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Complaint.

(Defendants were duly summoned November 4, 1927.)

COMPLAINT.

Filed November 28, 1927.

10

New Jersey Supreme Court

MORRIS COUNTY.

DOLORES NERNEY and JAMES L.
NERNEY, her husband,
Plaintiffs,

vs.

STANLEY-FABIAN CORPORATION, a
corporation, and PARK UNION
LUMBER COMPANY, a corpora-
tion,
Defendants.

*Action
at Law.
Complaint.*

20

COUNT ONE.

The plaintiff, Dolores Nerney, residing in the City of Dover, County of Morris and State of New Jersey, complains that:

30

1. On or about November 17, 1926, she was a pedestrian and was walking upon a sidewalk, which sidewalk is upon the premises owned by the defendant, Stanley-Fabian Corporation, which premises are located on a street known as Blackwell street, in the City of Dover, Morris County, New Jersey.

2. That said defendant Stanley-Fabian Corporation maintained a nuisance upon said prem-

40

Complaint.

ises in that it caused, suffered and permitted a certain coal hole in said sidewalk to be and remain open and unguarded.

10 3. That said plaintiff, while lawfully walking upon said sidewalk, suddenly fell into said coal hole, being unaware that the same was opened and not being warned of its presence and danger.

4. As a direct and proximate result whereof said plaintiff was seriously and permanently injured in and about the head, body and limbs and underwent, and will undergo in the future, great pain and suffering.

20 WHEREFORE, plaintiff, Dolores Nerney, demands as damages on count one, the sum of Fifteen thousand dollars (\$15,000).

COUNT TWO.

1. The plaintiff, Dolores Nerney, repeats the allegations contained in paragraph one of count one.

30 2. On the date and in the place aforesaid, the defendant, Park Union Lumber Company, by its agents, or servants, was engaged in unloading coal into an uncovered coal hole on the sidewalk of the premises owned by the Stanley-Fabian Corporation, on Blackwell street, in the City of Dover, County of Morris and State of New Jersey.

40 3. The defendant, Park Union Lumber Company, in so unloading coal was under a duty to place guards about the coal hole and to use reasonable care to provide a warning or warnings of such a nature that persons walking upon the sidewalk, and using reasonable care in so doing, would be apprised of the danger of the uncovered coal hole.

Complaint.

4. The defendant, Park Union Lumber Company, carelessly and negligently failed to provide suitable guards around the uncovered coal hole, and failed to use reasonable care to apprise pedestrians of the existence of the uncovered coal hole.

5. By reason of which negligence on the part of the defendant, Park Union Lumber Company, said plaintiff was seriously and permanently injured in and about the head, body and limbs, and underwent and will undergo in the future, great pain and suffering.

10

WHEREFORE, plaintiff, Dolores Nerney, demands as damages on count two, the sum of Fifteen thousand dollars (\$15,000).

COUNT THREE.

20

Plaintiff, James L. Nerney, husband of Dolores Nerney, residing in the City of Dover, County of Morris and State of New Jersey, says,

1. He repeats the allegations contained in paragraphs 1, 2 and 3 of count one.

2. By reason of the injuries to Dolores Nerney, his wife, he was obliged to expend large sums of money for medical treatment, and was deprived of the services of his wife, and lost the society of his wife for a long period of time.

30

WHEREFORE, plaintiff, James L. Nerney, husband of Dolores Nerney, demands as damages the sum of Twenty-five hundred dollars (\$2,500).

COUNT FOUR.

1. Plaintiff, James L. Nerney, husband of Dolores Nerney, repeats the allegations contained in paragraphs 1, 2, 3 and 4 of count two.

40

Complaint.

2. He repeats the allegations contained in paragraph 2 of the count three.

WHEREFORE, plaintiff, James L. Nerney, husband of Dolores Nerney, demands as damages the sum of Twenty-five hundred dollars (\$2,500).

10

COULT & SATZ,
Attorneys for Plaintiffs.

I hereby appoint and depute Charles A. Righter to serve the within writ.

Witness my hand and seal this 11th day of November, 1927.

WILLIAM N. BEACH,
Sheriff.

20

HENRY R. SPERLING,
Under Sheriff.

Served the within summons and complaint upon Park Union Lumber Company, by delivering a true copy thereof to Henry O. Baker, the president of said company, and agent upon whom process may be served, at his office, Blackwell street, Dover, N. J., November 16, 1927.

30

WM. N. BEACH, Sheriff,
by Charles A. Righter,
Special Deputy.

Service of the within complaint and summons is hereby acknowledged this 19th day of November, 1927.

CORPORATION TRUST CO.,
Jersey City.
for Stanley, Fabian Corporation.

40

**ANSWER OF PARK UNION LUMBER
COMPANY.**

Filed November 18, 1927.

NEW JERSEY SUPREME COURT.

MORRIS COUNTY.

10

DOLORES NERNEY and JAMES L. NERNEY, her husband <div style="text-align: right;"><i>Plaintiffs,</i></div>	}
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vs.

STANLEY-FABIAN CORPORATION, a corporation, and PARK UNION LUMBER COMPANY, a corpora- tion, <i>et als.</i> , <div style="text-align: right;"><i>Defendants.</i></div>	}
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*Action
at Law.*

Answer.

20

COUNT ONE.

Park Union Lumber Company, a corporation of the State of New Jersey, with its principal office in Dover, Morris County, N. J., says that:

1. It denies the first count.

COUNT TWO.

30

1. Defendant denies the first paragraph.
2. Defendant admits that through its servants and agents, it was engaged in unloading coal into a coal hole located on the sidewalk on Blackwell street in the Town of Dover, but denies that the coal hole was uncovered.

3. Defendant denies the third paragraph.

4. Defendant denies the fourth paragraph.

5. Defendant denies the fifth paragraph.

40

Answer of Park Union Lumber Company.

COUNT THREE.

1. Defendant denies paragraphs 1, 2, 3 of count one.
2. Defendant denies the second paragraph.

10

COUNT FOUR.

1. Defendant denies the allegations contained in paragraphs 1, 2, 3 and 4 in count two.
3. Defendant denies the second paragraph.

GENERAL DEFENSE.

1. Defendant says that the injuries mentioned in the complaint were caused by the negligence of the plaintiff Dolores Nerney.
- 20 2. Defendant says that Dolores Nerney, one of the plaintiffs, by her own negligence, contributed to the injury mentioned in the complaint.

KING & VOGT,
Attorney of Defendant.

30

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**REPLY TO ANSWER OF PARK UNION
LUMBER COMPANY.**

Filed November 25, 1927.

NEW JERSEY SUPREME COURT.

MORRIS COUNTY.

10

DOLORES NERNEY and JAMES L.
NERNEY, her husband
Plaintiffs,

vs.

STANLEY-FABIAN CORPORATION, a
corporation, and PARK UNION
LUMBER COMPANY, a corpora-
tion, *et als.,*

Defendants.

*Action
at Law.*

Reply.

20

The plaintiffs, Dolores Nerney and James L. Nerney, her husband, replying to the answer of the defendant, Park Union Lumber Company, deny each and every allegation contained in the said answer filed by the defendant, Park Union Lumber Company, and join issue thereon.

COULT & SATZ,
Attorneys for Plaintiffs.

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**ANSWER OF STANLEY-FABIAN
CORPORATION.**

Filed December 27, 1927.

NEW JERSEY SUPREME COURT.

MORRIS COUNTY.

10

DOLORES NERNEY and JAMES L.
NERNEY, her husband

Plaintiffs,

vs.

STANLEY-FABIAN CORPORATION, a
corporation, and PARK UNION
LUMBER COMPANY, a corpora-

Defendants.

*Action
at Law.*

Answer.

20

Defendant, Stanley-Fabian Corporation, a corporation organized under the laws of the State of New Jersey, with principal offices in the City of Newark, Essex County, New Jersey, in answer to the complaint of the plaintiffs, says:

ANSWER TO COUNT ONE.

30 1. This defendant admits ownership of premises on Blackwell street, in the City of Dover, Morris County, New Jersey, but has no knowledge or information from which to form a belief as to the other allegations of paragraph one.

2. This defendant denies paragraph two.

3. This defendant denies paragraph three.

4. This defendant denies paragraph four.

40

Answer of Stanley-Fabian Corporation.

FIRST SEPARATE DEFENSE TO
COUNT ONE.

Plaintiff, Dolores Nerney, was guilty of negligence which caused or contributed to the happening of the alleged accident in that she negligently, carelessly and recklessly conducted herself by failure to make reasonable and proper observations which the ordinarily prudent person would have made, and which would have disclosed the condition existing at the time of the alleged accident; and otherwise carelessly, negligently and recklessly conducted herself so as to contribute to the happening of the same.

10

SECOND SEPARATE DEFENSE TO
FIRST COUNT.

Plaintiff, Dolores Nerney, knew of the existence of the conditions existing at the time of the alleged accident, and deliberately proceeded into a place and position of danger, thereby accepting the risk thereof and attendant thereto.

20

ANSWER TO COUNT TWO.

As count two alleges no cause of action against this defendant, defendant makes no answer thereto.

30

ANSWER TO COUNT THREE.

1. This defendant repeats its answers to paragraphs one, two and three of the first count as though the same were herein specifically set forth.

2. Defendant denies paragraph two.

40

*Answer of Stanley-Fabian Corporation.*FIRST SEPARATE DEFENSE TO
COUNT THREE.

10 Plaintiff, Dolores Nerney, was guilty of negligence which caused or contributed to the happening of the alleged accident in that she negligently, carelessly and recklessly conducted herself by failure to make reasonable and proper observations which the ordinarily prudent person would have made, and which would have disclosed the condition existing at the time of the alleged accident; and otherwise carelessly, negligently and recklessly conducted herself so as to contribute to the happening of the same.

SECOND SEPARATE DEFENSE TO
COUNT THREE.

20 Plaintiff, Dolores Nerney, knew of the existence of the conditions existing at the time of the alleged accident, and deliberately proceeded into a place and position of danger, thereby accepting the risk thereof and attendant thereto.

ANSWER TO COUNT FOUR.

30 As count four alleged no cause of action against this defendant, defendant makes no answer thereto.

WILLIAM P. BRAUN,
Attorney of Defendant,
Stanley-Fabian Corporation.

REPLY TO ANSWER OF STANLEY-FABIAN
CORPORATION.

Filed December 28, 1927.

NEW JERSEY SUPREME COURT.

MORRIS COUNTY.

10

DOLORIS NERNEY and JAMES L.
NERNEY, her husband

Plaintiffs,

vs.

STANLEY-FABIAN CORPORATION, a
corporation, and PARK UNION
LUMBER COMPANY, a corpora-
tion,

Defendants.

*Action
at Law.*

*Reply to An-
swer of
Stanley-
Fabian Cor-
poration.*

20

Plaintiffs for reply to the answer of Stanley-Fabian Corporation, a corporation, say that:

1. They deny each and every allegation contained in the First Separate Defense to Count One.

2. They deny each and every allegation contained in the Second Separate Defense to Count One. 30

3 They deny each and every allegation contained in the First Separate Defense to Count Three.

4. They deny each and every allegation contained in the Second Separate Defense to Count Three.

COULT & SATZ,
Attorneys for Plaintiffs.

40

JUDGMENT.

Filed July 10, 1929.

10 This cause came on for trial July 5th, 1929 before Judge Rulif V. Lawrence and a jury. The jury rendered a verdict in favor of the defendants of no cause of action.

Whereupon it is adjudged that the complaint of plaintiffs be dismissed and that the defendant Park Union Lumber Company do recover of the said plaintiffs Delores (or Dolores) Nerney and James L. Nerney, her husband, its costs which have been taxed at the sum of One Hundred and Ninety-six Dollars and Eighty-five Cents and that the defendant, Stanley-Fabian Corp., do recover of the said plaintiffs Delores (or Dolores) 20 Nerney and James L. Nerney, her husband, its costs which have been taxed at the sum of One Hundred and Eighty-nine Dollars and Sixty Cents.

Costs of Deft. Park Union Lum- ber Co.	\$196.85
Costs of Deft. Stanley-Fabian Corp.	\$189.60

Judgment signed and entered July 10, 1929.

30

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NOTICE AND GROUNDS OF APPEAL.

Filed September 13, 1929.

NEW JERSEY SUPREME COURT.

MORRIS COUNTY.

DOLORES NERNEY and JAMES L.
NERNEY, her husband

*Plaintiffs,**vs.*

STANLEY-FABIAN CORPORATION, a
corporation, and PARK UNION
LUMBER COMPANY, a corpora-
tion,

Defendants.

10

*Action
at Law.**Notice and
Grounds of
Appeal.*

20

To: William P. Braun, Esq., attorney for Stan-
ley-Fabian Corporation; Messrs. King & Vogt,
attorneys for Park Union Lumber Company.

SIRS:

Please take notice, that the plaintiffs appeal to
the New Jersey Court of Errors from the whole
of the judgment entered in this cause on the fol-
lowing ground:

The trial court erred in failing, neglecting and
refusing to charge the jury at the trial of the
above cause, as follows:

“The rule is settled that the traveling public
have a right to presume, that there is no dan-
gerous impediment in any part of the highway,
in the absence of notice of the presence of such
impediment. This principle applies to all inter-
ferences with safety of travel arising from tem-
porary uses of the highway that are not normal

30

40

Notice and Grounds of Appeal.

and permanent incidents thereof, and it relieves persons passing along the highway from any obligation to look for such interferences with travel."

though requested so to charge by counsel for the plaintiffs.

10

Yours &c.

COULT, SATZ & TOMLINSON,
Attorneys for Plaintiffs.

Service of the within notice and grounds of appeal is hereby acknowledged this 11th day of September, 1929.

20

WILLIAM P. BRAUN,
Atty. for Stanley-Fabian Corp.

KING & VOGT,
Attys. for Park Union Lumber Co.

30

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TESTIMONY.

NEW JERSEY SUPREME COURT.

MORRIS COUNTY.

DOLORES NERNEY and JAMES L. NERNEY, her husband <i>Plaintiffs,</i>	} <i>Action at Law.</i>	10
<i>vs.</i>		
STANLEY-FABIAN CORPORATION, a corporation, and PARK UNION LUMBER COMPANY, a corpora- tion, <i>Defendants.</i>		

Morristown, N. J., July 5, 1929. 20

Before: Hon. Rulif V. Lawrence, Judge, and
a jury.

Appearances:

Messrs. Coult & Satz, by Joseph Coult, Esq.,
for the plaintiffs.

Messrs. King & Vogt, by Elmer King, Esq.,
Elmer S. King, Esq., for defendant, Park Union
Lumber Company. 30

William P. Braun, Esq., for defendant, Stan-
ley-Fabian Corporation.

A jury having been found satisfactory, were
duly sworn.

Thereupon Mr. Coult opened to the jury in be-
half of the plaintiffs.

Thereupon Mr. Braun opened to the jury in
behalf of the defendant, Stanley-Fabian Cor-
poration. 40

Dolores Nerney, direct.

Thereupon Mr. King opened to the jury in behalf of the defendant, Park Union Lumber Company.

DOLORES NERNEY, sworn on her own behalf as a plaintiff, testifies as follows:

10

Direct examination by Mr. Coult:

Q Mrs. Nerney, you are one of the plaintiffs in this case? A I am.

Q Where do you live? A Dover, New Jersey.

Q Where in Dover? A 91 Randolph avenue.

Q How old are you? A Forty-four.

Q And you are the wife of James L. Nerney, who is also a plaintiff in this case? A Yes.

20

Q You sustained an injury, you had an accident on the 17th of November, 1927? A Yes, I did.

Q Just where did that occur? A It occurred on the north side of Blackwell street going west just in front of the Stanley-Fabian Theatre.

Q About what time of day was it? A Between eleven and eleven-thirty in the morning.

Q What sort of a day was it? A A day similar to this, very beautiful day.

30

Q Where were you going? A To my sister's.

Q Where did she live? A On Elk avenue, Dover.

Q Before this accident happened, were you aware of any vehicle being near the curb ahead of you? I mean, as you came up Blackwell street? A Yes, there was a truck at the curb as I came up Blackwell street.

40

Q Did you pay any particular attention to it? A I noticed there was a chute extending from the truck down to the sidewalk.

Dolores Nerney, direct.

Q Where did that chute go? A Well, it appeared to be on the sidewalk between two and three feet from the building. I don't know just exactly how far.

Q When you say building, what building do you refer to? A It's a little sort of cigar and magazine store, I think, that's in front of the Stanley Theatre. 10

Q And did you see anybody else around there at that time, as you can recall? A Well, people on the street, but I can't recall any particular person.

Q And what did you do, Mrs. Nerney? A Well, I attempted to walk between the end of the chute and the building, on the sidewalk; and suddenly I found myself there into this coal hole. 20

Q Is there any doubt that you went in the coal hole? A Absolutely not; Judge Coult, there couldn't be.

Q Now, had you been aware of the coal hole before that time? A I had not.

Q Did you know that the end of this chute that you mentioned ran to the coal hole? A No, I did not, Judge Coult. I saw it come to the sidewalk.

Q Now, before the accident, did you see any coal hole? A I did not. 30

Q And did you see any cover over the coal hole before the accident? A Not before the accident, I did not.

Q Can you state to the jury where you were looking as you walked through this aperture between the end of the chute and the front of the building? A Well, as one would look ahead of them coming up Blackwell street.

Q You were not looking at the sidewalk? A No, I was looking as you look walking along— 40

Dolores Nerney, direct.

Q Was there anybody—I withdraw that. Did you know what was in the truck? A No, I didn't.

Q Was any coal being delivered at the time? A There was not.

10 Q Was there anybody in attendance on this truck? A Apparently not. I saw nobody.

Q How did you get out of the coal hole? A A gentleman who stood nearby helped me out.

Q Do you know who he was? A Yes, I do now. I didn't at that time.

Q Who was he? A Mr. Caniff.

Q Where did you go from there? A After I left there?

Q Yes? A I went to my sister's.

20 Q How did you get there? A Mr. Boyd took me in his car.

Q Now, did you suffer any pain at the time of the accident? A Yes, very much.

Q What kind of a pain did you have? A Well, my left leg was cut and scratched from the ankle when I went in the coal hole and my right knee was thrown under me and my full weight landed on my right knee.

30 Q And did that hurt? A Very much. The left leg at the time hurt me more than the right. The right didn't hurt me so much until I got up to walk on it.

Q And could you walk? A With difficulty.

Q Did you get home all right? A I went first to my sister's.

Q And then where did you go from there? A Then I went in a taxi to my own home.

Q Now, when was it your right leg began to hurt? A As soon as I stepped on it, Judge Coult?

40 Q I mean especially,— A Well, it hurt and kept hurting me and getting worse all the time.

Dolores Nerney, direct.

After I was on it, it kept getting worse and worse, and they sent for my doctor as I got home.

Q Who was your doctor? A Dr. Costello.

Q And what did he do? A He told me to stay off of it.

Q Now, what did he tell you—what did you do? A Later, he put me to bed. 10

Q How long were you in bed? A The first time, about ten days.

Q And then after ten days in bed, what did you do? A Well, I just hobbled around as best I could.

Q And did you have any difficulty in the use of that limb? A A great deal of difficulty.

Q What kind of difficulty? A Very severe pain and locking of that knee joint. 20

Q Well, when did the knee joint first lock? A Well, the first time it locked very badly was just about a week, little less than a week. The accident occurred on Wednesday and on Tuesday there was a bad locking.

Q What do you mean by locking? A I don't know just how to describe it; it probably seemed like something got in between it, I can't say it very well.

Q You say the first time was about a week after the accident? A That was a severe locking. 30

Q And then you say severe locking? Just what happened to you? A Well, I attempted to pick up something. I turned to pick up something, a newspaper off the floor, and as I did this the knee locked and developed this awful pain. The pain was so intense that I couldn't move. I had to stand in the position I was in for at least a half an hour without letting anybody touch me. In fact I had to stay 40

Dolores Nerney, direct.

there until my daughter came there and could help me get down on the couch.

Q Was there anybody there at that time? A My daughter and sister-in-law.

Q What did the doctor do for you then? A He had me in the bed and packed it in ice.

10 Q And how long did you have it in ice? A Well, that was alternated, ice and heat for perhaps a week or ten days. I don't just exactly remember the number of days.

Q And at the conclusion of that treatment, what did you do? A Well, I have had to wear a knee cap ever since.

Q Wearing a knee cap now? A I am, yes.

Q What is that made of? A Elastic.

20 Q And this locking of the knee joint, has that occurred since that time? A Oh, yes, very often.

Q And when was it the last time? A The last time was about four weeks ago. I was attempting to go down the stairs and the knee locked and if someone had not been with me, I would have fallen.

Mr. Braun: I object.

30 Q You say you were going down a flight of stairs? A Yes.

Q What did you do? A Someone grabbed me and then I grabbed the railing which saved me.

40 Q And between the time that you had this locking of the knee, before this last one, how frequently would your knee lock in the condition you have described? A Well, that depends how much I am on my feet. If I am not on my feet very much, probably I won't have it once a month

Dolores Nerney, direct.

or six weeks; when I am on my feet it locks very often; probably two or three times a week.

Q Is that accompanied by any pain? A Yes, I suffer severe pain for a few hours after.

Q What about your ability to get about? A It handicaps me very much.

Q Does it make any difference whether you are going uphill or down— A Going down hill it bothers me very much. 10

Q When did you last have pain? A Last night, I couldn't sleep.

Q And when before that? A Last week, I was doing some ironing in my kitchen and the knee joint locked and gave me a great deal of pain.

Q You had X-rays taken? A Yes.

Q When was the first one taken; do you remember about the date? A I think that was taken in January, 1928. 20

Q Well, I show you, Mrs. Nerney, an X-ray, which according to this date was taken on the 7th day of February, 1928. Does that recall the date? A Yes.

Q Now, where was that X-ray taken? A This X-ray was taken at the Dover General Hospital, I think. I had some taken there and some taken at All Souls Hospital in Morristown. I think that was taken at the Dover General. 30

Mr. Coult: I offer that in evidence.

(Marked Exhibit P. 1.)

A (Continued) I think this is a picture taken at All Souls Hospital at Morristown. There is another one that was taken at Dover General. I don't know where that is.

Q So you think this one that I have showed you was taken at All Souls? A Yes. 40

Dolores Nerney, direct.

Mr. King: Well—

Mr. Coult: I ask to read this label as follows which counsel objects to. Mrs. James L. Nerney, 5662—

10 Mr. King: Just a moment. That's as far as he can go.

Mr. Coult: I want the date. February 7, 1928. You object to that?

Mr. King: We already have it.

The Court: I won't let the jury see any writing made on it by someone else not interested in this case?

Mr. King: That's what we object to.

The Court: The date, I understand to be February 7.

20

Q Now, you say you had Dr. Costello? A Yes, sir.

Q And for how long did he treat you, Mrs. Nerney? A Well, he has treated me on and off ever since.

Q When did you see him last? A Well, I really haven't consulted him about my knee in probably four or five months.

30 Q And how frequently did he see you immediately after the accident? A He came over every day for awhile.

Q For how long? A Well, for the period of time I was to bed and then I probably saw him once a week. Sometimes not once a week. I just don't remember how often he came after that. Then I went to the office a good many times. I went to his office for baking. I went there for a month every other day.

40 Q Now, I was about to ask you, what treatments have you had aside from medical treatment? A Well, this baking.

Dolores Nerney, direct.

Q And who does that for you? A Dr. Costello.

Q When did you have your knee baked? A In December, 1920—let me see—June, 1928—December, 1920—just a minute and I will recall.

Q All right, take your time? A December, 1927. 10

Q And just tell the jury what that baking process was. What did that do to you? A Well, they wrapped the leg in heavy bandage to—

Mr. Braun: It must be understood that this testimony about baking and so forth was long after the accident and would have to be connected up later.

The Court: The treatment was made necessary as the proximate result of the accident. 20

Mr. Braun: I just want it understood.

The Court: All I want to do is to have Judge Coult say he is going to connect it.

Mr. Braun: I want it connected now.

The Court: If he don't connect it, I am with you.

Mr. Braun: I want to get it understood before the Court so you don't tell me later on that I should have hollered sooner. 30

Q Did you ever have any other injury to this right knee? A No.

The Court: Was the treatment you have been talking about the result of this particular accident?

The Witness: Yes, judge. The treatment I had for this particular injury. 40

Dolores Nerney, direct.

The Court: How many injuries have you had to that knee?

The Witness: I don't know; the lawyer confused me so I don't know just what I am talking about.

10 The Court: How many coal holes have you ever fallen into?

The Witness: I hope that's the only one.

Q Did you ever have any other injury to this knee? A No.

Q What about the baking process? A They wrap the knee in order to prevent burning and then it's put in what they call—just like a baking oven and heated with electricity, and the leg is put in there and kept at a certain heat for a
20 certain length of time. And then massaged afterwards with olive oil, I believe, I am not sure.

Q How many of these baking treatments did you have altogether? A I don't know exactly, but I went for a month at least every other day.

Q You said something about massage, did you? A Massage treatments.

Q Did you have massage treatments? A The
30 nurse after the baking, massaged my knee.

Q How long? A Just a few minutes, probably five minutes.

Q And that was during every time you had the baking treatment you had the massage treatment? A Yes.

Q Did you ever have massage treatments when it wasn't baked? A No, I didn't, except a little massaging I did myself.

Q These doctor bills for baking, were they
40 separate or included in his general bill? A I

Dolores Nerney, direct.

haven't really received a bill from the doctor yet.

Q And did you have any nurse; any expenses for nurses outside of the doctor bill? A No.

Q Prior to this accident, what had been your condition of health? A Hadn't had any handicap at all that I know of. 10

Q And of whom did your family consist? A My husband and my daughter.

Q And yourself? A Myself.

Q Did you employ any help in the house? A No.

Q You did the housework? A Well, not afterwards, did before myself. Of course I have had to have some help since.

Q Did you have anybody do the housework before the accident? A No. 20

Q How about after the accident? A Well, I have had to have help since. Right after the accident I had to have somebody two or three days a week.

Q Who was that somebody? A I had different people, Hungarian people and another woman—the first few weeks I had to have someone there; I did nothing except the lightest part. I had a woman do my cleaning and somebody do my laundry. 30

Q How old was your daughter then? A Seventeen.

Q Did she help around the house? A No, she couldn't, because she was in school all day.

Q How long did you have outside help in the house? A Well, I have had to have it more or less ever since.

Q Do you have outside help now? A No, not just now, because my daughter is home from school. 40

Dolores Nerney, cross.

Q When did she come home? A In May.

Q Before she did come from the school when did you have outside help in the house? A I had it occasionally, I had a woman come in and do my heavy work. I am alone a great deal. Mr. Nerney is away and my daughter is away.

10 Q What is your husband's business? A He is a traveling man.

Q How much did you have to pay per day for this outside help? A Three dollars and carfare.

Mr. Coult: Cross examine.

Cross examination by Mr. Braun.

20 Q That's sometimes once a week and sometimes once every two or three weeks? A Recently.

Q And you have no record of how many times? A No, I haven't.

Q Now, Mrs. Nerney didn't the doctor tell you to go right to bed when you got home? A He told me to stay off my feet as much as I could.

30 Q And sent you right to bed? A Well, after I went to bed of my own accord when I seen him. There wasn't anything else for me to do.

Q How long did you stay to bed? A Was in bed off and on a few days and went back definitely a week after.

40 Q I understood you to say in answer to Judge Coult's first question that you were in bed ten days and later there seemed to be some confusion about this because you said the accident happened on Wednesday and on Tuesday

Dolores Nerney, cross.

you had the dislocation of your knee when you went to pick something off the floor? A I mean I went to bed for ten days from that particular time.

Q From that time on? A Yes.

Q Just how did you hurt that right knee or right leg; how did you come to hurt it; you stepped in this hole, you say, with your left leg? A I thought I made that clear that I fell with my right leg bent under me and my weight thrown on that knee. 10

Q What happened to your left leg? A I was cut and bruised—

Q No, where did it go? A It went down in the coal hole.

Q And no doubt about that? A Absolutely no doubt about it. 20

Q When it went down in, were you stepping on it or about to step on it? A Step on what?

Q On your left leg? A Well, that I can't say. I was walking.

Q Well, do you know how you came to get into this hole? A I do not.

Q And you don't know whether you were taking a step with your left leg when you stepped into the hole and you fell or not; that right? A I don't quite understand you. 30

Q Do you know what caused you to fall? A I know I was walking and I know I attempted to pass between the end of the chute and the building and found myself through the coal hole.

Q And didn't the chute extend in the hole? A I saw the chute going down to the sidewalk.

Q You didn't see the hole? A No.

Q Did you look for the hole? A No, I didn't. I was looking for a space to walk. What seemed to be a perfectly clear space. 40

Dolores Nerney, cross.

The Court: What space were you attempting to pass over?

The Witness: As I remember, it's about twenty-one inches, probably a little bit more.

The Court: From where to where?

10 The Witness: From the end of the chute to the building.

The Court: There seemed to be a space for a person to walk from the end of the chute to the building?

The Witness: From the end of the chute to the building.

20 Q Did you see the end of the chute? A I don't remember that. There seemed to be that the chute seemed to come down to the sidewalk.

Q Mrs. Nerney, if you don't understand my question, well please tell me and I will try to make myself clear. Did you see the end of the chute?
A The chute came—

Q Did you see the end of the chute? Do you understand my question? A I don't remember.

Q As a matter of fact, you were not looking, were you? A I would not say that.

30 Q Well, you saw the coal wagon, didn't you?
A Yes, I saw the wagon.

Q Well, you knew it was a coal wagon and you knew there was a coal hole? A How would I know that.

Q Didn't you see the chute coming from the wagon to the sidewalk? A I saw the chute coming from the wagon to the sidewalk, yes.

40 Q And it was a coal chute? A I didn't know what it was, it was a chute, it wasn't necessary that it be a coal chute.

Dolores Nerney, cross.

Q Did you ever see anything else delivered that way except coal? A I have seen wood. Had it delivered in my own cellar that way.

Q Well then, it was either a coal or wood wagon, that right? A I would not say that.

Q What else have you seen? A I don't know; I can't say what else they may have delivered in it. 10

Q Didn't you look to see what kind of a wagon it was? A Why should I?

Q Didn't you care where that chute went? A The chute appeared to the end of the sidewalk, and there appeared to be space for people to walk, and I attempted to walk in that space.

Q Now, Mrs. Nerney, did I ask you what appeared there? A Yes, I did. 20

Q I asked you if the chute went to the sidewalk? A I say the chute came from the wagon to the sidewalk.

Q You knew something was about to be delivered there or was being delivered there or had been? A I didn't think anything about it.

Q You didn't care? A I was not interested in the coal wagon and the chute or whatever it may have been.

Q But you knew they had been delivering through a hole? A No, I didn't know anything about it. 30

Q Didn't you anticipate a hole there? A No.

Q Did you care whether there was a hole there or not? A Yes, I cared if there was a hole there.

Q Did you look to see if there was a hole there? A I looked for a place to walk and walked on it.

Q Did you look for a hole? A No. 40

Dolores Nerney, cross.

Q You didn't? A I looked for a place to walk on.

Q You didn't look for a hole that this chute was probably going into?

The Court: I object.

10 The Court: She says she didn't look for a hole.

Q And you didn't see any covering? A I looked for a place to walk.

Q Did you understand that correct, Mrs. Nerney?

The Court: Did you see a cover?

The Witness: No, I did not take note.

20 Q And you didn't see where the end of the chute went? A No, it went to the sidewalk.

Q Now, how close to the end of the chute did you pass? A There appeared to be a space somewhat around two feet. Now, I am not definite about it.

Q I ask you how close to the end of the chute did you walk? A I don't know. I walked on the sidewalk.

30 Q Did you change your position when you saw that obstruction? A I don't remember.

Q Did you change your course? A I must have had to change my course—

Q Not what you must have had. Did you? A Yes.

Q All right, that's what I want to know. And which way did you change your course? A What do you mean, north, south, east or west?

40 Q Well, did you change your course by veering to the right or left or— A To the right.

Dolores Nerney, cross.

Q You had been walking in what part of the sidewalk? A I just can't remember. I presume toward the center.

Q And had been walking briskly? A Yes, I think I had.

Q Did you continue to walk briskly as you changed your course? A I don't remember that. 10

Q Now, you said you looked for a place to walk; that right? A You had been looking for a place to walk, is that right? A I was walking on the sidewalk.

Q No, when you saw this wagon and chute, you said you were looking for a place to walk? A I said there appeared to be a place for people to pass between the end of the chute and the building.

Q Wel, when did you discover that? A Well, that I don't know. 20

Q You don't know that? You don't know when you first made your observations and saw that? A No, I don't know.

Q Was it before or after you had changed your course? A Well, I would had to have seen that place before I changed my course, necessarily .

Q Now, don't you remember whether it was before or after you changed your course? A No. 30

Q Do you remember just where you were looking and what you were looking at when you changed your course? A I was walking slow.

Q Well, were you looking at the sidewalk? A I don't remember.

Q Did you then look at the sidewalk between the end of the chute and the building? A I don't remember if it—yes, I suppose I did when I was looking for a place to walk. 40

Dolores Nerney, cross.

Q Now, did you or didn't you? A Yes.

Q When did you look at the sidewalk, between the end of the chute and the building? A I don't know.

Q How often did you—was it before or after the accident? A I don't just understand that question.

Q Did you look at the sidewalk between the end of the chute and the building before or after the accident? A Certainly before the accident.

Q You are sure about that? A Positive.

Q And how close were you to the chute at that time? A I don't know that.

Q You don't remember that at all? A No.

Q But you do remember about this passage-way? A Yes.

Q Now, can you indicate just how wide this passage was with your hands or something in the court room? A I said before I can't give a definite idea of just how far it was, it was possibly two feet.

The Court: Just indicate your conception of two feet.

The Witness: Well, I think about that wide. (Indicating.)

Q And that was the distance between— A As I remember.

Q —between the end of the coal chute and the building? A I imagine possibly a little bit more, I don't know. One doesn't measure distances when they are not in the habit of doing it.

Q Now, did you see the end of the coal chute at any time? A I don't remember.

Dolores Nerney, cross.

Q Was the coal chute still there after you found yourself on the sidewalk? A Yes, it was.

Q And did you make any observation then as to where the coal chute was? A Coming down to the coal hole, as I remember.

Q Did it go into the coal hole? A It came down to the edge of the coal hole. 10

Q Was there any coal around there at all? A I don't remember.

Q Did you notice any evidence of coal being put there or been delivered? A I don't remember.

Q Well, were you interested in finding where you were or why you were there? A I was so terribly hurt that I was not observing things just at that particular time; but I did observe that the cover of the coal hole was turned up on the other side of the coal hole with the prongs sticking up, with the cover laying on the sidewalk. 20

The Court: Between the coal hole and the curb on that side?

The Witness: It was on the downtown side of the street.

The Court: Toward Dover?

The Witness: It was east of the coal hole. 30

The Court: But not between the building and the coal hole?

The Witness: No, it was not. It was east of the coal hole.

Q On the further side as you approached it?

A No, on the same side as I had come from.

Q On the side you approached from? A It was on the east side of the coal hole and I came from the east and was going west. 40

Dolores Nerney, cross.

Q And was on the sidewalk turned up, with the prongs turned up? A Yes.

Q Was that the first you saw it? A Yes.

Q How near was it to the end of the chute?

A It didn't appear to be near the end of the chute at all. It was away from the coal hole.

10 I just don't know how far it was away from it.

Q You had passed it then before you got in the coal hole? A I can't say that. It must have been there because it was there when I was helped out of the hole.

Q That's the first you saw it? A Yes.

Q You hadn't seen it before that? A No.

Q Was it in your path as you approached the coal hole? A I don't know.

20 Q Now, you know you walked along that sidewalk, don't you, Mrs. Nerney? A I walked along as one ordinarily walks along a sidewalk.

Q You haven't any idea whether this coal hole was laying in the path you took as you approached this scene of this accident or not; this coal-hole cover? A No, I have not.

Q You haven't any idea whether it was in your path or not? A No, I didn't see it at all.

Q You don't remember stepping on it? A No, I didn't step on it.

30 Q You don't remember stepping over it? A No.

The Court: You say you know you didn't step on it?

The Witness: Positively.

The Court: What did you step on, do you think. Strike that out. What did you step on?

40 The Witness: Well, I was walking on the sidewalk. I don't remember stepping on anything else.

Dolores Nerney, cross.

The Court: You were not conscious of stepping on anything?

The Witness: No.

The Court: When your leg went in the hole—

The Witness: My leg went down in the hole. 10

Q As a matter of fact, you don't know how you came to fall, do you? A I do not.

Q It's a complete mystery to you? A The thing happened so suddenly, I don't think anybody could.

Q Now, Mrs. Nerney, when you saw this wagon and this chute and you changed your course, do you remember how soon you first made your observation and saw this what appeared to be a passage-way between the chute and the building? A No, I do not. 20

Q You don't remember how close you were? A No, I do not.

Q As a matter of fact, you never made any observation, did you? A Yes.

Q Sure about that? A Yes.

Q And you are sure you didn't see any hole? A I did not.

Q You are sure you didn't see any coal hole cover? A Not before the accident. 30

Q And you are sure you didn't see the end of the chute before the accident? A No, I don't remember.

Q And the reason you didn't see that was because you didn't look, wasn't that so? A No, I saw what appeared to be a perfectly clear passage for me to go up the street.

Q Well, how do you know it was perfectly clear if you don't know whether or when or what 40

Dolores Nerney, cross.

distance you made this observation? A Well, I just don't remember when I made the observation, but I do remember that there was a space on the sidewalk that appeared to be perfectly clear for pedestrians to pass over. There were people on the street coming and going the same as I.

10 Q And some of them were stepping over the coal chute? A I don't know what they were doing, I didn't notice.

Q Did you see anybody pass over this particular place before you? A I don't remember.

Q Then you don't know whether anybody passed there or didn't pass there before you? A The must have because there were other people on the street.

20 Q That's the reason you say it; because there were other people? A Reason for what?

Q That's the reason you say they must have passed there because there were people on the street? A Yes, there were people coming and going.

Q Didn't you, as a matter of fact, know that hole was there? A No.

Q Was this because you didn't care whether there was a hole there or not? A I didn't think anything about it.

30 Q You didn't think anything about any hole, eh? A No, sir.

Q Where did you think this delivery was going to be made of coal or wood or whatever they had running down that chute?

Mr. Coult: I object to that. No evidence of running down the chute.

The Court: Was there any coal running down the chute?

40 The Witness: No.

Dolores Nerney, cross.

Q Whatever they were running down the chute or had been? A That was no concern of mine.

Q You didn't care? A No.

Q You didn't care where the end of that coal chute went to? A No, I looked to see a place to walk on the sidewalk.

10

Q You didn't care whether that ran into a hole or not? A I didn't think anything about it.

Q As a matter of fact, you never did see the end of the chute because it was in the hole, isn't that so?

Mr. Coult: I object to that.

The Court: She says she didn't see the hole, nor did she see the end of the chute. That's her statement.

20

Mr. Braun: Can she answer that question, your Honor?

The Witness: I don't understand the question.

The Court: Yes or no to it.

Q (Question read.)

Mr. Coult: I object to that.

The Court: Oh, I am going to see what she says.

30

Mr. Braun: What she says—

Mr. King: I am going to butt in—

The Court: Wait a moment, I am taking care of this situation.

Q (Question read.)

The Court: Now, she says she didn't see the coal chute at all.

40

Dolores Nerney, cross.

Mr. King: She has said she saw the end of the chute in the edge of the coal hole. That's in, that evidence.

The Witness: I didn't see it.

10 The Court: She hasn't said anytime—I am going to allow this question and allow her answer, allow her to answer it in her own way. Read it.

Q (Question read.) A I didn't see the coal hole.

Q And you didn't see the end of the chute?
A If it were in the coal hole I didn't see it because I didn't see the coal hole.

20 Q Now, will you just listen to the question, Mrs. Nerney, and try to answer it. You didn't see the end of the chute before you fell? A No.

Q That's true, isn't it? A I should think so.

Q And the reason you didn't see it was because if you had looked when you were there, the end of the chute was in the coal hole?

Mr. Coult: I object, that can't possibly be answered. The reason you didn't see it was because if you had looked it was in the coal hole.

30 The Court: That again assumes something she hasn't said. Objection sustained (Exception allowed and sealed.)

Mr. Braun: I am not trying to ask any impossible questions. She said she didn't see the end of the chute and didn't see the coal hole, and afterwards—

The Court: Ask her, did you see the end of the chute?

40 The Witness: I don't remember.

Dolores Nerney, cross.

The Court: Did you at any time either before or after see the end of the chute?

The Witness: I don't remember. I don't remember.

Q Now, Mrs. Nerney, don't you remember testifying here in answer to a question I asked you that after you were down there, had fallen, you saw the end of the chute leading up to the hole? A You mean after I was injured? 10

Q After you were injured, yes? A I saw the chute in the coal hole, yes.

Q Now, didn't the end extend in the coal hole? A I don't remember that.

Q And you don't remember about where the end of the chute went? A No, I don't.

Q Didn't you look? 20

Mr. Coult: I object to that. We have been over it so many times.

Q Didn't you examine this place after the accident happened? A No, I did not examine it.

Q And made no effort to find out why you had fallen?

Mr. Coult: I object to that. She said she was in such pain. 30

Mr. Braun: She hasn't said so.

The Court: It's of no consequence anyway, what she saw afterward.

Q Now you say your left leg was the one scraped and gave you the most trouble? A When I was helped out of the coal hole, yes.

Q Your right leg didn't bother you until some-time later? A Not until the time I stepped on it. 40

Dolores Nerney, cross.

Q Can you recall yet whether you fell as you were taking a step with your left leg into that hole or whether you tripped or lost your balance or fell in some other way? A Please repeat that.

10 The Court: She didn't say she tripped.

The Witness: I said I didn't trip. I know I didn't trip. I don't know which leg I was taking a step on.

Q You also said you don't know what made you fall? A I don't know.

Q Well, have you been able to recall yet? A What made me fall?

20 Q What made you fall, what were you doing at the time? A I was walking. That's all I remember, walking.

The Court: Your left leg went in the coal hole?

The Witness: Yes.

The Court: You have no doubt about that?

The Witness: Absolutely not, judge.

30 The Court: You say this was a very bright day?

The Witness: Yes.

Q And there was nothing to obstruct your view? A Apparently not.

Q And you were in no particular hurry, but you were walking just briskly for the air? A Yes.

Q Going to visit your sister? A Yes.

40 Q Now, what investigation or what observation did you make at the time you first saw or

Dolores Nerney, cross.

from the time you first saw this wagon and chute up to the time the accident happened? A You mean, what did I observe in regard to the surroundings?

Q What did you do to ascertain that before, whether or not there was any danger or any obstruction? A I simply looked ahead to see if there was a place for me to walk and I walked on it. 10

Q Did you walk on the space that was there for you to walk on? A I surely did. I walked on the sidewalk.

Mr. Braun: That is all.

Mr. King: No questions.

Mr. Coult: That is all.

Mr. King: I do want to inquire of Mrs. Nerney if my statement is right that she saw the hole? 20

Mr. Coult: If your Honor please—

Mr. King: No, I am making an inquiry. I am addressing the Court.

The Court: Mr. Wheaton may go over it during recess.

Mr. King: I am willing to concede if she testified to that; I understand she saw the chute there, your Honor, in the coal hole. 30

The Witness: **No, I did not.**

The Court: Mr. King wants to know whether Mrs. Nerney didn't say she saw the end of the chute in the coal hole.

Mr. Coult: Before or after the accident?

The Court: Before the accident.

Mr. King: I am not making any statement about that.

(Witness excused.) 40

William F. Costello, direct.

WILLIAM F. COSTELLO, sworn on behalf of the plaintiffs, testifies as follows:

Direct examination by Mr. Coult.

Q Where do you live? A Dover.

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

Q Graduate of what school? A University of Buffalo.

Q What has your experience been since graduation? A Been practicing since 1907, attending surgeon at Dover Hospital.

Q Do you recall seeing Mrs. Nerney, the plaintiff in this case on or about the 17th day of November, 1926? A Yes, sir.

20 Q Where? A At her residence.

Q And do you recall what time of day it was? A I can't say exactly. I think sometime in the afternoon.

Q What condition did you find her? A She had some bruises and abrasions on her right knee and left leg and knee.

Q What were the character of the injuries on the left leg? A Just superficial injuries.

30 Q What sort of superficial injuries? A Scraping and abrasions, scraping of the skin and some swelling of the tissues.

Q Where was the scraping? A In the rear of the knee.

Q And where were the abrasions? A On the knee and leg.

Q When you say leg you speak of the part between the knee and the ankle. You call that the leg? A Yes.

Q How far did they go down the leg, the left? A Well, I can't say exactly.

40 Q Do you recall? A I don't.

William F. Costello, direct.

Q Now, how long did it take these injuries of the left leg to clear up? A Well, the abrasions, you mean?

Q Yes? A They were cleared up in a very few days.

Q Now, was there any injury to the right leg? A Yes. 10

Q What was it? A The same—you mean evidences of injury?

Q Yes. A Some evidence of injury, that is, abrasions of the skin and swelling in the joint, around the knee joint.

Q Now, what was the progress of the right leg? A She developed—she had a good deal of pain; had pain over the knee. And complained of a good deal of pain in the knee. That condition existed at intervals for several weeks. 20

Q What was the appearance of the knee during that time? A Are you referring to the day she was injured or subsequently.

Q I mean referring to the progress of the right knee. Describe to the jury what happened to that right knee? A She developed some swelling in the knee joint. A condition of swelling what you would probably call water on the knee, due to fluid in the knee joint causing that swelling and pain and tenderness. 30

Q How long did that persist? A About two weeks.

Q And during that time, how often did you see her? A Every day for two or three weeks.

Q Was there any inflammation in that joint? A Well, this swelling I refer to is result of inflammation.

Q Now, after that, did she develop any condition with relation to that right knee? A Yes. 40

William F. Costello, direct.

Q What was it? A Developed a condition of a loose cartilage in the knee joint.

Q Can you tell us which cartilage that was?
A Well, there is cartilages in the knee joint and they became loosened and after they become loosened they get out of position and that causes
10 sharp pain to the joint. I referred to it, that if the patient gets in certain positions, if the patient puts it in that position because it's more comfortable and then it hurts if they stick the leg out straight again.

Q What is called locking of the knee joint, what causes that? A That the cartilages get out of normal position.

Q Now, did you have any X-rays taken, doctor? A Yes.

20 Q I show you P. 1, X-ray of Mrs. James L. Nerney, February 7, 1928, and ask if you have ever seen that X-ray before? A Yes.

Q When did you see it last? A A few minutes ago, out in the lobby.

Q I handed it to you in the court room? Now, are you competent to read X-ray plates? A In a general way, yes, sir.

Q How much experience have you had in reading X-ray plates? A Well, I have been using
30 them, reading X-rays, I have seen X-rays for the last twenty years in my own cases and in conjunction with X-ray men.

Q Have you used them for that purpose, the purpose to diagnose a case? A Yes.

The Court: Diagnose for treatment?

The Witness: Yes.

Q And in the X-ray you have in your hand,
40 do you find any abnormality? A Yes.

William F. Costello, direct.

Q What is it? A Find evidence of inflammation in the upper end of the right tibia; that is the upper part of this bone. (Indicating)

Q What does that X-ray show? A It shows inflammation in the upper end of this bone (indicating).

Q Generally, what does it show? A It shows the lower end of the femur, the upper end of the femur and the tibia forming the knee joint and ankle, I would say the right and left leg. 10

Q Both legs? A Yes.

Q Doctor, did you know Mrs. Nerney before she had this accident? A Yes, sir.

Q And what was her condition of health previously? A Perfectly normal as far as I— up to the time of her accident? 20

Q Yes. A She was in normal condition as far as I know. I treated her for a number of years.

Q Now, if on the 17th of November, 1926, she was injured by falling through a coal hole, would you say that the injuries you observed when you first saw her was such as probably would result from such an accident? A Yes.

Q And if she had an accident and the things you observed, then will you say there was any connection between the injury she received from falling into the coal hole and the condition you point out on X-ray, P. 1? A It could have been the result of that type of injury, yes. 30

Q Have you ever seen her in this condition when her knee is locked? A Yes.

Q How many times? A Well, I think only once or twice when she had a definite locking. I have seen her several times shortly after the thing had subsided. In other words, she would 40

William F. Costello, direct.

call me to come and after I had gotten there it was subsided.

Q When you say subsided, could you tell whether there had been any trouble with the knee or not? A Only history.

10 Q On these occasions, what history did you get? A History of awful pain. Inability to extend her leg and then soreness afterwards.

Q And on these occasions when you actually saw the locking, what was its condition? A Well, the leg would be drawn up, up in more or less a fixed position and she would be complaining of pain.

Q Is such condition attended by pain? A Yes.

20 Q What type of pain? A Well, it's very severe, persistent type of pain.

Q Doctor, assuming that this accident happened on the 17th of November, 1926, and this lady is still suffering from this condition you observed, what have you to say as to whether or not it is temporary or permanent? A It's permanent, absolutely permanent.

30 Q Will there be any improvement in the future? A Possibly if she submits herself to an operation.

Q Well, aside from submitting herself to an operation, would you look for any change in the condition? Would you look for the condition to get progressively worse? A Furthermore, she is subject to infection in the tissues involved, probably will develop an infection in that joint in its present condition that's not in the other joint.

William F. Costello, cross.

Cross examination by Mr. Braun.

Q You think it shows no dangerous condition? A I didn't say that.

Q You have been treating the knee continuously? A I treated it continuously for quite awhile. I haven't seen her in five or six months for this condition now. 10

Q But from the time of the accident you have had charge of the case? A Yes.

Q What is the amount of your bill, doctor? A I can't tell you off-hand. I think it is approximately something like two hundred or two hundred and fifty dollars.

Q And did you convey this information to Mrs. Nerney about this possibility of infection inside this knee joint? A I don't know if I conveyed that particular information, no, sir. 20

Q Well, didn't you think it was important? A I conveyed the information that—

Q No, didn't you think it important? A Will you allow me to qualify my answer?

Q I asked a question, doctor, can you answer it or can't you? A Yes, what?

Q Now, did you think it important or didn't you? A Yes.

Q To convey it to them? A Yes. 30

Q And you didn't? A I didn't convey it in those exact words. If you will allow me to qualify the answer, I can tell you—

The Court: He doesn't want you to qualify; he wants a categorical answer.

Q I assume you found that situation you testified to here in court as a possibility was sufficiently important in your mind to convey 40

William F. Costello, cross.

it to your patient and her husband; now, did you or didn't you?

10 Mr. Coult: I object that that. Just listen to that question. I assume you found the information was sufficiently important for you to convey it to your patient and then, well, did you or didn't you. The question is, was it important or wasn't it and the next question he asks is, did you or didn't you. He already answered the first part.

The Court: Reframe the question.

20 Q Doctor, you testified to a condition here which you said might possibly arise in this knee. If this patient had some infection; now, I ask you, did you or did you not convey that information to your patient and you said you did convey it but not in those words.

The Court. That's his answer.

30 Q Now, why didn't you convey it in those words? A I don't think I used the same words. I conveyed to this patient a subsequent infection. I don't think I went on and narrated the infection, I said it might affect this joint in the future. That's the general terms I used to her but I tried to make it a little more clear to the jury.

Q Well, you didn't lay any particular stress on this when you gave her that information, did you? A I don't know whether I did or not.

40 Q You didn't tell her how many different kinds of infection she might have? A I told her from what different sources they might come, possibly could.

William F. Costello, cross.

Q Because as a matter of fact this is rather an obscure possibility, isn't it?

The Court: Remote is a better word.

Mr. Braun: I accept your Honor's amendment.

The Court: Is it an obscure possibility, using the word obscure in this sense, is there a remote possibility? 10

A As to whether she will get trouble in the joint, or get some of this inflammation?

Q Yes? A I don't know.

Q Now, as a matter of fact, you didn't look into all this. What are the probabilities? A I can't tell you whether you going home will have an automobile accident or not; I don't know. 20

Q Yet in this particular case is infection?

A You get some general infection and throw out the symptoms.

The Court: Now, you think there is some indication in this lady's leg, some indication of trouble in this joint?

The Witness: The only way I can answer that is this. This lady had an injury to her knee joint that had produced some permanent disturbance in that knee joint. When that is to develop, I can't say, might not develop any trouble. 30

The Court: All right, that's your answer.

Mr. Braun: Then I move that that portion of the doctor's testimony with respect to possible infection be stricken out.

The Court: The trouble is you didn't move quick enough. 40

William F. Costello, cross.

Mr. Braun: That was part of his direct. The doctor volunteered that without any question.

10 The Court: He has told or is telling his view and what he discovered in the leg situation and has given you his views about it. That's all there is about it. I will strike out all that refers to possibility.

Mr. Coult: He said that the probability is that this condition would grow worse in the future.

The Court: I am going to let that stand.

Mr. Coult: He said one of the reasons is that there was infection in the knee and the probability would be—

20 The Court: All right, let that stand there. But we have been dealing here with possibility and there are no indications of it.

Q Doctor, you testified about some X-rays. Were these X-rays taken at your instruction or by your request? A Yes.

Q In November, 1928? A November, 1928.

Q And one was taken March 7? A No, that picture was not taken at my request.

30 Q Were you treating Mrs. Nerney at that time? A Yes, sir.

Q And you didn't order that picture? A Not in February, 1928—yes, '28, you are right. I had to get connected up, I was thinking of February of this year.

Q Well, did you have any other pictures taken? A One taken by the Dover Hospital. I don't know whether before or after that.

40 Q Well, this accident happened in 1926, didn't it? A Yes.

William F. Costello, cross.

Q And you didn't have any X-ray taken until February, two years later or a year and a half?

A There was one taken prior to that and then the second X-ray that was taken.

Q Well, how long prior to that was the other X-ray taken? A I think it was taken in January or February of 1927. 10

Q And have you that X-ray? A No, I have not.

Q You haven't that X-ray here? A No, sir.

Q You did say something about an operation in this case? A Yes.

Q Did you recommend that? A I discussed it—

Q No, doctor, did you recommend it? A No, sir.

Q You did say in answer to Mr. Coult's question about probabilities of this being permanent that unless she submitted to operative methods, in your opinion, it would be? A Yes, sir. 20

Mr. Braun: That is all.

Cross examination by Mr. King.

Q Doctor, how many times have you treated Mrs. Nerney when you saw the condition of the knee inter-locking? A I think once or twice when I definitely saw it myself. 30

Q Then you have only seen it once or twice since the injury of 1926 and 1929, now? A Yes, sir.

Q How many times have you been called by her to treat her for the locking knee when you got there after the condition had abated? A Probably eight or ten times.

Q So you have eight and one times, nine; those are the only times— A I know others by hearsay. 40

William F. Costello, cross.

Q She explained that she did have these locking knee? A No, sir. You asked me how many times I had been called. She told me several occasions when she had the locking, when she did not bother calling me about it.

Q Then there were more than those? A Yes.

10 Q When you first saw the knee in this condition; when was the next time you were called by her? I am speaking now of frequency? A You mean when I first saw the knee lock?

Q Doctor, you said you hadn't seen her for four or five months. I rather thought you said a year now. Now, you mean four or five months past? A Yes.

Q Now, you also say that you looked for this condition that exists for more frequency of occurrences? A No, I don't say **that**.

20 Q You said the condition in her knee joint would probably get worse? A Not necessarily the locking, but the inflammatory condition that's in the joint probably will get progressively worse. The locking may happen once in six months or once in six years. That's not the important feature.

Q And it may never happen? A May never happen.

30 Q You had an X-ray taken and that doesn't show any visible injury to the bone, this X-ray you had taken? Does it show that? A This X-ray of the joint?

Q Yes? A Yes, it did.

Q Shows an injury to the bone? A Shows an infection in the head of the bone.

Q Now, I wish you would just show me how that infection is shown? A There's a roughening here, on this surface of the bone.

40 The Court: Which leg is that?

William F. Costello, cross.

The Witness: Right leg. It's not present in here, you get that roughening here (indicating).

Q That, you say, is visible so the jury can see it? A If they came up here.

Q I mean when they go to the jury room? 10

A I don't think they could because I don't think they know the difference of the thing. They would have to have it pointed out to them.

Q Now, you say it is in that? A Yes.

Q Why did you have this taken when you knew there was inflammation? Because that was the condition you were trying to abate? Why did you have an X-ray taken; you knew there was inflammation there? A To the best of my recollection, I think the picture was taken at the time that you requested Dr. Mills to see this patient and the time Dr. Weigel saw her. 20

Q I am asking why you did it? A I think for their information.

Q For the information of all of them?

A Yes.

Q How much did you charge for a call?

A Three dollars.

Q Now, if you made eighty calls on this lady— A I don't think so. At her home?

Q Yes? A I don't think so. 30

Q How many times had you been up to her home? A Well, I can't tell you. I have got my bill, it's got it—

Q No, just tell me the number? A I can't tell you that. I don't remember.

Q How many times was she at your office?

A Every day for probably three weeks and I saw her probably alternate days for some time afterwards. She came to my office five or six weeks for some baking and massaging and I 40

William F. Costello, further cross—re-direct.

say my bill is something like two hundred and fifty dollars. I don't know exactly.

Mr. King: That is all.

Further cross examination by Mr. Braun.

10 Q Doctor, you said the right leg was bruised between the knee and the ankle. Is that down around the joint? A Both legs showed some bruises.

Q Just scrapings? A And they were similar. How far they extended toward the ankle I can't say. It's two or three years ago.

Q Well, these bruises on the right leg was worse at the knee, wasn't it, than further down; around the joint? A As I remember, I think
20 most of the injuries were near both knees. That's my recollection; but the evidences of injury were very superficial.

Q Just scrapings? A Yes, they were negligible.

Q Were the sores on the right or left? A I don't remember that.

Q They were more extensive on one than the other? A I say I don't remember.

Q Or were they both the same? A I can't
30 say.

The Court: He says he don't know.

The Witness: They amounted to such little importance, I didn't pay much attention to them.

Mr. Braun: That is all.

Re-direct examination by Mr. Coult.

Q Doctor, on these occasions when you were
40 called and didn't see the knee actually locked,

William F. Costello, re-direct.

but saw it, as you say, subsided from that condition, was there any doubt in your mind that it had been locked? A No, sir.

Mr. Braun: I don't see—

Mr. Coult: It is re-direct.

The Court: He says he saw it locked, saw it twice. 10

Q I mean on these occasions when you didn't actually see it locked; on the different occasions when you came there afterwards; you said something about the condition subsiding. I am asking whether at that time there was any doubt in your mind from what you saw or history you got that it had been locked before? A No, sir.

Q Now, doctor, you say this lady's X-ray was gotten for the use of Dr. Mills. Who is Dr. Mills? 20

Mr. Braun: I object to that, it is not proper re-direct.

The Court: Mr. King's question incorporated the information that this gentleman examined her at the request of someone else.

Mr. Coult: If that's clear in this case, I have nothing further to say. 30

The Court: These X-rays were procured for their benefit.

Q At whose request; with regard to the X-rays? A Dr. Mills, Dr. Weigel and myself.

Q Do you know at whose request Dr. Mills examined her?

Mr. Braun: I object.

40

James H. Brothers, direct.

The Court: Well, he says he didn't know.

Mr. Coult: That is all.

(Witness excused.)

10 JAMES H. BROTHERS, sworn on behalf of
the plaintiffs, testifies as follows:

Direct examination by Mr. Coult.

Q Where do you live? A Newark and at
Belmar in summer.

Q What is your profession? A Physician
and surgeon.

20 Q From what school? A Columbia Uni-
versity, College of Physicians and Surgeons.

30 Q What's been your experience since you
graduated from Columbia? A Interne at the
Post Graduate Hospital for a little over two
years and was surgeon there after almost a
year previous to the war. I went over with
the Post Graduate Unit; was there twenty-two
and a half months. Had charge of the surgical
staff in that hospital which went from five hun-
dred beds to seventy-eight hundred beds in the
last two and a half to three months I was con-
nected with it. When I came back—

The Court: Any question about the
doctor's qualifications.

Mr. King: Not at all.

Q What's your present hospital connection?
A St. Barnabas, Newark.

40 Q Did you make an examination of the
plaintiff in this case? A I did.

James H. Brothers, direct.

Q When did you make it? A July 2.

Q In this Court House? A Yes.

Q At my request? A Yes.

Q Did you have anything to do with X-rays of her limbs taken? A I did. I requested fresh X-rays.

Q Where were the X-rays taken? A All Souls Hospital, Morristown. 10

Q Were you present when they were taken? A I was present and put the lady on the table and was present while they were developed.

Q I show you an X-ray photograph and ask you if you recognize that? A Yes.

Q What is that? A That is a view of from before backwards of both legs, approximately of the knee joint, taking in the femurs, which are the thigh bones of both legs and the lower leg, and the tibia of each leg. 20

Q What photograph is that? A That is plate 803, showing the right and left leg and as I have stated, this is a thigh bone, and this the tibia, and forms a support between the lower leg. This is the femur in each side.

Q Is that the same photograph that was taken? A Yes.

Mr. Coult: I offer it in evidence. 30

Mr. Braun: No objections.

(Marked Exhibit P. 2.)

Q I show you another X-ray and ask you if you recognize that? A That's a picture in a lateral view, taken from side to side and the under side of the leg down and outer side up of the right leg at the knee, approximately the same situation as shown in the other only this is a lateral posteria view. 40

James H. Brothers, direct.

Q Were you present when that was taken?

A I was.

Q See it developed? A Yes.

Q That at All Souls Hospital, Morristown?

A Yes.

10 Mr. Coult: I offer this X-ray.
(Marked Exhibit P. 3.)

Q Doctor, I show you another X-ray and ask you if you recognize that? A I do. That's a picture like the last one only this one—

Q You saw this developed? A Yes.

Mr. Coult: I offer it.

(Marked P. 4.)

20 Q Doctor, when you examined the plaintiff here in the Court House on July 2, what did you find? A Found that she has a disability of the right knee joint which is the result, in my opinion—

Q All right, describe it? A She has an approximately full motion and extension; flexion being this motion, and extension being that (indicating). She has a rub, which is arthritic, 30 practically over the external portion of the knee joint alongside of the patella or knee cap. That is present on extension and flexion.

Q What is your prognosis? A Inflammation in the joint. That is evidenced by the rub, through the patella slipping. It moves more than over to the opposite side.

Q That's painful? A Yes.

The Court: Is it traumatic?

The Witness: Yes.

40 The Court: Result of an injury?

James H. Brothers, direct.

The Witness: Yes. Also there is a rub in this right knee joint which gives a lateral motion when the leg is extended, the knee joint is extended and you hold it in that one position and it will lock there. Also a stabilizing position of this woman when she stands up has a tendency to throw her knee in this way alongside of the joint. She was also wearing an elastic apparatus to support the knee at the time I examined her. 10

Q I show you another X-ray marked P. 1 and ask if you have seen that before? A I have.

Q And doctor, you are advised that this X-ray photograph of the right and left leg of Mrs. Nerney, the plaintiff in this case, taken on the 7th day of February, 1922. I ask you what that picture discloses? A That shows the knee joint and about seven inches of the femur of either leg, this being the left side and that the right, and about eight inches of the tibia of either leg, which are the bones here and about six and a half inches of the femur on the other side. That is, an interior position, taken this way and the X-ray put here and placed posteria. This shows the elevation of the ligament which goes to make up the cap-shape depression on the head of the tibia. This rested here in which the condile of the femur rocked back and forth in this motion, I mean (illustrating). This is the semilunar cartilage. This extends straight down from here near the joint or points of the top at the central bone and comes across here just to the elevation at its outer edge. Here it is right here (illustrating). You press this one and you see it is fast. This little notch you see here, and fits perfectly 20 30 40

James H. Brothers, direct.

normal. Now, there is nothing to show whether this is the result of an accident or whether she has a diseased condition. Normally she has a tendency to throw that bone in. That's probably the result of trauma.

Q Now, you say trauma, you refer to a blow?

10 A Some kind of an accident.

Q Now, assuming this woman on the 17th day of November, 1926, while walking along Blackwell street in the City of Dover stepped into and fell into a coal hole, pulling her right leg under her. That she suffered pain in the right leg; that within a few days later she had a severe pain in the knee and that she went to bed and stayed in bed ten days and from that time one to the present time she has on various occasions had a locking of this knee joint and more or less pain; and assuming also prior to the accident she was in normal health and she never had any other injury to either knee before; can you from the information I have given you find any connection between the accident she sustained when she fell in the coal hole and the condition you found in this X-ray? A I can.

20

Q What was it? A That the thing I found had developed as the result of that accident. Namely the cartilage which gives a twisted motion in the knee.

30

Q Now, doctor, I show you P. 2 which you have already seen and ask you whether or not that plate shows any abnormality? A This plate does not show in this view the rise which I have seen in the picture I have just described. It would be right here. (Indicating.) You see the irregularity is no longer there.

Q What does that indicate, doctor? A That there has been an absorption of that material

40

James H. Brothers, direct.

and the cartilage here, and leaving a rough surface around that joint.

Q Would that account for the condition you found at the time of your examination? A It does.

Q I hand you P. 2 and P. 3, two photographs of the right and left knee, taken from side to side and ask you if there is any variation? A That's the left and that's the right. (Indicating.) Under the left knee back of the patella there's a little bone, an extra bone that forms with some people same as the other knee. This woman has that bone. You notice the clear area in the femur here and posteria here into the cap. That's the left leg. Now, come over to this one and notice the lessening in the space, distance between the rough service of the right femur and the posteria of the patella and compare them and then hear the rub. In fact, one part of the patella rubs on the rough surface of the femur. That patella moves up and down and that is the thing that causes the scrape which you feel with that motion of the joint. And again, if you look at the head, the top of this picture and compare it with the head of the top of the first picture you will see the protrudment which is evidence of this rough surface which is not in the first picture. It's the roughness of the right knee where we have the trouble, we found the trouble there.

Q Doctor, is that so marked that the jury could see it? A Certainly, they can see it.

Q Now, you say there was a scraping that you discerned, that you felt; what did that feel like? A Well, if you take some bones and put them together and rub them between your fingers, that's what that felt like.

James H. Brothers, direct.

Q What does that indicate? A That you have a rough surface around the joint that are rubbing together.

10 Q Normally, are the bones in that joint situated so they touch? A No, there are cartilages in between them. The same cartilage I mentioned before. At the head of the top of the bone there is a cap space, somewhat of a cavity and the cartilages are in that between the ends of the bone and without that they get this motion somewhat, which would rock back and forth at the head of the tibia and it causes that scraping of the bones together. Now this same cartilage is a joint, that's the same semilunar cartilage that I mentioned before and they touch like that (indicating with hands), like the letter
20 "C." They are two "C" that interlock in this fashion and the cartilages are in between and go to the outside edge and are attached here and when you put a weight on or body on them they flatten out and receive the weight. That's their function.

30 Q In this lady's present condition, do the bones slip around in that fashion, are they loose? A They do. I described that, showing the rotary motion and the tendency of their going anyway.

The Court: You actually think that trauma did that?

The Witness: I do.

Q Doctor, is this condition temporary or permanent in your opinion? A Permanent.

The Court: Why?

James H. Brothers, direct.

The Witness: Because it's loose, the end of the bone on the right knee and it is tender. That's what accounts for that.

The Court: And that situation is due to the tendency you speak of?

The Witness: Oh, yes. Aggravated by the accident. 10

Q And except for the absorption the semi-lunar cartilage would there be any development because of that tendency? A Yes, you can't say there would not later on. I can't look into the future and say that this woman has a tendency to form bone or anything else.

The Court: But did this accident in question have anything to do with that? 20

The Witness: About the future?

The Court: This present accident?

The Witness: Yes. In my opinion it's rubbing on the one cartilage there, therefore the bones are rubbing together and grating without the cartilage in between, that pad that's in between.

Q Doctor, is there any remedy for this condition? A You can operate and remove the cartilage and that produces a semi-stiff joint. When you remove that cartilage, there is a stiff joint. 30

Q What kind of an operation would that be? A Incision, open operation. You go in and pare off the loose pieces of the cartilage and cut it off; the free ends of it.

Q Would that require the administering of an anaesthetic? A Yes.

Q Be a minor or major operation? A Major. 40

James H. Brothers, cross.

Q Would there be any dangerous condition about it? A Yes.

Q What danger? A Infection; on account of any blood clots that gets in and lodges in there around the bone.

10 Q Is there any danger in the administering of the anaesthetic? A I wouldn't anticipate any danger if you give the proper kind. Persons with weak hearts is apt to have difficulty if you give too much they go out. Some people are inclined to start vomiting at a certain stage, as it affects the stomach.

Q How much time would it take for an operation? A Anywhere from forty-five minutes to an hour and a half.

20 Q How long would a person have to be laid up afterwards? A Anywheres from twelve weeks to six or eight months.

Q Can you estimate the reasonable cost of such operation, including hospital bills, nurses and so forth? A The operation itself would be according to who was doing it, anywhere from three hundred and fifty to a thousand dollars or more. That's the ordinary range of prices. The hospital charges right in our hospital are thirty-five dollars a week.

30

Cross examination by Mr. Braun.

Q You never performed such an operation, did you, doctor? A I have never taken charge of a semilunar cartilage. I have helped—

Q Just a minute now. You know better than that. I didn't ask for any speech.

40

Mr. Coult: The question was, you never performed any such operation as that. The

James H. Brothers, cross.

doctor said he never took charge, but he helped.

The Court: He says categorically that he didn't. You may bring out if he ever had one.

Q You also testified that you never performed such an operation in a case that was treated here recently where it developed as to the same sort of injury, didn't you, doctor? 10

Mr. Coult: I object. He can only be concerned with things he said at other times if it contradicts.

The Court: You already had the information and knew what he was going to say. He told you he did not himself perform the operation. 20

Q And most of your testimony today has been from purely academic information, hasn't it, doctor? A No, sir.

Q How many operations have you performed in the last month? A I have only had two. One was closed and one was open.

Q In fact, you spend most of your time testifying and examining, doctor? A A large part of it. I carry on my general work and do general surgery. No one operates in the heat, Mr. Braun. 30

Q In fact, you do very little operating now days, isn't that so? A It is not so.

Mr. Coult: Now, if the Court please. Counsel has admitted the doctor's qualifications and now attacking his qualifications. If this course is going to be pursued, I want 40

James H. Brothers, cross.

to go over the doctor's past history and just what he has done in the way of surgery.

Mr. Braun: I don't object to the qualifications of the doctor, but call your attention to the testimony.

10 The Court: Why pursue it further. He says he never performed one of the kind you are talking about.

Q And this operation that you speak of you say will take from forty-five minutes to how long? A An hour and a half; according to who does it.

Q Did you estimate that from record? A From seeing the operation done, yes.

20 Q And besides the use of ether, there is also a spinal injection which has none of the dangers or none of the nauseating effects of ether? A No, it sometimes kills people if it is not the same consistency as the spinal fluid. And if their head is down they will die from spinal anaesthesia.

Q Did you ever use it? A Yes, I certainly used it first with Dr. Lorenz, the first man who used it in this country in 1914.

30 Q You are somewhat of an expert on everything, aren't you? A No, I am not. We all have limitations and no one knows that any better than I do.

Q And you are being paid to testify here? A Certainly. I was called in by the doctor who treated the case.

Q And never consulted with him at all? A Yes.

Q When? A This morning.

Q What time? A Here in Court, outside.

40 Q That was at the Court? A Yes, I called Dr. Costello, known him before.

James H. Brothers, cross.

Q That's the first you ever spoke to him about this case? A Certainly. I wasn't here on July 2nd.

Q And you were at the last trial, weren't you? A I know nothing about any trial.

Q You don't know the case had been tried once before? A I didn't hear anything about that. 10

Q Now, how was this condition traumatic and yet you found a similar condition in the other leg. Do you say that's traumatic also? A I did not find a similar condition in the other leg.

Q Didn't you testify on direct that there was an extra bone, the same condition you described in the right leg? A An extra bone on the left knee which is formed by some people.

Q What do you call the condition this lady is suffering from? A A traumatic in which resulted an irritation of the semilunar cartilage in the right knee joint. 20

Q Hasn't it any name? A That's it.

Q All of that? A That's it. You can call it the beginning of a flat joint but it's not true. I could not call it that, it's not a true flat joint, it's not in that specific joint. You could get an irritation as the result of a rheumatism condition, but this is not a rheumatic knee. 30

Q An arthritic knee is the condition of inflammation in the knee, isn't that so? A It's the result of inflammation.

Q Well, isn't it inflammation? A Not necessarily. Arthritis might be the result of a previous acute inflammation but you can have acute inflammation and have chronic arthritis, but you don't have to have inflammation for arthritis.

Q Hasn't the arthritic condition any name? A It's a working production developing the present and previous inflammation, but you don't 40

James H. Brothers, cross.

have to have that present. Now the inflammation was evidenced by redness, heat, pain and swelling.

Q What has this lady now to evidence this condition? A The things you have heard me describe.

10 Q Heat? A She has not.

Q Swelling? A No, sir.

Q Pain? A Certainly.

Q Well, isn't that what you just described? A I just said she has no heat or swelling. She has no temperature.

Q Well, has she arthritis? A She has frequent arthritis.

Q Frequent, what next, what's that? A A continuation of the process.

20 Q What causes that condition? A The original condition plus the arthritis and that causes a re-open condition. She does have periods when she does have infection.

Q When? A When it locks.

Q That's the productive condition? A It certainly is.

Q And even the right knee is arthritic? A It's arthritic now.

Q Well, was it before the accident? A Not in my opinion, no.

30 Q Why is it now? A Comparing the left knee with the right.

Q And how do you compare that, by X-rays? A The X-ray is the only thing we had. At the time we compared both of them and she has nothing on the left knee now.

Q Were there any X-rays which were taken within six months of the accident? A I don't know.

40 Q They will show? A I haven't seen any only after I was in consultation the other day

James H. Brothers, cross.

when I had this other X-ray made. The other was in February. I see this one here and there were symptoms that I wanted to see what was going on and the only way to know it was a fresh X-ray.

Q Was the fresh X-ray a shadowgraph? A
A radiograph or shadow. 10

Q A shadow? A No, there isn't any shadow about it.

Q There's no shadow? A There as negative and positive to it, if you call that a shadow.

Q Doesn't an X-ray merely depict the parts of the body that resists the passage of the X-rays to a certain extent and cause their shadow on the plate? A Certainly, it's made with casting shadows. You can see points in between. That's not a shadow, it's definite at least. 20

Q Isn't it a relative shadow? A You can call it relative shadow if you wish. I don't.

Q It's not a reflection, is it, the same as the ordinary? A The ordinary picture has more light passed back of the form. This is the passage of light through substance instead of the reflection of light on substance which the ordinary photograph is.

Q And if the substance didn't pass any shadow you would not have any picture? A Why not? You have a different change in the body. That's the difficulty of observing X-rays the same as any other tissues; so you use some of the shadows but you don't stress them, which is a difficult delineation. 30

Q Your comparison here of the two pictures is depended on the similarity of the objects themselves and upon the angle at which the picture is taken? A Absolutely. 40

James H. Brothers, re-direct.

Q In other words, you could take a picture of the left leg and show the same condition that exists in the right leg if you turned the leg? A You can't.

10 Q You can't change the position? A You can show roughness of any joint by changing the position of the lamp.

Q You can change the distance, relative distance between two bones by changing their position? I mean space distance? A Yes, you can do that, but you can't produce infection.

Q You can show them apparently touching? A Yes, if you want to reduce the bone enough, that would be on one end.

20 Q Those things sometimes happen accidentally in taking pictures? A Yes, if you are not careful.

Q And also distortion appears when a picture is taken and the patient moves; your pictures aren't exactly the same and the objects aren't exactly the same? A Yes, that will happen if you are not careful with them.

Q You never took X-ray pictures yourself? A Yes.

Q Have you a machine? A Not at present.

30 Q Never did own one? A I never owned one of my own, no.

Re-direct examination by Mr. Coult.

40 Q Just tell the jury briefly some of your experiences? A Well, I was over in France and was acting surgeon the year before going over. I worked with John Erdman, and Robert Munn and I worked with Sam Lloyd and Dr. Arbuckle and Dr. Albie, the bone specialist and Dr. Gannon and Dr. Lorenz when he was here and Dr.

James H. Brothers, re-cross.

Gody. I don't know whether they are dead or not.

Q How many cases did you have any supervision of in France? A Well, I passed through something around eighty-eight thousand cases while that hospital was there.

Q What was your position in the hospital? 10
A I had charge of the surgical staff of the hospital consisting of two and a half units and before that I was one of the surgeons. I had charge of the S. P. C. before the men were really in the hospital. I went over the same date. We had a unit and a half which is about ten of our own and five from the other half unit.

Q How many of these hospitals were under your supervision? A They were all under my supervision half of the twenty-three months I was there. 20

Q And did you do much operating then? A Certainly, I operated. I would go in the hospital every day in my life in which I was there and do expert work which I had examined before and give information when anything came up.

Re-cross examination by Mr. Braun.

Q How old are you? A Forty-one the 7th 30
of December this year.

Q When did you graduate? A 1914.

Q When did you go to France? A 1917.

Q You say that you have helped operate with Dr. Albie? A I did.

Q In France? A He didn't go to France. He didn't go over with the unit.

Q All the doctors you mentioned who worked with you, were they in the clinic and you looked in to see what they were doing? A No, just 40

James H. Brothers, re-cross.

only as you would get information from them; for instance, Dr. Lorenz, I learned by assisting him. The first time he treated in this country, was at the clinic in Newark, and he did operations at the Newark Private Hospital. He was here the first time about two months and a half and
 10 the second time a little over three months and I assisted him every time he operated. Dr. Kepler and I.

Q Didn't Dr. Kepler sponsor Dr. Lorenz? A I don't know anything about that.

Q Wasn't it Dr. Kepler that brought him over? A I don't know. I didn't.

Q Wasn't it Dr. Kepler that had complete charge of his work and arranged for it? A Not complete charge. If Dr. Kepler was out
 20 then Dr. Lorenz while in Newark made his clinic at Dr. Kepler's office. Made his examinations in Dr. Kepler's office to decide whether patient should go to the clinic. We had two clinic days when I was associated with Dr. Kepler, unless Dr. Lorenz had some private case, I went right along with this. In all he spent about five months in this country. That's on his first two trips. He's here again now.

Q How much time had you spent with Dr. Albie? A About two years with him.
 30

Q Where? A Post Graduate Hospital.

Q When? A 1914 to '16.

Q That was before he became the prominent bone surgeon that he is today, wasn't it? A He always held that position. He was head of orthopaedic. During the war he was head of Colonial Hospital.

Q He was head of Colonial Hospital? A That's right.
 40

James L. Nerney, direct.

Q You didn't associate with him there or since? A No, sir. I was over-seas in France.

Mr. Braun: That's all.

(Witness excused.)

The Court: At this time we will take a recess until two o'clock. 10

AFTER RECESS.

JAMES L. NERNEY, sworn on his own behalf as a plaintiff, testifies as follows:

Direct examination by Mr. Coult.

Q You are the husband of the plaintiff, Dolores Nerney? A Yes. 20

Q And one of the plaintiffs in this suit? A Yes.

Q You live in Dover? A Yes.

Q And how old are you? A Forty-four.

Q What's your business? A Traveling salesman.

Q You recall this accident that happened to your wife? A Yes. 30

Q Before the accident, what was her condition of health? A Normal.

Q Did she do the housework? A She did.

Q Did you ever have any outside help? A No, sir.

Q Now, what was your wife's condition after the accident? Just tell the jury generally? A Well, I got home about three days, I think, after the accident and found her then sitting on a chair with the right leg up on another chair. She 40

James L. Nerney, cross.

was able to hobble around a bit but with considerable difficulty.

10 Q Go right on. A Well, she was apparently suffering a lot. Every move she made, groaning and so forth; very little sleep, very little rest at all. And then of course I remained at home for a week. She was in bed then when I left. Then I went on the road and I was recalled about three weeks later on account of the illness of my daughter.

20 Q Well, the illness of your daughter has nothing to do with this. A I was recalled three weeks later and found her condition apparently getting worse. She was having treatments and originally she was in heat bags and ice bags but nothing helped her whatever. When I came back she was in such a condition she could not help herself but tried to hobble around.

30 Q From that time on what has been Mrs. Nerney's condition, has she had any trouble with it? A Well, she complains frequently, almost daily. She can't walk on it. If she walks downhill, and walks three blocks down Main street in Dover, she stops three or four times to take the load off her knee. The pain seems to be there all the time. She goes to bed but in the night she complains, all night.

Cross examination by Mr. Braun.

Q Of course this pain that you speak about is what she tells you? A Well, flares up every move she makes. Naturally if she sleeps it's not a sign she has nothing.

40 Q Did that condition persist all the time when you are with her? A No, not all the time. When she was lying in bed, naturally she

Margaret Nerney, direct.

would not have so much pain, she would groan.
It is when she is standing on that leg.

Mr. Braun: That is all.

(Witness excused.)

10

MARGARET NERNEY, sworn on behalf of the
plaintiffs, testifies as follows:

Direct examination by Mr. Coult.

Q Miss Nerney, you are the daughter of
these two plaintiffs? A I am.

Q How old are you? A Eighteen.

Q What do you do? A I go to school. 20

Q Where? A New Jersey College for
Women.

Q What year? A Freshman year. I now
am in my sophomore year.

Q Do you recall when your mother was hurt?
A Very definitely.

Q Were you home? A Not the time she was
hurt; but I came home and found her in distinct
pain.

Q When were you home first after that? A 30
Four-thirty in the afternoon, it seems.

Q What was your mother's condition then? A
Apparently she was in very great pain. When I
came home she was sitting in a chair with an-
other chair before her and the right leg propped
up on that chair.

Q Were you there after the doctor was there?
A I was.

Q And do you recall any occasion on which
your mother's knee had locked? A I was there 40

Margaret Nerney, cross.

the first time it locked. I was standing opposite her when the knee locked the first time. Mother leaned over to pick up something and she straightened up and she groaned quite a cry and I attempted to help her but there was nothing that could be done. She just sat there and I
 10 could tell by the facial expression she was suffering a great deal of pain and I called the doctor and he came about fifteen minutes later and by that time, at least fifteen minutes, I got mother straightened up and got her so she would be more comfortable lying on the couch.

Q Between that time and the present, have you been home off and on? A Yes.

Q How much of your time did you spend away and how much home? A I was home every
 20 other week-end from September 17th on.

Q What year? A This past year.

Q During that time, did you have occasion to note whether or not your mother had trouble with her knee? A I have.

Q And has she had? A Very much trouble.

Q How did she show it? A Well, I was home for about four weeks and saw her and she had a great deal of trouble coming up and down-
 30 stairs. She limped a great deal.

Q When was the last time that you can recall that she had trouble with her leg? A Some time last week. I don't remember the occasion but I remember she had a great deal of trouble. She was very lame for awhile.

Cross examination by Mr. Braun.

Q Has the condition today improved over
 40 that at its worst before? A I don't understand.

William F. Costello, recalled, further direct.

Q Is her condition today improved over her condition at its worst as you saw it before at any time? A I can't say that, no.

Q Would you say her condition today is worse than it was at any time previous? A Well, I don't know. It has been very serious all along.

Q You think it's about the same? A No worse. 10

Q About the same as it was any time you saw it before? A Well, except the times she had the severe locking. At the time she had the severe locking of the knee, of course then it's much worse.

Mr. Braun: That's all.

(Witness excused.)

Mr. Coult: We rest. 20

The Court: Proceed with the defense.

Mr. Coult: Oh, just one moment. I would like to recall Dr. Costello for just one question.

The Court: All right.

WILLIAM F. COSTELLO, recalled on behalf of the plaintiffs. 30

Further direct examination by Mr. Coult.

Q Doctor, some mention was made of X-rays taken at the Dover Hospital. Are you connected with the hospital? A Yes.

Q And have you made a search for these X-rays? A Yes.

Q Have you been able to find them? A No. 40

Motions for a non-suit.

Q Do you know what became of them? A I took them from the hospital and I had them at my office, I think, and had them for reference when we consulted on this case with Dr. Mills and Dr. Weigel and myself and I haven't been able to locate them.

10 Q Where did you see Dr. Weigel? A In Morristown.

Q Did you have the X-rays with you then? A I am not sure whether—yes, I did.

Q And have you searched your office? A Yes.

Q And haven't found them? A No, sir.

Mr. Braun: No cross.

Mr. Coult: Now, we do rest.

20 The Court: Proceed.

Mr. Braun: I don't know about Mr. King, but I have a motion to make.

The Court: I would like to ask what you have presented against the Stanley-Fabian Company.

Mr. Coult: The answer admits they are the owners of the building on Blackwell street, I think, in which they have a theatre. We have proved this happened in front of the Stanley-Fabian Theatre. Certainly that is a prima-facia case. Does your Honor want me to read the admissions in the answer.

30

The Court: Yes, you better give them to me. Let me have them in both answers.

Thereupon Mr. Coult read from the answers filed in the case.

Mr. Coult: Now, their admission, coupled with the testimony of Mrs. Nerney that

40

George Richardson, direct.

this happened in front of the theatre makes it a prima-facia case.

Mr. Braun: Now, if the Court please, on behalf of the first named defendant, Stanley-Fabian Corporation, I make a motion for a non-suit on two grounds: first; that there has been no evidence on which negligence could be charged against this defendant and second on the ground that the plaintiff by her own testimony was guilty of contributory negligence as a matter of law. (Argument.) 10

The Court: What is your motion, Mr. King?

Mr. King: My motion is for a non-suit upon the ground that the evidence clearly discloses that she saw the chute and saw the coal cover. I don't quarrel whether she saw it before or after, because it was there in plain sight. I don't want to go over this two or three times but I say that I think we are entitled to a non-suit. (Argument.) 20

The Court: I am going to deny this motion without prejudice for a motion for direction. You may have an exception.

(Exceptions allowed and sealed.)

30

GEORGE RICHARDSON, sworn on behalf of the defendants, testifies as follows:

Direct examination by Mr. King.

Q Mr. Richardson, are you employed by the Park Union Coal Company in Dover? A Yes.

Q During December, 1926, were you hauling coal to the Stanley-Fabian Theatre premises?

A I was.

40

George Richardson, direct.

Q Did you haul it by automobile or team?
A Team.

Q And as you came up from your yard and stopped in front, would your team be headed west? A Yes.

10 Q Now, when was the first load you took up that morning? A The first load would be around half-past eight.

Q Now did an accident take place that day?
A Not on the first load, but it did on the second load.

Q And what time was that? A Between ten and half-past. Can't give the exact time.

20 Q And at the time you were up there at ten or half-past, did you have any coal chute extending from the wagon to a coal hole? A I did.

Q Tell the Court, please, how they were arranged, were there two chutes or but one? A Two.

Q You had one extending from the side of the wagon down to a wooden horse and then there was another carrying the chute to the hole?
A Yes.

30 Q Now, prior to the time of this accident, can you tell me how the chute was in the hole?
A The chute went right to the edge of the hole and had the cover on top of the hole.

Q Did the chute extend clear across the hole?
A No.

The Court: Did it extend in the hole?

The Witness: It extended to the hole.

The Court: But not in the hole?

40 The Witness: No; can't go in the hole. Just extended right to the edge of the hole and the coal drops down.

George Richardson, direct.

The Court: So you did put the cover on?

The Witness: Yes.

The Court: When did you do that?

The Witness: On every load, I did that.

The Court: What happened the moment of this accident?

10

The Witness: I was facing down to the chute; right near the coal hole. One chute from the wagon to the horse and the other running from the horse to the coal hole.

The Court: How was the cover placed?

The Witness: It touched the end of the chute and then would just cover the hole up.

The Court: And that was the chute that was extended in that hole?

The Witness: Yes.

20

The Court: In other words, you had taken the cover up when you first went there?

The Witness: Yes.

The Court: How did you put it back again?

The Witness: When I laid the cover on that, that just fits the end of the chute.

The Court: Suppose somebody stepped on that cover?

30

The Witness: It would go off?

Q Now, on this second occasion, will you tell the jury how the cover was in relation to the hole? I am speaking of the coal hole cover? A Well, we put the coal in there and always have the cover on the end of the chute. That will stop anybody from stepping into the hole.

The Court: That's what you intended to do?

40

George Richardson, direct.

The Witness: Yes.

The Court: Protect—

The Witness: Protect the public from stepping in that hole.

10 The Court: Not only what you intended to do, but is that what you did?

The Witness: Yes.

Mr. King: May we have some new marks on the photograph?

The Witness: Undoubtedly they will admit them.

Q I show you this photograph and ask you whether that fairly represents or if that represents or shows your team and your wagon?

20 A It does.

Q Is this the same team and wagon you had when this photograph was taken? A The same team and wagon.

Q Now, there's a wooden horse on the street side of the sidewalk? A That's right.

Q Was that the same wooden horse you had on the day—

Mr. Coult: I object to that as leading.

30 Q Is that the same wooden horse you had on the day this accident occurred?

Mr. Coult: I object to that as leading.

A I can't say whether the same wooden horse. We have four or five.

Q Are they all the same? A All the same build; same order.

40 Q This was one of the four you had? A Yes.

George Richardson, direct.

Q To which the main chute extended from the wooden horse down here? A Yes.

Q Is that the same chute? A It's the same with the chute and horses. There is lots of chutes and they all look about the same.

Q Does this picture fairly represent the condition of the chute from the wagon down to the second chute and from that chute on to the coal hole? A It does. 10

Q Now, you will notice down to the coal hole that the chute extends to the street side of the hole? A Yes.

Q And you notice over that the coal hole cover? A Yes.

Mr. Coult: Counsel is doing all the testifying.

The Court: Of course he is. 20

Mr. Coult: Witness is simply saying, yes or no.

The Court: Let him describe exactly what the condition was and he may say whether that photograph is a correct reproduction of the existing conditions at the time of that accident. He can say that.

Mr. King: Well, we will travel over to the other territory. 30

Q Do you recognize this place here as being the Stanley-Fabian Theatre Corporation? A I do.

Q Do you recognize this as the place that your team was, and what have you to say as to whether this picture fairly represents the conditions on the morning when this accident happened? A That represents the conditions.

Mr. King: Cross examine. 40

George Richardson, cross.

Cross examination by Mr. Coult.

Q You didn't take this picture, did you? A No, sir.

Q You were present when it was taken? A Yes, sir.

10 Q When was it taken? A Taken after the accident happened.

Q How long after? A Well, about—the accident happened November—taken before I came down to the case the last time.

Q That was last year, wasn't it? A I believe it was.

Q How long was this taken, a year after the accident? A I can't say it was taken a year after the accident.

20 Q Now let's see, the accident happened the 17th of November, 1926? A Yes.

Q And this case was tried before on the 4th of April, 1928, wasn't it? A I just don't remember what day it was.

Q Well, it was about a year ago? A About a year ago.

Q How long before the first trial was this photograph taken? A Taken a few days before I came down.

30 Q So a few days before the trial of this case, it was a year or about a year and a half after the accident you helped arrange these things to have this photograph taken? A They had me up there with the team to have pictures taken.

Q You had the same team? A Yes.

Q You had the same wagon? A Yes.

Q You don't know whether the same chute or not? A They all run alike.

40 Q You don't know whether the same chute?
A No.

George Richardson, cross.

Q You don't know whether the same horse or not? Are not sure you had the same horse there when you put the coal in at the time of the accident? A I am not sure.

Q You don't know whether it's the same coal hole cover or not? A Same cover.

Q How do you know? A Always has been. 10

Q Well, you have not been watching over the cover from the time of the accident until the day of this photograph? A No.

Q Well, you can't swear it's the same cover, can you? A No.

Q You don't know? A No.

Q And who else was there when you took this photograph; Mr. King? A No, sir.

Q Mr. Camiff? A No.

Q Charlie Boyd? A Charlie Boyd was there. 20

Q Called there? A He didn't come there on purpose.

Q Well, he was around while these photographs were being taken. Nobody helped you put these chutes up there? A No, I done it myself.

Q You don't know whether you got them the same place or not? A That's the way I always tried to put them. 30

Q You can't say you went back to this place there after the accident and set up these chutes the same way as they were the time of the accident happened? A I put in lots of coal after the accident.

Q You can't say that these chutes were set up precisely the same way when you took these photographs as the time the accident happened? About the way they were but not exact? A I can't say that. 40

George Richardson, cross.

Mr. Coult: Your Honor, it seems to me these photographs are irrelevant. At the best, it's only a photographic representation of this a year or a year and a half afterwards of what the situation was.

10

The Court: I wish you would describe to me how the cover was put on that hole after you left the chute there. Did you have it down just as it would be without the chute?

The Witness: Yes, right down in the chute.

The Court: Did you have it over the hole?

The Witness: It does fit over the hole.

20

The Court: But the chute didn't go into the hole?

The Witness: No, sir.

The Court: It stopped right at the edge?

The Witness: Yes.

The Court: Then you put the cover over the hole?

30

The Witness: That doesn't get into the end of the chute; it strikes the end of the chute, that lets the coal drop down into the chute. Otherwise it would not drop down, but would go all over.

The Court: But you were not unloading the coal at the time of this accident?

The Witness: I was in the wagon.

The Court: Did you have coal on?

The Witness: I had coal on.

The Court: But you hadn't unloaded?

The Witness: About half unloaded.

40

George Richardson, cross.

Q Well, the day of the accident, you left the cover on as you were unloading the coal down the chute? A Yes.

Q You couldn't have the cover down tight because that would interfere with the coal going in? A Stop the coal from dropping.

Q What did you put the cover in that position for? A To protect the public and to stop the coal from striking them.

Q You protected the public? Well, you can't stop any of the coal striking with the cover on? A That would—

The Court: Well, go on. I am inclined to think, Mr. King, that these photographs are probably inadmissible. They could only be used to illustrate the witness' testimony, if marked in evidence.

Mr. King: Let's see, this photograph is taken of the place of the accident. Not at the time of the accident—

The Court: Nearly a year later.

Mr. King: That isn't the point. The point is whether it showed the condition that morning. I just asked this question.

The Court: You are asking this witness, now, look at that photograph and there's a hole in it, but apparently, from what the witness says that shows the coal hole just exactly as it is.

Mr. King: However, if you say it's not beneficial, I won't pursue this line further, but it takes up a whole lot of time.

The Court: I think probably you better keep that out of the case in the circumstances.

George Richardson, cross.

Q Now, as your coal chute came down from the wagon and truck, it was fast to the other chute and that chute carried the coal on out to the coal hole? A Yes.

10 Q Now, this coal cover you speak about—I am going to ask leading questions unless I am stopped—this coal cover was on the coal hole with its edge in the side of the coal hole nearest the building? A Right.

The Court: It was tilted up, tilted up so the other side of the coal cover rested on the top part of the chute?

The Witness: That's right.

20 Q That permitted the coal to come down the chute and go down in the hole and prevented, as to say, anybody from stepping in the hole? A That's right.

Q On this morning, did you see the plaintiff coming up the street? A Well, I didn't see her coming up the street. I had stopped shoveling coal.

Q Did you see her before she came to your coal chute? A I did.

30 Q How far was she away when you first saw her? A Well, only about three or four feet away.

Q At that time you were not shoveling coal? A I was not shoveling coal.

Q What did she do? A She went to step over the end of the chute and she caught her toe or something and it threw her down on her knees.

40 Q How far away were you from this lady stepping over this chute? How many feet was it across the sidewalk from in the wagon? A About five feet.

George Richardson, cross.

Q And the morning was— A Nice morning.

Q So that you could see what happened? A Yes.

Q You told this jury you saw this woman trying to step over the chute? A I did. 10

Q When she tried to step over, where was she in relation to the coal cover? A Right on the end of the chute.

Q At the end of the chute? A Yes.

Q And was half of the cover at that point above the sidewalk? A Well, that would make it about five inches and a half, a little more; five or six inches.

Q What was the width of the chute? A About eight inches. 20

Q And the width of the coal cover? A Well, that would be about fifteen inches.

Q Now, was the lady trying to step over this cover or over the chute? A Over the chute. Trying to step over the chute.

Q Tell the jury what you saw in her efforts to get over—just what occurred? A Mrs. Nerney was walking over, she tripped or caught her heel or something that threw her down on her knee. That's all I can say. 30

Q What did she trip on? A On the end of the chute.

Q But you didn't know the cause of her tripping? A No.

Q Her skirts were not long enough to get caught in it? A No.

Q Can you tell me which foot was caught? A No, sir, I can't.

Q What next did you see? A See her go to her knees. By that time I jumped off the wagon. 40

George Richardson, cross.

Q What became of the cover to the coal hole?

A When she tripped that turned right up side down and went on the sidewalk.

Q Did it move the chute? A Yes, moved the chute too.

10 Q You saw it turn over? A Yes.

Q Did you see either of her limbs go down in the coal hole? A No, sir.

Q When you jumped from the wagon, what was her position? A Why, by that time I got off the wagon, another man had picked her up and put her on a bench.

20 Q All right, then I will go back and ask you to tell the jury her position the last time you saw her before you got from the wagon? A I saw Mrs. Nerney on her knees and when I jumped from the wagon another man had picked her up and put her on a bench of what is a news stand.

The Court: Was one of her legs in the coal hole?

The Witness: No, she was on her knees.

The Court: You could see that?

The Witness: Yes.

30 The Court: On both knees?

The Witness: Was on her knees.

Q She had been going from Dover, that is, going west? A She was going west.

Q Now, when you saw her on her knees, was she on the west side of the chute or was she on the east side? A The west side.

Q So she had gone clear over? A Yes.

40 Q Where did you notice the coal hole cover?
A Right alongside the chute.

George Richardson, cross.

Q Now, was that on the side on which she had been approaching, or was it in the west side?

A Over on the west side.

Q When you saw her on her knees? A Yes.

The Court: In the direction she was going? 10

The Witness: In the direction she was going.

Q Who was the gentleman that you saw coming towards this lady? A Mr. Camiff.

Q Is he in Court? A He is.

Q Then you say she was taken to a bench alongside the building? A She was.

Q But from there taken on up to her sister's or went home? A I don't know where she was taken, but I saw her taken away in an automobile. 20

Q Who did that? A Mr. Boyd.

Q Now, you are quite sure that being within this distance neither limb or leg was down the coal hole? A Was not down the coal hole.

Q Did she make any remarks to you when you got over to her? A No.

Mr. Coult: That is all. 30

The Court: Counsel for defendant has permisison to continue the examintion.

Cross examination by Mr. Braun.

Q Mr. Richardson, what happened to this coal hole cover while you were getting the second load? Did you put it back on again? A Always take the chutes down and put the cover back on again. 40

George Richardson, re-cross.

Q Who took it off the hole the second time?

A I did myself.

Q You also took it off the first time? A Yes.

Q Nobody from the building or from the people you were delivering the coal to had anything to do with that, did they? A No.

10 Q In fact there wasn't anybody there that hour of the day? A I didn't see anyone.

Q Theatre was closed? A Yes.

Mr. Braun: That's all.

Re-cross examination by Mr. Coult.

Q What time did you deliver the first load?

A I left the yard about half-past eight.

20 Q And where did you come from? A From the yard with the coal.

Q Whose yard? A Park Union.

Q Who told you to go to the Stanley-Fabian Company? A Why, the clerk in the office.

Q Had you delivered any coal the previous day there? A No, sir.

Q This was the first load this day? A Yes, sir.

30 Q And he told you to take it to the Stanley-Fabian Theatre on Blackwell street, right? A Yes.

Q Had you ever delivered coal there before? A Yes.

Q Other years? A Lots of it.

Q You were familiar with that coal hole? A Yes.

Q And when you got there you took the lid off the coal hole? A Yes.

40 Q Was it fastened down anyway? A No, it's not fastened.

George Richardson, re-cross.

Q How did you get it up? A Why, a little hole, use a grab hook to pull it up. You can't pull it up with your finger.

Q There wasn't any other fastening to that coal hole cover at all? A No.

Q So after you got the lid up, you arranged your chutes? A Yes. 10

Q You put on two chutes? A I put on only one.

Q You used only one chute? A I used two chutes to deliver the coal.

Q You did that after you lifted off the lid? A I put the lid on the end of one chute.

Q What did you do the first thing you got there? A I put my horse on the sidewalk, lifted one chute down.

Q Which one? A The one by the hole. 20

Q Then what did you do? A Then I put the other on top of that.

Q In the meantime did you have the lid off the hole? A Why, that always goes off before I start delivering the coal.

Q In fixing the chutes you brought the chute up to the edge of the hole? A Yes.

Q Then you say you took the cover of the hole out? A Yes.

Q So that one end of it rested on the chute; I mean one side of it, and the other side rested on the edge of the hole? A That's right. 30

Q And with the cover in that way on your horse and wagon at the curb and the chutes across the street, anybody in and around the street would be able to see the lid in that hole just as if it had been in the hole? A They would.

Q It would look just like a closed coal hole? A Not closed. I should judge five or six inches high. 40

George Richardson, re-cross.

Q There would be a little height on one side?

A Yes.

Q But there would not be an open coal hole in the street? A Not an open coal hole.

Q Then what did you do to make the coal lid so it would stay there and bear weight? A

10 What would stay there?

Q Suppose somebody stepped on the edge of it, it would not get off; in down the coal hole?

A No.

Q What would happen? A Tip it and it would not stay down. I have ripped it off myself with coal.

Q And yet in this case the lady didn't touch the coal hole cover at all? A Touched the end of the chute; trying to step over the end of the chute.

20 Q So it wasn't by stepping on a section of this coal hole cover or the edge of this cover that upset the cover? A I can't say.

Q May it have been that? A As far as I could see she stepped over the end of the chute.

Q But maybe she stepped on part of the coal cover, that could be possible? A Could be.

Q As a matter of fact, you don't know which? A It seemed to me she was crossing the end of the chute.

30 Q But you couldn't be certain about it? A No.

Q And the coal hole cover turned over and landed upside down over the side of the hole? A Yes.

Q Well, did it go to the right, over to the right? A Went right over here. (Indicating.)

Q Well, did it land on the right side? A It landed over on this side here.

Q Was on your right? A On my left.

40 Q On your left? A Yes.

George Richardson, re-cross.

Q So that when you came over to the edge of this chute and got here where the chute was, the lid was on the right of it? A On the right of it, yes.

Q Is that the way it happened? A Yes.

Q Now, at the time you first saw her, you were not shoveling coal? A No, sir. 10

Q What were you doing? A Just stopped for a little rest.

Q Where were you? A In the wagon.

Q You were not down on the ground? A No.

Q Isn't it a fact when this accident happened you were on the ground, you hadn't started to shovel coal yet? A I was in the wagon when the accident happened. 20

Q You saw the lady approach the chute? A Yes.

Q Did you notice where she was looking? A No.

Q Where was she looking, do you know? A Looking straight ahead, it seemed to me.

Q You didn't say anything to her? A No.

Q Didn't warn her? A Didn't say a word.

Q Then when she fell, you got off the wagon? A I got off the wagon. 30

Q Did you say anything to her? A No. She had been picked up and put on a bench.

Q Did you say anything to her? A No, sir, I didn't say anything to her.

Q Sure about that? A Yes.

Q Are you positive of that? A I remember I did ask her how she done it.

Q You asked her how the accident happened, didn't you? A I did.

Q And what did she tell you? A Said she didn't know. 40

Paul L. Caniff, direct.

Q Now, there's no question about that, is there? A No.

Q Now, if you had seen the thing happen, why did you ask her how it happened? A I was a little excited seeing her fall down.

10 Q You were so excited seeing her fall down that you had to get information from her as to how the accident happened? A I was not getting that information, I seen her catch her heel on the chute, that's all I know.

Q Can you give us any information as to why you asked her how she did it when you saw her do it? A That's the way it looked to me.

Q I know, but why did you ask her if you seen it happen? A I don't know.

20 Q You were not asking her for information, were you? A I was not asking for information. Naturally, because I was not concerned.

Q And yet in spite of the fact that this had transpired before your eyes; in spite of the fact that you saw her catch her foot on that chute and fall down, you went to her and said, how did this accident happen? A I asked how she did it.

Q Is that true? A (No response.)

Mr. Coult: That is all.

30 (Witness excused.)

PAUL L. CANIFF, sworn on behalf of the defendants, testifies as follows:

Direct examination by Mr. King.

Q Mr. Caniff, how old are you? A Forty-four.

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Paul L. Caniff, direct.

Q You live where? A Long Valley, Gillette, New Jersey.

Q In 1926 you were working for whom? A Henry L. Baker.

Q Where was his office in reference to the place where this accident happened? A Why, to be frank, I don't remember whether it was over —I had a question as to where the office was; at that time the office was in the theatre building. 10

Q How near was the entrance to your office to the place where they were putting in this coal? A Why, the coal hole, as I remember, is to the west of the entrance. It's within a few feet to the west of the entrance of the building and the entrance of the building is between the smoke shop or cigar store and the candy store.

Q Now, did you see this accident occur? A I did. 20

Q Which way were you going? A I was coming east.

Q And the lady was coming— A West.

Q Was there any other pedestrian anywhere near Mrs. Nerney? A There wasn't a soul on the street. The street was practically deserted.

Q This was what time? A About ten o'clock in the morning.

Q Perfectly light? A Yes; a very fine clear sunny day. 30

Q Did you see the coal chute as you approached it? A Yes, sir.

Q Now, I wish you would tell the jury, please, what you observed this woman do and if you saw her fall, how she fell? A I was within almost reaching distance of this woman when she fell. I grabbed for her and missed her and she fell on her knees, and I was there instantly and assisted her to her feet and took her over to a little newspaper bench and she sat down there. I didn't 40

Paul L. Caniff, direct.

carry the woman; I merely assisted her in a very gentle manner, by the shoulder, under the arm.

Q Did you see how the accident occurred? A From what I could see, the woman stumbled over the coal chute.

10 Q And when she landed, on what part of her — A She was on her knees. She fell on her knees.

Q Now, someone has said that she had one limb down the coal hole? A No, sir.

Q Directing your attention to that— A Now, I lifted the lady to her feet and if she had one leg in the coal hole I would have had to drag the leg out.

20 Q In substance, was either of her legs down in the coal hole? A No, sir.

Q Both knees were on the sidewalk? A Absolutely.

Q And she had been coming westerly approaching this just about when you were within reaching distance of her; did you notice where the coal cover was before the accident? A No, sir.

Q Where did you see it after the accident? A It was laying on the west side of the coal chute.

30 Q That would be what side? A That would be the theatre side.

Q She came up from the east going toward the west? A Yes.

The Court: In other words, it was west?

The Witness: The coal cover was laying to the west. That would be the same side of the coal chute as I was.

The Court: She came from the candy store side?

40 The Witness: Yes.

Paul L. Caniff, direct.

Q So that the coal cover was on the same side of the chute which she was approaching to pass over? That's what I am driving at? A Wait a minute; you say from the side she was coming. That would be the east side. The coal cover wasn't on the east side, the cover was on the west side. 10

Q In other words, after she hooked her toe in the cover which was there, it fell in the direction you found it?

Mr. Coult: I object to that. That's argumentative.

The Court: Reframe it.

Mr. King: Yes, sir.

Q Was the coal cover on the opposite side of the coal chute from which she was approaching before the accident? A I don't understand your question. 20

Mr. King: Repeat it.

Q (Question read.)

The Court: Where was the cover?

The Witness: It was on the west side of the chute. 30

The Court: Now, can you get the question. You are talking about the accident. Before the accident, where was the coal cover?

The Witness: I can't say.

The Court: You didn't see it?

The Witness: No, sir.

Q Now, after the accident, it was on the other side of the chute? A Yes. 40

Paul L. Caniff, cross.

Q As you and she were coming past it? A Oh, yes.

Q Who took the lady up to her home? A Mr. Boyd.

Q Was there any statement made by her as to how the accident occurred? A None whatever. I asked the lady if she hurt herself. I don't remember just exactly what she said, but it wasn't badly. If she had been hurt badly, I would offer to get assistance. She said she would be all right in a minute if she could sit there on the little bench. Just then Mr. Boyd came out the door. Her knee hurt her very much and he says, come, we will take you home. It was not home, but the home of her sister. He got his car and then she asked him to take her to her sister's.

Q How did she get to the car, with or without assistance. A No, not without assistance.

Q Did she have assistance? A Mr. Boyd took hold of her arm.

Q Did you see any indication of injury by dark spots or a torn skirt? A The lady did rub her leg. I remember that. Naturally she would.

Cross examination by Mr. Coult.

Q You were coming from the west, did you say? A Right.

Q And she was walking to the west? A Yes.

Q And you and she were just about to meet at this coal chute? A Yes.

Q And how far were you away from the coal chute when the accident happened? A Well, little better than an arm's distance because I attempted to grab the woman before she fell.

Q What was a little better than an arm's distance; about four feet? A About that.

Paul L. Caniff, cross.

Q And you are a fairly tall man, aren't you?

A Six foot, one and a quarter.

Q And when you walk, you step something like three feet to a step? A I don't remember how much.

Q So you were about a step and a half from the coal hole, were you? A Somewheres around that distance. 10

Q You were proceeding close? A Yes.

Q And you don't know whether there was any lid on that coal hole or not, do you? A Well, I wasn't looking for any.

Q Why not? A I was coming down the street and saw this woman stumble, and I wasn't looking for all these things—

Q She didn't stumble until you were four feet away? A True. 20

Q And when you were within four feet of that coal hole, you didn't know whether there was a cover on or not? A I didn't notice.

Q And if you hadn't looked and taken another step and a half you would have been in too? A No, sir.

Q What would have happened— A When you see a chute from a wagon to the sidewalk you naturally are not going to step in it.

Q You didn't have the time four feet away? A I had plenty of time to see where I was going. 30

Q You were doing just what anybody else does, were you? A Looking ahead.

Q You were looking ahead? A I was looking where I was going. I was watching my step.

Q Now, you say that after the accident she said that she wasn't hurt? A She didn't say she wasn't hurt. I asked if she was hurt and she said not much.

Q How soon after that did Mr. Boyd come down? A A few minutes; very short time. 40

Paul L. Caniff, cross.

Q Were you there all the time Mr. Boyd was there? A Yes, I was talking with the lady and Mr. Boyd came into view.

Q And she never told you how the accident happened, did she? A No, sir, she did not.

10 Q You never heard her say anything about it at all? A No, sir.

Q You were there all the time? A Yes.

Q And you were there until Boyd put her in the car? A I was there when she got into Mr. Boyd's car.

Q What's your business? A Public accountant for sales of real estate and insurance premiums and for Mr. Baker and other individuals, and connected with other activities.

Q With Mr. Baker? A Yes.

20 Q And how long have you worked for Mr. Baker? A Since March 1, 1925.

Q He is president of the Park Lumber Coal Company? A The Park Union Lumber Company, correct.

Q And has he any connection with the theatre? A Not after he sold it.

Q Did this accident happen before or after he sold it? A After.

30 Q But it was known as the Baker Theatre at the time of the accident? A The name of "Baker" was retained.

Q Then that's the same Mr. Baker? A Yes.

Q The Mr. Baker you have been working for all this time? A Yes.

Q And Mr. Baker was president of the Coal Company who is the defendant in this case? A Yes.

Mr. Coult: That is all.

40 (Witness excused.)

Charles B. Boyd, direct.

CHARLES B. BOYD, sworn on behalf of the defendants, testifies as follows:

Direct examination by Mr. King.

Mr. Boyd, you live in Dover? A Yes.

Q And you know where this accident occurred? A I do. 10

Q What's the first you knew there had been an accident?

The Court: When did you first know there had been an accident?

The Witness: Not until I came down from the office and saw Mrs. Nerney sitting on the bench.

Q Who was with her? A Mr. Caniff. 20

Q Was Mrs. Nerney in tears? A Not that I know of.

Q Did you speak to her? A Yes.

Q You knew her, didn't you? A Yes, I did.

Q Are you the gentleman who got the automobile to take her home? A The automobile was right on the street where Mrs. Nerney fell.

Q Your car? A My car.

Q How did you come to take her? A Why, I asked Mrs. Nerney if she was hurt and she said not much. Well, I said, probably I better take you home and she said she wanted to go to her sister's, Mrs. Lowe; so I took her to Mrs. Lowe's. 30

Q She lives out at Elks Park? A Yes.

Q Did you take her up? A Yes.

Q Now, all the way up did anybody support Mrs. Nerney? A No.

Q When you got there to the entrance to her sister's home, are there many steps? A Well, there's two or three steps from the sidewalk to 40

Paul L. Caniff, recalled, further direct.

the terrace and three or four steps to Mrs. Lowe's porch.

Q And when you got there was any assistance rendered to her to get to the porch? A Not that I knew.

10 The Court: She walked up herself?

The Witness: I had to get out of the car myself.

The Court: Did she walk alone?

The Witness: Alone.

The Court: How far is that, Mr. Boyd; from the car to Mrs. Lowe's porch?

The Witness: Oh, probably that's eighteen to twenty feet.

20 Mr. King: That is all.

Mr. Coult: No questions.

(Witness excused.)

PAUL L. CANIFF, recalled.

Further direct examination by Mr. King.

30 Q Mr. Caniff, after you saw the lady fall, did you notice whether the coal hole cover was in motion?

Mr. Coult: I object to that.

A No, sir, I don't remember—

Mr. King: Just a minute. When there is an objection, wait.

40 Mr. Coult: I withdraw the objection.

Motions for direction of a verdict.

Q Did you see the coal hole cover at all? A
After the accident, yes.

The Court: He has already said that, the lid was upside down.

The Court: How near the chute?

The Witness: I don't know, not very far. 10
I don't remember any distances. I don't remember. I was more interested in trying to save her from falling.

Mr. King: That is all.

(Witness excused.)

Mr. King: That is the case.

The Court: Any rebuttal?

Mr. Coult: No, sir.

The Court: You still think there is evi- 20
dence to hold the theatre company?

Mr. Coult: The authority of these Massachusetts cases.

The Court: I will entertain a motion for a direction as to the theatre company.

Mr. Braun: I so move your Honor (Argument). I move for a direction of verdict in favor of the defendant, Stanley-Fabian Corporation, first on the ground that there is no evidence of any failure of any duty on the part of that defendant to the plaintiffs of which negligence which was the proximate cause of her injury could be properly inferred. There is no evidence of any negligence on their part; and on the further ground that the plaintiff herself from her own testimony was guilty of contributory negligence, and the weight of the evidence on the whole case conclusively shows she was guilty of contributory negligence. 30
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Motions for direction of a verdict.

The Court: Does the trial judge pass on the weight of the evidence?

Mr. Braun: Yes, where it is shown conclusively.

10 Mr. King: Now, the case brings to my mind some confusion and the confusion is more confounded when I read it. They set the verdict aside before and the Court said—

Mr. Coult: I object to this unless this is aside the bar.

The Court: Perhaps that will be better. (Argument.)

20 The Court: I am of the opinion that the motions should be denied and I will charge the jury in the case as to the law. You may note an exception for both defendants.

(Exceptions allowed and sealed.)

Thereupon Mr. Braun summed up to the jury in behalf of the defendant Stanley-Fabian Corporation.

Thereupon Mr. King summed up to the jury in behalf of the defendant Park Union Lumber Company.

30 Thereupon Mr. Coult summed up to the jury in behalf of the plaintiffs.

Charge to Jury.

Thereupon the Court charged the jury as follows:

CHARGE TO JURY.

DOLORIS NERNEY and JAMES L.
NERNEY, her husband,

vs.

STANLEY-FABIAN CORPORATION, a
corp., and PARK UNION LUM-
BER COMPANY, a corp.

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} *Charge.*

LAWRENCE, *J.*, Ladies and Gentlemen of the jury, the Court naturally assumes that in deliberating upon this case you will observe the rules of law that will be laid down for your guidance and determine the facts, whether they be in favor of the plaintiffs or the defendants, in accordance with the law. In other words, that you will undertake to decide this case in accordance with the evidence and likewise in accordance with the law as the Court gives it to you. We have reached that stage of the case where the lawyers have finished discussing with you from what might be said to be a partisan standpoint, that is to say the side of the plaintiffs or of the defendants, and naturally you expect them to present in the most cogent way in which they could the sides of the controversy for which they respectively appear. After all, there are facts in the case, it seems to me, which may be usually expected and as to which there can be no real difference of opinion so far as the ultimate result is concerned. Either the defendants have been shown to have been negligent, one or the other, or both, as I shall presently discuss with

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Charge to Jury.

you, or even if they have been shown to have been negligent, likewise Mrs. Nerney has either been shown to have been guilty of contributory negligence or she has not.

Now, what is this case; the action arises out of an accident in which Mrs. Nerney alleges she
10 was injured while walking upon the sidewalk in front of the Stanley-Fabian Company's theatre in Dover. She alleges she was injured by reason of falling into a coal hole which was improperly and unsafely guarded and protected in the immediate circumstances and in that way was injured. Therefore she claims the right of recovering compensation for the injuries and her husband joins in the suit in his respective rights, which will be referred to presently. I ought to say, however, that the mere happening of the
20 accident as indicted by the testimony in this case will not justify the jury in awarding damages in favor of Mrs. Nerney. Since she seeks to recover compensation, the duty is upon her to prove under the greater weight of credible, legal evidence that one or both of the defendants, as the circumstances may indicate, is responsible for the accident with which we are here concerned. The legal definition of negligence is the failure to observe, for the protection of the interest of
30 another person, that degree of care, precaution and vigilance which the circumstances justly demand whereby such other person suffers injury. The plaintiff here claims that she has shown that both of the defendants were negligent in that they failed to properly guard and protect in the interest of the public, of whom at the moment Mrs. Nerney was one, with that degree of care and precaution for her safety, for the safety of the public, and particularly her safety, a public
40 sidewalk as required under the law. You are

Charge to Jury.

therefore required to pass on the question as to how the accident happened. There is no question apparently that the lady fell; but of course the liability for the alleged injury is the question in the case and therefore you are to understand that the rights of a pedestrian upon the sidewalk are declared by our Appellate Court to be within the purview of certain definite rules. Streets and sidewalks are presumed to be free from obstruction and if a person is injured by reason of an excavation in them, he or she is not bound to use more than ordinary care, unless the defendant shows that the excavation was properly guarded in some way to warn the public of the danger, and the negligence on the part of the person injured is not in general to be presumed where such person is using a public sidewalk, as in the present case, but it must be proved as a matter of defense, and whether there was negligence or not is a question of fact to be decided by the jury. It is said in connection with sidewalks that a person walking thereon is not required to use the highest degree of care or extraordinary watchfulness but such reasonable care in the circumstances as a reasonably prudent person would exercise. The duty undoubtedly was on the part of the defendants to guard the coal hole in question in such a reasonable way and nature that the public using the street, as heretofore said, of whom Mrs. Nerney was one, should not fall into the hole or fall upon the sidewalk by reason of such hole being improperly guarded or protected, whereby an injury results. So it is therefore said that one who obstructs a sidewalk by placing excavations in it is bound to render it safe to the public. The first question here, as I see it, is whether or not the defendants—one or the other—have been shown to be

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Charge to Jury.

negligent within the definition. I find myself on reflection obliged to qualify the suggestion that the Stanley-Fabian Theatre, the owner of the building, and I might say of the sidewalk, in front of which was the coal hole leading apparently to the coal bin below, which was there for the benefit of the theatre property, whether it is to be held or not will depend upon how you find the state of the evidence with reference to knowledge on the part of the Theatre Company, as to whether the coal hole in question was open at the time Mrs. Nerney was injured and whether it was being properly guarded and protected in the interest of the traveling public. I say I am obliged to qualify the suggestion that the mere fact that the hole was open would be chargeable to the Theatre Company in common with the Coal Company, as I shall refer to it, for the reason that it seems to me there is a fundamental principle of law that should be applied with regard to the Theatre Company, and that is this: it appears, applying it now concretely, that the coal in question was to be delivered to the Theatre Company through its properly qualified employees or officers, as the case may be, who may have had no knowledge as to the time when the coal was to be delivered whereby the cover would be taken off in order that the chute might properly be placed and the coal passed into the hole. Therefore, it is my conception that the Theatre Company is not to be held liable on the ground of negligence unless you find under the greater weight of the evidence that the hole was either open or unsafely protected in the interest of the traveling public for so long a time which in all reason, I may say, could not have elapsed without the Theatre Company knowing that the coal was being put in. Now, if the Theatre Company

Charge to Jury.

is to be charged with the knowledge that the hole was open and negligently protected by reason of the fact that a load of coal had been delivered which as I recall the testimony was about eight o'clock in the morning and at the time of the accident when a second load was about to be delivered the hour of ten o'clock had arrived, 10
 whether that lapse of time is sufficient in the judgment of the jury to have charged the Theatre Company through its employees, with the knowledge that the coal hole was open and unprotected in the interest of the public, that is, left unprotected so that the traveling public was not receiving that degree of care and caution and protection which the law requires, then I will say that you would have the right by implication to hold the Theatre Company generally 20
 responsible with the Lumber Company who was delivering the coal, assuming you find the issue of fact on the question of negligence against the Lumber Company. If, on the other hand, you find as a fact that a sufficient time had not elapsed so as to charge the Theatre Company with knowledge that the hole was open and unprotected, then it would be your duty to find a verdict of no cause of action as to the Theatre Company. 30

As to the other defendant, the Lumber Company, it appears they had an order for coal to be delivered to the Theatre Company and it became necessary for them to cart it to a part of the sidewalk opposite the building and deliver it through a coal hole provided with a cover. I might say in that regard that if you find the Theatre Company provided itself with the necessary protection through the medium or instrumentality of the cover and its removal had not been sufficiently long to charge them with notice, 40

Charge to Jury.

then you might say, well, they ought not to be held with negligence in the circumstance. Now, the Coal Company, however, having an order to deliver the loads of coal through the hole to the building were charged with the duty, through its employee in removing the cover from the hole, to

10 use reasonable care to see that the hole was properly protected in the interest of the traveling public, of whom Mrs. Nerney was one. It appears in the case that the employee undertook to place the cover of the hole over it in a slanting position so that one side of it rested upon the side of the hole nearest the wall of the building and the other side on the chute, evidently with the intent to protect the hole from being entirely exposed. Now, whether he was exercising due

20 care in the circumstance in doing that, it seems to me, has become peculiarly a question of fact for the jury, both with regard to the issue of negligence on the main case and that of contributory negligence on the part of Mrs. Nerney. The testimony appears to be of a contradictory nature. Having in mind the security which was to be accorded Mrs. Nerney in using the sidewalk at the time and the rules of law I have heretofore stated to you with regard to her rights to assume that it was safe for her to walk

30 upon the sidewalk, I will say the case comes to you in two phases. First that presented on behalf of the plaintiff and second that offered here by the defense. Mrs. Nerney testifies that as she came in the vicinity she noticed a coal chute, one end of which was on a coal wagon and the other on the sidewalk. She denies she saw the hole, but in any event she attempted to pass around the end of the chute on the part of the sidewalk between it and the wall of the building

40 which she regarded as safe to pass over. Now,

Charge to Jury.

whether the presence of the cover over the hole would tend to indicate to a pedestrian, especially Mrs. Nerney, at the time that it was safe for her to go where she was attempting to has become a question of fact for you to determine. In other words, was the presence of the cover over the hole and the way it was placed a notice to persons using the sidewalk that it was safe to go around the end of the chute which apparently reached only to one side of the hole, the rest of it being obscured by the cover placed in the manner that has been indicated to you in the testimony? Therefore it seems to me peculiarly a question of fact for you to determine whether a pedestrian would have been led into a position of false security in finding a place to walk with the cover placed as it was. In other words, so far as the charge of negligence is concerned, the gist of this case seems to be with reference to the question as to whether that hole was properly protected or not. If the cover had been entirely removed so that the hole would be exposed and a pedestrian would be able to observe not only the end of the chute, but the hole, then it seems to me that a different situation would arise than may arise (and this is a mere comment) in the present case where it appears the driver had attempted to protect the hole by putting the cover back. Now, so far as the testimony goes, it appears that it was a proper cover, and with no chute there it would be perfectly safe for a person to walk over it, as part of the sidewalk. But here, the driver apparently undertook, recognizing that the hole should not be left exposed, even with the chute in the position in which it was, to put the cover back in the usual and normal way, or at least so far as the side of the hole next to the building was concerned.

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Charge to Jury.

Now, was that a negligent thing to do? Was that the failure on the part of the driver in question to exercise the care and vigilance and caution due from him in the immediate circumstances, he being the person who removed the cover? Was that the proper observation of the care and caution due to pedestrians having occasion to use the sidewalk, of whom Mrs. Nerney was one? Now, you see that's her version of how this accident happened. She says that she attempted to go around the end of that chute and that her attention was not at all directed to the fact that the hole was open or that the cover was placed in a fashion that would make it unsafe for anyone even to step on it. In ordinary circumstances a person could walk over the hole if the cover was properly placed and presumably no injury would result. In other words, there is no evidence that it was an improper cover, so you have the main question to determine; has Mrs. Nerney shown under a fair preponderance of the proof that the defendant Coal Company through its employee (namely the driver) was negligent in the manner in which he attempted to protect, if he did, the hole at the time he had occasion to so do. Now, I do not attempt to say that the Coal Company did not have a perfectly legal right to deliver coal through the medium of the chute into that hole in the sidewalk. I disagree with counsel who suggested that to you a moment ago. Naturally the Coal Company had a perfect right to deliver the coal to the Theatre Company, but in doing so it was charged with the duty to exercise due and reasonable care, because ordinarily the sidewalk is a place of safety, so regarded in the law. Pedestrians are to presume it is free from exca-

Charge to Jury.

vation or obstruction. So when Mrs. Nerney saw this chute, it is a question for you to determine whether that hole was improperly protected in the immediate circumstance.

Should you resolve the question of negligence, the burden of which is upon the plaintiff here, in her favor, you still have the second question 10 which is important from the standpoint of the defense, and that is whether Mrs. Nerney herself was guilty of contributory negligence, because it is said that that phase of negligence is present in a given case when the injured person by her own negligence has contributed to the injury in such a way that but for her negligence she would not have suffered any injury from the negligence of the party charged. And therefore you have that question in this case which requires you to 20 pass upon the credibility of the witnesses in order to ascertain the truth. There are at least two witnesses who testified that as a matter of fact Mrs. Nerney didn't fall into the coal hole at all. She didn't attempt to go around between the edge of it and the wall of the building at the time of the accident, but that as a matter of fact, seeing the chute, she attempted to step over it and in doing so stumbled and fell. Now, that is the testimony of a witness produced on behalf of the defendant, the Coal Company, and a gentleman who happened to be coming along at the 30 time and saw the accident. Well, I am bound to say to you that if that be true, that Mrs. Nerney attempted to step over this unusual obstruction, I say that advisedly, because we do not have coal chutes every day in the way on a sidewalk, if she attempted to step over it and by reason of the height of the heels on her shoes or for some other reason proximately resulting in her falling and therefore you find, if you so find, that it was 40

Charge to Jury.

due to her own fault in attempting to do that very thing, she cannot recover, nor can her husband. In other words, that would indicate that this injury of which she complains was due not through the negligence of the defendant, but was her own fault in attempting to do something

10 which in the exercise of reasonable and ordinary care and prudence she should not have done. So there you have what we call the contributory feature in this case. Mrs. Nerney positively states that is not the way the accident happened at all. On the other hand the driver states he saw the woman and saw it happen and the witness who has been produced and who was walking the sidewalk at the time, both positively declare that's the way it did happen; that the

20 cover of the coal hole had nothing to do with it. That she was attempting to step over the chute, her foot caught and she fell on her knees and was picked up by the witness who so testifies. In fact, as I now recall the testimony on that, there was a third person who came along afterwards and while he didn't see the accident, he did take her in a car to the home of her sister. Now, if you find there was no negligence on the part of the defendants, one or the other, or both, as I have indicated to you, because it may be you will

30 find the Theatre Company had no knowledge of the fact that the hole was open, either express or implied, if you find there is no negligence on the part of either of the defendants, why, of course, necessarily a verdict of no cause of action would result. If, on the other hand, you do find negligence, but at the same time you find Mrs. Nerney was guilty of contributory negligence, why again there could be no recovery. It is only in the event you resolve these two questions in favor

40 of the plaintiffs that they can be awarded com-

Charge to Jury.

pensation. In that event, if you so find under the greater weight of the evidence, of a credible and legal nature, that negligence has been shown, and it appears in the case as a whole that Mrs. Nerney was not guilty of contributory negligence, then she would be entitled to receive a sum which in your judgment and discretion would properly and adequately compensate her for the injuries she suffered, having in mind its nature and extent, the pain and suffering which could be reasonably expected to accompany it; whether it has any permanent features that will incapacitate her; you have her testimony in that regard as to the injuries she received, and she would be entitled to a sum which in your judgment and discretion would properly and adequately compensate her. With regard to Mr. Nerney, he would be entitled to recover in the way of reimbursement such money as he may have expended as appears in the evidence in the attempt to cure his wife of her injuries, that is, the expense incurred for medical care and such other direct and proximate expenses as may have been required in attempts to cure his wife of such injuries. He likewise claims that he experienced a loss of service of his wife in the household, for which he would likewise be entitled to compensation if you find any evidence in the case to support it. I do not recall any other phases of compensation sought by either of these plaintiffs; if so, counsel may so indicate to me. Hearing none, I presume I have covered all the phases of compensation in that respect.

There has been some statement made by a physician produced on the part of the plaintiffs that some operation might be necessary with regard to the complete cure of Mrs. Nerney of her injuries. Some testimony likewise, as I recall

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Charge to Jury.

as to the reasonable and probable expense. Whether that operation be necessary would depend on how you find the state of the evidence. Now, if it be a fact that in all reasonable probability such operation will be necessary, having in mind the testimony with regard to the expense, and that you find it to be reasonable, you would have the right to add and include that as an item in the award to be made to Mr. Nerney. Now, these remarks are all predicated, as you will understand, upon the proof of negligence upon the part of one or the other of the defendants, or both, as the case may be. You are not to hold the Stanley-Fabian Company unless you find that a reasonable time had elapsed between the time when the coal hole cover was first taken off and the time of the accident to have, impliedly at least, given notice to the Theatre Company that the hole in question was not properly protected in the interest of the traveling public or the pedestrians, particularly Mrs. Nerney as one of them. With regard to the other defendant, I may say that the liability there depends generally upon the proof of negligence on the part of this employee. If there was no negligence and none proven, I mean by credible evidence, why then, of course, you could not hold the coal company, neither indeed could you hold the theatre company. You understand that one or both or either could be held under the rules of law I have given you, always bearing in mind the fact that if Mrs. Nerney herself was guilty of contributory negligence, there can be no recovery. In the circumstance, the case is submitted to you with the injunction that you endeavor to do justice as between these litigants.

I may say that there are two plaintiffs and two defendants here and you are to distinguish

Exceptions to Charge.

of course with regard to the recovery that either or both of the plaintiffs are so entitled to. Of course, if you find in favor of Mrs. Nerney, her husband necessarily, if the evidence justifies it, would likewise be entitled to recover, but you must separate these two verdicts if you find in favor of the plaintiffs, so much for Mrs. Nerney 10
and so much for her husband, bearing in mind the rule I have given you, and likewise covering the defendants. If you find against both defendants, you will say so. If you find against one or the other, you will so indicate and if you find one not liable and the other liable, then necessarily your verdict will be so **couched**. In making that remark, you will understand I have no opinion to express as to how the verdict should go in this case. 20

Thereupon the jury retired.

EXCEPTIONS.

Mr. Coult: I except to the Court's refusal to charge specifically the first, second and third requests of the plaintiffs' requests to charge.

The Court: Exception is allowed.

The Court: I wish you would bring that jury back. 30

LAWRENCE, *J.*, Ladies and Gentlemen of the Jury, as the result of a certain exception that was taken by counsel in reference to the charge for the operation that it is said may be reasonably and in all probability necessary with regard to the injury of Mrs. Nerney, I do say to you that of course that operation may or may not occur. If Mrs. Nerney does not desire it, and if it is not performed of course you cannot make any al- 40

Exceptions to Charge.

lowance in any award of damages to her therefor. In other words, you have regard to what she said on that subject and it must appear that the operation is reasonably and probably necessary, but if you find it is not to be performed and the testimony doesn't indicate it will be, why, you
 10 cannot include it; therefore I desire to modify my statement in that regard. Now again, I say to you that I express no opinion as to the verdict in this case. It depends on how you determine the issue of negligence and that of contributory negligence. Please bear that in mind. I just called you back to modify my statement with regard to the alleged operation that is said to have been necessary with regard to Mrs. Nerney's injuries. You may retire.

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EXCEPTIONS.

Mr. Coult: (On a later date) I desire to except to what the Court said to the jury after having called them back, I not having been present at the time.

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PLAINTIFFS' REQUESTS TO CHARGE.

NEW JERSEY SUPREME COURT.

MORRIS COUNTY.

DOLORES NERNEY and JAMES L. NERNEY, her husband, <div style="text-align: right;"><i>Plaintiffs,</i></div> <div style="text-align: center;"><i>vs.</i></div> STANLEY-FARIAN CORPORATION, a corp. and PARK UNION LUM- BER COMPANY, a corp	}	Action at <i>Law.</i>	10
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1. A person walking on the sidewalk of a public street is not required to use the highest care or extraordinary watchfulness, but such reasonable care as one under the circumstances, being reasonably prudent and careful would exercise and ought to exercise. 20

2. A pedestrian is not obliged to look constantly where he is going nor to give unremitting attention to his steps and it follows that he is not guilty of contributory negligence as a matter of law merely because failing to do so he falls into a hole. 30

3. The rule is settled that the traveling public have a right to presume, that there is no dangerous impediment in any part of the highway, in the absence of notice of the presence of such impediment. This principle applies to all interferences with safety of travel arising from temporary uses of the highway that are not the normal and permanent incidents thereof, and it relieves persons passing along the highway from any obligation to look for such interference with travel. 40

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New Jersey Court of Errors and Appeals

DOLORES NERNEY and JAMES L.
NERNEY, her husband,
Plaintiffs-Appellants,

vs.

STANLEY FABIAN CORPORATION, a
corporation, and PARK UNION
LUMBER COMPANY, a corpora-
tion,
Defendants-Respondents.

*Action
at Law.*

*Appeal from
Supreme
Court.*

BRIEF FOR DEFENDANT-APPELLEE STANLEY-FABIAN CORPORATION.

The appeal of the plaintiffs-appellants from the judgment entered against them in favor of the defendants-respondents on a verdict after trial in the above action, is grounded solely upon the refusal of the trial court to charge verbatim a portion of the opinion rendered in the case of *Reilly v. B. S. Janney, Jr. & Co.*, 103 Law, p. 11, 135 Atl., p. 66 (S. C., p. 121, l. 30).

Facts.

The facts stated in plaintiffs' brief omit certain vital elements, and the Court's attention is respectfully called to the following evidence adduced at the trial.

On her direct testimony, plaintiff Dolores Nerney testified that as she proceeded along the sidewalk she was aware of the presence of a truck at the curb, and a chute extending from the truck to the sidewalk to within two or three feet from the building line (S. C., p. 16, ll. 33-40; S. C., p. 17, ll. 1-11). She accordingly

changed her course (S. C., p. 30, ll. 32-40), and although she was looking at the sidewalk (S. C., p. 31, ll. 37-40; S. C., p. 32, ll. 11-14) she claims to have suddenly found herself in a coal hole (S. C., p. 17, ll. 16-19), but could give no explanation as to how this came about or how she came to fall (S. C., p. 35, ll. 12-16). The fact was undisputed that the coal chute extended from the wagon to the coal hole on the sidewalk, over which was placed the cover of the coal hole (S. C., p. 80, ll. 24-31; S. C., p. 81, ll. 33-39; S. C., p. 87, ll. 1-3), and that at the time of the accident, the coal hole had been uncovered by George Richardson, the driver of the defendant, Park Union Lumber Company, without any knowledge or notice to the defendant, Stanley Fabian Corporation, as the theatre being operated by them was closed (S. C., p. 92, ll. 1-13). The only explanation of the accident was the testimony of Richardson (S. C., p. 89, ll. 26-30; S. C., p. 90, ll. 16-31) and witness Paul L. Caniff (S. C., p. 97, ll. 33-40; S. C., p. 98, ll. 1-10). The testimony of these witnesses was to the effect that Mrs. Nerney in attempting to step over the end of the chute apparently caught her heel and tripped, landing on her knees on the sidewalk.

POINT I.

The request to charge was not applicable to the admitted facts in the case.

The request to charge was apparently taken from the opinion rendered by Chief Justice Gummere in the case of *Reilly v. B. S. Janney, Jr. & Co., Inc.*, 103 Law, p. 11, 135 Atl., p. 66, but while it enunciates and expresses the settled law of the State under certain circumstances, it failed to include the immediately following

sentence in the opinion above referred to. This sentence, if included in the request, would have made it entirely proper, since it provided for the very facts in the case at bar, which distinguishes it from the cases upon which the Reilly case was decided. The omitted sentence reads as follows: "If the traveller sees them he must, of course, use reasonable care to avoid them, but he is not negligent merely because he does not look for them."

In *Durant v. Palmer*, 29 Law, p. 544, cited in the Reilly case, the plaintiff had no notice or knowledge of any unusual condition in the sidewalk, but was enticed into stepping into an open areaway by a window display maintained by the defendant.

In *Thomas v. Consolidated Traction Co.*, 62 Law, p. 36, the accident happened late at night, at which time the plaintiff fell over an unguarded and unlighted pile of rails which had been placed in the street by the defendant. The plaintiff did not see them, nor did he have any notice of their presence. In that case it was held for the jury to decide whether or not in the exercise of reasonable care he should have seen them.

In *Matheke v. U. S. Express Co.*, 86 Law, p. 586, also cited in the Reilly case, a defendant was charged with negligence for the failure of its driver to see a scaffold suspended over the street and with which the top of the wagon he was driving came in contact. The evidence showed that the driver was watching his horses and looking where he was going, therefore failing to see the overhead obstruction, which he did not anticipate.

In the case at bar, as pointed out, in the additional state of facts set forth heretofore,

Mrs. Nerney had notice and warning of an unusual obstruction in the sidewalk, so much so that she changed her course, and made observations for a place to walk. Under the rule laid down in the Reilly case, she was, therefore, not absolved from the duty of looking.

It is, therefore, respectfully urged that it was not error for the trial court to refuse to charge the jury as requested, as the point of law set forth in the request, namely, the absolution of the pedestrian from the duty to look when he has no notice or is not aware of the presence of any obstruction or impediments, is not involved in this case.

A request to charge must be supported and warranted by the evidence. *Humphries v. Woodstown*, 48 Law, p. 588; *Epstein v. Hammer Piston Ring Co.*, 2 Misc., p. 231, and it is not error for a court to refuse to charge the jury upon a point of law not involved in the case. *New Brunswick Steamboat & Canal Transportation Co. v. Treir*, 24 Law, p. 697.

A request to charge that ignores an essential fact which is part of the essence of the action is also bad. *Rothstein v. Rothstein*, 143 Atl., p. 366; 6 A. R. 1460.

POINT II.

The request to charge insofar as it was applicable to the case was covered in the charge of the Court.

The trial court included in its charge to the jury the following: "Streets and sidewalks are presumed to be free from obstruction, and if a person is injured by reason of excavation in them, he or she is not bound to use more than

ordinary care, unless the defendant shows that the excavation was properly carried on in some way to warn the public of danger, and the negligence on the part of the person injured is not in general to be presumed where such person is using a public sidewalk, as in the present case, but it must be proved as a matter of defense, and whether there was negligence or not is a question of fact to be decided by the jury" (S. C., p. 109, ll. 12-23).

"The duty undoubtedly was on the part of the defendants to guard the coal hole in question in such a reasonable way and nature that the public using the street, as heretofore said, of whom Mrs. Nerney was one, should not fall into the hole or fall upon the sidewalk by reason of such hole being improperly guarded or protected, whereby an injury results. So it is therefore said that one who obstructs a sidewalk by placing excavations in it is bound to render it safe to the public" (S. C., p. 109, ll. 29-38).

"Naturally the coal company had a perfect right to deliver the coal to the theatre company, but in doing so it was charged with the duty to exercise due and reasonable care, because ordinarily the sidewalk is a place of safety, so regarded in the law. Pedestrians are to presume that it is free from excavation or obstruction, so when Mrs. Nerney saw this chute, it is a question for you to determine whether that hole was improperly protected in the immediate circumstances" (S. C., p. 114, ll. 34-40; S. C., p. 115, ll. 1-4).

The only element contained in the request to charge which was not included in the general charge of the Court was that point urged by the plaintiffs that the plaintiff Dolores Nerney

was under no obligation to look for the coal hole. This as argued under Point I of this brief was an improper request under the rule laid down in the case of *Reilly v. B. S. Janney & Co. Inc., supra*, which distinguishes between that character of cases where the traveler had no notice of any obstruction and was therefore under no duty to look for that of which he was unaware, and such cases as the case at bar, where the pedestrian had notice of an unusual condition and was thereby charged with the duty to exercise reasonable care to avoid injury, by reason of the unusual conditions of which he had notice.

POINT III.

The failure to charge the request was harmless.

As pointed out under Points I and II, plaintiffs were not entitled to a charge absolving Mrs. Nerney from the duty to use reasonable care under the facts in the case. The mere academic proposition of law cannot be insisted upon where the facts in the case do not warrant such a charge to the jury. Furthermore, by the clear weight of the evidence, Mrs. Nerney was guilty of contributory negligence, and was so held to be by the clear weight of the evidence on a decision by the Supreme Court after the first trial of the case, *Nerney v. Stanley Fabian Corporation, et als.*, 145 Atl. 466, VII N. J. Misc. Rep. 361.

The verdict was, therefore, just and proper regardless of the charge of the Court, and in fact, so far as this appellee is concerned, the case should not have been submitted to the jury.

It is respectfully submitted that these elements can also be taken into consideration on this appeal by the Appellate Court in the interests of justice.

It is therefore respectfully submitted that the judgment of the Supreme Court should be affirmed.

Yours truly,

WILLIAM P. BRAUN,
Attorney and of Counsel for
Defendant-Appellee,
Stanley Fabian Corporation.

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New Jersey Court of Errors and Appeals.

DOLORES NERNEY and JAMES L. NERNEY, her husband,
Plaintiffs-Appellants,

vs.

STANLEY-FABIAN CORPORATION and
PARK UNION LUMBER Co.,
Defendants-Respondents.

Action at Law.

On Appeal from
Supreme Court.

BRIEF FOR DEFENDANT, PARK UNION
LUMBER COMPANY.

The appellants prosecute their appeal in this court because of the alleged failure of the court below to charge their third request as follows:

“The rule is well settled that the traveling public have a right to presume, that there is no dangerous impediment in any part of the highway, *in the absence of notice of the presence of such impediment.* This principle applies to all interference with safety of travel arising from temporary uses of the highway that are not normal and permanent incidents thereof, and it relieves persons walking along the highway from any obligation to look for such interferences with travel.”

POINT I.

The Court charged the request.

The Court charged as follows (109) :

*“streets and sidewalks are presumed to be free from obstruction and if a person is injured by reason of an excavation in them, he or she is not bound to use more than ordinary care, unless the defendant shows that the excavation was properly guarded in some way to warn the public of the danger, and negligence of the person injured is not in general to be presumed when such person is using a public sidewalk, as in the present case, but it must be proved as a matter of defence. * * * It is said in connection with sidewalks that a person walking thereon is not required to use the highest degree of care or extraordinary watchfulness, but such reasonable care in the circumstances as a reasonably prudent person would exercise.”*

And on page 112, line 26, *et seq.* :

“Having in mind the security which was to be accorded Mrs. Nerney in using the sidewalk at the time, and the rule of law I have heretofore stated to you with regard to her right to assume that it was safe for her to walk upon the sidewalk.” (112)

And on page 114, line 36, *et seq.* :

“ordinarily the sidewalk is a place of safety, so regarded in the law.

Pedestrians are to presume it is free from excavation or obstruction.”

The Court is not required to charge in the exact words of the request, but he may do so in substance.

The limitation contained in the request to charge

“in the absence of notice of the presence of such an impediment”

is not mentioned or argued in appellants' brief.

The rule of law no doubt is

“The rule is well settled that the traveling public have a right to presume, that there is no dangerous impediment in any part of the highway, *in the absence of notice of the presence of such an impediment.*”

The Court charged that

“the streets and sidewalks are presumed to be free from obstructions”; that

“the plaintiff had a right to assume it was safe for her to walk upon the sidewalk,” and

“Pedestrians are to presume it is free from excavation or obstruction”, and

in so doing the Court charged more favorably for the plaintiff than requested.

There is no error in this respect.

POINT II.

The request to charge was not relevant to the issue before the court.

The brief of plaintiff quotes in detail the evidence given by the plaintiff Mrs. Nerney by which it clearly appears that she *saw the chute extending from the coal wagon to the sidewalk, but declares she did not see the coal hole.* The cover rested on the side opposite to the point where the chute entered, and extended over, and was supported by, the edges of the chute. This she saw before she reached the obstruction; she testifies she saw the end of the chute and attempted to walk between that point and the building; to say she saw the end of the chute with such clear vision that she attempted to

pass around it, and then did not see or know it was a coal hole is subject to the closest scrutiny.

With these facts admitted in the case, the request to charge is not applicable; the request to charge is based upon the theory that she did not know of the coal hole, the rule of law is only applicable

“in the absence of notice of the presence of such impediment.”

Assuming the court had failed to charge as requested no harm could have come to the plaintiff as she saw the impediment, and in attempting to pass around it, fell in or by the hole and thus received her injuries.

We respectfully urge the appeal should be dismissed.

KING & VOGT,
Attorneys of Park Union
Lumber Company.

ELMER KING,
Of Counsel.

New Jersey Court of Errors and Appeals

DOLORES NERNEY and JAMES L.
NERNEY, her husband,
Plaintiffs-Appellants,

vs.

STANLEY FABIAN CORPORATION, a
corporation, and PARK UNION
LUMBER COMPANY, a corpora-
tion,
Defendants-Respondents.

*Action
at Law.*

*Appeal from
Supreme
Court.*

BRIEF FOR PLAINTIFFS-APPELLANTS.

Defendants-respondents, Stanley Fabian Corporation and Park Union Lumber Company (hereinafter called defendants) have judgments for costs on verdict after trial in the above action against the plaintiffs-appellants, Dolores Nerney and James L. Nerney, her husband (hereinafter called plaintiffs), (Judgment, S. C., p. 12). Plaintiffs appeal to this court on the ground that the trial judge erred in refusing to charge the following request (Grounds of Appeal, S. C., p. 13):

“The rule is settled that the traveling public have a right to presume, that there is no dangerous impediment in any part of the highway, in the absence of notice of the presence of such impediment. This principle applies to all interferences with safety of travel arising from temporary uses of the highway that are not normal and permanent incidents thereof, and it relieves persons passing along the highway from any obligation to look for such interferences with travel.”

This ground of appeal is based on plaintiffs' third request to charge (S. C., p. 121, l. 30). Exception to refusal to charge (S. C., p. 119, l. 25).

Facts.

On November 17, 1927, the plaintiff, Dolores Nerney, while walking west on the north side of Blackwell street, in the City of Dover, sustained a fall which resulted in serious permanent injury to her right leg. She sued to recover for her personal injuries and her husband joined her with a claim for consequential damages.

It was Mrs. Nerney's contention that she had stepped into an open coal hole maintained by the defendant, Stanley-Fabian Company in a sidewalk which fronted the premises of that defendant, and that this coal hole had been opened and left unguarded by servants of the defendant, Park Union Lumber Company, who had been delivering or were about to deliver a load of coal to the theatre building.

The defendants contended that Mrs. Nerney had been injured in tripping over a coal chute as she attempted to step over it. The question of fact as to the negligence of one or both of the defendants was left to the jury. Both defendants had pleaded contributory negligence and this question at issue was also left to the jury to determine. Whether the jury found adversely to the plaintiffs on the question of the defendants' negligence or on the question of Mrs. Nerney's contributory negligence can only be surmised. Therefore, if the law with regard to contributory negligence was improperly stated to the jury, there was error.

I.

The request to charge contained a well-settled principle of law.

The plaintiffs' third request to charge, which has been already quoted, was taken verbatim from the opinion of Chief Justice Gummere in the case of *Reilly v. B. S. Janney, Jr., & Co., Inc.*, 135 Atl. 66 (not yet reported in the State Reports). This case was decided in the Supreme Court in 1926 and the opinion is based upon the reasoning of *Durant v. Palmer*, 29 N. J. L. 544; *Matheke v. U. S. Express Co.*, 86 N. J. L. 586; 92 Atl. 399. That it expresses the settled law of this State cannot be questioned.

II.

The request was not covered in the charge.

On the question of contributory negligence the Court charged as follows (S. C., p. 109, ll. 12-28):

"Streets and sidewalks are presumed to be free from obstruction and if a person is injured by reason of an excavation in them, he or she is not bound to use more than ordinary care, unless the defendant shows that the excavation was properly guarded in some way to warn the public of the danger, and the negligence on the part of the person injured is not in general to be presumed where such person is using a public sidewalk, as in the present case, but it must be proved as a matter of defense, and whether there was negligence or not is a question of fact to be decided by the jury. It is said in connection with sidewalks that a person walking thereon is not required to use the highest degree of care or extraordinary watchfulness but such reasonable care in the circumstances as a reasonably prudent person would exercise."

The above instruction not only ignored the request that the jury should be charged that Mrs. Nerney was relieved from any obligation to look for the coal hole, but intimates she was required to use even more than ordinary care if the defendant had shown that "the excavation" was properly guarded "in some way" to warn the public of danger. It informed the jury that negligence is not "in general to be presumed" where a person is using a public sidewalk, as in the present case, but must be proved, without enlightening the jury as to whether the case in hand was one of those where the plaintiff's negligence would have to be proved by the defendant or whether it fell outside of the "general" class and was one where the jury should presume there was negligence without requiring proof of the matter. It is true that no exception was taken to this portion of the charge but the purport of it made the failure to charge as requested even more hurtful than if the Court had charged that no more than ordinary care is ever required of pedestrians and that negligence is never presumed but must always be proved. But, whether the charge with regard to contributory negligence as given was technically correct or incorrect, the Court did not charge the jury either specifically or otherwise, what the plaintiff had requested the Court to charge, namely, that there was no obligation on the part of the plaintiff to look for the coal hole.

III.

The failure to charge this request was harmful.

Mrs. Nerney asserted frequently in the course of her examination and cross examination that she had not seen the coal hole previous to going

into it. On direct examination she testified as follows (S. C., p. 17, l. 15; p. 18, l. 10):

Q And what did you do, Mrs. Nerney?

A Well, I attempted to walk between the end of the chute and the building, on the sidewalk; and suddenly I found myself there into this coal hole.

Q Is there any doubt that you went in the coal hole? A Absolutely not; Judge Coult, there couldn't be.

Q Now, had you been aware of the coal hole before that time? A I had not.

Q Did you know that the end of this chute that you mentioned ran to the coal hole? A No, I did not, Judge Coult. I saw it come to the sidewalk.

Q Now, before the accident, did you see any coal hole? A I did not.

Q And did you see any cover over the coal hole before the accident? A Not before the accident, I did not.

Q Can you state to the jury where you were looking as you walked through this aperture between the end of the chute and the front of the building? A Well, as one would look ahead of them coming up Blackwell street.

Q You were not looking at the sidewalk?

A No, I was looking as you look walking along—

Q Was there anybody—I withdraw that. Did you know what was in the truck? A No, I didn't.

Q Was any coal being delivered at the time? A There was not.

Q Was there anybody in attendance on this truck? A Apparently not. I saw nobody.

Q How did you get out of this coal hole?

A A gentleman who stood nearby helped me out.

On cross examination by counsel for the defendant, Stanley-Fabian Company as testified as follows (S. C., p. 27, ll. 8-20):

Q Just how did you hurt that right knee or right leg; how did you come to hurt it; you stepped in this hole, you say, with your left leg? A I thought I made that clear that I fell with my right leg bent under me and my weight thrown on that knee.

Q What happened to your left leg? A I was cut and bruised—

Q No, where did it go? A It went down in the coal hole.

Q And no doubt about that? A Absolutely no doubt about it.

And again (S. C., p. 27, ll. 38-40):

Q You didn't see the hole? A No.

Q Did you look for the hole? A No, I didn't. I was looking for a space to walk. What seemed to be a perfectly clear space.

Again (S. C., p. 29, ll. 27-40):

Q You didn't care? A I was not interested in the coal wagon and the chute or whatever it may have been.

Q But you knew they had been delivering through a hole? A No, I didn't know anything about it.

Q Didn't you anticipate a hole there? A No.

Q Did you care whether there was a hole there or not? A Yes, I cared if there was a hole there.

Q Did you look to see if there was a hole there? A I looked for a place to walk and walked on it.

Q Did you look for a hole? A No.

Again (S. C., p. 35, l. 25; p. 36, l. 15):

Q And you are sure you didn't see any hole? A I did not.

Q You are sure you didn't see any coal hole cover? A Not before the accident.

Q And you are sure you didn't see the end of the chute before the accident? A No, I don't remember.

Q And the reason you didn't see that was because you didn't look, wasn't that so?

A No, I saw what appeared to be a perfectly clear passage for me to go up the street.

Q Well, how do you know it was perfectly clear if you don't know whether or when or what distance you made this observation? A Well, I just don't remember when I made the observation, but I do remember that there was a space on the sidewalk that appeared to be perfectly clear for pedestrians to pass over. There were people on the street coming and going the same as I.

Q And some of them were stepping over the coal chute? A I don't know what they were doing, I didn't notice.

Q Did you see anybody pass over this particular place before you? A I don't remember.

Again (S. C., p. 38, ll. 12-25):

Q (Question read.) I didn't see the coal hole.

Q And you didn't see the end of the chute? A If it were in the coal hole, I didn't see it because I didn't see the coal hole.

Q Now, will you listen to the question, Mrs. Nerney, and try to answer it? You didn't see the end of the chute before you fell? A No.

Q That's true, isn't it? A I should think so.

Q And the reason you didn't see it was because if you had looked when you were there, the end of the chute was in the coal hole?

Again (S. C., p. 41, ll. 5-15):

Q What did you do to ascertain that before, whether or not there was any danger or any obstruction? A I simply looked ahead

to see if there was a place for me to walk and I walked on it.

Q Did you walk on the space that was there for you to walk on? A I surely did. I walked on the sidewalk.

From all the foregoing it is to be noted that Mrs. Nerney was maintaining throughout her testimony with great persistency that she had been walking on a sidewalk looking ahead of her without paying particular attention to the place where she happened to put her feet and that she did not at any time before the accident look for or observe the presence of this coal hole.

With this testimony in the case it was of vital importance to the plaintiffs to have the Court instruct the jury that Mrs. Nerney was under no obligation to look for this particular interference with travel, otherwise the jury might readily conclude that she was convicted of contributory negligence out of her own mouth.

When the Court charged the jury that she was bound to use ordinary care in the use of the sidewalk, without making it clear to the jury, as the plaintiffs requested, that the duty to use reasonable care did not include the duty of looking for the presence of the coal hole into which Mrs. Nerney said she fell, the Court permitted the jury to speculate as to one of the elements of ordinary care required of pedestrians, though that element had already been determined as a matter of law by the courts of this State. The result was that the jury might defeat the plaintiff because she failed to look where she was walking, though she was under no legal duty to do so.

This is an appeal and not a rule to show cause. The request to charge was sound. The Court declined to charge it and did not cover it in the

charge. The Court's failure to do so prejudiced the plaintiffs.

We submit that the judgment of the Supreme Court should be reversed.

Respectfully submitted,

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