothing that the defendant could have done would have prevented the accident, is contrary to fact, since the placing of a mat or the placing of sawdust, ashes, cork or some other substance which prevents slipping, would in all probabilities prevented the accident in question and there was no testimony on the part of the defendant-appellant that any attempt was made to alleviate the existing dangerous condition by the application of any one of these forms or otherwise.

POINT II.

A prima facie case was made out by the plaintiffs-appellees, and the motion for non-suit was properly denied.

As shown by the testimony of Wilma L. Bodine in her direct examination (Case, p. 16, l. 25):

"Q What time did you arrive at the Goerke store? A I figured it was about 12:20.

Q What took you there? A I wanted to do some shopping."

And again on the same page, line 32:

"Q At about 12:20 what was the condition of the weather? A It had been snowing when I got off the train.

Q What time did you get off the train? A About ten minutes to 11:00."

And further on page 22, line 30:

"Q What was the condition of the weather in Newark? A It was snowing when I got off the train and by that time it turned into fine rain.

Q Did you enter the Goerke store? A Yes, I had left the pavement; I was just in the entrance to the Goerke store.

Q Did you notice the floor of the entrance? A It was very slushy, like dirty snow.

Q Was it paved or unpaved? A It is tiling.

Q It is a straight entrance or sloped? A It slopes a bit."

Again referring to Case, page 30, lines 15 to 21 inclusive.

It is clear from examining this testimony of Wilma Bodine that the defendant did not use reasonable care in the maintenance of their entrance way and a question for the jury arose whether or not permitting such a condition to exist after the snow had ceased to fall for the length of time it was testified to it had existed was maintaining its premises in a reasonable and careful manner, taking into consideration the nature of the defendant-appellant's business, whereby they impliedly induce persons (including the plaintiff Wilma L. Bodine) to enter their store.

In a case of *Phillips* v. *Library Company,* 55 N. J. L., page 307, which case has been followed by *Feinberg* v. *Public Service Railway Company,* 94 N. J. L. 55, and *Koppertz* v. *The Jerseyman,* 98 N. J. L. 836:

"The gist of the liability in such cases consist in the fact that the person injured did not act merely on motives of his own, to which no sign of the owner or occupier contributed, but that he entered the premises because he was lead by the acts or conduct of the owner or occupier to believe that the premises were intended to be used in the manner in which he used them, and that such use was not only acquiesced in, but was in accordance with the intention or design

for which the way or place was adapted and prepared or allowed to be used."

"An owner or occupier of lands, who, by invitation, express or implied, induces a person to come upon the premises, is under a duty to exercise ordinary care to render the premises reasonably safe for the purposes embraced in the invitation."

Therefore non-suit was properly refused because as in the case of *King* v. *Zierz,* 73 N. J. L. 134:

"A non-suit cannot be granted upon the ground that plaintiff has failed to prove want of reasonable care unless the proof in the case is so clear that no other legitimate conclusion can be reached by the jury."

And further in the case of *Brooman* v. *N. J. Street Railway Company,* 70 N. J. L., on page 822, this Court said:

"In performing this function the trial judge must take care not to trench on the peculiar province of the jury to determine questions of fact; and must bear in mind that the question is not whether he would infer negligence from the established facts but whether negligence can be reasonably and legitimately inferred therefrom by the jury."

The plaintiffs-appellees also rely on the case of *Cooper* v. *Reinhardt,* 81 N. J. L. 402, cited in defendant-appellant's brief, on page 6, where the Supreme Court held that where:

"The fact that a hotel keeper knew that his entrance steps and platform were covered with snow and slush which were freezing, and did not within three and a half hours after the snow stopped falling have them cleared or otherwise cared for, but allowed a departing guest to use them in that condition to his injury, justifies a finding that the hotelkeeper was negligent."

And further, the fact

> "That the plaintiff noticed when he entered the hotel that there was snow upon the steps and platform is not conclusive evidence that he was not in the exercise of reasonable care in attempting to use them several hours later."

And still further,

> "We also think that it cannot be said as a matter of law that the plaintiff was guilty of contributory negligence.
>
> Therefore the question of contributory negligence was likewise left for the determination of the jury."

The cases cited by the defendant-appellant regarding contributory negligence embody a different set of facts which are not analogous to the case in point.

The case above cited, *Cooper* v. *Reinhardt,* embodying facts which are very similar to the case in question and the Court held that the question of negligence is for the jury.

POINT III.

The Trial Court did not err in its refusal to direct a verdict in favor of the defendant because referring again to the evidence adduced during the trial in support of the Court's refusal to non-suit the plaintiff, the Court was likewise acting within its province by refusing a direction of the verdict as there was ample conflicting testimony to warrant the verdict of a jury.

We find in the case of *Meyers* v. *Birch,* 59 N. J. L. 238, it was held:

> "The court is justified in controlling a jury in its verdict, by a binding instruction, only in those cases in which the testimony will not support any other verdict than that which is directed."

And in *Hoff* v. *Public Service Railway Company,* 90 N. J. L. 386:

> "In passing upon a motion for the direction of a verdict, the court cannot waive the evidence, but it is bound to concede to be true all evidence which supports the view of the party against whom the motion is made, and to give to him the benefit of all legitimate inferences which are to be drawn in his favor."

And further in *City of Elizabeth* v. *Central Railroad Company,* 82 N. J. L., page 94, it was held:

> "In order to warrant the direction of a verdict for a defendant it should appear that the evidence offered by the plaintiff to sustain his case was clearly insufficient to justify a verdict in his favor, and that a verdict rendered by the plaintiff thereon would be set aside as unsupported by the evidence or against the weight of it."

POINT IV.

The X-ray prints were properly admitted.

The case of *Joy* v. *Flax,* 127 Atl. Rep., page 596, upon which the defendant-appellant bases its claim that the X-ray Exhibits P. 1, P. 2 and P. 3, were improperly admitted in evidence differs from the case in point since the X-rays which were admitted in evidence in that case were not identified by the attending physician and there was no evidence adduced tending to prove that the physician in charge based his diagnosis upon them, nor that they were prepared at his request, whereas in the case in question Dr. Francis R. Haussling on Case, page 17, line 22:

> "Q I show you Exhibits P. 1, P. 2 and P. 3 and ask you whether these prints of X-rays were before you at the time that you attended this lady? A Yes.

Q Do you know where they were prepared? A The pictures were taken at the Newark Memorial Hospital.

Q Do you know the writing of the defendant, Mr. Ullrich, at the hospital? A I am not positive.

Q Would you recognize it if you saw it? A I think so.

Q Do you recognize the prints? A Yes.

By the Court.

Q You recognize the print of the plate you used in treating this case? A Yes, sir."

It will be readily observed from reading this testimony that the prints in question which were admitted in evidence were the very prints the doctor in charge of the case used in his diagnosis of the case.

On Case, pages 12 to 15, inclusive, the examination of Rudolph Ullrich, technician and X-ray man at the Newark Memorial Hospital, where the X-rays were taken and made, identified the plates as those purporting to be pictures showing the fractured parts of the plaintiff Wilma L. Bodine's arm, which was injured in the accident and as plates ordered and used by Dr. Haussling the attending physician.

In *Rodinson* v. *Payne,* 99 N. J. L. 135, this Court held:

"If the correctness of X-ray photographs is established by the testimony of the person making them, or if they are identified by the surgeon under whose general direction and for whose use they were made, and by whom they were used in his diagnosis of the bodily injury, they are admissible in evidence and may properly be taken into the jury room."

POINT V.

The case was an ordinary negligence action, presenting no question of law new or complicated. It presented a jury question only and the findings of the jury should not be disturbed.

POINT VI.

There was no error; the judgment should be affirmed.

ABE J. DAVID,
JOSEPH STEINER,
Attorneys and of Counsel
with Plaintiffs-Appellees.

J. ELMER HAUSMANN,
On the Brief.