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Notice of Appeal

(Filed June 26, 1934.)

**Hudson County Court of
Common Pleas**

10

ANNA PLEVA,
Plaintiff,

v.

SAMUEL GOOTZEIT,
Defendant.

Action at Law

20

*To the above named Plaintiff, and Maurice M.
Krivit, Esq., her attorney, 1 Exchange Place,
Jersey City, N. J.:*

PLEASE TAKE NOTICE that the defendant herein
appeals from the whole of the judgment entered
in this cause to the New Jersey Supreme Court.

Respectfully, etc.,

AUTENRIETH & WORTENDYKE,
Attorneys for Defendant.

30

Dated June 22nd, 1934.

Service of the within Notice of Appeal is here-
by acknowledged this 22nd day of June, 1934.

MAURICE M. KRIVIT,
Attorney for Plaintiff.

40

Order

(Filed July 5, 1934.)

HUDSON COUNTY COURT OF COMMON
PLEAS

10

ANNA PLEVA,

*Plaintiff,**v.*

SAMUEL GOOTZEIT,

Defendant.

} Action at Law

20

Defendant having served his notice of appeal to the New Jersey Supreme Court from judgment entered in favor of plaintiff in this cause, on June 22, 1934; and

30

It appearing that the Official Court Stenographer, by reason of unforeseen circumstances, has been unable to furnish a stenographic transcript of the testimony, charge and exceptions on the trial of this cause in sufficient time to enable defendant to serve his grounds of appeal within the time prescribed by the rules;

It is, on this 2nd day of July, 1934, ORDERED that defendant herein have until the 16th day of July, 1934, to serve and file his grounds of appeal in this matter.

THOMAS H. BROWN.

40

Grounds of Appeal

(Filed July 16, 1934.)

NEW JERSEY SUPREME COURT

ANNA PLEVA,
Plaintiff-Appellee,

v.

SAMUEL GOOTZEIT,
Defendant-Appellant.

10

On Appeal

*To the above named Plaintiff-Appellee, and
Maurice M. Krivit, Esq., her attorney, 1 Ex-
change Place, Jersey City, N. J.:*

20

PLEASE TAKE NOTICE that the following are the
Grounds upon which defendant-appellant rests his
said appeal:

1. The Trial Court denied defendant's motion
for a mistrial during the selection of the jury,
which defendant contends was an abuse of dis-
cretion on the part of the Trial Court and revers-
ible error. Plaintiff's attorney, in selecting the
jury, asked Number 3 in the box for the name of
his employer and the kind of business in which
said employer was engaged, and whether the
juror or his employer was in the insurance busi-
ness. Being informed by the juror that his em-
ployer was an insurance company, plaintiff's at-
torney asked said juror what kind of insurance,
and was told by the juror that his employer wrote
all kinds of insurance. Plaintiff's attorney then
asked whether said juror's employer wrote insur-
ance risks covering tenement house and apart-

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Grounds of Appeal

ment house properties and received answer in the affirmative.

- 10 2. The Trial Court, in denying defendant's motion for a mistrial during the selection of the jury, used the following language, which defendant contends was highly prejudicial to defendant and constituted an abuse of discretion on the part of the Trial Court and reversible error:

20 "The Court: Yes. I might say that the attitude of the court in this particular, for the purpose of the record in case this case is carried up, is because of the fact that a case was tried here yesterday that took the best part of two days. The jury was out for six hours. One of the jurors was listed as a broker and as a matter of fact he was in the insurance business and he is alleged to have made certain remarks in the jury room with relation to matters of this sort, and I think as a matter of justice that no man should be permitted to sit on a jury where there is any possible question of bias; and I think, therefore, if a man is in the insurance business insuring tenement house properties—which I know nothing about but which I take from the questions of counsel—that he should not in fairness to the litigants be permitted to sit on a jury."

30

3. The Trial Court overruled defendant's objection to the following question to the witness, Anna Pleva:

"Where were you working?"

- 40 4. The Trial Court overruled defendant's objection to the following questions to the witness, Anna Pleva:

Grounds of Appeal

"Did you seek employment when you were able to?"

"Did you get some employment?"

"When did you first get employment?"

"What employment was that?"

"What did you do with that corporation?"

10

"How long did you work there?"

"How much were you paid for that?"

"What was your weekly average?"

"Were you able to get work after that?"

"How much did you make there?"

"Did you make the same as you did before?"

"Is that all the work you have been able to get?"

20

5. The Trial Court denied defendant's motion for a non-suit.

6. The Trial Court charged the jury as follows:

"And, third, if you so find" (in favor of plaintiff) "you will compensate her for any loss of wages;"

"In connection with the question of loss of wages there was some colloquy between counsel and a motion was made to strike out some testimony and I told counsel I would handle it in my charge, and that is what I purpose to do now. You will recall that the plaintiff's testimony developed that she worked for Henry L. Doherty and Company. They are big oil specialists in New York, Mr. Doherty being one of the oil geniuses of this country and head of the City Service Company, and she worked for this firm getting one hundred dollars a month. She said she received a letter from them. Of course she had her own

30

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Grounds of Appeal

10 opinion as to why she was let out. That opinion, however, is not to enter into your deliberations. In the absence of any statement from Henry L. Doherty and Company we have got to take what the letter said and they said they let her out due to the depression. Now, that being so she could not sur-charge this defendant, nor could you penalize this defendant for any damages by reason of loss of this position. Say you or I worked for the Public Service for five hundred dollars a month and we had an accident and were injured and weren't employed when we went back. If we could show we had this steady position and they would not hold it open, and we went out looking for another position and couldn't get one, then we could charge the loss of that position to that accident, because the loss reasonably flowed from the accident. In that case the position would be lost by reason of the accident, but I don't see that there is any such situation in this case."

20

7. The Trial Court charged the jury as follows:

30 "So, likewise, I charge you the reverse, that is, that contributory negligence is the reverse of negligence."

Respectfully, etc.,

AUTENRIETH & WORTENDYKE,
Attorneys for Defendant-Appellant.

Dated July 14th, 1934.

40 Service acknowledged as within time July 16, 1934.

MAURICE M. KRIVIT,
Attorney for Plaintiff-Appellee.

Summons

The defendant in this cause was duly summoned.

Complaint

(Filed July 27, 1932.)

10

HUDSON COUNTY COURT OF COMMON PLEAS

ANNA PLEVA,

Plaintiff,

v.

SAMUEL GOOTZEIT,

Defendant.

Action at Law

20

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

1. The defendant, at the time hereinafter mentioned was the owner and had control of the building and premises known as No. 254 Jackson Avenue, in the City of Jersey City, County of Hudson and State of New Jersey, portions of which building consisting of separate offices, were rented out by the defendant to various persons as places of business; that the defendant reserved to himself control of the hallways, lobbies and staircases of said building used in common as the sole means of access to and egress from the offices in said building to the adjoining street.

30

40

Complaint

10 2. Defendant assumed the duty of providing necessary and sufficient light in said hallways and staircases, in order that persons in the said building might be permitted to pass along said hallways and staircases safely; and that the defendant further assumed the duty of maintaining said hallways and staircases in good condition.

20 3. At the time hereinafter mentioned, defendant negligently and carelessly maintained said hallways and staircases in a darkened and unlighted condition, and failed and wholly omitted and did not provide and maintain any lights in said hallways and staircases; and further that defendant negligently and carelessly maintained said hallways and staircases, and failed and wholly omitted to keep said hallways and staircases in good condition.

 4. On or about the 9th day of June, 1932, at or about 6 P. M. (Daylight Saving Time), plaintiff was lawfully in said building, and while passing down the stairs leading from the offices therein to the street adjoining, was caused to fall and did fall, by reason of:

30 (a) The absence of lights therein and its dark and unlighted condition;

 (b) The defective condition in which said staircases were maintained;
and this without any fault or negligence on the part of the plaintiff.

40 5. As a result of said fall, plaintiff was severely wounded, bruised and injured in and about her body, arms, limbs, back and head, her nervous system was shocked, having sustained a fracture of

Complaint

the right arm, loss of two front teeth, torn ligaments in the right shoulder, contusions and lacerations of the chin, contusions and lacerations of the right side; and permanent scars on the right side of her face; and she became and was sick, sore and disabled and was confined to her bed and her house for some time and was obliged to and did employ medical aid and attendance, in order to try to effect a cure of her injuries, which cure has not as yet been effected.

10

6. By reason of the injuries sustained by plaintiff, she was compelled to and did expend a large sum of money for medical aid and attendance, and will in the future be obliged to expend large sums of money for a like purpose. Further, plaintiff has been deprived of pursuing her usual gainful occupation.

20

Wherefore plaintiff demands as damages the sum of Twenty-five thousand (\$25,000.00) dollars and costs of suit.

MAURICE M. KRIVIT,
Attorney for Plaintiff.

30

40

Answer

(Filed August 9, 1932.)

HUDSON COUNTY COURT OF COMMON
PLEAS

10

ANNA PLEVA,

*Plaintiff,**v.*

SAMUEL GOOTZEIT,

Defendant.

} Action at Law

20

Defendant residing in the County of Hudson and State of New Jersey, answering the complaint herein says that:

1. Defendant admits that on June 9, 1932, he was the owner of the building and premises known as No. 254 Jackson Avenue, Jersey City, New Jersey, but except as aforesaid defendant denies the allegations contained in the complaint.

30

SEPARATE DEFENSES.

1. At the time and place mentioned and described in the complaint, plaintiff failed to exercise reasonable care for her own safety and in this and divers other respects was negligent and her said negligence proximately contributed in the causation of any injuries which she may have sustained.

40

2. At said time and place in making use of said premises under the circumstances then and there

Reply

obtaining, plaintiff assumed the risk of whatever injuries she may have sustained.

AUTENRIETH, GANNON & WORTENDYKE,
Attorneys for Defendant.

10

Reply

(Filed August 17, 1932.)

HUDSON COUNTY COURT OF COMMON
PLEAS

ANNA PLEVA,

Plaintiff,

v.

SAMUEL GOOTZEIT,

Defendant.

Action at Law

20

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

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1. She denies paragraphs one (1) and two (2) of the Separate Defenses.

MAURICE M. KRIVIT,
Attorney for Plaintiff.

40

Testimony

HUDSON COURT OF COMMON PLEAS

10

ANNA PLEVA,

*Plaintiff,**v.*

SAMUEL GOOTZEIT,

Defendant.

Jersey City, New Jersey,

June 13, 1934.

20

Before:

HON. THOMAS H. BROWN, Judge, and a Jury.

Appearances:

MAURICE M. KRIVIT, Esq., Attorney for the
Plaintiff.By EDWARD A. MARKLEY, Esq., of counsel.
AUTENRIETH & WORTENDYKE, Esqs., Attor-
neys for the Defendant.

30

By REYNIER J. WORTENDYKE, JR., Esq.

(Note by the Stenographer: During the quali-
fication of the jurors the following proceedings
were had:)

Mr. Wortendyke: I move for a mistrial, if the
Court please.

40

The Court: The question that has been asked
is one that is addressed to the sound discretion

Case

of the court. The court thinks as a matter of fact it is a very proper question to ask. The court is going to allow it.

Mr. Wortendyke: May I have an exception, your Honor?

The Court: Yes. I might say that the attitude of the court in this particular, for the purpose of the record in case this case is carried up, is because of the fact that a case was tried here yesterday that took the best part of two days. The jury was out for six hours. One of the jurors was listed as a broker and as a matter of fact he was in the insurance business and he is alleged to have made certain remarks in the jury room with relation to matters of this sort, and I think as a matter of justice that no man should be permitted to sit on a jury where there is any possible question of bias; and I think, therefore, if a man is in the insurance business insuring tenement house properties—which I know nothing about but which I take from the questions of counsel—that he should not in fairness to the litigants be permitted to sit on a jury.

Mr. Wortendyke: The court's statement puts me in rather an embarrassing situation and I think that my duty to my clients compels me to pray an exception to the court's statement at the present time.

The Court: You have your exception.

For the purpose of the record let the record show that the question propounded by counsel was that he noticed that juror number three, Alexander McKenzie, was listed as a bookkeeper.

Mr. Markley: There wasn't any reference to that. The only reference was after that.

The Court: Wait a minute. In substance, number three was listed as a bookkeeper—was that it?

Case

Mr. Markley: Number three was on the list as a bookkeeper.

10 The Court (continuing): And counsel asked him who he was bookkeeper for and the juror responded giving the name of the concern he worked for. The juror was then asked what kind of concern it was and he said it was an insurance company. He was then asked what kind of insurance and he said his firm wrote all kinds of insurance, and then he was asked whether or not his company wrote insurance risks covering tenement house and apartment house properties and he said yes.

20 Mr. Wortendyke: Possibly my recollection is faulty. I think that series of questions was addressed to Mr. Ransom, number nine.

Mr. Markley: No, Mr. Ransom was on the list as "Insurance business" and he said he wrote all kinds of insurance and I challenged him.

Mr. Wortendyke: Then it may be noted on the record that the question of counsel in any event included the question, "Are you in the insurance business?"

The Court: Yes.

30 Mr. Wortendyke: And your Honor allowed me an exception?

The Court: Yes. I am allowing you an exception. In order that there may be no doubt about it also, Captain Wortendyke, I will ask that you hand up to the court at the conclusion of the case any request you want to make, which I will make verbatim, on the question of insurance, if you have any doubt about possibly being prejudiced.

(Thereupon the jury was impaneled, accepted and sworn.)

40 Thereupon Mr. Markley opened to the jury for the plaintiff.

Case

Mr. Wortendyke (after the plaintiff's opening): If the Court please, in view of counsel's opening, in which the gravamen of the plaintiff's case is stated to be the defective nosings on the stairway, and in view of the pleadings which claim not only that but also failure to light the tenement house, I ask counsel at this time to state whether he intends to stand on both of the alleged bases or whether counsel intends to stand on his opening.

10

Mr. Markley: I intend to rely on both.

May I say another word to the jury?

(Addressing the jury): There is no light on this floor either. Also, gentlemen, on this point, the second landing where the doctor's office was, I forgot to mention there was no light there either and it was somewhat dark, and that is alleged in the complaint and I present it to you for what it is worth. The main thing in the case is the defective nosings and their loosened condition, which existed for a long period of time before this accident happened.

20

(Thereupon Mr. Wortendyke opened to the jury on behalf of the defendant.)

30

Mr. Markley: At this time, if the Court please, I would like to read the interrogatories and answers made by the defendant.

The Court: All right.

Mr. Wortendyke: I object to that unless they are offered in evidence.

The Court: Will you offer them in evidence?

Mr. Markley: I don't think we have to but I am glad to do it anyway.

The Court: Very well, let them be marked in evidence.

40

Anna Pleva, direct

(The interrogatories were marked Exhibit P-1 and the answers thereto were marked Exhibit P-1-a in evidence.)

10 Mr. Markley (addressing the jury): These, gentlemen, are questions put to the defendant to be answered under oath before trial so that we might have some information to give you here today, and these (referring to Exhibit P-1-a) are the answers made under oath.

(Thereupon Mr. Markley read Exhibits P-1 and P-1-a to the jury.)

20 ANNA PLEVA, the plaintiff, called as a witness in her own behalf, being sworn, was examined and testified as follows:

Direct examination by Mr. Markley:

Q. Miss Pleva, where do you reside? A. 180 Clifton Avenue, Clifton, New Jersey.

Q. And with whom do you live? A. My mother and father.

Q. What is your age, Miss Pleva? A. Twenty-five.

30 Q. On June 9th, 1932, were you employed? A. Yes, sir.

Q. And where were you employed? A. Henry L. Doherty and Company, 60 Wall Street, New York City.

Q. And what work did you do there? A. Clerk.

Q. In what department? A. In the trading department.

40 Q. And what were your earnings in that department at the time as clerk? A. One hundred dollars a month.

Q. At what time did you quit your work there at night? A. At five or a little later.

Anna Pleva, direct

Q. Did you have an appointment with your dentist on the night of June 9th, 1932? A. Yes, I did.

Q. Who was your dentist at that time? A. Dr. Harris.

Q. Did you go to Dr. Harris' office that evening? A. Yes, sir. 10

Q. What did you go there for? A. To have a cavity filled.

Q. To have a cavity filled? A. Yes.

Q. Is that the only work that you asked him to do? A. Yes.

Q. And had you been to his office before that? A. Six months ago.

Q. That is six months prior to June 9th? A. Yes. 20

Q. Had you been there between the six months prior to the time of the accident? A. Yes.

Q. And was that at 254 Jackson Avenue? A. Yes, sir.

Q. Jersey City? A. Yes.

Q. On June 9th, 1932, did you have dental treatment at the doctor's office? A. Yes.

Q. After you received your dental treatment what did you do? A. I proceeded to go out.

Q. Let me go back a moment. Where was the doctor's office, on what floor in the building? A. Second floor. 30

Q. You had to go up one flight of steps? A. Yes.

Q. And then go in his office? A. Yes.

Q. Had you had this dental treatment? A. Yes, and came down again.

Q. And then you had your accident? A. Two flights of stairs—you go here (indicating) and make a turn here (indicating) and— 40

Q. In other words there is a landing in between

Anna Pleva, direct

as you go down from the second floor to the first floor? A. Yes.

Q. And is the first floor on the level with the street? A. Yes.

Q. You are on your way down now, are you? A. Yes.

10

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

Q. As you went down will you tell his Honor and the jury just what happened? A. I went down about three steps when my heel got caught in a nosing on the stairs.

Q. When what? A. My heel got caught in a raised nosing on about the third step, I think.

20

Q. Third step? A. Yes, when I was going down, and the next I knew I let out a scream and the next I know Dr. Harris was there picking me up and there was a dent in the wall, my tooth struck the wall.

Q. In other words your tooth struck the wall and there was a dent in the wall? A. Yes.

Mr. Wortendyke: I object to counsel repeating the answers by way of characterization and request that the answer of the witness herself stand.

30

Mr. Markley: I don't want to repeat. I just want the jurors to hear.

The Court: Objection sustained, for the purpose of the record.

Q. I think you said that the point where your heel caught was on the third step, was it not? A. Yes.

Q. Was that the third step from the top? A. Yes.

40

Q. And as you were going down how far did you fall? A. I think it was about six or seven

Anna Pleva, direct

steps in the whole flight and I must have fell a couple of feet.

Q. When you fell first what did you strike against—when you first fell? A. Struck against the wall.

Q. On which side? A. Right side.

Q. And that is when your tooth— A. That is where I got my broken shoulder too—and side.

Q. Which shoulder was broken? A. Right shoulder.

Q. Just point to the part that was broken? A. Right here (indicating) and here (indicating).

Q. You are pointing to the top of your shoulder? A. Yes, back and side.

Q. What other injuries did you receive at that time? A. Contusions and abrasions all over my face and I was bleeding and all scratched up, and my right thigh.

Q. What was the matter with your right thigh? A. A place about the size of that (indicating), all black and blue.

Q. Were these injuries painful? A. Yes.

Q. I think you said you screamed? A. Yes.

Q. Then what happened? A. The next thing I knew Dr. Harris was picking me up and taking me to the office, and on the way up he showed me the step. I just glanced at it. I was very shocked and stunned and nervous and I didn't know what I was doing, and he put me in a chair.

Q. And you looked at the step, did you? A. Yes.

Q. The third step from the top? A. Yes.

Q. What did you observe about it? A. That the nosing was raised about three-eighths to half an inch.

Q. Had you noticed that before? A. No.

Q. When you got to the office was medical aid

10

20

30

40

Anna Pleva, direct

called for you? A. Yes, he put me in a chair and I felt like fainting and Dr. Harris gave me a glass of water and he said, "How do you feel?" And I thought all my teeth were knocked out because my face was all swollen.

10 The Court: Strike all that out. Don't tell us what you thought. Give us the facts and raise your voice, because I can't hear you sitting here.

The stenographer will repeat the question.

Q. (Question repeated by the stenographer as follows: "When you got to the office was medical aid called for you?") A. Yes.

20 Q. Before I get to the medical aid,—when you got to the office and were in there for a while did anything happen to your face? A. It started to swell more and more and I felt like a knife was sticking me right in the back here (indicating).

Q. You are referring to your shoulder? A. Yes, and I felt like a knife was sticking me in the back of my shoulder and it just hung loosely, and Dr. Harris said he would call a doctor and he called up Dr. Feinberg.

30 Q. Did Dr. Feinberg come? A. Yes, he came, and they took X-rays right there in the office. Dr. Harris had an X-ray machine and they took X-rays and announced it was a compound fracture, double fracture, and he put it in a temporary splint and they said they had better call up Dr. Benjamin, a bone specialist, and I had to wait a couple of hours because Dr. Benjamin was very busy.

40 Q. Did he eventually come? A. Yes.

Q. When? A. About three hours later, I guess.

Anna Pleva, direct

Q. Then what did he do? A. He took some more X-rays in different positions and he gave me some drink to soothe me because it was painful to set my arm, gave me a drink and he put me in a cast, one of those airplane casts.

Q. How did that lift your arm? A. Lifted my arm in that position (indicating). 10

Q. Out from your body? A. Yes.

Q. Then what happened? A. Then, before that, when Dr. Feinberg came there and they noticed I had a fractured shoulder they called up my brother at home and told him all about it and he came down.

Q. Your brother came with his car? A. Yes.

Q. And got you? A. Yes.

Q. And took you home, or where? A. When he came there they got the owner of the building and Dr. Harris and my brother, and they all went to look at the stairs, and they all noticed—— 20

Q. Did you go with them at that time? A. Not at that time—going out I looked again.

Q. Going out you looked again, but while your brother was there they got Mr. Gootzeit, the defendant, and he came there and your brother and Dr. Harris and he all looked at the stairway that same evening? A. Yes. 30

Q. While you were still there? A. Yes.

Q. Was there any light in that place while you were going down? A. No.

Q. After you got home what did you do? A. Dr. Harris gave me some pills and I took them because I wouldn't be able to sleep very much at night because it was very painful, so I went immediately to bed.

Q. Let me go back again for a moment. When you went down finally did you look at the nosings 40

Anna Pleva, direct

on the other steps? A. Yes, and all seemed to be loose.

Mr. Wortendyke: I object to that as immaterial.

The Court: Objection sustained.

10

Mr. Markley: I would like to be heard. Mr. Wortendyke in opening said the condition did not exist for such a length of time as to charge the owner with notice. Now I want to show the general condition.

Mr. Wortendyke: It is absolutely immaterial. The step complained of has been fixed by the witness and located. The complaint has been narrowed down to a specific step.

20

Mr. Markley: She says it was about the third step.

Q. That is what you said, didn't you? A. Yes.

30

Mr. Markley: Now, I think I have a right to show the condition of the adjoining steps to show the whole thing was bad, to show the landlord had notice of it. It might have been the second step; it might have been the fourth step. I ask for a reading of the record. She said about the third step.

Mr. Wortendyke: I think she specifically said the third step.

Mr. Markley: I will ask her.

Mr. Wortendyke: Of course, now—

40

Q. Where was it that you fell? A. The last time I said I didn't know whether it was the second, third or fourth step.

Q. You think it was the third step as near as you can recollect? A. Yes.

Anna Pleva, direct

The Court: I think I will sustain the objection, Mr. Markley. I think the condition of any other part of the premises is quite beside the issue. If you have any cases that will sustain you in your contention, I will be glad to consider them and maybe I will reconsider my ruling.

10

Mr. Markley: She says about the third step, maybe the second and maybe the fourth step.

The Court: I will allow you to show the condition of the second, third and fourth steps.

Mr. Wortendyke: I withdraw the objection.

20

Q. What about the other steps? A. The other steps all looked to be in a dilapidated condition.

Q. Were the nosings loose on those? A. Yes, but the one I fell on was especially bad. It was raised about three-eighths or half an inch.

Q. Now, going to your home,—what did you do when you got home? A. I took some pills and went to bed immediately.

Q. How long were you in bed after the accident? A. I was in bed for about four or five weeks, except for visits to Dr. Benjamin's office.

30

Q. You came to the doctor's office, I believe—did you? A. Yes.

Q. Dr. Benjamin is the bone specialist? A. Yes.

Q. He is in Jersey City? A. Yes.

Q. How often did you go to him? Did you go there the next day? A. Yes, I had to go the next day. They took some more X-rays to see whether the cast was set right and the bone was right.

40

Anna Pleva, direct

Q. How about the next day? A. The next day I had to go again.

10 Q. And how were you brought to the doctor's office? A. My brother has a closed sedan car and he put cushions inside and he used to drive me down to Dr. Benjamin's office. I had about four or five cushions and pillows in the car.

Q. Who went with you? A. My mother and brother.

Q. Who took care of you while you were laid up during those months? A. My mother.

Q. How long were you laid up, do you remember? A. I was laid up in bed for about four or five weeks, but I couldn't go out of the house until after Labor Day.

20 Q. Except to go to the doctor, propped up in the car, as you stated? A. Yes.

Q. During that period were these injuries you had painful? A. Very painful.

Q. How long did the doctor continue to treat you? A. The doctor continued to treat me until about December of the same year, 1932.

Q. Did you get your job back over where you worked? A. No, I didn't.

30 Q. Were you paid any salary after you were laid up? A. Yes, they gave me a month's salary besides my two weeks' vacation.

Q. Then what happened about your job? A. First they told me they would take me back, then I got a letter stating they were laying off some people and I was told I was one of them included in the lay-off.

Q. And was that during the time you were laid up in bed? A. Yes.

40 Q. How long had you worked there prior to this accident? A. Over two and a half years.

Anna Pleva, direct

Q. Now, while you were home, who took care of you? A. My mother.

Q. Now, will you just step down and show the foreman and the other jurors the tooth that was chipped off? Point that one out.

(The witness goes before the jury and then returns to the witness stand.) 10

Q. How long were you incapacitated as a result of your injuries? A. About eight months.

Q. Do you remember what the doctor's bill was?

A. Dr. Benjamin's was one hundred and fifty dollars.

Q. He is the man that continued to treat you? A. Yes.

Q. Dr. Feinberg only gave you first-aid? A. Yes. 20

Q. How about your arm today, does it bother you any more? A. In damp weather—I don't know—it seems to get cold and tender and I have to massage it to get the blood to circulate and I get very tired if I have to use it too much. I get very tired.

Q. What did the doctor do for you after a while? A. I had to go there for massage treatments and I had to get baked under a sun lamp and my mother had to do it three times a day besides going to the doctor's. 30

Q. How often did you go to the doctor after the first week? A. Well, two times a week at least.

Q. Two times a week after that? A. Yes.

Q. How long was your arm in the cast? A. My arm was in the cast about five weeks, then it was in a splint for a month and then I had it in a sling for over a month. 40

Anna Pleva, cross

Mr. Markley: I think that is all; cross examine.

Cross examination by Mr. Wortendyke:

10 Q. You went to the dentist on the evening of June 9, 1932, right from work, did you not, Miss?

A. Yes.

Q. And when did you arrive at Dr. Harris' office? A. About six, a few minutes before six, I don't know the exact time.

Q. About six o'clock? A. It might have been before that because I left right from the office.

Q. Well you worked in Wall Street, did you? A. Yes.

20 Q. And the dentist's office is out here in Greenville, isn't it? A. Yes, I have to take the subway to Journal Square—Tube—and then I hop on a bus.

Q. And you got there about six o'clock? A. Yes.

Q. This was in the summer time, wasn't it? A. Yes.

Q. Nice day? A. Yes.

Q. Broad daylight, wasn't it? A. Yes.

30 Q. And you had to have a cavity filled? A. Yes.

Q. Where was the cavity, please? A. Here (indicating).

Q. The upper left side? A. Yes.

Q. And how long did you have to wait in the doctor's reception room before he could get to you? A. I think there was someone before me. I went in right after that, about five minutes.

Q. Five minutes after you got there? A. About five minutes.

40 Q. And he had to bore a hole in the tooth? A. Drilled the tooth.

Anna Pleva, cross

Q. Drill the tooth, I mean? A. Yes.

Q. And then put in the filling? A. Yes.

Q. And you lived in Clifton, New Jersey, at the time? A. Yes.

Q. And still do? A. Yes.

Q. And you were planning after you got through with the dentist's office to go back home, weren't you? A. Yes. 10

Q. And how were you planning to go home, Miss? A. Well, if I make the 7:05 I would make it, and if not I get a later train, but I didn't have any special date that night.

Q. But you were planning to make the 7:05? A. If I could make it, if not, a later train.

Q. You were planning to make it, if possible? A. Of course, if possible. 20

Q. That would get you home when? A. That would get me home about a quarter to eight, maybe ten to eight.

Q. And you would take the 7:05 from the Erie over here on Long Dock at the foot of Pavonia Avenue? A. Yes.

Q. The regular Erie terminal? A. Yes.

Q. And you would get there by trolley or bus from the doctor's office and then by Tube from Journal Square? A. Yes. 30

Q. Now, when you came into the dentist's office it was broad daylight, wasn't it? A. Yes, outside.

Q. Broad daylight outside? A. Yes.

Q. And how was it inside? A. Well, it wasn't like it was outside, naturally. There was no light lit there and it was a little duller.

Q. There was no necessity for a light, was there, Miss? A. I don't think so, no, but it wasn't as light as it was outside. 40

Anna Pleva, cross

Q. You had no difficulty in finding your way to the dentist's office, did you? A. No.

Q. You didn't need an artificial light to show you the way, did you? A. Not when I went in, no.

10 Q. And approximately when did you leave the dentist's office on your way down? A. I think it was about 6:15.

Q. A quarter after six, so you had the tooth drilled between approximately six o'clock and a quarter after? A. It only takes about a minute to do it—a very small one.

Q. A minute? A. A couple of minutes.

Q. You had had some dental work done before? A. Yes.

Q. Also filling cavities? A. Yes.

20 Q. You say it takes just about a minute? A. Yes,—not just a minute—a couple of minutes.

Q. About a couple of minutes? A. Not a couple of minutes, but it doesn't take long.

Q. Well, does it take two minutes? A. I don't know the exact time.

Q. You had had it done before? A. Yes. It didn't take very long.

30 Q. And when you went up to the dentist's office there was nothing wrong with the stairs, was there? A. I didn't notice anything.

Q. You went in and you had your tooth filled, and you got through about a quarter after six and then you started out? A. Yes.

Q. Now, when you came out of the dentist's room or office how was the stairway? Was it dark or light or what? A. Well, it wasn't like—it was light but not broad daylight like outside.

40 Q. It was sufficiently light to enable you to see everything that was there? A. I think it was.

Anna Pleva, cross

Q. So that the light had absolutely no connection with your falling, did it? A. No.

Q. No. Now, you started downstairs, did you? A. Yes.

Q. And you didn't see anything wrong then, did you? A. No, I didn't examine them that closely going down. I expected the stairs to be perfect. 10

Q. In any event, you didn't see anything wrong when you came up a few minutes before? A. No, because I didn't examine the stairs.

Q. Won't you be kind enough to answer my questions? You didn't see anything wrong with the stairs around six o'clock? A. I didn't notice anything.

Q. Nor did you see anything wrong with the stairs when you started to go down around 6:15, as you say? A. I just went down about thee stairs when I fell. 20

Q. Did you notice anything wrong with the stairs? Did your powers of observation, your eyesight, give you notice of anything wrong with the stairs before you fell? A. No.

Q. Then when you had fallen you cried out and ultimately Dr. Harris arrived from his office from which you had just come? A. When I was falling I can't remember what happened. I felt myself going and I screamed and the next thing I know Dr. Harris was picking me up. 30

Q. Where were you, on the landing, what we call the landing part? A. Yes.

Q. And how long did you and Dr. Harris stay on the landing? A. He picked me up and took me right in his office.

Q. And on the way up, according to your direct testimony, Dr. Harris pointed out to you a raised nosing on a particular step, didn't he? A. Yes, 40

Anna Pleva, cross

because I told him I tripped and fell, and he showed me a nosing there.

Q. He showed you? A. Yes.

10 Q. And that was the first personal knowledge, personal to you, that you had about any nosing whatsoever—was when the doctor on the way up after picking you up showed you this particular nosing, is that so? A. Yes.

Q. And it is on the basis of that that you testify, is it not, that you fell on about the third or fourth step? A. Yes.

Q. You didn't by any chance fall on a step near the bottom, did you, Miss? A. No.

20 Q. I show you a photograph Miss Pleva, and call your attention to two rather irregular ink rectangulars marked upon two steps shown, one marked "1" and the other marked "2." You recall me showing you this picture on the previous trial of this case, do you not? A. Yes.

Q. And those ink markings were made on there by you at the previous trial? A. Yes.

Mr. Wortendyke: I ask that it be marked for identification.

The Court: It may be so marked.

30 (Picture marked D-1 for Identification.)

Q. And I suppose at this time also you say that that picture does not correctly represent the condition of the stairs as it existed at the time of your fall? A. No.

Q. Do you still say this picture does not correctly represent the appearance of the stairs as it existed at the time of your fall? A. No.

40 Q. In any event the markings with ink—

The Court: Wait a minute. What did you mean when you answered "no," Miss?

Anna Pleva, cross

The Witness: That it doesn't look the same.

The Court: That it doesn't look the same as at the time of the accident, is that what you mean?

The Witness: Yes.

10

By Mr. Wortendyke:

Q. Then your answer is that it does not correctly represent the appearance? A. No.

Mr. Markley: She means yes to that.

The Witness: I mean it doesn't look the same.

Q. In any event, these markings in ink that I have shown you which you made on the last trial of this case, and which are respectively marked with the numbers "1" and "2," have to do with the step from which or upon which you claim to have fallen—is that true? A. Yes.

20

Q. Now, which one of them? A. I can't be sure. I think it was the third.

Q. In other words, it was one or the other of the two steps that you have marked in ink, is that so? A. Yes.

30

Q. Your answer is yes? A. Yes.

Q. Now, about how long did you and Dr. Harris spend looking at this particular nosing when on the way up he showed it to you? A. After he was taking me up after I fell?

Q. Yes. A. I just glanced at it. I was too weak to stand long.

Q. You were in pain, weren't you? A. Absolutely.

Q. But it was on the way upstairs to his office

40

Anna Pleva, cross

that he showed you this particular nosing? A. Yes.

Q. And that was the time you noticed it was about three-eighths to one-half inch raised, is that so? A. Yes.

10 Q. And how long did it take you to make an examination to determine that as you were on your way up to the office following your fall? A. Not even a minute.

Q. About a minute or a little less than a minute? A. A little less than a minute.

Q. And then after having made that observation you continued on up to Dr. Harris' office? A. Yes, with his help.

20 Q. And then I understand that after you had received first-aid in the office later that evening you showed your brother and Mr. Gootzeit that particular nosing? A. I didn't show him; I didn't go down.

30 Q. I beg your pardon. I understood you to say on direct examination you did. Well, what was the fact? What do you know of your own knowledge of the showing of this particular nosing that particular evening? A. I was in a chair and Dr. Harris called up the owner of the building and my brother was there and the three of them said they were going to look at it.

Q. You weren't present when Dr. Harris showed the other two the step? A. No, I wasn't, but on the way out again after my arm was treated he showed me the step and all.

Q. He shown you again the step? A. They were there. I think they hammered it down in the meantime—I am not sure.

40 Mr. Wortendyke: I ask that that be stricken out as not responsive.

The Court: Strike it out.

Anna Pleva, cross

Q. On your way out the step was again shown to you by Dr. Harris? A. Yes.

Q. What day of the week did this happen, Miss? A. I believe it was a Thursday.

Q. And the next day was Friday and you came in from Clifton, New Jersey, to Jersey City, is that true? A. Yes.

10

Q. And the next day after that? A. Saturday.

Q. Did you come in? A. Yes.

Q. Did you come in Sunday? A. No.

Q. When did you next come in? A. I don't remember; it might have been on a Monday or Tuesday.

Q. And how frequently after that did you come in from Clifton to Jersey City to see the doctor? A. An average of about twice a week.

20

Q. Did I understand you to say that you were in bed for four or five weeks? A. Yes.

Q. What were you in bed for? A. Because I was too weak to stand or do anything and I had to rest and my mother always gave me pills so I could get some sleep and it was quite a strain on me to go to Jersey City. Don't think it wasn't.

Q. I didn't imply that it wasn't, Miss. A. That is why I had to go to bed right away.

30

Q. So that is what you mean, when you weren't on the road from Clifton to Jersey City, back and forth to the doctor, you were in bed—is that what you mean? A. Yes.

Q. Now, as a matter of fact, Miss, you were notified by your employer that by reason of the depression and because of slackness of business in his brokerage office your services would be no longer required, isn't that so? A. Yes.

Q. And you therefore lost no earnings whatsoever as a result of this accident, did you? A. No, but I think——

40

Anna Pleva, cross

Q. No. Do you want to explain that answer "no"? A. Yes. I might have got a job some place else. I know a couple that got jobs.

10 Q. But so far as Henry L. Doherty and Company is concerned, you lost no earnings from them on account of this accident? A. I don't know what the real reason was. They said on account of the depression. It might have been that they thought they could do without me. I was one of the two that was laid off.

Q. So even if you had been completely well at the time you wouldn't have any further job with Henry L. Doherty and Company, would you? A. Not according to the letter.

20 Q. Not according to the letter, exactly, and in addition to that you received six weeks' pay, two of which was vacation money, didn't you? A. Yes.

Mr. Wortendyke: Now, if your Honor please, I ask that the testimony on direct examination with respect to the earnings be stricken out.

30 Mr. Markley: I think it is perfectly proper. She hasn't worked since Doherty laid her off. He laid her off while she was home. What she earned is some criterion. If she had been able to get out and work she might have obtained work as other girls did she spoke of.

40 The Court: I sustain the objection and order the testimony stricken out insofar as the plaintiff lays any claim for loss of money for services to be rendered to Henry L. Doherty and Company, inasmuch as it appears affirmatively that she lost her position there due to the depression, but I will

Anna Pleva, cross

allow the testimony to stand which fixes the rate of compensation that she received from Henry L. Doherty and Company so that the jury may have some indication or some idea as to the value—not necessarily and entirely dispositive of what her services were worth, because they may have been worth more and they may have been worth less—but it is some evidence which the jury may have before it to consider in determining what her services were reasonably worth. I will allow counsel, if he desires to and can show it through this witness, to re-examine her to determine whether or not she made any efforts to secure any other positions with any other companies.

10

Mr. Markley: She was incapacitated she says for eight months. I will be glad to ask her.

20

The Court: All right.

Mr. Wortendyke: May I have an exception to that portion of your Honor's ruling which permits any consideration by the jury of any alleged loss of earnings?

30

The Court: I am sustaining you on that, Mr. Wortendyke. I say that that part of her testimony will be stricken out and the jury is instructed to disregard it as to loss of earnings from Henry L. Doherty and Company. It appears from what you developed on cross examination that she got a letter which stated the loss of her position was due to the depression. Of course she says she don't know whether that was accurate or not, but for all purposes of this case we must take it to be accurate in

40

Anna Pleva, cross

the absence of any representation from Henry L. Doherty and Company to give us any evidence to the contrary. I am sustaining your objection.

10

Mr. Wortendyke: Then, if the court please, I respectfully submit, in the absence of any proof, particularly in the light of the bill of particulars, which charges the loss of this particular job which caused her to lose her earnings, that there is no basis in this case for the jury to consider any loss of earnings, past, present or prospective.

20

The Court: I will say up to the present time that is correct, Mr. Wortendyke. However, if counsel for the plaintiff desires to examine his client for the purpose of showing that she endeavored to secure positions elsewhere I will allow it.

Mr. Markley: If the Court please, I would like to be heard. For eight months this girl was incapacitated.

The Court: You can show that.

Mr. Markley: I have shown it.

30

The Court: But you haven't shown—for example it is the bounden duty or obligation of every plaintiff who loses a position to try to reduce his or her damage, to minimize it. For instance, if she had a job previously which paid her one hundred dollars a month and had a chance to get another position for seventy-five dollars a month, and wouldn't take it——

40

Mr. Markley: I think we are talking at cross-purposes. So far as the loss of the Doherty job is concerned that cannot be attributed to this accident, but she only got

Anna Pleva, redirect

six weeks' salary as a result of the loss of that job. Now, from the end of the six weeks down to the end of the eight month period she was incapacitated. She certainly is entitled to be compensated for that if the jury find that she might have worked and earned some money. 10

The Court: I don't think so.

Mr. Wortendyke: I respectfully submit that what she might have worked and earned is entirely too speculative.

The Court: I will allow you when he is through with the cross examination to show that she went out and made efforts to secure another position.

Mr. Markley: She was incapacitated during the eight months. 20

The Court: All right; objection sustained.

Mr. Markley: Will your Honor allow me an exception?

The Court: You may have an exception.

Redirect examination by Mr. Markley:

Q. Did you seek employment when you were able to? A. Yes, I did. 30

Q. Did you get some employment? A. Yes, I did.

The Court: Where were you working?

Mr. Wortendyke: I want to object before the answer. I submit it is incompetent, irrelevant and immaterial because in answer to number nineteen of the demand for bill of particulars, which reads as follows: "If employed, give name and address of employer, nature of latter's business, posi- 40

Anna Pleva, redirect

tion or capacity of said plaintiff in said employment and amount of wages or salary then being received by said plaintiff and how payable." The answer was "Plaintiff was employed by Henry L. Doherty Co., number 60 Wall Street, New York City, N. Y., as a clerk and received the sum of one hundred dollars per month. Plaintiff has lost her position as a result of this accident." And number twenty-one, "Itemize in detail all earnings of which said plaintiff claims to have been deprived by reason of said injuries, explaining how computed." And the answer to number twenty-one is: "See answer to nineteen."

The Court: What is the date of the bill of particulars?

Mr. Markley: August 5th, 1932. The accident was June 9th, 1932. She was incapacitated for eight months and then she went out to get work and she did get some work.

The Court: I will allow it.

Mr. Wortendyke: I pray an exception, if the Court please.

May have the demand for bill of particulars and the bill of particulars marked for identification?

The Court: Yes.

(Demand for bill of particulars marked D-2 for Identification and the bill of particulars marked D-3 for Identification.)

The Court: I want these facts to appear affirmatively on the record so if this case should go up it would show the Appellate Court the reasons for my ruling.

Anna Pleva, redirect

Mr. Markley: I have no objection to the bill of particulars going in evidence.

The Court: Very well, let the record show that the demand for bill of particulars and the bill of particulars are admitted in evidence by consent of counsel.

(D-2 for Identification (demand for bill of particulars) and D-3 for Identification (bill of particulars) admitted in evidence and marked D-2 and D-3, respectively.)

Mr. Wortendyke: I would like to be protected by having your Honor recognize, if you will, my objection to this entire line of questions asked this witness, regarding any loss of earnings. I base my objection on the answers to nineteen and twenty-one.

Mr. Markley: You have got to take them altogether.

The Court: If this woman was incapacitated as she claims she could only itemize all earnings which she claims to have been deprived of up to the date that the question was answered by her, and that is the reason for my ruling.

Mr. Wortendyke: May I have an exception?

The Court: Yes.

Mr. Wortendyke: I understand my objection stands to all questions of a similar nature?

The Court: Yes.

By Mr. Markley:

Q. When did you first get employment? A. About a year later after the accident.

Anna Pleva, redirect

Q. What employment was that? A. The Air Cruiser Corporation.

Q. What did you do with that corporation? A. We had to cement the fabric for the balloons and airships.

10 Q. Speak up. A. The first job I got after my accident was for the air cruisers, about a year later, a year later exactly, I think, and we had to cement the fabrics for the balloons and airships.

Q. How long did you work there? A. I worked there about two or three weeks.

Q. How much were you paid for that? A. Paid twenty cents an hour.

20 Q. What was your weekly average? A. I couldn't tell because when it was damp we didn't work.

The Court: What was your weekly average?

The Witness: About twelve.

The Court: About twelve dollars per week?

The Witness: Yes.

30 *By Mr. Markley:*

Q. Were you able to get work after that? A. The next job I had was in January.

Q. January of—— A. This year, in a hosiery place. I worked there about three months and the place closed down.

40 Q. How much did you make there? A. My average was about sixteen dollars a week, and after that I got a job with the Air Cruisers and worked there two or three months and was laid off last week.

Anna Pleva, recross

Q. Did you make the same as you did before?
A. Got twelve dollars a week.

Q. Is that all the work you have been able to get? A. Yes.

Q. Mr. Wortendyke has referred to the fact that you had a high heel on your shoe at the time it caught on the nosing. 10

Mr. Wortendyke: I object to that question as improperly framed. That is not in the evidence.

The Court: He hasn't finished his question.

Q. Did you have a high heel on at the time? A. I had a heel on like this (indicating). It might have been a trifle lower, sport heel. 20

Q. Hold your foot out so the jury can see. A. (Witness complies.)

Q. Is that the type of heel that was on the shoe that caught in the metal nosing? A. Yes.

Q. And that is a sport shoe, is it? A. Yes.

Q. About what is the height of the heel at the greatest point, would you say? A. About an inch and a half.

Q. Inch and a half? A. Yes. 30

Recross examination by Mr. Wortendyke:

Q. And nothing happened to the heel when you fell, did it? A. No.

By the Court:

Q. Let me ask you this, Madam. Between the date of the accident and the period of one year later when you say you went to work for this 40

Anna Pleva, redirect-recross

other concern, in the interim did you endeavor to secure employment—yes or no? A. No.

Q. You did not. Why not? A. Because my arm wasn't well enough.

Q. Your arm wasn't well enough? A. No.

10 Q. What do you mean by that? A. For eight months I couldn't use it at all and then two months or so later I got employment in the Air Cruisers.

Redirect examination by Mr. Markley:

Q. You say you started to look for work about eight months after the accident? A. Yes.

20 Q. And you got work in about two months? A. Yes.

Q. And you got this other position about ten months after the accident? A. Yes.

Recross examination by Mr. Wortendyke:

Q. That was with the Air Cruisers? A. Yes.

Q. And you were doing cement work? A. Yes, you have a strip like that you and cement that and cement the other side and cement the two pieces together.

30 Q. And then after you gave up that you went back to similar work? A. No, then I got a job in a hosiery place for a couple of months, and then they called me back to the Air Cruisers.

Q. Now you are busy again? A. No, I was laid off last week.

Q. You weren't laid off then due to any injuries, were you? A. No.

40 Mr. Wortendyke: That is all.
(Witness excused.)

Dr. Irwin R. Harris, direct

DR. IRWIN R. HARRIS, called as a witness on behalf of the plaintiff, being sworn, was examined and testified as follows:

Direct examination by Mr. Markley:

Q. Dr. Harris, where do you live? A. 335 10
Stegman Parkway, Jersey City.

Q. What is your profession, Doctor? A. Den-
tal surgeon.

Q. How long have you been a dental surgeon?
A. Twenty-two years.

Q. What college are you a graduate of? A.
College of Dental Surgery, New York.

Q. When did you graduate? A. 1922.

Q. Where have you practiced since? A. 250 20
Jackson and 254 Jackson Avenue.

Q. As I understand it on June 9, 1932, your
dental office was at 254 Jackson Avenue, Jersey
City? A. That is right.

Q. That is the premises of the defendant,
Samuel Gootzeit? A. Yes, sir.

Q. And on what floor was your dental office
located, Doctor? A. One flight up.

Q. Were there any other tenants on that floor?
A. Yes, there were two other tenants on that 30
floor.

Q. Were there other tenants above? A. I be-
lieve there were about three upstairs.

Q. What was the nature of these tenants, com-
mercial tenancies? A. There was one commercial
tenant down on my floor. There was a dental
laboratory.

Q. What were the others? A. Residential.

Q. And this hallway that led from the first floor,
that is, from the street level up to the second floor 40

Dr. Irwin R. Harris, direct

where your office was located, was that used by these tenants in the building? A. Yes.

Q. Used by you? A. Yes, sir.

Q. Used by your patrons, your customers? A. Yes, sir.

10 Q. And was it used by the people above you? A. Yes, sir.

Q. Was there any other stairway leading up to your place from the street? A. No.

Q. Do you remember the occasion of the accident to the plaintiff, Anna Pleva, on June 9th, 1932? A. Yes, I do.

20 Q. Had she been to your office for some dental treatment before she fell? A. Yes, she had been a patient of mine for the past three years.

Q. And on this particular occasion what dental treatment had you performed for her? A. Amalgam filling and a prophylaxis.

Q. Do you remember her leaving your office? A. Yes, I do.

Q. What was the next thing you knew of her? A. The next thing I heard was a scream.

Q. How long after she left the office? A. Oh, two seconds after she left the office.

30 Q. When you heard the scream what did you do, if anything? A. Went out into the waiting room and into the hall and looked down the hallway and there I saw Miss Pleva lying midway on the floor.

Q. Was she lying on the floor? A. Yes.

Q. Sitting down or what? A. Lying right down.

40 Q. Where was she with respect to your floor, the second floor, how far below it, how many steps? A. Well, there are about eight steps after you leave the hallway and she was right on the stairs.

Dr. Irwin R. Harris, direct

Q. It is a short stairway, isn't it? A. A short stairway, about eight steps.

Q. And then there is a landing? A. And another step or steps.

Q. Six or seven steps? A. Yes.

Q. And then there is a turn? A. Then there is a turn with a few more steps and then there are other steps leading out on the street. 10

Q. She was at the bottom of the first six or seven or eight steps? A. Yes.

Q. And there was sort of a landing there? A. Yes, from my office.

Q. And when you first saw her she was in what position? A. She was lying down.

Q. What did you do? A. Picked her up and asked her what happened. 20

Q. Was there anybody else there at that moment besides you and she? A. Myself and she.

Q. Then what did you do? A. I picked her up and asked her what happened and she said she fell.

Q. What was her condition? A. Well, her condition was—bloody—painful—she was in pain. Swelling started on the face.

Q. Did you take her up to your office? A. I carried her up to my office. 30

The Court: You mean physically you lifted her up in your arms?

The Witness: Yes, sir.

Q. On the way up did you notice the condition of the stairway—on the way up? A. On the way up I asked her what she done and she said she fell on the steps and on the way up I said, "You must have fell on some of these nosings here and tripped." 40

Dr. Irwin R. Harris, direct

Mr. Wortendyke: I ask that that be stricken out, if the Court please, the portion of the answer where he made his own comment.

10 The Court: I will order it stricken out and the jury is instructed to disregard it.

Q. Did you, Dr. Harris, notice the condition of the steps on that stairway that night? A. Yes, I did.

Q. At that time? A. At that time, I did.

Q. And subsequent thereto did you also examine them again? A. I did.

20 The Court: When did you examine them the second time?

The Witness: After I called Mr. Gootzeit up.

The Court: Was that an hour later or two days or a day or what?

The Witness: About half an hour later.

The Court: About half an hour after the alleged accident?

The Witness: Yes.

30 *By Mr. Markley:*

Q. And who was Mr. Gootzeit that you called up? A. The owner of the building.

Q. Did he come up there? A. Yes.

Q. Did you go over that stairway leading from your office down to the first floor with him? A. We did.

Q. What did you examine on the steps? A. Nosings and certain metal rods.

40 Q. What did you find? A. We found some of them broken and some lifted up on a few of the steps.

Dr. Irwin R. Harris, direct

Q. Did that apply to each of the steps on that flight? A. Several of the steps on that flight.

The Court: What did you find with regard to the second, third and fourth steps from the bottom?

Mr. Markley: From the top. 10

The Court: From the top?

The Witness: The nosings on the landing there were lifted and broken in a few of the places.

The Court: What do you mean by "the rods"?

The Witness: There is a metal rod that runs along the oilcloth or linoleum and on that metal rod there were like little nosings to keep the railing down with tacks. 20

Q. You are referring to the metal nosings then on the steps? A. Yes.

Q. And on those steps you say the metal nosings were lifted? A. Yes.

Q. And broken? A. Yes.

Q. What do you mean by "lifted"? A. Well, they weren't level with the linoleum. There were spaces that were elevated, in other words, elevated above the linoleum. 30

Q. They were not snug against the step? A. No.

Q. They were loose?

Mr. Wortendyke: If the Court please, counsel is testifying himself.

Q. You say the nosing, Dr. Harris, was lifted up. Can you tell us a little more about that so the jury can clearly understand it? A. On the 40

Dr. Irwin R. Harris, direct

linoleum there is a metal rod that runs along, like a little rail, and they were hammered down.

Q. Where was the linoleum, underneath that?

10 A. Underneath. Now one particular place, a few places rather, you could notice some of the tacks out of these little edges of metal and the metal rods were cracked and loose and elevated due to the fact there was nothing holding them down.

The Court: What do you mean when you say "cracked"?

The Witness: Just broken in half.

By Mr. Markley:

20 Q. Now, Doctor, can you tell his Honor and the jury how long this stairway was in that condition prior to June 9th, 1932? A. It had been that way for the past three years.

Q. Before June 9th, 1932? A. Yes.

Q. How long had you been a tenant prior to June 9th, 1932? A. About seven or eight years.

Q. And at the time of the accident did you have a lease or not? A. I did.

30 Q. How long a lease? A. I had a five-year lease and a five-year option.

Q. You say for several years prior to June 9th that condition existed? A. Yes.

Q. Had you done anything with respect to notifying Mr. Gootzeit about the condition of the steps? A. I used to go out occasionally with a hammer myself and try to bring it down smooth.

40 Q. What had you done with respect to notifying Mr. Gootzeit? A. I asked Mr. Gootzeit if he would be good enough to fix those stairs. There were patients of mine complaining.

The Court: Wait a minute. Did you tell him that?

Dr. Irwin R. Harris, direct

The Witness: I told Mr. Gootzeit that. I told him the condition of the stairs was in very bad shape and I would appreciate it if they would be taken care of.

The Court: When was that?

The Witness: In the past two years before the accident. 10

By Mr. Markley:

Q. On one occasion or more than one occasion?

A. On more than one occasion.

The Court: When was the date of the last occasion, or about the time?

The Witness: I don't recall positively, around two or three weeks before that. 20

By Mr. Markley:

Q. Now, Doctor, was there any light in that hall at that time?

Mr. Wortendyke: Objected to as immaterial. Miss Pleva has testified that light or no light had absolutely nothing to do with her fall and therefore it now appears that the existence or non-existence of a light had absolutely nothing to do with the accident. 30

Mr. Markley: The testimony of the plaintiff herself is not controlling on this Court or jury. The Court takes the testimony of all the witnesses.

The Court: First off let us address ourselves to this question. Was there any legal obligation on the part of the landlord 40

Dr. Irwin R. Harris, direct

to have any light there at this particular time?

10

Mr. Markley: It depends on what time this was. I think it depends on the statute. The question arises, when did the sun set on this particular day?

The Court: I will sustain the objection.

20

Mr. Markley: Your Honor will allow me an exception? I won't press the light question on the theory of negligence. The more important thing is the condition of the steps anyway; but I think I have a right, nevertheless to show the surrounding circumstances, whether it is on the theory of negligence or not. I think I have a right to show the conditions prevailing there at that time even though it may not be on the theory of negligence. We have a right to show whether the lights were on or off at that particular time, and I submit we have a right to show the conditions prevailing in the hall.

The Court: I have sustained the objection.

30

Mr. Markley: Your Honor will allow me an exception?

The Court: We will recess at this time until a quarter of two.

(Recess until 1:45 P. M.)

40

Dr. Irwin R. Harris, cross

(AFTER NOON RECESS)

1:45 P. M.

DR. IRWIN R. HARRIS, upon being recalled,
testified as follows:

10

Direct examination by Mr. Markley (continued):

Q. What would it cost to repair that tooth? A.
That would cost seventy-five dollars.

Q. Would that be a reasonable charge? A.
Yes.

Q. You say the injuries she had that day were
painful? A. Yes, I certainly do.

Cross examination by Mr. Wortendyke:

20

Q. Doctor, you were a tenant in these premises
at the time of this occurrence, were you not? A.
Yes.

Q. And had been approximately for seven or
eight years previously? A. Approximately.

Q. And you still are, are you not? A. Yes.

Q. You were under some sort of a lease, were
you? A. That is right.

Q. And your office was on the second floor, that
is, the first floor above the ground floor? A.
Yes, sir.

30

Q. During this period of several years previous
to June 9th, 1932, you say that these stairs had
been in very bad condition? A. They have been
in bad condition.

Q. Throughout that period? A. Throughout
the period of the past few years, yes.

Q. And in the past few years you include a
period of a few years previous to June 9th, 1932?
A. Yes.

40

Dr. Irwin R. Harris, cross

Q. As a matter of fact you testified, did you not, that almost all of the nosings were in bad condition? A. Yes, sir.

Q. Loose, is that so? A. Yes, sir.

10 Q. Sticking up? A. One in particular, yes, sir.

Q. Generally in bad condition? A. Yes, sir.

Q. And throughout this period of years you continually told Mr. Goodzeit about it, didn't you? A. Yes, sir.

Q. Complained to him about it? A. Yes, sir.

Q. Asked him to fix it? A. Yes, sir.

20 Q. He didn't fix it? A. I don't know what you would call fixing. They were supposed to be fixed.

Q. Did you see them fixed? A. There were repairs done there with a hammer, knocking them down. I am not an expert in that work. I don't know what you would call fixing.

Q. You are a dentist? A. Yes, sir.

Q. Nevertheless, during this period of time previous to June 9th, 1932, you were out there with your hammer working on them? A. Yes, sir.

30 Q. How many times were you out there working on the stairs with your hammer? A. Quite a few times.

Q. Give us, if you will be good enough, a little more accurate approximation. Were you out there ten times, twenty times, thirty times or what? A. I was out quite a few times; I don't just remember how many times.

40 Q. When were those times? A. Sometimes once a week, sometimes twice a week, sometimes once a month, sometimes twice a month, sometimes a few times more.

Dr. Irwin R. Harris, cross

Q. And that was over a period how long before June 9th, 1932? A. A few years.

Q. You weren't obligated under your lease to do any hammering on the stairs, were you? A. No.

Q. By the way, how were these nosings fastened to the stairs? A. I understand from what I could see they were fastened with tacks. 10

Q. Carpet tacks? A. I don't know.

Q. And you were hammering them several times? A. I don't know whether they were carpet tacks or whatever you might call them.

Q. You know what a tack is, Doctor, even though you are a dentist? A. Yes.

Q. Were they tacks about the height of what I am indicating with my fingers, or maybe shorter? A. I never took any of them up. 20

Q. You were hammering them? A. Yes, but I don't know the exact size of those tacks.

Q. They weren't screws, of course? A. I don't think so.

Q. How many times did you hammer these nosings before June 9th, 1932? A. Quite a few times.

Q. And you had to look at what you were hammering in order to hit it, didn't you? A. Yes. 30

Q. What did you use? A. My hammer.

Q. What kind of hammer is that, a regular carpenter's hammer? A. No, regular dental hammer.

Q. Oh, a dental hammer. So you were working on these nosings with a dentist's hammer? A. Yes.

Q. What does a dentist's hammer look like? A. A dentist's hammer is made of all metal that we use for— 40

Dr. Irwin R. Harris, cross

Q. Do you use it in the mouth? A. No.

Q. You use it simply on materials outside of the human mouth? A. Yes.

Q. And that is what you were using for these nosings? A. Yes.

10 Q. How closely before June 9th, 1932, was the last time you were out with your hammer working on the nosings of the stairs? A. Possibly a few weeks.

Q. This accident was in June, wasn't it? A. If I remember correctly.

Q. You were out there in May, the month before? A. I might have been.

Q. Well, were you? A. I might have been; I don't recollect.

20 Q. Well, how much of your testimony do you recollect? A. I know I was out there quite a few times hammering down those nosings.

Q. Now, when you were hammering down those nosings did you do anything else about it, when you found you had to be continually away from your patients to be hammering on the nosings? A. I asked Gootzeit if he would be good enough to put the stairs in suitable condition so I wouldn't have to be wasting my time going out and hammering on the stairs.

30 Q. Did he do it? A. Not that I know of.

Q. So you had to resume hammering out there on the stairs? A. Yes.

Q. Are you still hammering out there? A. No, they are taken off entirely.

Mr. Markley: What is that?

40 The Witness: They are taken off entirely.

Dr. Irwin R. Harris, cross

Q. As a matter of fact after this accident you requested the landlord to take off all nosings? A. No, sir.

Q. You did not? A. No.

Q. Isn't it a fact that within a month or approximately within a month following this accident you requested the landlord to take all nosings off the stairs and the linoleum, and he did so? A. No, sir, I asked that the stairs be put in a good condition. 10

Q. Your answer then is no to my question? A. That is right.

Q. Now the first intimation that you had that Miss Pleva had fallen was when you heard the cry? A. Screaming out.

Q. Scream, if you will. And you went out, didn't you? A. Yes. 20

Q. Went downstairs. And I think in answer to one of the Court's questions you said you picked her up? A. Yes.

Q. Carried her bodily up the stairs? A. Yes.

Q. By the way, what landing was she on when you found her? A. At the base of the stairs.

Q. On the ground floor or between the ground floor and your floor? A. It is just between the first floor and the landing leading out from my office. 30

Q. I show you Exhibit D-1 for Identification and ask you whether that picture shows the landing where you found the young lady? A. Here is the mark where I found her.

Q. Here (indicating)? A. Yes, right here.

Q. Indicating the portion that is apparently paved with—what do you call that, criss-cross oil-cloth? A. Linoleum. 40

Dr. Irwin R. Harris, cross

Q. Patterned linoleum? A. I don't know.

Mr. Markley: That is D-1 for Identification?

Mr. Wortendyke: Yes.

10 Q. Then after you had picked up the lady in your arms you started up the stairs with her, didn't you? A. That is right.

Q. And while you were on your way up the stairs from the landing that you have indicated to the top of the stairway you made an inspection of the stairs, didn't you? A. I asked Miss Pleva——

20 Q. Did you or did you not, Dr. Harris, make an inspection of the stairs? A. (No answer.)

The Court: Just say yes or no.

A. Yes.

Q. What were you doing with Miss Pleva while you were making this examination? A. That is very easily noticeable while you are carrying somebody up.

30 Mr. Wortendyke: I ask that the answer be stricken out as not responsive.

The Court: Strike it out.

Q. (Question repeated by the stenographer.)
A. I asked Miss Pleva how she felt.

Q. What were you doing, not what you asked her? A. Carrying her up the stairs.

40 Q. How long did it take you to make this inspection of one of the steps of the stairway that you have referred to? A. It could be seen with the naked eye.

Dr. Irwin R. Harris, cross

Q. Beg pardon? A. I say it could be seen walking up with the naked eye.

Q. What step is it you are now referring to? A. Third or fourth step from the bottom.

Q. Which was it? A. Third or fourth from the bottom.

Q. Can't you tell us which of the two, and what was wrong with the third or fourth step from the—which did you say, top or bottom? A. Bottom.

Q. Bottom. And what was wrong with that? A. The nosing was lifted.

Q. And about how high was it lifted? A. I judge around five-eighths of an inch.

Q. Now, you, of course, didn't see Miss Pleva fall, did you? A. No.

Q. So how did you know what step she fell from? A. I noticed that this particular third or fourth step, that the nosing was more elevated than any of the other railings and nosing of the other steps.

Q. But you didn't know that was the step she fell from? A. I asked her where she fell from.

Q. And didn't she tell you it was the third or fourth step from the bottom? A. She said, "I fell from one of these steps," and we noticed the nosing on that third or fourth step.

Q. Did she tell you she fell from the third or fourth step from the bottom? A. I don't recollect.

Q. In any event you came to the conclusion that the third or fourth step from the bottom was the one that caused her to fall? A. Yes, sir.

Q. Despite the fact at the time she fell you were up in your office? A. That is right.

Dr. Irwin R. Harris, cross

Q. Now, is your recollection perfectly clear about this particular step that you noticed when you were coming up with Miss Pleva in your arms, the third or fourth from the bottom? A. I believe so.

10 Q. Incidentally, Doctor, referring you again to this Exhibit D-1 for Identification, being the photograph to which I have previously referred, does that correctly represent the appearance and condition of the stairway as you saw it when you were carrying Miss Pleva up? A. It looks too good.

Mr. Wortendyke: I ask that the answer be stricken out as not responsive and ask
20 for a yes or no answer to my question.

The Court: So ordered.

Q. (Question repeated by the stenographer.) A. The steps don't look as good. These steps look much better.

Mr. Wortendyke: I ask that the answer be stricken out and the witness again instructed to answer the question.

30 The Court: The witness will answer the question directly.

Q. (Question again repeated by the stenographer.) A. No.

Mr. Markley: May I look at it now?

Mr. Wortendyke: Do you want to put it in evidence?

40 Mr. Markley: No, I don't want to put it in evidence. You have used it in questioning the witness.

Dr. Irwin R. Harris, cross

By Mr. Wortendyke:

Q. It is a fact, is it not, that until you had pointed out to Miss Pleva the particular step which you referred to a moment ago, namely, the third or fourth from the bottom, she had no knowledge as to the step from which she fell? A. I have nothing to do with that, telling her which step she fell from. 10

Q. Did you point out this step to her at the time you were carrying her up? A. I said to her, "You must have fell or tripped on the third or fourth step."

Q. The third or fourth step, meaning the third or fourth step from the bottom? A. That is right, yes. 20

Q. Now, do you recall July 14th, 1932, the month following this particular occurrence? A. No.

Mr. Wortendyke (addressing man at defendant's counsel table): Will you stand up, Mr. McCann, please?

(Mr. McCann stands up.)

Q. I direct your attention, Mr. Witness, to the man who stands at the defendant's counsel table and ask you whether you discussed this occurrence with that gentleman following the accident in the month of July, 1932? A. What date did you say that was? 30

Q. On or about July 14th? A. Mr. McCann was in my office with Mr. Gootzeit some time in July.

Q. Did you discuss this accident with him? A. I had nothing to say to him. 40

Q. Then you know the name of the gentleman who just stood up? A. I do.

Dr. Irwin R. Harris, cross

Q. And his name is Mr. McCann, is it not? A. That is right.

10 Q. And did you or did you not tell Mr. McCann when he questioned you on the occasion to which you have just referred regarding this accident that the stairway was in perfect condition and that you had examined it after the girl had fallen and saw nothing wrong with it? A. I had nothing to say to Mr. McCann at all.

Q. Yes or no. Did you or did you not tell Mr. McCann what I have just stated? A. No.

20 Q. Now, did I correctly understand you to say—correct me if I am wrong, please—that you testified today on your direct examination that the same evening after this accident, that is, later on, you showed Mr. Gootzeit, the defendant in this case, the owner of the building, the stairway? A. Yes, sir.

Q. You did. About what time in the evening was that? A. It must have been around eight or half past seven—half past seven or eight o'clock—around that time. I can't say definitely.

Q. And what did you say to him? A. I told Mr. Gootzeit what happened that evening.

30 Q. Did you tell him what particular step the young lady fell from? A. No.

Q. What did you tell him? A. I told him the girl tripped and fell on the steps, over the railings, and that is all.

Q. Over the railings? A. The rods, if you want to call it such.

40 Q. Can you show us or explain to us what you mean by the rods by reference to this D-1 for Identification? A. Yes, sir. Here is what I call the railing (indicating) right here.

Dr. Irwin R. Harris, cross

Q. Indicating—correct me if I am wrong—I don't want to misconceive your testimony—indicating by the end of this fountain pen along the metal edge of the step of the stairway shown? A. Yes, sir.

Q. Do I correctly interpret your answer as you have illustrated it? A. Yes, sir. 10

Q. And what was the nature of the dental work you performed on Miss Pleva this particular evening? A. Amalgam filling.

Q. Amalgam filling? A. Yes.

Q. Is that this silver colored filling? A. Yes. And prophylaxis.

Q. And what is prophylaxis? A. Cleaning.

Q. Correct me if I am wrong. I assume before you could fill you had to drill? A. That is right. 20

Q. And you had to mix up your amalgam, as you call it? A. Yes.

Q. And insert it? A. Preparation of the cavity.

Q. Preparation of the cavity and then the insertion of the filling? A. Yes.

Q. What next? A. Preparation of the cavity, beveling of the margins.

Q. Those are the edges of the tooth? A. Lining it with sedative, preparing the amalgam and plugging it. 30

Q. And by plugging, you mean putting the amalgam in? A. Inserting it.

Q. And then after that you gave the general cleaning or prophylaxis, as you call it? A. Yes.

Q. You are, of course, not interested in this case or its outcome? A. No, sir.

Q. Haven't any interest whatsoever? A. No, sir, outside of justice being done. 40

Q. Beg pardon? A. No.

Dr. Irwin R. Harris, redirect

Mr. Markley: You say, "Outside of justice being done"?

Mr. Wortendyke: I object to my adversary testifying and I object to him putting words in the mouth of the witness.

10 Mr. Markley: The witness said that.

The Court: The witness said that.

Redirect examination by Mr. Markley:

Q. Looking at this Exhibit D-1, Dr. Harris—

Mr. Wortendyke: I object to the use of the exhibit unless it is put in evidence.

20 Mr. Markley: Counsel has referred to it in cross examination. In order for me to continue my redirect examination I certainly have a right to refer to it. I am willing to put it in evidence because it was taken after the accident.

Mr. Wortendyke: I object to counsel stating when this picture was taken.

The Court: Suppose we find out when it was taken first?

30 Mr. Wortendyke: Of course it was taken after the accident. I suppose Mr. Markley means some considerable time afterward.

Mr. Markley: Yes, and if there was some change in this—

Mr. Wortendyke: It was taken shortly before August 2nd, 1932—the same year.

Mr. Markley: What do you mean by "shortly"?

The Court: Within a few days or a week?

40 Mr. Wortendyke: Yes, a few days or a week.

Dr. Irwin R. Harris, redirect

By Mr. Markley:

Q. Now, referring to this D-1 that counsel has referred to in his cross examination, I think you testified that this did not represent the condition of those steps as they were at the time of the accident? A. That is right.

10

Q. Further referring to this photograph, does it show the number of steps, however, that was in that first half of the flight from the second to the first floor? Does it show the number of steps? A. I think there are eight steps in that stairway.

The Court: Mr. Witness, when you are asked a question, why can't you answer what you are asked? You calmly ignore what is asked you and trot merrily along and answer what you please.

20

Q. I understand there were a number of steps and then there was a landing half way down before you got from the second floor to the first floor? A. Yes, sir.

Q. This presumably shows the steps in the first part of that stairway leading from the second floor to the landing, which was half way down to the first floor—is that right? A. Yes, sir.

30

Q. Now, looking at the photograph, does it, so far as you can recall, show the number of steps and the two landings that were in that stairway? A. Yes, sir.

Q. Taking the first step, can you tell us how many steps there were, not including the landings? A. I don't recollect.

Q. Can you count them in the photograph? A. Yes, there are six.

40

Q. Now, then, you say that the step that had

Dr. Irwin R. Harris, redirect

the unusual lift of the metal nosing was the third or fourth one from the bottom? A. Yes, sir.

Q. You say there are how many steps in the stairs? A. Six.

10 Q. Well, if it was the third or fourth from the bottom it would likewise be the third or fourth from the top, wouldn't it? A. Yes, sir.

Mr. Wortendyke: I object to that as argumentative and not proper redirect examination.

Mr. Markley: Counsel has emphasized the fact by this witness that it was three or four steps from the bottom.

20 Mr. Wortendyke: I certainly think the jury is intelligent enough to figure that out for themselves.

The Court: I will allow it.

Q. Now, then, do you know whether between the day of this accident, which was June 9th, 1932, and some time around the 2nd of August, 1932, there was any change in those steps? A. They were repaired that night and the following morning they were repaired.

30 Mr. Wortendyke: I ask that it be stricken out as immaterial.

The Court: I will direct that the answer be stricken out. He was asked if he knew whether there was any change. The answer is yes to that. The rest of the answer will be stricken out.

Q. When were those changes made?

40 Mr. Wortendyke: Objected to as immaterial.

Dr. Irwin R. Harris, redirect

Mr. Markley: Counsel has presented a photograph here showing——

The Court: He hasn't offered it in evidence. If he offers it in evidence I will allow you to call a witness to the stand on rebuttal to show that there was a different condition at the time of the photograph and at the time of the accident. 10

By Mr. Markley:

Q. Now you have testified on cross, when Mr. Wortendyke asked you whether those nosings were there up to the present time, you said they were entirely taken off—I think you said, didn't you? A. Yes, sir.

Q. And is that the fact? A. Yes, sir. 20

Q. So that none of those nosings are there now that appear in that photograph? A. That is right.

Q. Now, you have testified that when Mr. McCann, the gentleman sitting at the counsel table over there, came to your place some time after this accident with the defendant, Mr. Gootzeit, that you did not tell him anything about how this accident happened—I think you said? A. That is right.

Q. I think you further said that you did not tell him that these steps were in good condition at the time of the accident? A. That is right. 30

Q. Was there a reason why you didn't tell him anything?

Mr. Wortendyke: Objected to as immaterial and not proper redirect examination. The question was asked the witness for the purpose of laying a foundation for contradiction. 40

Mr. Markley: Maybe it would be rebuttal.

Minnie Eyre, direct

10 The Court: I don't see what his refusal to answer questions has to do with it. I might see an automobile accident and a man might come to question me but I wouldn't have to talk to him if I didn't feel like it. There would be no obligation on my part to tell him. He might be a police officer but if I didn't feel like talking to him I wouldn't have to talk to him. I might feel it was none of his business.

Mr. Markley: All right; that is all.
(Witness excused.)

20 MRS. MINNIE EYRE, called as a witness on behalf of the plaintiff, being sworn, was examined and testified as follows:

Direct examination by Mr. Markley:

Q. Mrs. Eyre, where do you live? A. 106 Grant Avenue.

Q. Were you employed by Dr. Harris, who was just on the stand, in his dental office? A. I am.

Q. Are you still employed by him? A. I am.

30 Q. And were you employed by him at the time of this accident to Miss Pleva? A. I was.

Q. And what was your work for him on June 9th, 1932? A. I opened his office every morning—attended to the duties there.

Q. How long prior to June 9th, 1932, were you in charge of his office? A. About four years.

Q. How long altogether? A. Six.

40 Q. Had you occasion during that period, say two years before the accident, June 9th, 1932, to observe the condition of the nosings on the steps

Minnie Eyre, direct

leading from the second floor down to the first landing? A. I had.

Q. And what was the condition of those nosings? A. At numerous times they were loose and raised.

Q. And how long had that existed? A. Perhaps a year. Different times I noticed it. 10

The Court: Do you refer to a year previous to the date of the alleged accident?

The Witness: I do.

Q. What was the effect of these loose nosings on the step?

Mr. Wortendyke: Objected to as immaterial.

The Court: Objection sustained. 20

Q. As you go down those steps over those loose nosings from Dr. Harris' floor, the second floor to the first floor, what would happen as you walked down?

Mr. Wortendyke: Objected to as calling for a conclusion.

The Court: Objection sustained.

Mr. Markley: Will you allow me an exception, your Honor? 30

Q. What else did you notice about those nosings? A. They were raised and loose; that is all.

Q. Now were they removed?

Mr. Wortendyke: Objected to as immaterial.

The Court: Objection sustained.

Mr. Markley: All right; I won't press it.

The Court: You live in the building, as I understand it? 40

Herbert G. Christ, direct

The Witness: No, I do not, your Honor.
I live on Grant Avenue.

Mr. Markley: She worked in the dental
office. That is all.

10 *Cross examination by Mr. Wortendyke:*

Q. You say you were employed by Dr. Harris
at the time? A. I was.

Q. And you are still employed by him? A. I
am.

Q. On a salary? A. I am.

Q. And you are receiving your salary up until
today, are you? A. I am.

20 Mr. Wortendyke: That is all.
(Witness excused.)

HERBERT G. CHRIST, called as a witness on
behalf of the plaintiff, being sworn, was examined
and testified as follows:

Direct examination by Mr. Markley:

30 Q. Mr. Christ, where do you reside? A. 300
Clerk Street.

Q. What is your business? A. Dental techni-
cian.

Q. And how long have you been a dental tech-
nician? A. Since March, 1932.

Q. Now then going back to June—May of 1932
—did you have an office in Jersey City as a dental
technician? A. I did.

40 Q. Where was your office? A. 254 Jackson
Avenue.

Q. Is that the property of Samuel Gootzeit? A.
That is right.

Herbert G. Christ, direct

Q. And where did you have your office in that building? A. On the second floor front.

Q. And how long had you been a tenant in the building in 1932? A. Since May 1st, 1932.

Q. I believe that you are on the same floor as Dr. Harris? A. That is right.

Q. Was there another tenant on that floor? A. In the rear.

Q. Did you have occasion from May 1st of 1932 to observe the nosings on the steps leading from your floor down to the first landing? A. I did.

Q. And what did you observe about those nosings as to their condition? A. That the majority of them were loose and raised. That was the condition of the steps.

Q. And had that existed all during the time you were there from May 1st? A. It did.

Q. Were they at any time fixed to your knowledge while you were there up until June, the date of this accident? A. Off and on.

Q. What way were they fixed? A. Just by hammering them down.

Q. Then what would happen? A. Well, it would last maybe a day or two and the same occurrence would happen again.

Q. It would come up again? A. Absolutely.

Q. Do you recall the date of the accident, June 9th, 1932? A. I don't know if that is the exact date of the accident or not.

Q. But you recall the accident happening to Miss Pleva? A. I do.

Mr. Wortendyke: I object to counsel leading.

The Court: Please refrain from leading.

Q. Do you know whether any repair was made to that step the day after the accident?

Herbert G. Christ, cross

Mr. Wortendyke: I object to that as immaterial and ask that the answer be stricken out. The answer was given before I had an opportunity to put in my objection.

10 The Court: Objection sustained. Strike out the answer. There is no question involved here about management and control. The question would be competent if the control and management of the stairway were in dispute.

Mr. Markley: May I reserve this for rebuttal in the event these pictures are offered in evidence?

The Court: Yes.

20 Mr. Markley: All right; that is all.

Cross examination by Mr. Wortendyke:

Q. You say you have an office on the second floor too? A. Yes.

Q. Still have them there? A. No.

Q. You have a prejudice against the defendant in this case, have you not? A. None whatsoever.

Q. As a matter of fact you and he had an argument about your rent? A. Not at all.

30 Q. That isn't so? By "dental technician" what do you mean? What do you do? A. Mechanical work.

Q. Set the false teeth and do the bridge work for practicing dentists? A. That is right.

Q. And you work in conjunction with Dr. Harris, in connection with his work? A. He and several dentists.

Q. You know him very intimately, do you not? A. Just through business.

40 Q. Mr. Christ—is it? A. That is right.

Q. How long had you been doing Dr. Harris' work? A. Since I opened my office.

Herbert G. Christ, redirect

Q. And you are here at his request, aren't you?

A. Not at all.

Q. You are not? A. (No answer.)

Mr. Wortendyke: That is all.

Redirect examination by Mr. Markley:

10

Q. You are a dental technician and you do work for a number of dentists? A. Yes, sir.

Q. Any dentist that wants your services?

Mr. Wortendyke: Objected to.

The Court: Objection sustained. We are not concerned with that.

Mr. Markley: I want to show that he worked not only for Dr. Harris but for other dentists.

20

Mr. Wortendyke: He has already testified to that.

By Mr. Markley:

Q. When is the last time you did any work for Dr. Harris? A. I judge around the latter part of 1933.

Q. And you haven't done any since? A. No.

Q. In regard to your tenancy there did you have a lease? A. I did.

30

Q. For how long? A. One year.

Q. When the one year was up, what happened?

Mr. Wortendyke: Objected to as immaterial.

The Court: I think the door to that was opened by you, Captain. You asked whether he didn't have an argument with this man or whether there wasn't some feeling existing between them.

40

Mr. Wortendyke: Which he denied, and

Harry Schneckendorf, direct

which question I asked for the purpose of laying a foundation for contradiction. The question would only be proper on rebuttal, if at all.

The Court: I will sustain the objection.

10

Mr. Markley: All right, we will bring him back on rebuttal.

(Witness excused.)

HARRY SCHNECKENDORF, called as a witness on behalf of the plaintiff, being sworn, was examined and testified as follows:

20

Direct examination by Mr. Markley:

Q. Mr. Schneckendorf, what is your business?

A. Life insurance.

Q. And on the occasion of this accident, on June 9th, 1932, where were you? A. I was at Dr. Harris' office that evening.

The Court: Were you in the office at the time of the accident?

The Witness: I was, yes, sir.

30

By Mr. Markley:

Q. What were you there for? A. Getting some work done on my teeth.

Q. You were a patient? A. Yes, sir.

Q. What attracted your attention, if anything? A. When Dr. Harris run out and said there was a scream and left me.

Q. Did you hear the scream? A. I heard the scream very slightly when he ran out.

40

Q. Keep your voice up. A. I heard a very faint scream when Dr. Harris ran out.

Harry Schneckendorf, direct

Q. Did you go out? A. I had a towel around my neck. He was working on me at the time.

Q. Then what did you do? A. After a while I went out after him and when I went to the door he was walking in with a lady in his arms and brought her in and sat her in his chair and she was in pain at the time, and he first took her in the examining room, or his office, rather, and she was in pain all the time and he was asking her questions and tried to help her out, and finally called a doctor. 10

Q. Were you there when the defendant Gootzeit came to the premises that evening? A. Yes, sir.

Q. Were you there when he went down and looked at the stairs? A. Yes, sir. 20

Q. Did you at that time observe this flight of steps leading from the second floor down to the first floor? A. While they were speaking of it I went to the stairs to see what was wrong.

The Court: Did you observe them?

The Witness: Yes, I did.

Q. What did you observe about the nosings on these steps? A. They were lifted.

Q. What do you mean by "lifted"? A. The screw was just lifted out of the nosing, was right up above the nosing. 30

The Court: Further detail and explain what you mean by the last statement.

The Witness: The nosing was lifted right off the stairs, right across, and the screw was there, right in there, very loose—very plain. 40

Q. Later do you know whether there was anything done to the stairs that night?

Harry Schneckendorf, cross

The Court: Do you know of your own knowledge?

The Witness: Yes, sir.

Q. What was done?

10 Mr. Wortendyke: Objected to as immaterial if it was after the accident.

The Court: Objection sustained.

Mr. Markley: May I reserve the right on that on rebuttal?

The Court: Yes.

Cross examination by Mr. Wortendyke:

Q. You say that a nosing was lifted, Mr. Schneckendorf? A. Yes, sir.

20 Q. What nosing was that? A. Well, there were a few lifted there, a few nosings.

Q. There were a few lifted? A. Yes, sir.

Q. On how many steps? A. I took notice on two.

Q. What two were they? A. The third and fourth from the bottom.

Q. And the screws were lying right there? A. One particular screw was lifted from the nosing, the one I took particular notice of.

30 Q. Didn't you testify on direct examination that one of those screws was lying there? A. I said it was lifted from the nosing.

Q. The screw was? A. Yes, sir.

Q. Was the nosing itself lifted? A. The nosing was lifted.

Q. And this was on what step, did you say? A. Just what step it was I can't say. There were two lifted but one particular screw was lifted from the nosing.

40

The Court: Was the screw still embedded in the wood?

Harry Schneckendorf, cross

The Witness: Yes, sir.

The Court: That is what I wanted you to explain before. Was it lying loose on the stairs or still in the wood?

The Witness: Still in the wood.

By Mr. Wortendyke:

10

Q. What time did you come to Dr. Harris' office? A. I came to Dr. Harris' office exactly about six o'clock or six-ten.

Q. Did you follow Miss Pleva in the dentist's chair? A. I was sitting in the waiting room.

Q. I mean after she got through were you the next patient? A. Yes.

Q. And after she left you were in the dental chair? A. Yes.

20

Q. And were you in the dental chair with this towel around your neck when this accident happened? A. Yes, sir.

Q. You, of course, didn't see what step Miss Pleva fell on, if she fell on any? A. No, sir.

Q. And you didn't notice anything wrong with the nosings when you came up to the doctor's office, did you? A. One one occasion——

Q. Did you or did you not? A. Yes, sir, that one nosing I referred to.

30

Q. That particular evening? A. That particular evening.

Q. And I suppose you would say this Exhibit D-1 does not correctly represent the appearance and condition of those stairs when you saw them that evening? A. No, sir.

Q. That does not? A. No.

By the Court:

Q. Let me ask you this. Judging by the tenor of one your answers to counsel for the defense,

40

Harry Schneckendorf, cross

—do I understand you to say or mean that you had visited this dentist's office on other occasions, other than June 9th, 1932? A. I have, yes, sir.

Q. And did you call upon Dr. Harris upon these other occasions for dental treatment? A. Yes, sir.

10

Q. On how many other occasions did you call on the doctor? A. Your Honor, I still go to the doctor for dental work.

Q. I don't care about that—before the date of the accident? A. Before the date of the accident, about three or four months.

Q. One visit or more than one? A. More than one.

20

Q. How many? Were you there four or five times—six times—how many? A. I had been there about a dozen times, to be exact.

Q. A dozen times? A. Yes, sir.

Q. For a period how long preceding June, 1932? A. Four months.

Q. Four months. On any of those other occasions did you notice the condition of the steps—yes or no? A. No, sir.

Q. No? A. No, sir.

30

The Court: All right; that is all.
(Witness excused.)

Mr. Markley: Now we have Dr. Benjamin, your Honor, whom I understand has been operating. He is supposed to be here.

40

Mr. Wortendyke: You already have plenty of medical testimony. If you want to stipulate that Dr. Benjamin's testimony will be the same as Dr. Klaus' I will so stipulate.

Motion for Nonsuit

Mr. Markley: Dr. Benjamin is the attending physician and he was to be here, your Honor.

Do you want me to read his testimony?

Mr. Wortendyke: Dr. Feinberg, who was first called, testified without objection from me as to what Dr. Benjamin did and as to evidence of pain. Dr. Klaus, who was called in afterwards, testified to what he found then, and the X-rays are in the record. I don't see the necessity of cluttering up the record. 10

Mr. Markley: May I call him if he comes in?

The Court: Yes.

Mr. Wortendyke: That is in the discretion of the Court. The point is simply this: I am not trying to pass the responsibility to the Court. At the same time I have a rather strenuous job as it is in connection with objections in this case. 20

Mr. Markley: I am willing to accept Mr. Wortendyke's statement that Dr. Benjamin's testimony would be the same as Dr. Klaus'. 30

How about the doctor's bill? His charge was \$150. 30

Mr. Wortendyke: I am willing to stipulate that that is a reasonable bill.

Mr. Markley: With that, then, if the Court please, we rest.

(Plaintiff rests.)

Mr. Wortendyke: If the Court please, under the evidence in this case I move for 40

Samuel Goodzeit, direct

10 a nonsuit upon the ground that there is no evidence in the case from which an inference could be drawn that this defendant was guilty of any negligence which was the proximate cause of the particular injuries in this case. There has been no basis ad-

15 duced so far as legal evidence is concerned, as I see it, indicating beyond conclusions drawn from circumstances found subsequent to the occurrence that the particular step, whatever it may have been, from or upon which the plaintiff fell was in a condition proximately causing the fall and re-

20 sulting proximately from negligence on the part of the defendant in this case.

The Court: Motion denied.

Mr. Wortendyke: Exception, if your Honor please.

DEFENDANT'S CASE

SAMUEL GOOTZEIT, the defendant, upon being called as a witness in his own behalf, being first duly sworn testified as follows:

30 *Direct examination by Mr. Wortendyke:*

Q. You are the defendant in this case, are you not? You are the one that is being sued? A. Yes, sir.

Q. Do you hear me all right? A. Yes, I hear.

Q. And you are the owner of this building where this accident is alleged to have occurred? A. Yes, sir.

Q. And you were the owner on June 9th, 1932?

A. Yes, sir.

40 Q. What kind of building is it, Mr. Gootzeit? I mean how many places are there in it, floors or whatever you call it? A. Three-story brick.

Samuel Goodzeit, direct

Q. Three-story brick? A. Yes.

Q. Is that on a corner? A. Corner of Wilkinson Avenue.

Q. What is the street number on Jackson Avenue? A. 254 Jackson.

Q. And what is the street number of Wilkinson Avenue? A. 180 Wilkinson.

10

Q. So that 180 Wilkinson and 254 Jackson Avenue is the same? A. Same thing, yes, sir.

Q. And at the time of the accident, on or previous to June 9th, 1932, how often were you in those premises, how often were you in that building? A. I am there several times a day.

Q. You are there several times a day? A. Yes.

Q. And what did you go to the premises for on those occasions? A. This is property that I make a living from and I am trying to look around to see that everything is in good condition.

20

Q. So that you derive your income from that property? A. Yes, sir.

Q. Do you collect the rents? A. Yes, sir.

Q. Now I call your attention to June 9th, 1932, which is the day it is charged that this accident to Miss Pleva occurred. Were you in the premises that day? That was Thursday? A. I am pretty sure I were.

30

Q. And during the day time? A. Yes, sir.

Q. Did you have occasion to go up this stairway which leads from the ground floor to the second floor? A. Yes, sir.

Q. Did you have occasion to look to see the steps of that stairway that day? A. Surely. I can't walk without looking at it.

Q. I call your attention to the two steps that lead up to where you are seated on the witness stand. As you walk up those stairs can you see

40

Samuel Goodzeit, direct

them from an erect position? A. Sure you can see it.

Q. And is that the position you walked in in walking up and down the stairs on that day? A. Yes, sir.

10 Q. Now I show you this photograph which has been marked for identification as D-1 and ask you to look carefully at it and tell us whether the portion of the stairway shown in that picture—tell us first whether that is part of the stairway which leads from the ground floor to the second floor in that premises—yes or no? A. Yes, sir.

20 Q. And I ask you to look again at the photograph carefully and tell us whether that accurately and correctly shows the condition of that stairway? A. Yes, sir.

Q. That portion of the stairway as it existed that day, June 9th, 1932, when you saw it? A. Yes, sir.

30 Q. Now I call your attention to the metal edges of the steps and also to the surface of the steps, that is the part you step on. Will you tell the jury and the court, please, how that stairway was covered, what the covering consists of, including the edges? A. Linoleum and brass edging.

Q. How was the edging made? What was the edging made of? A. Brass edging.

Q. And how was it fastened on? A. Like screw nails.

40 Q. Screw nails. Now, that day, June 9th, 1932, was any one of those nosings on the stairway shown in that picture either loose or lifted up or sticking up or bent, or were any of the screw nails that were used in fastening the nosings to the stairway sticking up or lifted or missing? A.

Samuel Goodzeit, direct

Nothing was loose or sticking out. Everything was in perfect condition.

Q. How long before that day, June 9th, 1932, had you had that put in? A. About two years before that.

Mr. Wortendyke: I offer this picture in evidence. 10

Mr. Markley: I would like to ask a few questions about it first.

By Mr. Markley (on the offer):

Q. Were you there when this picture was taken?

Mr. Wortendyke: Objected to as immaterial in view of the evidence that it correctly depicts the conditions as they existed on the day of the accident. 20

The Court: I will allow it.

Q. This picture was taken, according to counsel's representation, some time around August, 1932. Now, between June 9th, 1932, and August 2nd, 1932, there were repairs made to that stairway, weren't there? A. Never, no repairs.

Q. Didn't you come there the night of the accident? A. Yes. 30

Q. Were you there with Dr. Harris the very night that girl fell? A. Yes.

Q. And on that occasion wasn't Dr. Harris' hammer taken and used for the purpose of trying to tighten those nosings? A. No.

Q. And next morning didn't the son of your superintendent go in there and make further repairs to that stairway? A. No, nobody made repairs. 40

Q. Were you there the next morning? A. Yes, sir.

Samuel Goodzeit, direct

Q. All next morning? A. What do you mean, "all?"—in and out.

Q. Were you there when your superintendent's son was there making repairs? A. No. Those nosings were taken off two or three months afterward by the request of Dr. Harris.

10 Q. The nosings were taken off two or three months later? A. Yes.

Q. You haven't any nosings there now? A. No, sir.

Q. I am talking about the tightening and the repairing of those nosings? A. Didn't need any tightening at all.

Q. When were any repairs made to those nosings before this accident? A. Two years, but not to the nosings. It was put in, the whole thing, two years before.

20 Q. Two or three years before? A. About two years before.

Q. I call your attention to your testimony, page 97, where you were asked—

Mr. Wortendyke: This is going into the full realm of cross examination. I haven't finished my direct examination.

30 The Court: I think that is right.

Mr. Wortendyke: I now renew my offer in evidence of Exhibit D-1 for Identification.

The Court: I will allow it.

(D-1 for Identification admitted in evidence and marked Exhibit D-1.)

Direct examination by Mr. Wortendyke (continued):

40 Q. Now, it has been brought out on the partial cross examination, when counsel for the plaintiff asked you with reference to the picture, that two

Samuel Goodzeit, direct

or three months after the accident the nosings were taken off? A. Yes, sir.

Q. Why did you take them off? A. I wanted to favor Dr. Harris. He asked me to do it, so there wouldn't be no discussion about nosings to take them off, and I did it.

Q. Did you have on June 9th, 1932, and before that time anyone doing the cleaning on those stairs? A. I have a janitor there, Mrs. Rock.

Q. What is her name? A. Mrs. Rock.

Q. Does she live in the premises? A. Yes.

Q. What part of the premises does she live in? A. Top floor.

Q. Does she live there now? A. Yes, sir.

Q. How often did she clean these stairs? A. Practically every day.

Q. Did she do the actual cleaning herself? A. Yes, sir.

Q. Now, when was the first time that you heard anything about an alleged accident that had occurred on June 9th, 1932? A. I didn't get it.

Mr. Wortendyke: I withdraw the question.

Q. When did you first hear that this Miss Pleva fell, and who told you? A. Dr. Harris told me.

Q. And what did he say?

Mr. Markley: What did he say when?

Q. When was it? A. About an hour or so later.

Q. What did he do, call you up? A. Yes.

Q. What did he say? A. He said an accident happened.

Q. What did you do? A. What could I do? I couldn't do anything.

Q. Did you stay where you were or did you go to the property? A. I went home. I looked around. I didn't see anything what should be wrong about it.

Samuel Goodzeit, direct

Q. What do you mean "you went home"? Did you go to the property? A. I went upstairs to Dr. Harris' and stayed there a while and then went home.

10 Q. When you went to Dr. Harris' office was that the same evening? A. Yes, sir.

Q. What did he say to you with reference to these stairs? A. He didn't say anything about them. She fell on the stairs, he says.

Q. Did he show you any part of the stairs? A. There wasn't anything to show.

Q. Did he say anything about the stairs to you? A. He said she tripped on the nosings. That is what he said.

20 Q. Did you look at the nosings? A. It was perfect.

Q. Was there anything wrong with the nosings? A. No.

Q. Were they lifted? A. No.

Q. Were they sticking up? A. No, sir.

Q. Were any of the screw-nails loose? A. No, sir.

Q. Were they raised? A. No, sir.

30 Q. Did you take a hammer, either Dr. Harris' hammer or anyone else's hammer, and nail them down? A. I didn't use no hammer. It didn't need it.

Q. Did Dr. Harris say to you anything about what particular step Miss Pleva fell from? A. No.

Q. Did you examine this stairway that is disclosed in this photograph from top to bottom that evening? A. Absolutely. I looked at it and there wasn't anything wrong.

40 Q. Was there anything wrong? A. No, sir, nothing wrong.

Q. At that time how long had Dr. Harris been a tenant in that property up until then? How long before June 9th, 1932, was he in your prop-

Samuel Goodzeit, direct

erty approximately? A. About seven or eight years, something like that.

Q. Did you ever see him out with a hammer or with anything else hammering down the nosings?

A. No, sir.

Q. Did he ever tell you that the nosings were loose or defective or sticking up? A. No, sir.

10

Q. Or that these screw-nails were sticking up? A. No, sir.

Q. Did Mrs. Rock ever tell you that the nosings were sticking up or loose in the way referred to in my last question? A. No, sir.

By the Court:

Q. How far away from the premises where the accident happened did you live at the time of the accident? A. Twelve blocks.

20

Q. And what did your line business or was your line of business at the time of the accident? A. Retired.

Q. Retired? A. Yes, sir.

Q. Did you own other property beside 254? A. Yes, I had another property, 292 Jackson Avenue.

By Mr. Wortendyke:

Q. Did Dr. Harris at any time tell you that any of his patients had complained about the nosings or had fallen on the nosings? A. No, sir.

30

Q. Did Mrs. Eyre, this lady in the front seat here in the blue dress, did she ever complain to you about the nosings? A. Never spoke about it.

Q. Did Mr. Christ, the gentleman just back of Mrs. Eyre, did he ever complain to you about the nosings? A. No, sir.

Q. Did Mr. Schneckendorf ever complain to you about the nosings, the gentleman who sits next to Mr. Christ in the second row? A. No, sir.

40

Q. Now, when you did take the nosings off two

Samuel Goodzeit, cross

or three months afterwards at Dr. Harris' request——

Mr. Markley: How long after?

Mr. Wortendyke: I withdraw the question.

10

Q. How long after the accident did you take them off at Dr. Harris' request? A. Two or three months.

Q. When you did take them off, at that time and under those circumstances, was there anything wrong with them then? A. No, sir.

20

Q. Now, from the time that these nosings were put on until you removed them, two or three months after this alleged accident, was there ever any repairs made to the nosings? A. No, sir.

Q. Was there any condition during that entire period requiring any repairs? A. No, sir, didn't require any.

Cross examination by Mr. Markley:

Q. You say now it was two or three months after the accident that you took the nosings off? A. Yes, sir.

30

Q. I want to call your attention to what you said the last time, on page 93: "He"—meaning Dr. Harris—"made that complaint, didn't he? A. The nosings he said.

"Q. When did he mention it? A. After the accident happened.

"Q. How long after? A. I can't say.

"Q. Approximately? A. I took off the nosings.

"Q. Will you answer my question? Was it a week after the accident? A. I could not say that.

40

"Q. Was it a month? A. Something like that." Do you remember so testifying? A. I said it

Samuel Goodzeit, cross

was two or three months, something like that. I can't remember the exact date.

Q. Now. The question was, "Was it a month?" And you said, "Something like that." A month after the accident. Didn't you so testify? A. If I said two or three months—I can't recall.

Q. No, the question was—— A. Pardon me one second. If I know the exact date I would say surely, but I don't know the exact date.

Q. On page 93 of this record you were asked, "Was it a month?" and your answer was "Something like that." Didn't you so testify? That was your answer? A. I don't remember I answered that.

Q. Would you say you didn't say that? A. I say I don't recollect.

Q. Then it might have been about a month after the accident you took these nosings off?

Mr. Wortendyke: If the Court, please, I object to the question as unfair. If counsel will read five questions down on the very same page he will find this question: "You did it at the request of Dr. Harris? That was at the request of Dr. Harris?" And the answer by this witness, "A month or two."

The Court: The jury will draw their own conclusions.

By Mr. Markley:

Q. You don't know how long it was, do you? A. I just said between two or three months; I don't know exactly.

Q. But you said here about a month? A. I said about. I didn't say the exact time, did I?

Q. If these nosings were all right, Mr. Gootzeit, and in perfect condition and if they were

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Samuel Goodzeit, cross

properly nailed down and they were good nosings why did you take them off? A. To please Dr. Harris.

10 Q. Why should you please Dr. Harris if you had good, fine nosings on there? A. He said there should be no question about the nosings and I took them down.

Q. You were the property owner? A. Yes.

Q. You know what is right? A. Yes.

Q. You knew these nosings were good? A. Yes, sir.

Q. You only had them on there two or three years? A. Yes.

20 Q. And yet you took them off? A. Yes. A lot of things tenants ask me to do that are not proper I do it just to please the tenant.

Q. You didn't think it was proper to do it? A. No.

Q. You did it just to please Dr. Harris? A. To please Dr. Harris, absolutely.

Q. You didn't make any repairs to these nosings from the time they were put on? A. No, I did not.

30 Q. You had them on two or three years and never touched them after they were put on? A. No.

Q. You were there every day, weren't you? A. Yes, sir.

Q. You saw those nosings every day? A. Yes, sir.

Q. In fact you saw them between three and four times a day? A. Yes.

Q. You never made any repairs to them? A. No, didn't need it.

40 Mr. Markley: I ask that the latter part of the answer be stricken out—"didn't need it."

The Court: I will allow it.

Samuel Goodzeit, cross

Q. You did borrow a hammer from Dr. Harris one time, didn't you?

Mr. Wortendyke: I object to that unless the time is fixed.

Mr. Markley: He said he never borrowed a hammer in answer to Mr. Wortendyke. Now, I am going to prove he did. 10

Q. Didn't you borrow a hammer from Dr. Harris on one occasion? A. Possibly I did, but not for that purpose. Possibly I did; I don't remember that, but not for the stairs surely.

Q. I am going to show you did. Page 96 of this record. You were asked, "Did you ever borrow a hammer?" And your answer, "When I had to repair the nosings." You said that, didn't you? A. I didn't. 20

Q. Here it is in the record—"Did you ever borrow a hammer?" and your answer, "When I had to repair the nosings." A. I might have misunderstood you, but I never did.

Q. Then you dispute that this record is accurate, do you, this court record? A. I don't say that. I might have said that but I misunderstood what it was.

Q. On page 96 you were asked, "Did you ever borrow a hammer?" and you answered, "When I had to repair the nosings." Isn't that what you said? A. I don't think I said that. 30

Q. Do you deny you said that? A. I don't deny I said that, but I didn't repair none. Why should I say that?

Q. If you did borrow a hammer to repair the nosings, as you said, the nosings must have been loose? A. The nosings were never loose. 40

Q. Why did you borrow a hammer to repair them? A. I probably borrowed the hammer to

Samuel Goodzeit, cross

repair something else, but I don't think I used it on the nosings.

10 Q. When this case was tried before it was tried on February 28th of this year, and at that time you testified you did borrow a hammer to repair nosings. Now, what did you repair with the hammer? A. There is plenty of things to repair in a house.

Q. What did you repair with respect to the nosings? A. The nosings I didn't even know were repaired.

Q. You say here now you didn't repair the nosings after the accident? A. I didn't.

Q. Never touched them? A. Not before I took them off.

20 Q. Let me read to you from your testimony last time. "Did you ever borrow a hammer from Dr. Harris to knock down the nosings? A. When?

"Q. Prior to June 9th? A. No, sir.

"Q. Did you ever borrow a hammer? A. When I had to repair the nosings.

"Q. When was that? A. A couple of months after the accident."

30 Mr. Wortendyke: I ask for the next question and answer.

Mr. Markley: I will read the next in a moment, but I think I have a right to stop there. That is a clear thought.

Q. You said that?

Mr. Wortendyke: I would like to register my objection as improper cross examination.

40 The Court: I will allow the question.
Mr. Wortendyke: Exception.

Samuel Goodzeit, cross

Q. Now, suppose I give it to you once again:

“Q. Did you ever borrow a hammer from Dr. Harris to knock down the nosings? When?

“Q. Prior to June 9th? A. No, sir.

“Q. Did you ever borrow a hammer? A. When I had to repair the nosings.

“Q. When was that? A. A couple of months after the accident.”

10

Q. You so testified, didn't you in this case last time? Didn't you say that? A. I might have said it but I didn't take it to repair the nosings. I took it to tear down nosings.

Q. Yes or no? Didn't you so testify last time—yes or no? A. If it is in the record I must have testified that way.

Q. And that was the truth, wasn't it? A. What?

20

Q. You testified to the truth? A. It was not to repair the nosings. It was only to take off the nosings.

Q. Did you testify to something that was not the truth? A. At that time——

Q. Please. Did you testify to something that was not the truth? A. I don't testify anything that isn't true.

Q. So whatever appears in that record was the truth at the time, wasn't it? A. Yes, sir.

30

Q. All right. Now, then, when you took off these nosings you ripped them off? A. Yes, sir.

Q. Just ripped them off? A. Yes, sir.

Mr. Markley: That is all.

(Witness excused.)

Mr. Wortendyke: I would like to show to the stenographer the transcript of testi-

40

Samuel Goodzeit, cross

mony on the previous trial of this case bearing the official seal of Emmet J. Victory, Official Stenographer, and ask the stenographer whether that is the official record furnished pursuant to my request.

10

Mr. Markley: I will admit it is. I have a copy right here.

Mr. Wortendyke: I now ask to read into the present record from page 96 of the transcript of the previous trial the questions and answers which have been read by Mr. Markley on cross examination and the additional questions and answers immediately following.

20

Mr. Markley: I have no objection to reading what is on page 96, and I suppose you mean down to page 97.

Mr. Wortendyke (reading):

"Q. Did you ever borrow a hammer from Dr. Harris to knock down the nosings? A. When?

"Q. Prior to June 9th? A. No, sir.

"Q. Did you ever borrow a hammer? A. When I had to repair the nosings.

30

"Q. When was that? A. A couple of months after the accident.

"Q. Did you rip them out? A. Yes. Mrs. Rock's son helped me.

"Q. Both of you ripped them out together? A. Yes.

"Q. What was the condition of the nosings at the time you ripped them out? A. Perfect condition."

40

Mr. Markley: Now, I would like to finish that thought. There are one or two more questions there.

(Reading:)

Pauline Rock, direct

"Q. Had you ever repaired that stairway at all? Did you ever repair the stairway at any time prior to June 9th, 1932?" and the answer, "About two or three years ago I had a man nail the linoleum and the nosings."

10

(MRS.) PAULINE ROCK, called as a witness on behalf of the defendant, being sworn, was examined and testified as follows:

Direct examination by Mr. Wortendyke:

Q. On June 9th, 1932, Mrs. Rock, were you living in these premises 254 Jackson Avenue? A. Yes.

20

Q. That is also known as Wilkinson Avenue? A. Yes.

Q. It is on the corner? A. Yes.

Q. Are you the lady that was employed by Mr. Gootzeit to do the cleaning? A. Yes, I was.

Q. How many times a day or week did you clean the stairs leading from the second to the first floor? A. Every morning.

Q. Tell us what you did. How did you go about it? A. Used a regular hand-brush and kept going down this way, and I had to kneel down to do it.

30

Q. Did you get on your hands and knees? A. Yes.

Q. For instance, if the step on which you are sitting here was the step you were to wash where would you be with your knees to wash this step here? A. Down there (illustrating).

Q. Did you wash those stairs the morning of June 9th, 1932, from top to bottom? A. I did.

40

Q. Did you use soap and water? A. Yes, I did.

Q. Did you use rags? A. Yes, I did.

Pauline Rock, direct

Q. And in the course of your washing down did you or did you not wipe the nosings of the steps with your rag? A. I did.

Q. Did your rag catch in any part of the nosings? A. No, it didn't.

10 Q. Was any part of those nosings sticking up that morning? A. Not while I was cleaning.

Q. Did you see any parts of them sticking up that day? A. No.

Q. Was any part of the screw-nails sticking up? A. No.

Q. Were any of the nosings bent? A. Not while I was there.

Q. Were any of the nosings loose? A. No.

20 Q. Now, June 9th, 1932, was a Thursday? A. Yes.

Q. Next day was Friday. Did you wash the next day too? A. Yes.

Q. What was the condition of the nosings then? A. Just as I done before.

Q. Was there anything defective about the nosings at that time? A. No.

Q. Were you doing that kind of work in those premises when the nosings were put in in the first place? A. Yes.

30 Q. How many years ago about was it? A. I have been there eleven years in May.

Q. Were those nosings or the linoleum after they were once put down ever loose or sticking up or broken? A. Not while I was taking care of it.

Q. And you were taking care of it for eleven years? A. Yes.

40 Q. Was any complaint ever made to you by Dr. Harris that the nosings were defective or sticking up or loose? A. No.

Q. Did you ever see Dr. Harris out with a ham-

Pauline Rock, cross

mer knocking them down? A. No, because I am through in the morning—and then I am through.

Q. Well, did you ever see him? A. No, I did not.

Q. Did any patient of Dr. Harris' ever complain to you about the nosings? A. No, they did not. 10

Q. Now from June 9th, 1932, when this accident is alleged to have occurred, until the nosings were finally taken up were there any repairs made in between those two times? A. No.

Q. Your answer is no? A. Yes.

Q. I show you, Mrs. Rock, Exhibit D-1 in evidence, a picture, and ask you whether that correctly represents the appearance and condition of those stairs as they existed on both the morning of June 9th and the morning of June 10th, 1932? A. Yes. 20

Q. I call your attention to this lady on the front row, Mrs. Eyre. Did she ever complain to you that the nosings were loose or sticking up? A. No.

Q. I call your attention to the gentleman sitting behind her. Did Mr. Christ ever complain to you, the dental technician upstairs—did he ever complain to you? A. No. 30

Q. Did Mr. Schneckendorf ever complain to you? A. No, he did not.

Cross examination by Mr. Markley:

Q. You would come there in the morning, Mrs. Rock? A. I live on the premises.

Q. —do your cleaning, and when would you leave? A. When I got finished with my work.

Q. When would that be? A. Take me about half an hour or an hour. 40

Pauline Rock, cross

Q. Then you would be gone, would you? A. Yes.

Q. As I understand it you were cleaning these particular steps for eleven years? A. Yes.

10 Q. You know them daily for eleven years? A. Yes.

Q. And all during that entire eleven years the stairway was in the same condition? A. Yes.

Q. It was never repaired in that time, was it? A. No.

Q. No repairs of any kind were made in the eleven years? A. No.

Q. And nothing was done there during the entire time you worked there? A. What?

20 Q. Nothing was done there to repair the stairs all during the time you worked there? A. None.

Q. These nosings were on there for eleven years, weren't they? A. Yes.

Q. And they never were changed, were they? A. No, only when they were taken off.

Q. Only when they were taken off after this accident? A. I think so. I done my work there.

Q. You never knew of any change in them all during this eleven years? A. No.

30 Q. Did your son ever do any work for Mr. Gootzeit on those premises?

Mr. Wortendyke: I object to that.

A. He helped Mr. Gootzeit take up the nosings, that is all.

The Court: Just a moment.

Mr. Wortendyke: Objected to as immaterial, what her son or John Jones did.

The Court: Objection sustained.

40 Mr. Markley: That is all.

*Pauline Rock, redirect, recross**Redirect examination by Mr. Wortendyke:*

Q. Madam, these particular nosings and the linoleum shown in this picture—— A. Yes.

Q. How many years before June 9th, 1932, were they put on? A. I think when Dr. Harris moved in there.

10

Q. When Dr. Harris moved in? A. Yes.

The Court: When Dr. Harris moved in?

The Witness: Yes, I think so—no, before that. Maybe I have it wrong. I have been there eleven years in May. They were on then at that time.

Q. Were they the same nosings? A. Yes.

Q. They were? A. Yes.

20

Q. During that period was there anything loose or sticking up or broken about them? A. No.

Mr. Markley: I object to that as not redirect examination.

The Court: I will allow it to stand.

Q. In any event, is there any doubt or uncertainty in your mind regarding the condition of these nosings on the morning of June 9th, 1932? A. They were perfect.

30

Mr. Wortendyke: That is all.

Recross examination by Mr. Markley:

Q. You still work for Mr. Gootzeit, don't you? A. I do.

Q. Have you talked this case over with him? A. No, I did not.

Q. Have you talked it over with anybody? A. No.

40

James B. McCann, direct

Q. Not a soul? A. No, sir; not a soul. I am just as clear as the next one.

Mr. Markley: That is all.
(Witness excused.)

10

JAMES B. McCANN, called as a witness in behalf of the defendant, being sworn, was examined and testified as follows:

Direct examination by Mr. Wortendyke:

Q. Mr. McCann, did you on behalf of the defendant in this case investigate this alleged accident? A. Yes, I did.

20

Q. I call your attention to the date which has been testified to here in this case, June 9th, 1932. When with reference to that date did you investigate the accident? A. About the middle of July, July 14th, following the accident.

Q. Did you go to these premises, number 254 Jackson Avenue, also known as 180 Wilkinson Avenue? A. Yes, I did.

Q. Did you interview anyone there? A. Yes, I did.

30

Q. Whom did you interview? A. Dr. Harris.

Q. Is that the Dr. Harris who testified here on behalf of the plaintiff here today? A. Yes, it is.

Q. In the interview with Dr. Harris on July 14th, 1932, as a part thereof or in conjunction therewith or at any other time in reference thereto did you offer any inducement, make any promise or representation or exercise any duress or persuasion upon Dr. Harris upon obtaining information regarding this accident?

40

Mr. Markley: I object to the question

James B. McCann, direct

because it is entirely improper and immaterial.

The Court: Has Dr. Harris charged any duress was used upon him or pressure of any kind?

Mr. Wortendyke: No, your Honor, and I defy my adversary to deny that that will be shown on rebuttal, or will be attempted.

10

Mr. Markley: It is premature here.

Mr. Wortendyke: I will reserve it for sur-rebuttal.

Q. In any event you interviewed Dr. Harris?

A. Yes.

Q. Did you tell him you were investigating the case? A. Yes.

Q. Did you ask him about this alleged fall of Miss Pleva on June 9th, 1932? A. Yes.

20

Q. And what did he tell you regarding the stairway which was the subject matter of the complaint?

Mr. Markley: I object to the form of the question on the ground that the only proper way to use this—this is merely for the purpose of contradicting Dr. Harris and for the purpose of affecting his credibility. He is not a party to the suit.

30

Mr. Wortendyke: I withdraw the question.

Q. In that interview in which you asked Dr. Harris about this accident did he or did he not say to you that the stairway was in perfect condition; that he had examined it after the girl had fallen and saw nothing wrong with it? A. That is what he told me.

40

James B. McCann, cross

Cross examination by Mr. Markley:

Q. You say you were employed to investigate this accident by Mr. Gootzeit?

10

Mr. Wortendyke: Objected to as an incorrect statement of his direct testimony. His testimony was that he investigated this accident. It is very evident that a certain nebulous domain is being approached.

The Court: The stenographer will repeat the beginning of the direct examination.

(First part of the direct examination read by the stenographer.)

20

The Court: It now develops that your question was, "Did you investigate this case on behalf of the defendant?" So you have opened the door.

Mr. Wortendyke: My objection, if your Honor please, went to the characterization of the testimony to the effect that Mr. McCann was employed.

By Mr. Markley:

30

Q. (Question repeated by the stenographer.) Is the answer yes or no? A. No.

Q. But you did investigate the accident in his behalf you say? A. In his behalf, yes, sir.

Q. But you didn't start your investigation, if I understand you correctly, until July 14th, 1932? A. Yes, sir.

Q. You know that the accident happened more than two months before that?

40

The Court: One month before—June 9th.

Q. That is right. One month before. A. Any

James B. McCann, cross

knowledge that I had that the accident had occurred was probably a day or two before I started my investigation on July 14th.

Q. Well, it was approximately a month before your investigation that the accident happened, on June 9th? A. Yes.

Q. Did you go there and look at the stairway? A. Yes, I did.

Q. Accompanied by anybody? A. I was alone.

Q. Did you have this photograph made? A. I ordered that it be taken, yes.

Q. When was that made? A. It was made some time after July 27th.

Q. Now, what happened between the time of the accident on June 9th and when—when was it, July 27th? A. Yes.

Q. What happened to this stairway in the meantime, you don't know, do you? A. No, sir.

Q. Now then, in the course of your investigation of how the accident happened and the cause of it, I assume you interviewed the various tenants in the building, didn't you? A. Yes, I did.

Q. And did you get statements from the different tenants in the building?

Mr. Wortendyke: Objected to as immaterial.

Mr. Markley: I think I have a right to show what his examination consisted of.

Mr. Wortendyke: I renew my objection and further respectfully state to the Court, as I stated when the question to lay foundation was asked of Dr. Harris, that the question was solely for that purpose.

The Court: I will sustain the objection.

Mr. Markley: Will your Honor allow me an exception?

James B. McCann, cross

By Mr. Markley:

Q. Now, you had known Dr. Harris before this, hadn't you?

10 Mr. Wortendyke: Objected to as immaterial.

 The Court: I will allow it.

A. I had met him.

 Mr. Wortendyke: Will your Honor allow me an exception?

Q. How long previous?

20 Mr. Wortendyke: May I have my objection run to all these questions so I won't be interrupting?

 The Court: I don't know what the purpose is. Of course whether he did know him or not is beside the point, but it may be that he may be able to show some feeling between this witness and Dr. Harris.

30 Mr. Markley: I will withdraw it for the purpose of shortening the trial, because I assume Mr. Wortendyke is going to put Mr. McCann back again if I put Dr. Harris on.

By Mr. Markley:

Q. You went in, saw Dr. Harris. You were both very friendly. You asked him how this thing happened and he told you how it happened just as you have told us here?

40 Mr. Wortendyke: I object on the ground the question embodies an entire misstate-

James B. McCann, cross

ment of the testimony. There is no testimony of that kind.

Mr. Markley: I am asking whether he said that without any persuasion or hostility. I think I have a right to find out the circumstances under which he said it.

10

The Court: I will sustain the objection. Reframe the question.

Q. Did Dr. Harris refuse to talk to you? A. No.

Mr. Wortendyke: Objected to as immaterial.

Q. Did he show any hostility to you? A. No.

Q. Did you have any trouble getting him to tell you about the accident? A. None at all.

20

Q. You asked him and he told you what you have testified to? A. Yes, sir.

Q. Then did you write it down? A. Yes.

Q. And put it in black and white? A. Yes, sir.

Q. Did you ask the doctor to sign it? A. I did, yes.

Q. Did he sign it? A. He refused. Pardon me. When you asked me about writing it down in black and white, I wrote it in my note book.

30

Q. Did you write down a statement? A. When I first went in and asked him about the accident—

Mr. Wortendyke: Objected to as immaterial.

The Court: I will allow it.

Mr. Wortendyke: Exception.

The Court: It goes to his credibility.

40

James B. McCann, cross

By Mr. Markley:

Q. Did you write down his statement as he gave it to you? A. I made notes in my note book as to what he told me.

10 Q. Did you make out a statement or not? A. No, sir.

Q. The reason why you didn't was because he told you he wouldn't sign any statement? A. That is it exactly.

Q. As a matter of fact didn't you request the doctor to testify favorably to the defendant and if he would do so that the defendant would pay him to the extent of five hundred dollars? A. No, sir.

20 Q. You absolutely deny that, do you? A. Absolutely, yes.

By the Court:

Q. Let me ask you this question. You say the doctor talked very freely to you? A. Yes, sir.

30 Q. If he told you this story that you have related to us so freely, why didn't you write it down and present it to him and ask him to sign it? A. May I explain everything?

40 Q. Yes. A. It will be necessary for me to do that. About a year previous to this meeting with Dr. Harris on July 14th, 1932, to ask him about this accident that Miss Pleva had—when I went there I recognized him as being a claimant in an accident about a year previous to that, in June, 1931. At that time he was a passenger in an automobile and was injured and I went to see him about that accident and I then took a signed statement from him as to just how the accident occurred and he signed the statement, and in that

James B. McCann, cross

statement he said that he would accept \$450 to compensate him for his injury, and that is why I knew Dr. Harris and why we were friendly, because I met him before.

Mr. Markley: After that he was friendly?

The Court: Let him finish his answer.

10

The Witness: I was finished—if there are any other questions.

Q. You asked me for permission to answer the question fully. If you were friendly, and you say he gave you this statement as you have related it to us, why didn't you prepare a written statement and write all these things down and say, "Sign it"? A. I asked him, "Will you give me a signed statement about this, Doctor?" And he said, "No, I signed one statement for you and didn't get anything out of it, so why should I sign this one?" And I said, "O. K.," and I just jotted it down in my book.

20

Q. Have you got your note book here? A. No.

By Mr. Markley:

Q. Where is your note book? A. It is in my office in Newark.

30

Q. In the previous case after the statement— A. Yes.

Q. —for this accident on a bus— A. No, automobile.

Q. —you did pay him \$450? A. No, we didn't. That is why he wouldn't sign the statement, because we didn't pay him anything for the automobile accident.

Q. After you got a statement you didn't pay him anything? A. No.

40

James B. McCann, redirect

Q. Never paid him a nickel? A. No.

Q. So when you came around this time he wouldn't sign anything? A. No.

Q. But he wasn't hostile to you? A. No.

10 Q. And you didn't offer him \$500 this time? A. No.

Q. Did you offer him anything the previous time?

Mr. Markley: That is all.

By the Court:

Q. Where do you live? A. Montclair.

20 Q. Did you live in Montclair at the time of this alleged accident? A. I was born in Montclair. My family lived there all the time.

Redirect examination by Mr. Wortendyke:

Q. Is this the prior automobile accident statement (handing paper to the witness) that Dr. Harris signed? A. Yes, it is.

Mr. Wortendyke: I offer it in evidence.

Mr. Markley: Objected to as immaterial.

30 Mr. Wortendyke: I offer it for identification.

(The paper identified by the witness marked D-4 for Identification.)

Q. And in this previous accident did you offer him any money whatsoever as a condition of getting his statement? A. No, sir.

Q. Did you ever pay him anything? A. No, sir, never.

40 Q. Did you offer him any money for a statement in this case? A. No, sir.

James B. McCann, recross

Q. And did you ever pay him anything? A. No, sir.

Mr. Wortendyke: That is all.

Recross examination by Mr. Markley:

Q. Where are all these other witnesses that you have got in this case in the building?

10

Mr. Wortendyke: I object to that, if the Court please.

The Court: Objection sustained.

(Witness excused.)

Mr. Wortendyke: I find, if your Honor please—and I feel I should explain this offer—your Honor asked that the bill of particulars be put in evidence, which was done by consent of counsel on both sides. I find in connection with the application which I made to your Honor regarding the testimony as to earnings or her opportunity to get another job that as late in this case as April, 1933, almost a year after the accident, admittedly by the plaintiff's own testimony following the termination of her confinement, spontaneously and without any demand whatsoever, the plaintiff's attorney in this case served upon me an amendment to the bill of particulars in which additional particulars are furnished spontaneously by the plaintiff, and I would like to offer them in evidence to make the picture complete.

20

30

The Court: All right.

Mr. Markley: No objection.

(Amendment to the bill of particulars admitted in evidence and marked Exhibit D-5.)

Mr. Wortendyke: And I would like to renew my motion in the light of the furnishing of that supplement at that late date, which is silent of

40

Case

course to any such claim, that the testimony be stricken out regarding her ability or inability to get a job following this accident, including the testimony regarding what she earned in the particular jobs she did get after the accident.

10 The Court: Now, so you and I won't be fooling one another, in plain English——

 Mr. Wortendyke: I am not trying to fool your Honor.

 The Court: I know you are not intentionally doing it but you are unwittingly doing it because you are talking in a nebulous fashion about something you evidently know is in your upper story and which I don't know anything about. Now, you can pick out in the record question by question
20 just what you want stricken out and I will strike it out, but I think the better way to handle this thing would be in my charge to the jury. You have had these papers in your file for six months and I have never seen that paper and I don't know what it says in there and that isn't fair to me. There is passed up to me to rule on something that I don't know what you lawyers are talking about and I don't intend to rule on any such thing as
30 that. I don't mean to say you would do it intentionally but here you are talking about something I don't know what you are talking about. I haven't seen it and you say you have just discovered it in your folder, and I think the better way would be, so the jury won't be all confused and so this record won't be manhandled, that I handle it in my charge to the jury.

 Mr. Wortendyke: All right, to clear the situation I will be very glad to withdraw my present
40 application. With that the defendant rests.

DEFENDANT RESTS

Dr. Irwin R. Harris, direct

DR. IRWIN R. HARRIS, recalled in rebuttal by the plaintiff, having been previously sworn, was examined and testified as follows:

Direct examination by Mr. Markley:

Q. Dr. Harris, did you tell the investigator who was on the witness stand there was nothing wrong with the stairs when Miss Pleva fell? A. No, sir. 10

Mr. Wortendyke: Objected to as improper rebuttal. He so testified when I asked the question to lay the foundation.

The Court: I think that is true, Mr. Markley. He was asked the question categorically on cross examination whether he didn't tell this investigator that and he denied it and it is in the record. 20

Q. When this young man, McCann, the investigator, came to your place in July of 1932 did you recall that he had been to see you about another case prior to that? Did you recognize him as an investigator that had been to you on another occasion? A. Yes. 30

Q. And what had been your experience on the other occasion with him? 30

Mr. Wortendyke: Objected to as improper rebuttal.

The Court: Objection sustained.

Did he offer you five hundred dollars to give him a favorable statement in this case?

The Witness: Yes, sir.

The Court: What did he say?

The Witness: He offered me five hundred dollars to testify in their favor, in Mr. Goot- 40

Dr. Irwin R. Harris, direct

zeit's favor. First he offered me two hundred dollars, then two hundred and fifty dollars and five hundred dollars.

The Court: What did you say to that?

10 The Witness: That I had no information to give him and that I am not to be bought.

By Mr. Markley:

Q. Now, then, Doctor Harris, after the accident and on the night when Mr. Gootzeit came there in response to the telephone call, was anything done to the stairs that night, the steps?

20 Mr. Wortendyke: Objected to as improper rebuttal. It has already been testified to that they were hammered down.

Mr. Markley: When the photograph was offered in evidence I objected to it on that ground and the court said I would have a chance to prove that the photograph didn't show the condition later.

The Court: I think that is so.

30 Mr. Wortendyke: I will leave it to the jury. My recollection is that it has already been testified to.

The Court: Mr. Markley's insistence at first was that if there was a changed condition the photograph shouldn't go in and I allowed it on the witness' testimony that there was no change.

Mr. Wortendyke: Out of consideration to the Court I withdraw my objection.

By Mr. Markley:

40 Q. What was done to those steps that night?
A. Hammered down.

Herbert G. Christ, Direct, cross

Q. When they were hammered down did they stay down? A. No, they didn't stay down.

Q. Who did the hammering that night? A. I done part of it and Mr. Gootzeit done part of it.

Q. How about next day, next morning? A. I had nothing to do with what was done next morning. Whatever was done next morning I had no part in it.

10

Q. You didn't see that? A. No.

Mr. Markley: All right; that is all.

(Witness excused.)

HERBERT G. CHRIST, recalled in rebuttal by the plaintiff, having been previously sworn, was examined and testified as follows:

20

Direct examination by Mr. Markley:

Q. Mr. Christ, the morning after this accident were you there at the premises? A. I was.

Q. Were any repairs made to the steps leading from the second floor down to the landing between the second and first floors? A. There were.

Q. Who made those repairs? A. Mrs. Rock's son.

30

Q. What was the nature of the repairs that were made that you observed? A. He was tacking down the strips and when I was passing I said, "I see, George, you are busy," and he said, "Yes, we had an accident last night."

Q. Were the nosings up? A. He had one nosing up and the rest of them was tacked down.

Cross examination by Mr. Wortendyke:

Q. What time was this, Mr. Christ? A. It was about half past nine in the morning.

40

Mr. Wortendyke: That is all.

(Witness excused.)

Court's Charge

Mr. Markley: That is all of the rebuttal.

(MRS.) PAULINE ROCK, recalled by the defendant in sur-rebuttal, testified as follows:

Direct examination by Mr. Wortendyke:

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Q. Did your son do any repairs on these stairs the morning after the accident? A. No.

Mr. Wortendyke: That is all.
(Witness excused.)

20

Mr. Wortendyke: The defendant rests.

Mr. Markley: The plaintiff rests.

(Thereupon Mr. Wortendyke summed up to the jury on behalf of the defendant.)

(Thereupon Mr. Markley summed up to the jury on behalf of the plaintiff.)

(Thereupon an adjournment was taken until 9:45 A. M., June 14, 1934.)

June 14, 1934.

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9:45 A. M.

(Case continued pursuant to adjournment.)

(Appearances, the same.)

(The jury was polled by the clerk.)

Thereupon the Court charged the jury as follows:

Court's Charge

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Gentlemen of the Jury: During the course of the examination of the jurors the question of in-

Court's Charge

surance cropped into this case. Probably you
 will remember the questions asked. One of the
 jurors was asked what his business was. He was
 listed as a bookkeeper or something of that sort,
 and counsel asked by whom he was employed and
 he answered and then he was asked as to the na-
 ture of the concern or business and he said, "Gen-
 eral insurance," and he was further asked if that
 covered apartment houses and tenement houses
 and he said, "Yes." Whereupon counsel for the
 defense made a motion for a mistrial on the
 ground that it was a question foreign to the issue
 and had no proper place in the proceedings, and
 inasmuch as that situation developed and inas-
 much as I ruled adversely to counsel for the de-
 fendant because of the fact that under the cases
 disposition of a motion of that sort rests in the
 sound discretion of the Court, and inasmuch as I
 felt the questions that were asked were proper
 ones, nevertheless, I feel it my duty to charge you
 that you are emphatically and positively to ignore
 any and all reference that may have been made at
 that time to the question of insurance. I do not
 want that to creep into this jury box or into the
 jury's deliberations or determination of this case.
 If I thought for a moment you gentlemen would
 dispose of this case and decide this case by rea-
 son of that element, I would unhesitatingly set
 aside the judgment or award; and I am going to
 go into the logic that is behind a rule of that
 character a little more at length than judges gen-
 erally do. The defendant is entitled to his day in
 court like anybody else. He is entitled to even-
 handed justice just the same as any one of you
 twelve men in this jury box would be if you were
 the defendant in his place. He is entitled to have
 his case squarely and fairly decided on the evi-

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Court's Charge

10 dence that develops here by sworn witnesses and sworn testimony. He is entitled to carry insurance if he feels like it. He doesn't have to if he doesn't want to—I emphasize that,—and whether he does is no concern of yours and is no concern of mine. It is none of our business, in plain English. He is entitled to have equal-handed justice at your hands, which I feel confident he is going to have irrespective of the question of insurance. And, as I have said in other cases, if you find there was a question of insurance, the insurance company is entitled to a square deal at your hands just the same as anybody else, no more and no less. Now, gentlemen, I think I have made myself clear to you on that question.

20 (Addressing Mr. Wortendyke.) Did you give me any requests on that?

Mr. Wortendyke: I think it has been covered. The request has been covered. That is, I refer to number nine.

30 The Court (continuing): Now then, gentlemen, there is another injunction I want to leave with you, and that is this, that at the close of the plaintiff's case a motion was made for a nonsuit and again at the close of the defendant's case a motion was made for direction of a verdict.

(Note by the Stenographer: No motion for direction of verdict was made.)

40 Both of those motions were denied by me because I felt that those questions were legal questions to be decided by me rather than by a traverse jury. I specifically charge you now at this time to ignore my disposition of those motions. My disposition of those motions is not to be taken by you as any indication on my part as to what I think on the question of liability or non-liability. You do not need to concern yourselves with what

Court's Charge

I think. I have no right to think about the facts unless I keep my thoughts to myself. I have no right to give them to you and I do not propose to do so. You are the sole judges of the facts, and I want you to guard your prerogatives in that respect just as jealously as I guard my prerogatives. I will not allow anybody to encroach upon my prerogatives and you should not let anyone encroach upon yours.

10

Now the burden of proof is on the plaintiff in this case, the same as in any suit of a similar nature, and before she can recover she must satisfy you by the fair preponderance of the proof, by the greater weight of the evidence, that the defendant in this case has been guilty of some act or acts of negligence and which act or acts of negligence were the proximate cause of this accident and the alleged resulting injuries, to the exclusion of any other intervening agency, and if there should be any other intervening agency in your judgment, no matter how slight, this case would fall, and then it would be your solemn duty to bring in a verdict in favor of the defendant and against the plaintiff for no cause of action.

20

Now I realize that in the performance of your duty perhaps one of the foremost questions that agitates your minds is, What duty did the defendant owe to the plaintiff? The plaintiff, you will recall, was a patient of a dentist who had offices in the building, Dr. Harris. She had a right to go there, and I charge you in that connection (charging you from the case of *Buda v. Dzuretzko*, following a long line of cases in this case, 93 Atlantic, page 83)——

30

“Where a landlord lets out portions of a building to several tenants”——and that is the situation

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Court's Charge

10 here,—“Where a landlord lets out portions of a building to several tenants, retaining in his possession or control the passageways and stairways for the common use of the tenants and those having occasion to visit them, he is under the responsibility of a general owner of land who holds out an invitation to enter upon and use his property, and is bound to see that reasonable care is exercised to have the passageways and stairways reasonably fit and safe for such use.”

20 Furthermore, in this case, it is charged, first, that the landlord had actual notice of the defective nosings, and, second, it is alleged that they existed for such a length or period of time that if he didn't have actual notice by the exercise of reasonable care and prudence he should have had notice himself. Now that is what is charged. Of course, on the other hand that is categorically denied by the dendant. Now it is for you to determine wherein the truth lies. Somebody isn't telling the truth here. They both can't be right.

30 Now the defendant comes in here and files his answer, and in his answer he admits ownership and control but categorically denies that he was negligent, and says, as a separate defense, that at the time and place mentioned and described in the complaint, that the plaintiff failed to exercise reasonable care for her own safety, and in this and divers other respects was negligent, and her said negligence proximately contributed in the causation of any injuries which she may have sustained, and at said time and place in making use of said premises under the circumstances then and there obtaining, plaintiff assumed the risk of whatever injuries she may have sustained.

40 Now I charge you in that connection that inas-

Court's Charge

much as these defenses are affirmative defenses, the burden of establishing these affirmative defenses is upon the defendant, just as I charged you in the first instance the burden of proof was upon the plaintiff to satisfy your minds by the greater weight of the evidence, by the fair preponderance of the proof, of the alleged act or acts of negligence on the part of the defendant. So, likewise, I charge you the reverse, that is, that contributory negligence is the reverse of negligence, only charging it on the other part, that is, the burden of proof must be borne by the defendant in setting up that affirmative defense, that is to say, the defendant must satisfy your minds by the greater weight of evidence, by the fair preponderance of the proof, that she was guilty of contributory negligence in the manner that I have read it word for word and verbatim from the defendant's answer.

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20

Now, of course, if after a calm review of all the testimony in this case you feel that the plaintiff has made out her case, but you are satisfied by the defendant's proof which he offers (not only by the proof that the defendant offers but by all the proof in the case; that even goes to the plaintiff's case as put in) that her own carelessness, her own laxity, contributed to the happening of this event and she assumed the risk as charged, then, gentlemen of the jury, it would be your solemn duty to bring in a verdict in favor of the defendant once again and against the plaintiff for no cause of action.

30

In determining the question of liability, you are not necessarily to be controlled by the number of witnesses. You are to be controlled by the quality of the testimony, by the quality of the testimony of credible witnesses.

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Court's Charge

10 Take this case, examine it carefully and scrutinize the testimony of all the witnesses. Bear in mind the possible interest that this or that witness may have in the final outcome of this case and then give to the testimony of this or that witness the relative weight that you think in your judgment his or her testimony merits and warrants.

20 A bill of particulars has been offered in evidence in this case. You will take that and examine it and read it and see if there is anything in it that is inconsistent in your judgment with the testimony that has been offered. Bills of particulars are demanded and they have a right to demand them and they have a right to have them answered, and they have been answered, and in this case, as in other cases, bills of particulars are furnished for the purpose of apprising opposing counsel just what he is to meet. I say, take the bill of particulars and examine it carefully. Examine all of the evidence carefully.

30 Now if after a calm review of all the testimony you should feel that the plaintiff in this case was free from contributory negligence and if you should feel that she has made out her case by the greater weight of the evidence, then it would be your duty to bring in a verdict in favor of the plaintiff and against the defendant, and then, and then only, for the first time, would you consider the question of damages. And in that connection I charge you that you will allow to this plaintiff such a sum as you think and feel would fairly and reasonably compensate her for the pain and suffering that she has endured. To that sum you would add such an amount according to whichever way you determine her injuries to be. That is, if

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Court's Charge

you determine them to be temporary of course the amount to be added would be less than if you determined them to be permanent. Of course if you determine them to be permanent you would aggravate the amount *pro tanto*. And, third, if you so find you will compensate her for any loss of wages; and, fourth, you would add to that sum such an amount as she was obliged to expend for medical treatment, doctors' bills and hospitalization or anything of that sort that may have been shown or developed in this case.

10

In connection with the question of loss of wages there was some colloquy between counsel and a motion was made to strike out some testimony and I told counsel I would handle it in my charge, and that is what I purpose to do now. You will recall that the plaintiff's testimony developed that she worked for Henry L. Doherty and Company. They are big oil specialists in New York, Mr. Doherty being one of the oil geniuses of this country and head of the Cities Service Company, and she worked for this firm, getting one hundred dollars a month. She said she received a letter from them. Of course she had her own opinion as to why she was let out. That opinion, however, is not to enter into your deliberations. In the absence of any statement from Henry L. Doherty and Company we have got to take what the letter said and they said they let her out due to the depression. Now that being so she could not surcharge this defendant, nor could you penalize this defendant for any damages by reason of loss of this position. Say you or I worked for the Public Service for five hundred dollars a month and we had an accident and were injured and weren't employed when we went back. If we could show

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Court's Charge

10 we had this steady position and they would not hold it open, and we went out looking for another position and couldn't get one, then we could charge the loss of that position to that accident, because the loss reasonably flowed from the accident. In that case the position would be lost by reason of the accident, but I don't see that there is any such situation in this case.

(Addressing Mr. Wortendyke.) Did you cover that in your requests to charge, Mr. Wortendyke?

Mr. Wortendyke: Yes.

The Court: What number is that?

Mr. Wortendyke: Number one.

20 The Court: I guess I covered it more elaborately than you have. Are you satisfied with it? I mean if you want me to I will charge number one.

Mr. Wortendyke: I think number one is a little bit inconsistent with your Honor's present charge.

The Court: I think I have covered it. However I will charge it as you have requested.

30 I have been requested to charge you and do charge you that you cannot award plaintiff anything by way of compensation for loss of earnings, because by her own testimony no such loss resulted from the accident.

40 I am requested to charge and do charge you that if you find that the use of the stairs by the plaintiff was a matter in which defendant had no interest and was a matter relating to plaintiff's own business or that of a tenant in the building and did not relate to any business or purpose of defendant, then plaintiff was merely a licensee of defendant and cannot recover under the evidence in this case.

Upon reflection I decline to charge request num-

Court's Charge

ber two. In fact I reiterate what I have already said. The defendant in this case, under authority of *Buda v. Dzuretzko*, 93 Atlantic, page 83, from which I have already quoted in this charge, retained possession or control of the stairways for the common use of the tenants, and he rented this place in particular to this Dr. Harris, who was a dentist, and in renting to him as a dentist he knew he would have to have patients coming in and out of that building, so as a matter of law he held out an invitation to enter his property and he was obligated to see that reasonable care was exercised to have the stairways reasonably safe for such use.

10

I decline to charge request number three as I have already covered it fully in my charge.

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I decline to charge request number four. I have covered that.

Request number five. I am requested to charge and do charge you if you find a witness has testified intentionally falsely in one material respect, you may reject all of his or her testimony.

I so charge you.

Request number six. I am requested to charge you and do charge you that the fact that plaintiff is a young lady should not influence your verdict, nor should the fact that she was injured as far as the question of liability is concerned.

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I think I have already fully covered request number seven, but I will charge you again: "Unless the defendant had notice or knowledge of a defective condition of the stairs before the accident, plaintiff cannot recover."

Request number eight. I am requested to charge you and do charge you that although plain-

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Court's Charge

10 tiff charges that lack of adequate lighting on the stairway had something to do with the accident, the proofs show to the contrary, and I, therefore, charge you that you cannot consider the question of lights in the hallway or on the stairway in determining whether or not the defendant is liable.

I decline to charge request number nine. I have charged at length on the question of insurance, and I think I have more than fully covered it, and I decline to charge anything further.

Mr. Wortendyke: May I say, if your Honor please, number nine is withdrawn in view of your Honor's charge.

20 The Court: Request number ten: "You are to rely strictly upon your own hearing and observation in determining what the evidence in this case was, and you may, therefore, disregard any statements as to what the evidence in the case is or was by either of counsel or the court."

I gladly charge that.

Gentlemen, you may take the case.

(Thereupon the jury retired.)

30 Mr. Markley: I want to note an exception to your Honor's charge in leaving to the jury the question of contributory negligence, on the ground there is no evidence of any contributory negligence in this case.

Secondly, I take exception to your Honor's charging the jury and instructing the jury in accordance with request number one of the defendant.

I also except to your Honor's giving to the jury request number seven.

40 The Court: You may have your exceptions.

Mr. Wortendyke: If your Honor please, I respectfully pray an exception to that portion of

Court's Charge

your Honor's charge wherein your Honor stated to the jury that contributory negligence is the reverse of negligence.

The Court: That was further qualified by my stating to the jury that just as in the first instance the obligation was on the plaintiff of establishing negligence on the part of the defendant by the greater weight of the evidence so likewise the same obligation was upon the defendant in establishing contributory negligence. However, I will recall the jury on that.

10

Mr. Wortendyke: Shall I note my other exceptions now?

The Court: No, wait until I get this one out of the way.

(Thereupon the jury returned to the court room.)

20

The Court: Gentlemen of the jury, in the course of my charge to you, and which charges are generally made by me extemporaneously, the words cropped into my charge that contributory negligence—although I elaborated on it—was the reverse of negligence. Now, I qualified that but in case there is any misunderstanding on your part about it, I want to make myself clear on the subject.

30

By contributory negligence is meant—and it is charged by the defendant that even though the defendant may have been negligent, the plaintiff, by virtue of her own negligence, contributed to the happening of the event but for which the accident could never have occurred; and no matter how slight that contributory negligence may have been the law of this state is well-settled that the courts will not attempt to weigh the scales of justice and determine who is the greater or lesser

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Court's Charge

at fault, but in that case cold-bloodedly says there cannot and must not be any recovery.

(Thereupon the jury again retired.)

10 Mr. Markley: I note an exception to what your Honor has just said on the question of contributory negligence, on the ground that there is no evidence of any contributory negligence in this case and that question should have been removed from the consideration of the jury.

The Court: You may have an exception.

20 Mr. Wortendyke: I respectfully pray an exception to that portion of your Honor's charge in which your Honor stated to the jury that if by reason of the accident they should find that the plaintiff was prevented from obtaining a position or was caused to lose her position that they may allow her compensation for loss of wages, which she would otherwise have earned, on the ground that the evidence in the case conclusively excludes any such basis as a basis of damages.

Further, I respectfully pray an exception to that portion of your Honor's charge describing the status and standing of Henry L. Doherty and Company, the former employer of the plaintiff in this case.

30 Finally, I respectfully pray an exception to that portion of your Honor's charge in which the example of one employed by the Public Service or someone else at a certain salary per month was caused to lose a certain position by reason of an accident is cited by your Honor. The ground for my exception in that respect is that the illustration is inapplicable to the evidence in this case.

The Court: You may have your exception.

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Requests to Charge

DEFENDANT'S REQUESTS TO CHARGE

1. You cannot award plaintiff anything by way of compensation for loss of earnings because by her own testimony no such loss resulted from the accident.

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2. If you find that the use of the stairs by the plaintiff was a matter in which defendant had no interest and was a matter relating to plaintiff's own business or that of a tenant in the building and did not relate to any business or purpose of defendant, then plaintiff was merely a licensee of defendant and cannot recover under the evidence in this case.

20

3. Even if you should find that defendant owed plaintiff the duty of reasonable care in the maintenance of the stairway, and even if you find that defendant violated that duty, yet, if you also find that plaintiff, by some act or omission of her own, contributed, no matter in how slight a degree, to the happening of the accident, plaintiff cannot recover, and your verdict must be no cause for action and in favor of defendant.

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4. It is the quality and credibility of the evidence that counts, not the number of witnesses.

5. If you find a witness has testified intentionally falsely in one material respect, you may reject all of his or her testimony.

6. The fact that plaintiff is a young lady should not influence your verdict, nor should the fact that she was injured as far as the question of liability is concerned.

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Requests to Charge

7. Unless the defendant had notice or knowledge of a defective condition of the stairs before the accident, plaintiff cannot recover.

10 8. Although plaintiff charges that lack of adequate lighting on the stairway had something to do with the accident, the proofs show to the contrary, and I, therefore, charge you that you cannot consider the question of lights in the hallway or on the stairway in determining whether or not the defendant is liable.

20 9. The attorney for the plaintiff, as well as the Court, has referred to insurance in this case. I charge you that you are to utterly disregard these references, for the reason that they have no bearing whatsoever upon the merits of the case. You have taken an oath to decide the case fairly and impartially upon the evidence, and if you allow any other consideration, inference, prejudice or assumption to influence you in any way in arriving at your verdict, that verdict cannot be a just verdict.

30 10. You are to rely strictly upon your own hearing and observation in determining what the evidence in this case was, and you may, therefore, disregard any statements as to what the evidence in the case is or was either of counsel or the Court.

Exhibit P-1**Interrogatories**

HUDSON COUNTY COMMON PLEAS COURT

ANNA PLEVA, <i>Plaintiff,</i> <i>v.</i> SAMUEL GOOTZEIT, <i>Defendant.</i>	10 Action at Law Interrogatories
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To:

AUTENREITH, GANNON & WORTENDYKE, Esqs.,
Attorneys of Defendant. 20

SIRS:

TAKE NOTICE that the plaintiff demands answers under oath to the following interrogatories within the time required by law:

1. Did you own the premises, 254 Jackson Avenue, Jersey City, on June 9th, 1932?
2. How many stories has said building? 30
3. On said date, who were the tenants of said building?
4. On said date, what was the business of said tenants?
5. Were said tenancies month to month, or by written lease?
6. Set forth a copy of lease entered into by you and the tenants in said building at said time. 40
7. Did you have in your employ a Superintendent or a janitor to take care of said building?

Exhibit P-1

8. What was his name and address at said time?

9. What were his duties on said date?

10 10. If you did not employ a Superintendent to take care of said premises on said date, who did employ him?

11. If you did not have control of said premises as far as the hallways, lobbies and staircases of said building are concerned, which were used in common as the sole means of access and exit from said building, who did have control of said common hallways, lobbies and staircases in said building?

20 12. Who had the duty of providing the necessary and sufficient light in said hallway and stairways?

13. Give the name and address of such person.

14. Who turned on the light in said hallways and staircases on said date, and at what time of day? Give his name and address.

15. Where were said lights located?

30 16. How long were said lights permitted to burn?

17. At what time in the morning were said lights extinguished and by whom?

18. By whom was the person employed who took care of the lighting of said premises on said date?

Dated November 6th, 1933.

40

Respectfully,

COLLINS & CORBIN,
Attorneys for Plaintiff.

Exhibit P-1

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

STANLEY G. BROOKS, of full age, being duly sworn, according to law, on his oath, deposes and says:

10

That he is associated with the firm of Collins & Corbin, attorneys of plaintiff in the above entitled action; that on the 8th day of November, 1933, at 10:35 A. M. he served a true copy of the within interrogatories on Autenreith, Gannon & Wortendyke, attorneys of deft. herein, at their office, 921 Bergen Ave., Jersey City, N. J., by leaving same with the person in charge thereof, Miss Wortham.

STANLEY G. BROOKS.

20

Sworn and subscribed to before me }
 this 8th day of November, 1933, }
 before me, at Jersey City, N. J. }

ADOLPH S. HUMMEL,

An attorney-at-law of New Jersey.

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Exhibit P-1-A**Answers to Interrogatories****HUDSON COUNTY COURT OF COMMON
PLEAS**

10

ANNA PLEVA,

*Plaintiff,**v.*

SAMUEL GOOTZEIT,

Defendant.

Action at Law
Answers to
Interrogatories

20

To:

MAURICE M. KRIVIT and/or COLLINS & CORBIN,
Attorney or Attorneys for Plaintiff.

PLEASE TAKE NOTICE that the defendant herein
makes answer to the interrogatories propounded
by the plaintiff, as follows:

30

1. Yes.

2. Three stories.

3. Improper. See notice of motion herewith.

4. Improper. See notice of motion herewith.

5. Improper. See notice of motion herewith.

6. Improper. See notice of motion herewith.

7. Yes.

8. Improper. See notice of motion herewith.

40

9. Improper. See notice of motion herewith.

10. See No. 7.

Exhibit P-1-A

11. I had control of the hallways, lobbies and staircases of the building.

12. I did.

13. Improper. See notice of motion herewith.

14. Do not know.

10

15. Suspended from ceiling over stairways.

16. Question obscure and ambiguous. See notice of motion herewith.

17. Improper. See notice of motion herewith.

18. By me.

Respectfully, etc.,

20

AUTENREITH, GANNON & WORTENDYKE,
Attorneys for Defendant.

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

SAMUEL GOOTZEIT, of full age, being duly sworn, according to law, upon his oath deposes and says:

I am the defendant in the above entitled cause named. I have read and understand the interrogatories propounded to me by the plaintiff therein, and the foregoing answers thereto, and said answers are true.

30

....

SAMUEL GOOTZEIT.

Subscribed and sworn to before me }
this 13th day of November, 1933. }

ALFRED H. GRIMMINGER,
Attorney at Law of N. J.

40

Exhibit D-2HUDSON COUNTY COURT OF COMMON
PLEAS

10

ANNA PLEVA,

*Plaintiff,**v.*

SAMUEL GOOTZEIT,

Defendant.

Action at Law
Demand for
Bill of Particulars

20

*To the above named plaintiff and Maurice M.
Krivit, Esq., her attorney, 1 Exchange Place,
Jersey City, N. J.:*

PLEASE TAKE NOTICE that

the defendant in the above entitled cause, demands that you serve upon the undersigned his attorneys, within ten (10) days after the service hereof upon you, a bill of particulars with reference to the complaint herein, in the following respect, viz.:

30

1. ~~At what hour of the day or night on~~
~~did the occurrence complained of occur?~~

2. What was the age of plaintiff on June 9, 1932?

40

3. Particularize in detail, referring specifically to parts or portions of the body affected and extent of injury to each, all personal injuries by the said plaintiff alleged to have been sustained upon or in consequence of the occurrence complained of in the complaint.

Exhibit D-2

4. Specify which of said injuries were temporary and the nature, extent of and duration of incapacity attendant upon each.

5. If it is claimed that any of said injuries are permanent, particularize the same and indicate the nature of and extent of incapacity attendant upon each.

10

6. If said plaintiff claims that said injuries necessitated her confinement to a hospital or hospitals, give name and address of each and date of admission to and of her discharge from each.

7. Itemize in detail as to amounts, purposes and objects for which and individuals, associations or corporations to which paid or incurred, all expenses to said plaintiff for hospital care, treatment, board or other attention or service.

20

8. If said plaintiff claims that as a result of said injuries she was compelled to obtain medical or surgical care, treatment or other attention, give name and address of each physician or surgeon from whom same was obtained.

9. Itemize in detail all treatments or other services therefrom obtained, and give date upon which and place where each item of such treatment or service was rendered.

30

10. Itemize in detail as to amounts, purposes or objects for which and individuals to whom paid, all expenses by said plaintiff incurred for medical or surgical care, treatment or other attention.

40

11. If said plaintiff claims that said injuries

Exhibit D-2

necessitated her obtaining the services of a nurse or nurses, give name and address of each nurse rendering same, nature thereof and dates upon which rendered.

10 12. Itemize in detail any and all expenses which said plaintiff was compelled to incur for nursing services, indicating respective amounts and the respective payees or obligees with reference thereto.

13. If said plaintiff was confined to bed on account of said injuries, from what date to what date was she wholly so confined?

20 14. If said plaintiff was confined to home on account of said injuries, from what date to what date was she wholly so confined?

15. If it is claimed that as a result of said injuries it became necessary to have X-rays made, give name and address of person or institution taking same, date when and place where each was taken, and condition revealed by each.

30 16. Itemize cost to plaintiff of all X-rays, if any, taken.

17. Was said plaintiff by reason of said injuries, prevented from attending to her gainful occupation? If so, from what date to what date was she actually and wholly so prevented by reason thereof?

40 18. Was said plaintiff engaged in any gainful occupation on June 9, 1932, or immediately preceding said date? If so, state whether employed or in business for herself.

Exhibit D-2

19. If employed, give name and address of employer, nature of latter's business, position or capacity of said plaintiff in said employment and amount of wages or salary then being received by said plaintiff and how payable.

20. If in business for herself, give location of business, name under which conducted, position of said plaintiff therein or with reference thereto and nature of compensation being received therefrom or interest then had therein.

21. Itemize in detail all earnings of which said plaintiff claims to have been deprived by reason of said injuries, explaining how computed.

22. Particularize and explain in what respects and details it is contended that the hallways and staircases of the building referred to were negligently and carelessly maintained.

23. In which particular hallway or upon which particular staircase, and if the latter, upon what step thereof, was plaintiff caused to fall on the date mentioned in the complaint?

24. What specific condition, object or substance was the immediate cause of said fall?

25. The hour of said fall being 6 P. M., Daylight Saving Time, on June 9, 1932, explain how the alleged absence of lights in said hallway or on said stairway contributed to the fall.

26. Explain and particularize the alleged defective condition of said staircase referred to in paragraph 4(b).

Respectfully, etc.,

AUTENRIETH, GANNON & WORTENDYKE,
Attorneys for Defendant.

Exhibit D-3HUDSON COUNTY COURT OF COMMON
PLEAS

10

ANNA PLEVA,

*Plaintiff,**v.*

SAMUEL GOOTZEIT,

*Defendant.*Action at Law
Bill of Particulars

20

*To: Messrs. Autenrieth, Gannon & Wortendyke,
Attorneys for Defendant.*

SIRS:

PLEASE TAKE NOTICE that the following is a bill of particulars of the claims and demands of the plaintiff in her complaint, made pursuant to the demand of the defendant.

30

1.

2. 23 Years of age.

3. As a result of this accident plaintiff sustained severe contusions of the right thigh, contusions and abrasions of the face, a broken right lateral upper incisor tooth, and fracture of the right shoulder. The fracture of the right shoulder is a comminuted fracture consisting of a fracture of the surgical neck and a fracture of the greater tuberosity of the humerus.

40

4. Contusions of the right thigh and contu-

Exhibit D-3

sions and abrasions of the face were temporary; the period of each being about five weeks.

5. The loss of tooth substance is permanent. It is impossible to tell at this time whether there will be any permanent disability resulting from the fracture of the shoulder. The disability to date has been total. 10

6. No hospital.

7. Plaintiff, at this time, has not received any bills for medical treatment, care, attention or services.

8. Dr. Jacob C. Fineberg, #116 Bergen Avenue, Jersey City, N. J.; Dr. Irwin R. Harris, #254 Jackson Avenue, Jersey City, New Jersey, and Dr. Harold C. Benjamin, #59 Crescent Avenue, Jersey City, N. J. 20

9. Plaintiff cannot itemize in detail all treatments or other services obtained from physicians and refers defendant to the physicians named above for information. Plaintiff says, however, that all services were rendered at the offices of Dr. Harris and Dr. Benjamin. 30

10. Plaintiff has not received bills from attending physicians or for other care and attention.

11.

12. Plaintiff has not received any bills for nursing services, at this time. 40

13. Plaintiff was confined to her bed from June 9th, 1932 to July 12, 1932.

Exhibit D-3

14. Plaintiff was confined to her home from June 9, 1932 to this date and is still so confined except for treatment at the doctors' offices.

10 15. Dr. Irwin R. Harris, #254 Jackson Avenue, Jersey City, N. J. June 9, 1932 and Dr. Harold C. Benjamin, 59 Crescent Avenue, Jersey City, N. J. on another date after accident. See 3.

16. Plaintiff has not received bills for said X-rays.

17. Yes, June 9, 1932, and is still prevented as a result of her injury, from attending her gainful occupation.

20 18. Yes, plaintiff was employed.

19. Plaintiff was employed by Henry L. Doherty Co., #60 Wall Street, New York City, N. Y. as a clerk and received the sum of \$100.00 per month. Plaintiff lost her position as a result of this accident.

20. See 19.

30 21. See 19.

22. Defendant allowed the staircases to be out of repair in that the nosing on the said steps were worn, torn, broken and loose.

40 23. The staircases referred to is the staircase which runs from the hallway, which hallway leads out of Dr. Harris' office and is the uppermost staircase. Plaintiff was caused to fall on the third and fourth steps from the top of said staircase.

Exhibit D-5

24. The nosing on the staircases was loose and not properly nailed to the steps of the said staircases.

25. The said staircases were not properly lighted.

10

26. See 24.

Dated August 5th, 1932.

MAURICE M. KRIVIT,
Attorney of Plaintiff.

Exhibit D-5

20

Amendment of Bill of Particulars

HUDSON COUNTY COURT OF COMMON
PLEAS

ANNA PLEVA,
Plaintiff,

v.

SAMUEL GOOTZEIT,
Defendant.

Action at Law
Amendment of
Bill of Particulars

30

To:

MESSRS. AUTENREITH, GANNON & WORTENDYKE,
Attorneys of Defendant:

SIRS:

40

PLEASE TAKE NOTICE that the plaintiff hereby amends her bill of particulars heretofore served

Exhibit D-5

upon you in accordance with your demand in the following respects:

1. Particular No. 22 is amended so as to read as follows:

10

20

22. The hallways and staircases of the building referred to were negligently and carelessly maintained in that the defendant allowed and permitted the staircases and the steps thereof and the nosings on said steps to be out of repair and in a worn, torn, broken and loose condition. Said nosings were improperly and carelessly nailed to the said steps so that the said nosings were loose and movable. Furthermore, the defendant was negligent in permitting said hallway and staircase and steps to be without lights and in a dark and dangerous condition to persons lawfully using the same. The defendant was further negligent in failing to use reasonable care to inspect and to observe the said defects and to repair the same.

30

2. Particular No. 24 is amended so as to read as follows:

See No. 22.

3. Particular No. 26 is amended so as to read as follows:

See No. 22.

Dated April 4, 1933.

40

MAURICE M. KRIVIT,
Attorney for Plaintiff.

Rule for Judgment

(Filed June 18, 1934)

HUDSON COUNTY COURT OF COMMON
PLEAS

ANNA PLEVA, <i>Plaintiff,</i> <i>v.</i> SAMUEL GOOTZEIT, <i>Defendant.</i>	10 Action at Law Rule for Judgment
--	--

This action was tried before Judge Thomas H. Brown with a jury in the presence of the counsel for the respective parties in the Hudson County Court of Common Pleas on May 13 and May 14, 1934.

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The cause having been heard and submitted to the jury, they returned their verdict as follows: They find a verdict in favor of the plaintiff, Anna Pleva and against the defendant, Samuel Gootzeit, in the sum of Twenty-five hundred (\$2500) Dollars.

Whereupon it is adjudged that the plaintiff, Anna Pleva, recover of the defendant, Samuel Gootzeit, the sum of Twenty-five hundred (\$2500) Dollars and her costs to be taxed.

30

THOMAS H. BROWN,
Common Pleas Judge.

Rule actually entered this
18th day of June, 1934.

On Motion of

MAURICE M. KRIVIT,
Attorney of Plaintiff.

40

JudgmentHUDSON COUNTY COURT OF COMMON
PLEAS

10

ANNA PLEVA,

*Plaintiff,**v.*

SAMUEL GOOTZEIT,

*Defendant.*Damages \$2,500.00
Costs 73.02

Total \$2,573.02

Maurice M. Krivit,
Attorney

20

Judgment on Verdict in the above entitled cause was entered in this Court on the eighteenth day of June in the year of our Lord One Thousand Nine Hundred and Thirty-four in favor of the plaintiff, Anna Pleva, and against the defendant, Samuel Gootzeit, in a plea of Action at Law for the sum of Twenty-five Hundred Dollars damages and Seventy-three Dollars and Two Cents costs of suit.

30

Judgment entered and signed this 18th day of June, 1934.

THOMAS BROWN,
Judge.

40

Opinion of Supreme Court

(Filed Feb. 4, 1935)

NEW JERSEY SUPREME COURT

No. 11—October Term, 1934

10

ANNA PLEVA,
Plaintiff-Respondent,

v.

SAMUEL GOOTZEIT,
Defendant-Appellant.

20

Submitted October 12, 1934; decided February , 1935.

Defendant's appeal from Hudson Common Pleas.

Before Brogan, Chief Justice, and Justices Parker and Bodine.

For the appellant, Reynier J. Wortendyke, Jr.

For the respondent, Edward A. Markley.

The opinion of the court was delivered by Parker, *J.*

30

In its fundamentals, the case belongs to the class of which *Siggins v. McGill*, 72 N. J. Law 263, is typical. The following paragraph taken from the brief for respondent, sufficiently states the facts which on the evidence the jury was entitled to find:

“The action was for personal injuries sustained by the plaintiff upon leaving the office of a Dr. Irwin I. Harris at 254 Jack-

40

Opinion of Supreme Court

10 son Avenue, Jersey City, where she had been for dental treatment. Dr. Harris was a ténant on the second floor of the building which was owned by the defendant who controlled the common passageways thereof. The plaintiff was descending the common stairway from the second to the first floor when she was caused to fall by reason of its defective condition due to defendant's negligence."

The points made in the brief for appellant (there was no oral argument) and which are supported by suitable grounds of appeal, are:

20 "I. The Trial Court abused its discretion in denying defendant's motion for a mistrial and in commenting upon the matter of insurance while the jury was being selected.

"II. Plaintiff was not entitled to any recovery for loss of earnings in this case.

"III. The Trial Court erroneously charged the jury that contributory negligence is the reverse of negligence."

30 As we conclude that there should be a reversal on the first point, it will be unnecessary to treat the others in detail; but as the case must be retried, it may be well to say that the second point seems not well taken as the bill of particulars furnished some months before the trial did not bar proof of damages incurred after it was served. Also that the error pointed out by the third point, due apparently to lack of accurate phrasing of the charge on a subject as to which
40 the legal rules are elementary, and as to which they were properly charged after exception had

Opinion of Supreme Court

been taken, was probably cured in a legal sense, though the exception might better have been forestalled by charging correctly in the first place. To say that contributory negligence is "the reverse of negligence" is not only confusing, but wrong. The "reverse of negligence" is care.

10

Turning to the first ground: as the jury was being selected, counsel for plaintiff questioned juror No. 3 before he was sworn, pursuant to P. L. 1911, page 220 (C. S. Suppt. 1924, p. 1651), "for the purpose of eliciting information upon which he may determine whether or not to interpose (a) peremptory challenge." The statute goes on to specify "the purpose of disclosing, whether or not the juror is impartial as between the parties to the suit and without interest therein or in (the) result thereof." This, in civil causes (*Lamble v. State*, 96 N. J. Law, 231) seems to permit such interrogation in advance of any challenge and as a basis for a peremptory challenge only. The examination was not taken by the stenographer at the time, but the judge epitomized it thus:

20

"The Court: * * * For the purpose of the record let the record show that the question propounded by counsel was that he noticed that juror number three, Alexander McKenzie, was listed as a book-keeper.

30

"Mr. Markley: There wasn't any reference to that. The only reference was after that.

"The Court: Wait a minute. In substance, number three was listed as a book-keeper—was that it?

40

Opinion of Supreme Court

"Mr. Markley: Number three was on the list as a bookkeeper.

10

"The Court (continuing): And counsel asked him who he was bookkeeper for and the juror responded giving the name of the concern he worked for. The juror was then asked what kind of concern it was and he said it was an insurance company. He was then asked what kind of insurance and he said his firm wrote all kinds of insurance, and then he was asked whether or not his company wrote insurance risks covering tenement house and apartment house properties and he said yes."

20

Defendant's counsel then moved for a mistrial, and the following colloquy ensued:

"The Court: The question that has been asked is addressed to the sound discretion of the court. The court thinks as a matter of fact it is a very proper question to ask. The court is going to allow it.

30

"Mr. Wortendyke: May I have an exception, your Honor?

40

"The Court: Yes, I might say that the attitude of the court in this particular, for the purpose of the record in case this case is carried up, is because of the fact that a case was tried here yesterday that took the best part of two days. The jury was out for six hours. One of the jurors was listed as a broker and as a matter of fact he was in the insurance business and he is alleged to have made certain remarks in the jury room with relation to matters

Opinion of Supreme Court

of this sort, and I think as a matter of justice that no man should be permitted to sit on a jury where there is any possible question of bias; and I think, therefore, if a man is in the insurance business insuring tenement house properties—which I know nothing about but which I take from the questions of counsel—that he should not in fairness to the litigants be permitted to sit on a jury.

10

“Mr. Wortendyke: The court’s statement puts me in rather an embarrassing situation and I think that my duty to my clients compels me to pray an exception to the court’s statement at the present time.

20

“The Court: You have your exception.”

At the end of the case the court charged the jury (and on this particular point apparently to the satisfaction of defendant) that they were to ignore all reference that had been made to the question of insurance, etc. But this, in our estimation, did not cure the manifest error committed by the trial judge, first, in bringing into the case, and in the presence of the jury, his account of what had happened the day before, including hearsay as to what some juror in another case had said in the jury room, together with a ruling on the eligibility of a certain class of juror, which under the statute was for the decision of counsel and not of the court (the statute looking only to peremptory challenges) and secondly, in overruling the request for a mistrial, which was a fitting challenge to something in the way of testimony by the court, unsworn

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40

Judgment of Reversal

and irrelevant, or if relevant, incompetent. See *State v. Raymond*, 53 N. J. Law 260, 262.

10 A general test of reversal laid down in Section 27 of the Practice Act of 1912 is that after examination of the whole case, it must appear that the error injuriously affected the substantial rights of a party. The case before us seems to be conspicuously one in which that condition obtains; and the judgment is therefore reversed to the end that a new trial be had.

Judgment of Reversal

(Filed Feb. 8, 1935)

20

NEW JERSEY SUPREME COURT

ANNA PLEVA,
Plaintiff-Respondent,

v.

SAMUEL GOOTZEIT,
Defendant-Appellant.

On Appeal
Judgment of Re-
versal

30

This cause coming duly before this Court on appeal from a judgment entered on the verdict of a jury in the Hudson County Court of Common Pleas in favor of the Plaintiff-Respondent, and the Court having duly examined the briefs of the respective parties; and the cause being duly submitted to the Court for determination; and

40

The Court having adjudged and determined

Judgment of Reversal

that the judgment below should be reversed, as appears from the opinion of the Court filed herein;

It is, on this 8th day of February, 1935, ORDERED and ADJUDGED that the judgment heretofore entered in favor of Anna Pleva, the Plaintiff-Respondent herein, and against Samuel Gootzeit, the Defendant-Appellant herein, in the Hudson County Court of Common Pleas, be and the same is hereby reversed.

10

And the record in this cause is hereby remitted to said Hudson County Court of Common Pleas, to be there proceeded with in accordance with law and not inconsistently with the opinion of this Court as aforesaid.

20

Rule actually entered this 8th day of February, 1935, on motion of Autenreith & Wortendyke, Attorneys for Defendant-Appellant.

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Notice and Grounds of Appeal

(Filed Feb. 18, 1935)

NEW JERSEY SUPREME COURT

10

ANNA PLEVA,

Plaintiff,

v.

SAMUEL GOOTZEIT,

Defendant.

Action at Law
Notice and
Grounds of Appeal

To:

MESSRS. AUTENREITH & WORTENDYKE,
Attorneys of Defendant.

20

PLEASE TAKE NOTICE that the plaintiff appeals to the Court of Errors and Appeals from the whole of the judgment entered in this cause in the Supreme Court on the following grounds:

30

1. The Supreme Court erred in reversing the judgment of the Hudson County Court of Common Pleas.

2. The Supreme Court erred in refusing to affirm the judgment of the Hudson County Court of Common Pleas.

3. The Supreme Court erred in holding that the Hudson County Court of Common Pleas committed an abuse of discretion in failing to grant the defendant's motion for a mistrial.

40

4. The Supreme Court erred in refusing to affirm the judgment of the Hudson County Court of Common Pleas for one or more of the reasons advanced for such affirmance in said Supreme Court.

Dated, February 15, 1935.

MAURICE M. KRIVIT,
Attorney for Plaintiff.

THE UNIVERSITY OF CHICAGO PRESS

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[5192]

48 MAY.T.1935

New Jersey Court of Errors and Appeals

ANNA PLEVA,
Plaintiff-Appellant,

v.

SAMUEL GOOTZEIT,
Defendant-Respondent.

ACTION AT LAW

On Appeal from
Supreme Court

BRIEF IN BEHALF OF THE PLAINTIFF-APPELLANT

(1)

Statement of the Case

This appeal brings before this Court for review a judgment of the Supreme Court reversing a judgment of the Hudson County Court of Common Pleas in favor of the plaintiff-appellant (hereinafter called the plaintiff) against the defendant-respondent (hereinafter called the defendant).

The action was for personal injuries sustained by the plaintiff upon leaving the office of a Dr. Irwin I. Harris at 254 Jackson Avenue, Jersey City, where she had been for dental treatment. Dr. Harris was a tenant on the second floor of the building which was owned by the defendant who controlled the common passageways thereof. The plaintiff was descending the common stair-

way from the second to the first floor when she was caused to fall by reason of its defective condition due to defendant's negligence.

Plaintiff received severe injuries including a comminuted fracture of the surgical neck of the humerus with an injury of the shoulder joint which resulted in a five per cent. restriction of motion and a ten per cent. permanent disability. She also broke her front right central incisor tooth. She was confined to her bed for four or five weeks (p. 23, l. 30); to her home for approximately three months (p. 24, l. 17). She was incapacitated for eight months (p. 25, l. 14).

The case was submitted to the jury. A verdict was rendered in favor of the plaintiff for \$2,500 (p. 141). It is from the judgment entered upon that verdict that the appeal was taken to the Supreme Court (p. 1).

Seven grounds of appeal were filed in the Supreme Court (p. 3), although only three were argued in the brief of the defendant. The others will therefore not be considered because they are waived.

Marten v. Brown (E. & A.) 81 N. J. L. 599; affirming 80 N. J. L. 143;

Aschenberg v. Mundy (Sup. Ct.) 76 N. J. L. 352;

Lavin v. P. S. Ry. Co. (Sup. Ct.) 77 N. J. L. 217.

The Supreme Court reversed the judgment of the Hudson County Court of Common Pleas (pp. 148, 149) and it is from that judgment of reversal that this appeal is taken (p. 150).

The three grounds of appeal which were argued by the defendant in the Supreme Court are as follows:

"I. The trial court abused its discretion in denying defendant's motion for a mistrial and in commenting upon the matter of insurance while the jury was being selected.

"II. Plaintiff was not entitled to any recovery for loss of earnings in this case.

"III. The trial court erroneously charged the jury that contributory negligence is the reverse of negligence."

We shall consider these grounds of appeal in the order in which they were presented in the defendant's brief in the Supreme Court.

(2)

Prefatory Statement

Before proceeding to the argument we pause to point out that counsel for the defendant presents no ground of appeal involving either the negligence of defendant which makes him liable for the plaintiff's injuries or the nature and extent of those injuries. It is therefore conceded that the defendant was negligent and that his negligence was the proximate cause of the injuries to the plaintiff and that the plaintiff's injuries justify the verdict which was rendered in her favor.

In defendant's brief in the Supreme Court, counsel said:

"The answer admitted ownership of the premises but denied all else and charged affirmatively contributory negligence and assumption of risk on the part of the plaintiff."

Counsel overlooks the answers to interrogatories by defendant where the defendant admitted not only the ownership of the premises consisting of three stories having tenants on each floor, but

also admitted that he had control of the hallways, lobbies and staircases of the building (p. 131, ll. 1-10). Also the defendant admitted that he employed a superintendent or janitor to take care of common passageways of the building of which the place of the accident was one (p. 127, ll. 40-p. 130, ll. 35-40). There was therefore no question of ownership, control, possession and operation of the stairway and the sole question was whether it was negligently maintained by the defendant. That was decided adversely to the defendant by the jury and no ground of appeal assails that finding.

As to the charge in the answer that the plaintiff was guilty of contributory negligence and assumed the risk of her injuries, it is sufficient to say that those questions were submitted to the jury by the trial judge and the jury decided those adversely to the defendant and no ground of appeal attacks that finding.

In Section 27 of the Practice Act of 1912 (P. L. 1912, p. 382), it is provided:

“No judgment shall be reversed, or new trial granted on the ground of misdirection, or the improper admission or exclusion of evidence, or for error as to matter of pleading or procedure, unless, after examination of the whole case, it shall appear that the error injuriously affected the substantial rights of a party.”

While we shall later argue that the trial court committed no error in the respects contended for by the defendant, we nevertheless desire to point out that the alleged errors complained of did not in any way injuriously affect the substantial rights of the defendant and therefore the judgment below should be affirmed.

(3)

BRIEF OF THE ARGUMENT

I

The trial court did not err because it did not abuse its discretion in denying defendant's motion for a mistrial.

The rule is well settled that the refusal to withdraw a juror and declare a mistrial is a matter which rests in the sound discretion of the trial court and is not assignable as error.

Heiler v. Goodman's Motor Express Co.
(E. & A.), 105 Atl. 233, 92 N. J. L. 415;

Smith v. Brunswick Laundry (E. & A.),
108 Atl. 184, 93 N. J. L. 436;

Price v. New York Central R. R. Co.
(E. & A.), 110 Atl. 127, 98 N. J. L. 554.

Rulings on matters addressed to the sound discretion of the trial court are not disturbed on appeal unless there is very clear proof that the discretion has been abused.

Patterson v. Surpless (E. & A.), 107
N. J. L. 307;

Watson v. Detroit Fidelity & Cas. Co.
(E. & A.), 109 N. J. L. 71, 74;

Braelow v. Klein (E. & A.), 100 N. J. L.
156, 158.

Chapter 151 of the Laws of 1911 (p. 220) provides as follows:

"1. From and after the passage of this act all challenges to jurors, for any cause whatever in any action or suit, civil or criminal, in any court of this State, may be made at any time before the juror is actually sworn.

"2. Upon the trial of any issue in any civil suit or action in any court of this State, each party shall be entitled to challenge peremptorily six of the general panel of jurors summoned and returned by the sheriff or other officer.

"3. Either party or his attorney may question any juror, after his name is drawn from the box and before such juror is sworn, for the purpose of eliciting information upon which he may determine whether or not to interpose such peremptory challenge. *Within the discretion and under the control of the court, such questions shall be permitted for the purpose of disclosing whether or not the juror is impartial as between the parties to the suit and without interest therein or in result thereof.*"

There is nothing in the record in the case *sub judice* to show an abuse of discretion.

Counsel for the defendant in his brief in the Supreme Court attempted to place an unwarranted interpretation upon what occurred at the trial of this case by using such phrases as "unduly impressing the element of insurance upon the jury," "implication with respect to the honesty and integrity of present day jurors" and "clandestine and unholy alliance between the defendant and some insurance company." Also by taking extracts from the colloquy between court and counsel and separating them from their context, counsel distorted what occurred on the

trial of this case. In the drawing of the jury at the beginning of the trial, counsel for plaintiff asked one of the jurors certain questions. So that what occurred may be clearly presented, we give verbatim here the entire colloquy (p. 12, l. 40; p. 14, l. 40):

“Mr. Wortendyke: I move for a mistrial, if the Court please.

“The Court: The question that has been asked is one that is addressed to the sound discretion of the court. The court thinks as a matter of fact it is a very proper question to ask. The court is going to allow it.

“Mr. Wortendyke: May I have an exception, your Honor?

“The Court: Yes. I might say that the attitude of the court in this particular, for the purposes of the record in case this case is carried up, is because of the fact that a case was tried here yesterday that took the best part of two days. The jury was out for six hours. One of the jurors was listed as a broker and as a matter of fact he was in the insurance business and he is alleged to have made certain remarks in the jury room with relation to matters of this sort, and I think as a matter of justice that no man should be permitted to sit on a jury where there is any possible question of bias; and I think, therefore, if a man is in the insurance business insuring tenement house properties—which I know nothing about but which I take from the questions of counsel—that he should not in fairness to the litigants be permitted to sit on a jury.

“Mr. Wortendyke: The court’s statement puts me in rather an embarrassing situation and I think that my duty to my clients compels me to pray an exception to the court’s statement at the present time.

“The Court: You have your exception.

“For the purpose of the record let the record show that the question propounded

by counsel was that he noticed that juror number three, Alexander McKenzie, was listed as a bookkeeper.

"Mr. Markley: There wasn't any reference to that. The only reference was after that.

"The Court: Wait a minute. In substance, number three was listed as a bookkeeper—was that it?

"Mr. Markley: Number three was on the list as a bookkeeper.

"The Court (continuing): And counsel asked him who he was bookkeeper for and the juror responded giving the name of the concern he worked for. The juror was then asked what kind of concern it was and he said it was an insurance company. He was then asked what kind of insurance and he said his firm wrote all kinds of insurance, and then he was asked whether or not his company wrote insurance risks covering tenement house and apartment house properties and he said yes.

"Mr. Wortendyke: Possibly my recollection is faulty. I think that series of questions was addressed to Mr. Ransom, number nine.

"Mr. Markley: No, Mr. Ransom was on the list as 'Insurance business' and he said he wrote all kinds of insurance and I challenged him.

"Mr. Wortendyke: Then it may be noted on the record that the question of counsel in any event included the question, 'Are you in the insurance business?'

"The Court: Yes.

"Mr. Wortendyke: And your Honor allowed me an exception?

"The Court: Yes. I am allowing you an exception. In order that there may be no doubt about it also, Captain Wortendyke, I will ask that you hand up to the court at the conclusion of the case any request you want to make, which I will make verbatim,

on the question of insurance, if you have any doubt about possibly being prejudiced.

“(Thereupon the jury was impaneled, accepted and sworn.)”

It will be noted that the trial court at the conclusion of the colloquy requested counsel for the defendant to hand up to the court at the conclusion of the case any request he might want to make on the question of insurance which the court stated he would give verbatim to the jury so that there could not possibly be any question of prejudice.

Counsel for the defendant complied with this request and his request number 9 was as follows (p. 126, ll. 15-25):

“9. The attorney for the plaintiff, as well as the Court, has referred to insurance in this case. I charge you that you are to utterly disregard these references, for the reason that they have no bearing whatsoever upon the merits of the case. You have taken an oath to decide the case fairly and impartially upon the evidence, and if you allow any other consideration, inference, prejudice or assumption to influence you in any way in arriving at your verdict, that verdict cannot be a just verdict.”

The trial court in his charge to the jury did in fact cover the matter most thoroughly so that there could not possibly be any question of prejudice unless we conceive of our jury system as one where the jury totally disregards the instructions of the trial court. The trial court's charge to the jury on this phase of the case was as follows (p. 113, l. 1-p. 114, l. 20):

“Gentlemen of the Jury: During the course of the examination of the jurors the

question of insurance cropped into this case. Probably you will remember the questions asked. One of the jurors was asked what his business was. He was listed as a book-keeper or something of that sort, and counsel asked by whom he was employed and he answered and then he was asked as to the nature of the concern or business and he said, 'General insurance,' and he was further asked if that covered apartment houses and tenement houses and he said, 'Yes.' Whereupon counsel for the defense made a motion for a mistrial on the ground that it was a question foreign to the issue and had no proper place in the proceedings, and inasmuch as that situation developed and inasmuch as I ruled adversely to counsel for the defendant because of the fact that under the cases disposition of a motion of that sort rests in the sound discretion of the Court, and inasmuch as I felt the questions that were asked were proper ones, nevertheless, I feel it my duty to charge you that you are emphatically and positively to ignore any and all reference that may have been made at that time to the question of insurance. I do not want that to creep into this jury box or into the jury's deliberations or determination of this case. If I thought for a moment you gentlemen would dispose of this case and decide this case by reason of that element, I would unhesitatingly set aside the judgment or award; and I am going to go into the logic that is behind a rule of that character a little more at length than judges generally do. The defendant is entitled to his day in court like anybody else. He is entitled to even-handed justice just the same as any one of you twelve men in this jury box would be if you were the defendant in his place. He is entitled to have his case squarely and fairly decided on the evidence that develops here by sworn witnesses and sworn testimony. He is entitled to carry insurance if he feels

like it. He doesn't have to if he doesn't want to—I emphasize that,—and whether he does is no concern of yours and is no concern of mine. It is none of our business, in plain English. He is entitled to have equal-handed justice at your hands, which I feel confident he is going to have irrespective of the question of insurance. And, as I have said in other cases, if you find there was a question of insurance, the insurance company is entitled to a square deal at your hands just the same as anybody else, no more and no less. Now, gentlemen, I think I have made myself clear to you on that question.”

At the conclusion of this instruction to the jury the following colloquy occurred between the court and counsel for the defendant (p. 131, ll. 20-30):

“(Addressing Mr. Wortendyke): Did you give me any requests on that?”

“Mr. Wortendyke: I think it has been covered. The request has been covered. That is, I refer to number nine.”

It therefore appears that counsel was entirely satisfied with the instructions of the court to the jury and no exception was taken to the charge, which emphatically wiped out any possible element of prejudice if it ever existed, which is denied.

The situation presented in the case at bar is wholly different from that which was before this Court in *Patterson v. Surpless*, 107 N. J. L. 305, 307, where the trial court permitted counsel to ask the jury as to whether they were stockholders in a particular insurance company, namely, the Standard Accident Insurance Company, and then overruled a question to the defendant which was asked for the purpose of showing that he was not insured; and finally the trial court refused the

request of the defendant to instruct the jury that insurance was not relevant to the issue involved. It that case the court of last resort said at page 307 (*italics ours*):

“We think, however, on the remaining ground raised on the appeal both cases must be reversed. When the jury was being drawn counsel for the plaintiff asked the jurors whether any of them were stockholders in the Standard Accident Insurance Company, whereupon counsel for the defendants moved the court to declare a mistrial. The motion was denied and an exception allowed. Later in the trial the defendant Miller was asked whether he was insured and he answered in the negative. On motion of the plaintiff’s counsel this answer was stricken out. At the conclusion of the taking of testimony the court was requested by the defendants’ counsel to instruct the jury to disregard any question of insurance in the cause and this was refused, and we may add that our own examination does not disclose that any instruction was otherwise given to neutralize the injurious effect of the question, nor does counsel for the respondent point out any such instruction. *Rulings on such a question ordinarily rest in the sound discretion of the trial judge, and, unless such discretion is abused, will not be disturbed. Such was the declaration of this court in the case of Bashaw v. Eichenberger, 100 N. J. L. 153. We there said in a somewhat similar situation that it was ‘not apparent that any injury had arisen which could not be removed by proper instructions and caution to the jury,’ and the refusal of a motion to withdraw a juror in that case was held not to be error.*

“We have here, however, in addition to the improper question asked of the jurors, the subsequent effort of defendants’ counsel to nullify its injurious effect by the testimony of Miller that he was not insured, the

court striking it out without objection having been made to the question eliciting such testimony, and finally the refusal of the court to instruct the jury that the question of insurance was irrelevant."

Also at page 308 this Court in that case said:

"It was the duty of the court to guard against any prejudicial effect, either by arresting the trial *in limine* or by guarding against the pernicious results through proper instructions to the jury."

In the case at bar the trial court fully protected the defendant from any possible prejudicial results by his clear-cut instructions.

In the case of *Hughes v. English*, 9 N. J. Misc. 28, 29, where the situation was somewhat similar to that in the case *sub judice*, the Supreme Court held:

"The refusal to declare a mistrial was not error. The plaintiff was asked this question: 'I think it was in the testimony that your mind was hazy for how long?' and the court said, 'The question is, "for how long." ' This was objected to and the objection overruled and the witness answered: 'For quite some time after that I have a hazy recollection of some conversation, I believe it was from Mrs. English, that the insurance company would take care of me.' Counsel for the defendant then asked for a mistrial. There had been a similar episode in the proofs when counsel for the defendant offended by asking the plaintiff if he had accident insurance of any kind, and the court in denying the defendant's motion for a mistrial immediately directed the jury not to concern themselves with the question of whether or not there was any insurance involved in the case.

"We cannot say that in this there was abuse of the discretion permitted to the trial court. The subject has been elaborately discussed in the Court of Errors and Appeals in *Sutton v. Bell*, 79 N. J. L. 507, and recently in the case of *Patterson v. Surpless and Miller*, 8 N. J. Adv. R. 589; 151 Atl. Rep 754 (not yet officially reported).

"In the present case there was nothing to indicate a purpose on the part of either plaintiff or his counsel to prejudice the minds of the jurors and the learned trial judge was alert to see that no injury resulted from the injection of the remark."

So in the case at bar there is nothing to indicate a purpose on the part of counsel to prejudice the minds of the jurors and the learned trial judge was alert to see that no injury resulted from the attempt of counsel in the selection of the jury to obtain an impartial one, a jury that would not be prejudiced in favor of the defendant by reason of the fact that one or more members of the jury was engaged in the business of insuring apartment houses against accident.

Finally this Court in *Bashow v. Eichenberger*, 100 N. J. L. 153, 155, has held that the denial of a motion of this kind was not an abuse of discretion lodged in the trial court, in a case where the facts were much stronger than in the case at bar. In that case this Court held:

"The next ground of complaint is the refusal of the trial court to grant the defendant's motion to withdraw a juror because of certain questions asked by plaintiff's attorney of jurors regarding their ownership of stock in the American Automobile Insurance Company of St. Louis, and because of a

statement by one of the plaintiff's witnesses. It has been repeatedly held that the granting of such a request rests in the discretion of the trial judge, and, unless abused, the exercise of this discretion will not be disturbed on review. The facts in this case were that, when the jury was being impaneled plaintiff's counsel asked if any of them were stockholders or interested in the insurance company mentioned, and during the progress of the trial Emma Roth, a witness called by the plaintiff, was asked to give the details of a conversation with Edward W. Garrett, one of the defendants, in the course of which she said: 'He asked me how many children my daughter (Mrs. Bashaw) had and I told him, and how old they were, "Well," he said, "tell Mrs. Bashaw not to worry," that he was fully insured and that he intended to do what was right, and he knew how she must feel about it.'

"While it is true the fact of insurance by the defendant was an irrelevant circumstance in the trial, it is not apparent that any injury had arisen which could not be removed by proper instructions and caution to the jury. We cannot, therefore, say that the denial of the motion was an abuse of the discretion lodged in the trial court. It will be observed that the first question to which objection is made was not addressed to a witness, but to the jurors before they were sworn. Whether it was important that counsel should have information of this sort before accepting the jurors, or whether, if important, this is the proper method to obtain it, it is not necessary to decide in this case. As a preliminary inquiry, made before the jurors were apprised of the nature of the case, it would not seem likely to have worked an injury which would require a mistrial. The testimony of the witness Emma Roth appears to have been, in a measure, volunteered. There is nothing to show that

counsel was deliberately attempting to extract from the witness irrelevant testimony for the purpose of prejudicing the defendant."

In the case at bar no witness testified to anything with respect to any insurance carried by the defendant as in the *Bashaw* case. The entire contention of the defendant is with respect to certain questions asked of a juror before he was sworn so that counsel might determine whether or not he should exercise a peremptory challenge.

In the case *sub judice* it appeared that the occupation of a number of the jurors was misstated in the jury list handed to counsel. The occupation of the juror if of sufficient importance to be listed on the jury list was of sufficient importance to be accurately stated. Counsel had the right to find out what the occupation of each juror was in order to determine whether it was of such a character as to prejudice him against the plaintiff. This accident happened in an apartment house in which there were offices and apartments. It is common knowledge that the liability of owners of such buildings is usually covered by insurance. It may well have been that a particular juror might have been the insurance agent who wrote the insurance on this very apartment house and his company might be called upon to pay the judgment if one were rendered in favor of the plaintiff. It was the duty of counsel for the plaintiff to eliminate such a juror, for he probably would not be impartial.

The juror who was asked the particular question which was objected to by counsel for the defendant was listed as a bookkeeper on the jury list when he was working for an insurance com-

pany that wrote insurance risks covering tenement house and apartment house properties. No reason has to be assigned for a peremptory challenge and in this instance counsel still had a number of peremptory challenges which he had a right to exercise.

Counsel for defendant in his brief in the Supreme Court criticized at length and without justification the remarks of the trial court in denying the motion for mistrial. It is plain that the trial court was moved solely by a desire to have the case decided by a jury that was not biased. What he said at the time and what he said in his instructions to the jury demonstrate that fact. In any event the ruling of the trial court was sound and not an abuse of discretion. His instructions to the jury at the conclusion of the case fully comply with the rulings of this Court as to the manner in which the trial court should deal with the situation presented.

It is respectfully submitted that under the settled law there was no abuse of discretion in denying the motion for a mistrial and that the trial court more than protected the interests of the defendant by his charge to the jury which was entirely satisfactory to counsel for defendant.

II

The trial court did not err in the admission of testimony as to the plaintiff's earnings and loss of earnings and likewise did not err in his charge to the jury as to recovery by plaintiff for loss of earnings.

It is elementary that in order to sustain an appeal there must be an exception to the alleged

error with respect to the admission of testimony and the objection on the trial must be supported by the grounds of the objection. In order to appeal from an alleged error in the court's charge there must be an exception taken to the alleged erroneous instruction.

In the case at bar counsel for the defendant did not on the trial except to the alleged error in the court's charge of which he now complains as to the allowance of certain questions to the plaintiff. As to her loss of earnings the trial court ruled with counsel for the defendant and the questions which were allowed were proper.

It appeared that at the time of the accident the plaintiff was employed as a clerk in the office of Henry L. Doherty & Co. in New York City (p. 16, ll. 30-40). She earned \$100 a month (p. 16, l. 40). In the complaint one of the items of damage claimed was (p. 9, ll. 15-20): "Further plaintiff has been deprived of pursuing her usual gainful occupation."

After the service of the summons and complaint and before answer the defendant served a demand for particulars. Three of the demands, numbers 17, 18 and 19, dealt with her loss of earnings. These demands, together with the answers, are as follows (p. 134, l. 30-p. 135, l. 10; p. 138, ll. 15-25):

"17. Was said plaintiff by reason of said injuries, prevented from attending to her gainful occupation? If so, from what date to what date was she actually and wholly so prevented by reason thereof?

"Yes, June 9, 1932 and is still prevented as a result of her injury, from attending her gainful occupation.

"18. Was said plaintiff engaged in any gainful occupation on June 9, 1932, or immediately preceding said date? If so, state whether employed or in business for herself.

"Yes, plaintiff was employed.

"19. If employer, give name and address of employer, nature of latter's business, position or capacity of said plaintiff in said employment and amount of wages or salary then being received by said plaintiff and how payable.

"Plaintiff was employed by Henry L. Doherty Co., #60 Wall Street, New York City, N. Y. as a clerk and received the sum of \$100.00 per month. Plaintiff lost her position as a result of this accident."

There is no question in the case but what the plaintiff was employed by Henry L. Doherty & Co. and that she earned \$100 a month and that the accident incapacitated her from continuing to work for some time. There is no dispute in the case that she sustained the injuries she claimed, that she was confined to her bed for four to five weeks (p. 23, l. 30); to her home for approximately three months (p. 24, l. 17), and that she was incapacitated for eight months (p. 25, l. 15).

The accident happened on June 9, 1932, and on that day she was working for Henry L. Doherty & Co. and would have continued to work had it not been for the accident (p. 16, l. 30, *et seq.*). Sometime after she was incapacitated she received a letter from her employer informing her that her services were no longer required because of slackness in business (p. 33, ll. 30-40). Just when that letter was received does not appear. It does appear, however, that the de-

mand for the bill of particulars was answered on August 5, 1932, whereas the accident happened as stated on June 9, 1932 (p. 38, l. 25). The bill of particulars could not speak for any date subsequent to August 5, 1932, because the plaintiff did not know what the future held in store for her at that time. She was under the impression when she answered the bill of particulars on August 5, 1932, that she had lost the position as a result of her injury and so stated in the bill of particulars. She was still of that opinion on the trial of the case and was justified in so thinking. Her testimony on direct examination was as follows (p. 24, ll. 25-40):

"Q. Did you get your job back over where you worked? A. No, I didn't.

"Q. Were you paid any salary after you were laid up? A. Yes, they gave me a month's salary besides my two weeks' vacation.

"Q. Then what happened about your job? A. First they told me they would take me back, then I got a letter stating they were laying off some people and I was told I was one of them included in the lay-off.

"Q. And was that during the time you were laid up in bed? A. Yes.

"Q. How long had you worked there prior to this accident? A. Over two and a half years."

It will be noted that in her direct examination she admitted receiving a month's salary. She then said that she was told she would be taken back and later received a letter stating that she was laid off. On cross examination she testified as follows (p. 33, l. 35-p. 34, l. 15):

"Q. Now, as a matter of fact, Miss, you were notified by your employer that by

reason of the depression and because of slackness of business in his brokerage office your services would be no longer required, isn't that so? A. Yes.

"Q. And you therefore lost no earnings whatsoever as a result of this accident, did you? A. No, but I think——

"Q. No. Do you want to explain that answer 'no'? A. Yes. I might have got a job some place else. I know a couple that got jobs.

"Q. But so far as Henry L. Doherty and Company is concerned, you lost no earnings from them on account of this accident? A. *I don't know what the real reason was.* They said on account of the depression. It might have been that they thought they could do without me. *I was one of the two that was laid off.*

"Q. So even if you had been completely well at the time you wouldn't have any further job with Henry L. Doherty and Company, would you? A. Not according to the letter.

"Q. Not according to the letter, exactly, and in addition to that you received six weeks' pay, two of which was vacation money didn't you? A. Yes."

It may very well have been that the plaintiff was laid off because of her incapacity. She was one of only two employees that was laid off. The lack of business could very well have been used by the employer as a reason for letting her out. The fact is that she had a steady job there up to the time of her accident for two and a half years before the accident (p. 24, l. 40). Upon the foregoing testimony counsel for the defendant moved to strike out the testimony of the plaintiff on direct, quoted *supra*, "with respect to the earnings" (p. 34, ll. 25-30).

It is perfectly plain that what she earned up to the time of the accident was relevant and competent testimony to prove her earning capacity. If she had not been incapacitated for eight months and if she had not been confined to her bed for four to five weeks and to her home for three months, she would have been a worker and she did have a job. What she earned at the time of the accident was a circumstance which the jury had a right to consider. The trial court sustained the objection. The ruling and the colloquy between court and counsel thereon was as follows (p. 34, l. 35-p. 37, l. 25):

“The Court: I sustain the objection and order the testimony stricken out in so far as the plaintiff lays any claim for loss of money for services to be rendered to Henry L. Doherty and Company, inasmuch as it appears affirmatively that she lost her position there due to the depression, but I will allow the testimony to stand which fixes the rate of compensation that she received from Henry L. Doherty and Company so that the jury may have some indication or some idea as to the value—not necessarily and entirely dispositive of what her services were worth, because they may have been worth less—but it is some evidence which the jury may have before it to consider in determining what her services were reasonably worth. I will allow counsel, if he desires to and can show it through this witness, to re-examine her to determine whether or not she made any efforts to secure any other positions with any other companies.

“Mr. Markley: She was incapacitated she says for eight months. I will be glad to ask her.

“The Court: All right.

"Mr. Wortendyke: May I have an exception to that portion of your Honor's ruling which permits any consideration by the jury of any alleged loss of earnings?"

"The Court: *I am sustaining you on that, Mr. Wortendyke.* I say that that part of her testimony will be stricken out and the jury is instructed to disregard it as to loss of earnings from Henry L. Doherty and Company. It appears from what you developed on cross examination that she got a letter which stated the loss of her position was due to the depression. Of course she says she don't know whether that was accurate or not, but for all purposes of this case we must take it to be accurate in the absence of any representation from Henry L. Doherty and Company to give us any evidence to the contrary. I am sustaining your objection.

"Mr. Wortendyke: Then, if the court please, I respectfully submit, in the absence of any proof, particularly in the light of the bill of particulars, which charges the loss of this particular job which caused her to lose her earnings, that there is no basis in this case for the jury to consider any loss of earnings, past, present or prospective.

"The Court: I will say up to the present time that is correct, Mr. Wortendyke. However, if counsel for the plaintiff desires to examine his client for the purpose of showing that she endeavored to secure positions elsewhere I will allow it.

"Mr. Markley: If the Court please, I would like to be heard. For eight months this girl was incapacitated.

"The Court: You can show that.

"Mr. Markley: I have shown it.

"The Court: But you haven't shown—for example it is the bounden duty or obligation of every plaintiff who loses a position to try to reduce his or her damage, to minimize it. For instance, if she had a job

previously which paid her one hundred dollars a month and had a chance to get another position for seventy-five dollars a month, and wouldn't take it——

“Mr. Markley: I think we are talking at cross-purposes. So far as the loss of the Doherty job is concerned that cannot be attributed to this accident, but she only got six weeks' salary as a result of the loss of that job. Now, from the end of the six weeks down to the end of the eight month period she was incapacitated. She certainly is entitled to be compensated for that if the jury find that she might have worked and earned some money.

“The Court: I don't think so.

“Mr. Wortendyke: I respectfully submit that what she might have worked and earned is entirely too speculative.

“The Court: I will allow you when he is through with the cross examination to show that she went out and made efforts to secure another position.

“Mr. Markley: She was incapacitated during the eight months.

“The Court: All right; objection sustained.

“Mr. Markley: Will your Honor allow me an exception?

“The Court: You may have an exception.”

It will be noted that the end of the controversy was that counsel for the defendant was fully sustained, counsel for the plaintiff was overruled and noted an exception. No error therefore can be predicated upon this part of the record. Upon redirect counsel for the plaintiff sought to bring out that the plaintiff when she recovered from the effects of her accident did seek employment. Plaintiff testified that she did get some employment (p. 37, ll. 30-35). Then the trial court

asked a question (p. 37, l. 25) when counsel for the defendant interposed the following objection (p. 37, l. 35-p. 39, l. 40):

"Mr. Wortendyke: I want to object before the answer. I submit it is incompetent, irrelevant and immaterial because in answer to number nineteen of the demand for bill of particulars, which reads as follows: 'If employed, give name and address of employer, nature of latter's business, position or capacity of said plaintiff in said employment and amount of wages or salary then being received by said plaintiff and how payable.' The answer was, 'Plaintiff was employed by Henry L. Doherty Co., number 60 Wall Street, New York City, N. Y., as a clerk and received the sum of one hundred dollars per month. Plaintiff has lost her position as a result of this accident.' And number twenty-one, 'Itemize in detail all earnings of which said plaintiff claims to have been deprived by reason of said injuries, explaining how computed.' And the answer to number twenty-one is: 'See answer to nineteen.'

"The Court: What is the date of the bill of particulars?

"Mr. Markley: August 5th, 1932. The accident was June 9th, 1932. She was incapacitated for eight months and then she went out to get work and she did get some work.

"The Court: I will allow it.

"Mr. Wortendyke: I pray an exception, if the Court please.

"May I have the demand for a bill of particulars and the bill of particulars marked for identification?

"The Court: Yes.

"(Demand for bill of particulars marked D-2 for Identification and the bill of particulars marked D-3 for Identification.)

"The Court: I want these facts to appear affirmatively on the record so if this case should go up it would show the Appellate Court the reasons for my ruling.

"Mr. Markley: I have no objection to the bill of particulars going in evidence.

"The Court: Very well, let the record show that the demand for bill of particulars and the bill of particulars are admitted in evidence by consent of counsel.

"Mr. Wortendyke: I would like to be protected by having your Honor recognize, if you will, my objection to this entire line of questions asked this witness, regarding any loss of earnings. I base my objection on the answers to nineteen and twenty-one.

"Mr. Markley: You have got to take them altogether.

"The Court: If this woman was incapacitated as she claims she could only itemize all earnings which she claims to have been deprived of up to the date that the question was answered by her, and that is the reason for my ruling.

"Mr. Wortendyke: May I have an exception?

"The Court: Yes.

"Mr. Wortendyke: I understand my objection stands to all question of a similar nature?

"The Court: Yes."

Counsel for the plaintiff then proceeded to ascertain just what employment the plaintiff was able to obtain after she had recovered from her accident as follows (p. 39, l. 40-p. 41, l. 5):

"Q. When did you first get employment?

A. About a year later after the accident.

Q. What employment was that? A. The Air Cruiser Corporation.

Q. What did you do with that corpora-

tion? A. We had to cement the fabric for the balloons and airships.

"Q. Speak up. A. The first job I got after my accident was for the air cruisers, about a year later, a year later exactly, I think, and we had to cement the fabrics for the balloons and airships.

"Q. How long did you work there? A. I worked there about two or three weeks.

"Q. How much were you paid for that? A. Paid twenty cents an hour.

"Q. What was your weekly average? A. I couldn't tell because when it was damp we didn't work.

"The Court: What was your weekly average?

"The Witness: About twelve.

"The Court: About twelve dollars per week?

"The Witness: Yes.

"By Mr. Markley:

"Q. Were you able to get work after that? A. The next job I had was in January.

"Q. January of— A. This year, in a hoisery place. I worked there about three months and the place closed down.

"Q. How much did you make there? A. My average was about sixteen dollars a week, and after that I got a job with the Air Cruisers and worked there two or three months and was laid off last week.

"Q. Did you make the same as you did before? A. Got twelve dollars a week.

"Q. *Is that all the work you have been able to get?* A. Yes."

The objection of counsel for the defendant to the question seems to be on the theory that the answers to demands numbered 17, 18 and 19 of the bill of particulars limited the plaintiff in her proof solely to the loss of earnings sustained as an employee of Henry L. Doherty & Co. How-

ever, as stated above, the bill of particulars could not speak as to the future, and as the answers thereto were given on August 5, 1932, and as the plaintiff was incapacitated for eight months after June 9, 1932, until some time in February, 1933, it is plain that her testimony as to what occurred after August 5, 1932, was perfectly proper, relevant and material to the issue. She was prevented from attending to a gainful occupation for eight months, even though her loss of the Doherty position may have been due to a lack of business rather than to her injury. Had she not been incapacitated for eight months she could have sought employment elsewhere, and it is for the jury to say whether there was any loss of earnings during her period of incapacity. Her testimony shows that she did obtain some work and that the work she obtained was all the work that she was able to get. The admission of testimony as to the moneys she earned was proper in any event to prove that she attempted to obtain work when she was able to and in fact did minimize her loss.

Notwithstanding that it was a jury question as to whether or not she sustained any loss of earnings, the trial court charged this item of damage out of the case and removed it from the jury's consideration as follows (p. 119, l. 15-p. 120, l. 31):

"In connection with the question of loss of wages there was some colloquy between counsel and a motion was made to strike out some testimony and I told counsel I would handle it in my charge, and that is what I purpose to do now. You will recall that the plaintiff's testimony developed that she worked for Henry L. Doherty and Company. They are big oil specialists in New York,

Mr. Doherty being one of the oil geniuses of this country and head of the City Service Company, and she worked for this firm getting one hundred dollars a month. She said she received a letter from them. Of course she had her own opinion as to why she was let out. That opinion, however, is not to enter into your deliberations. In the absence of any statement from Henry L. Doherty and Company we have got to take what the letter said and they said they let her out due to the depression. Now that being so she could not surcharge this defendant, nor could you penalize this defendant for any damages by reason of loss of this position. Say you or I worked for the Public Service for five hundred dollars a month and we had an accident and were injured and weren't employed when we went back. If we could show we had this steady position and they would not hold it open, and we went out looking for another position and couldn't get one, then we could charge the loss of that position to that accident, because the loss reasonably flowed from the accident. In that case the position would be lost by reason of the accident, but I don't see that there is any such situation in this case.

"(Addressing Mr. Wortendyke): Did you cover that in your requests to charge, Mr. Wortendyke?

"Mr. Wortendyke: Yes.

"The Court: What number is that?

"Mr. Wortendyke: Number one.

"The Court: I guess I covered it more elaborately than you have. Are you satisfied with it? I mean if you want me to I will charge number one.

"Mr. Wortendyke: I think number one is a little bit inconsistent with your Honor's present charge.

"The Court: I think I have covered it. However, I will charge it as you have requested.

"I have been requested to charge you and do charge you that you cannot award plaintiff anything by way of compensation for loss of earnings because by her own testimony no such loss resulted from the accident."

Counsel for the defendant then took the following exception (p. 124, ll. 15-25), *but nowhere in the charge did such language exist*:

"I respectfully pray an exception to that portion of your Honor's charge in which your Honor stated to the jury that if by reason of the accident they should find that the plaintiff was prevented from obtaining a position or was caused to lose her position that they may allow her compensation for loss of wages, which she would otherwise have earned, on the ground that the evidence in the case conclusively excludes any such basis as a basis of damages."

Counsel argues in his brief in the Supreme Court that the court's charge quoted above was inconsistent with the statement previously made in the charge, viz. (p. 119, l. 9):

"And third, *if* you so find you will compensate her for any loss of wages;"

But no exception was taken by counsel for the defendant to this alleged inconsistency.

Furthermore, the instruction to the jury to compensate the plaintiff for any loss of wages *if the jury found any* is not inconsistent with what the court said because if there was no evidence of any loss of wages then under the court's charge the jury could not allow any because it could not find any.

The trial court in his main charge and also in charging the first request of the defendant gave the defendant instructions more favorable than he deserved. Under the settled law the defendant cannot object to an instruction which is more favorable than he deserves.

Mallery v. Erie R. R. Co. (E & A) 86
N. J. L. 210;
Gellatt v. C. R. R. Co. of N. J. (Sup. Ct.),
86 N. J. L. 416, 418.

We therefore respectfully submit that no error was committed by the trial court in the admission of any testimony; no error was made by the trial court in his charge to the jury; no exception was taken to the alleged erroneous instruction; and the exception taken to an alleged instruction which the trial court did not give the jury is worthless.

III

The trial court did not err in his charge of contributory negligence.

On the question of contributory negligence the trial court in his main charge instructed the jury as follows (p. 116, l. 25-p. 117, l. 25):

“Now the defendant comes in here and files his answer, and in his answer he admits ownership and control but categorically denies that he was negligent, and says, as a separate defense, that at the time and place mentioned and described in the complaint, that the plaintiff failed to exercise reasonable care for her own safety, and in this and

divers other respects was negligent and her said negligence proximately contributed in the causation of any injuries which she may have sustained, and at said time and place in making use of said premises under the circumstances then and there obtaining, plaintiff assumed the risk of whatever injuries she may have sustained.

"Now I charge you in that connection that inasmuch as these defenses are affirmative defenses, the burden of establishing these affirmative defenses is upon the defendant, just as I charged you in the first instance the burden of proof was upon the plaintiff to satisfy your minds by the greater weight of the evidence, by the fair preponderance of the proof, of the alleged act or acts of negligence on the part of the defendant. So, likewise, I charge you the reverse, that is, that contributory negligence is the reverse of negligence, only charging it on the other part, that is, the burden of proof must be borne by the defendant in setting up that affirmative defense, that is to say, the defendant must satisfy your minds by the greater weight of evidence, by the fair preponderance of the proof, that she was guilty of contributory negligence in the manner that I have read it word for word and verbatim from the defendant's answer."

Counsel has taken from its context one short sentence of this instruction of contributory negligence and has magnified it into what he calls "an obscurity" or "an inconsistency." However, if the phrase is read as part of the instruction there could not be any doubt in anybody's mind as to what the court meant even though the phrase separated from its context might be regarded as an inapt one. When counsel for the defendant took an exception to this single phrase

of the charge on contributory negligence, the trial court recalled the jury and again charged them on the subject of contributory negligence as follows (p. 123, l. 20-p. 124, l. 2):

“The Court: Gentlemen of the jury, in the course of my charge to you, and which charges are generally made by me extemporaneously, the words cropped into my charge that contributory negligence—although I elaborated on it—was the reverse of negligence. Now, I qualified that but in case there is any misunderstanding on your part about it, I want to make myself clear on the subject.

“By contributory negligence is meant—and it is charged by the defendant that even though the defendant may have been negligent, the plaintiff, by virtue of her own negligence, contributed to the happening of the event but for which the accident could never have occurred; and no matter how slight that contributory negligence may have been the law of this state is well-settled that the courts will not attempt to weigh the scales of justice and determine who is the greater or lessor at fault, but in that case cold-bloodedly says there cannot and must not be any recovery.”

No exception was taken after this further instruction by counsel for the defendant. We respectfully submit that the trial court's instruction on contributory negligence fully and adequately covered the subject matter thereof and that no harmful error was committed.

IV

Comment on Opinion of Supreme Court

The Supreme Court bases its reversal of the Hudson County Court of Common Pleas upon three grounds: First, that the trial court committed error in denying counsel's motion for a mistrial; second, that the trial court committed error in some of his remarks during the colloquy following the motion for a mistrial; and third, that under Section 27 of the Practice Act of 1912, after examination of the entire case, it appeared that the error injuriously affected the substantial rights of the party.

We have demonstrated under Point I of this brief that the trial court did not abuse its discretion in denying the motion for a mistrial, and consequently the denial of that motion was not error. In addition to the argument under Point I, we desire now to point out that the questions asked of the particular juror were proper not only under technical legal rules, but as a practical necessity. The accident out of which this suit arose occurred in an apartment house which was, as a matter of fact, covered by insurance. The presence on the jury of an employee of an insurance company writing policies which cover apartment houses might be prejudicial to the plaintiff, and if, as the defendant's counsel contends, the questions asked of the juror were improper, then the practical result may often be not only that an employee of an insurance company writing policies covering similar properties will be permitted to sit as a juror, but em-

ployees of the very company covering the risk, and perhaps even the man who wrote the policy or who investigated the accident involved in the suit, would be permitted to sit. Under the cases cited in Point I, and in order to obtain a fair and impartial trial, it is essential that such questions be permitted. Since the interrogation of the juror was proper, the court's ruling allowing those questions and denying the motion for a mistrial was obviously proper and not an abuse of discretion.

With respect to the second ground on which the Supreme Court reversed the Hudson County Court of Common Pleas, the opinion of the Supreme Court is as follows:

"At the end of the case the court charged the jury (and on this particular point apparently to the satisfaction of defendant) that they were to ignore all reference that had been made to the question of insurance, etc. But this, in our estimation, did not cure the manifest error committed by the trial judge, first, in bringing into the case, and in the presence of the jury, his account of what had happened the day before, including hearsay as to what some juror in another case had said in the jury room, together with a ruling on the eligibility of a certain class of juror, which under the statute was for the decision of counsel and not of the court (the statute looking only to peremptory challenges) and secondly, in overruling the request for a mistrial, which was a fitting challenge to something in the way of testimony by the court, unsworn and irrelevant, or if relevant, incompetent. See *State v. Raymond*, 53 N. J. Law 260, 262."

A mere reading of the colloquy (p. 146, ll. 20-40; p. 147, ll. 1-20) demonstrates conclusively that

the trial judge did not make any attempt to give an account of what had happened the day before, including hearsay, nor did he make any attempt to quote what some juror in another case had said in the jury room, nor did he attempt in any way to rule upon the colloquy upon a certain class of juror. The court had just denied a motion for a mistrial and allowed the questions which had been asked of the jurors (p. 146, ll. 20-28) and the remarks complained of were made by the court as an explanation of his ruling and constituted the reason for that ruling. As we have shown under Point I of the brief, the ruling itself is unassailable, and it is, of course, fundamental that the decision of a trial court, if proper upon any ground, will be sustained even though the reasons advanced by the court were erroneous or incomplete or even, in fact, if the reasons advanced by the court did not state a legal ground for the ruling.

Beach v. Palisade Realty & Amusement Co., (E. & A.) 86 N. J. L. 238, 240;
Solomon v. Public Service Ry. Co., (E. & A.) 87 N. J. L. 284, 286;
McCrary Stores Corp. v. Braunstein, (E. & A.) 99 N. J. L. 166, 169.

It, therefore, follows that even assuming, although we do not admit it, that the trial judge's reason for his ruling as he expressed it during the colloquy was erroneous, since the ruling itself was proper, the mere fact that he applied the wrong reasoning is not a proper ground for reversal.

The Supreme Court in the latter part of the passage quoted above referred to the overruling of the request for a mistrial as something in the way of testimony by the court and cited *State v. Raymond*, 53 N. J. L. 260, 262. In that case the defendant testified that he had not been able to procure the attendance of a witness because he had been in jail and did not know the whereabouts of the desired witness. Following the cross examination, the following colloquy occurred:

“Judge—Have you, or is there a man who goes to New York every day for you during this trial?

“Prisoner—No, sir; not expressly for me; he goes every day; I have had him deliver some letters for me and attend to some matters.

“Judge—A black-eyed man?

“Prisoner—Yes, sir; I know who you have reference to.

“Judge—You said the other day on the stand that you did not have any facilities for acquiring witnesses or evidence, or anything of that kind, and I think I ought to state to the jury that this man accosted me on Saturday night, on the train coming from New York, and told me that he was a friend of the defendant and went to New York every day for him; I don’t know anything further than that; I thought it was due to the defendant to state the fact to him.”

A reading of this quotation demonstrates the distinction between *State v. Raymond* and the case *sub judice* which apparently the Supreme Court overlooked. In *State v. Raymond*, the trial judge, without having been sworn as a witness, contradicted that of the defendant, whereas here, as we have previously pointed out, the trial judge

was merely explaining the reason for his ruling. He was not attempting to either quote what had occurred in the jury room the day before, pass on the eligibility of a certain class of juror or give anything in the way of testimony, as was the fact in *State v. Raymond*.

The Supreme Court concludes its opinion as follows (p. 148, ll. 3-15):

“A general test of reversal laid down in Section 27 of the Practice Act of 1912 is that after examination of the whole case, it must appear that the error injuriously affected the substantial rights of a party. The case before us seems to be conspicuously one in which that condition obtains; and the judgment is therefore reversed to the end that a new trial be had.”

Section 27 of the Practice Act of 1912, referred to in the opinion, provides:

“27. Reversal or New Trial on Merits. No judgment shall be reversed, or new trial granted, on the ground of misdirection, or the improper admission or exclusion of evidence, or for error as to matter of pleading or procedure, unless, after examination of the whole case, it shall appear that the error injuriously affected the substantial rights of a party.”

It is to be noted that Section 27 of the Practice Act refers specifically to error and is a provision to prevent the reversal of causes even though error has been committed when it has not affected the rights of either of the parties. However, in order to reverse in any case there must exist three things: error by the trial court; exception noted by the party alleging the error, and a preservation of that exception in the grounds of appeal.

The appellate court will not consider errors to which an exception was not taken or not preserved by the grounds of appeal. *A fortiori*, a remark of the court *arguendo* cannot be the basis of a reversal. If there is to be a reversal every time a trial judge makes an unfavorable statement, very few judgments could be sustained.

Benz v. Central Railroad of N. J. (Sup. Ct.), 82 N. J. L. 197;

Kargman v. Carlo (E. & A.), 85 N. J. L. 632, 636;

Gellatty v. Central R. R. Co. of N. J. (Sup. Ct.), 86 N. J. L. 416;

Mallery v. Erie R. Co. (E. & A.), 86 N. J. L. 210.

Since in the case at bar we have clearly demonstrated that it was not error nor an abuse of discretion for the trial court to deny counsel's motion for a mistrial, and, since no reversal can be had for an erroneous reason when the ruling itself was proper upon any ground, there was nothing for the Supreme Court to consider under Section 27 of the Practice Act, we respectfully submit that the Supreme Court erred in reversing the judgment of the Hudson County Court of Common Pleas.

Section 27 only applies when there is an erroneous ruling and an exception, but the examination of the whole case reveals that it was not harmful or injurious and therefore not reversible error. Here we have a reversal because of a "remark" of the trial judge, although the ruling was sound. Also, the charge wiped out any improper impression that may have flowed from the remark.

V

CONCLUSION

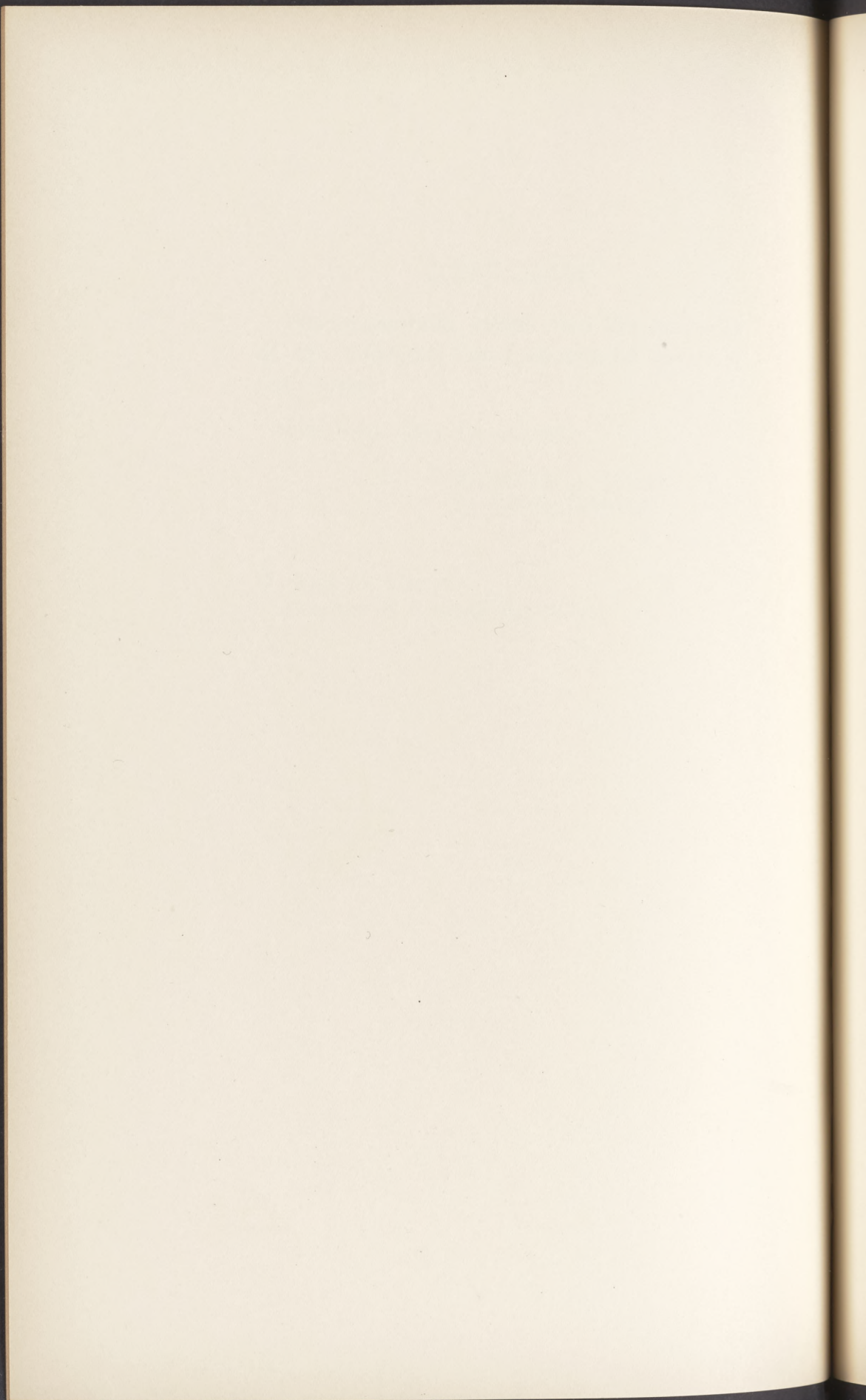
We respectfully submit that the judgment of the Supreme Court should be reversed, with costs.

Submitted—May Term, 1935.

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8 MAY. 7. 1935

New Jersey Court of Errors and Appeals

ANNA PLEVA,
Plaintiff-Appellant,

vs.

SAMUEL GOOTZEIT,
Defendant-Respondent.

On Appeal.

BRIEF FOR DEFENDANT-RESPONDENT.

Statement.

This is an appeal from a judgment of the New Jersey Supreme Court reversing a judgment of the Hudson County Court of Common Pleas entered upon the verdict of a jury in favor of appellant, plaintiff in the trial court, and against respondent, defendant in the trial court, in a tort action for damages for personal injuries alleged to have been sustained through a fall upon a stairway in premises owned by said defendant.

The complaint charged that plaintiff, while lawfully in a building owned by defendant, consisting of separate offices rented out by defendant to various persons as places of business, was caused to fall upon a stairway in said building by reason of the unlighted and defective condition thereof (Case, pp. 7-8). Plaintiff also charged that defendant, owner of said premises, reserved to himself control of the hallways and stairways in said building (p. 7).

The answer admitted ownership of the premises but denied all else and charged affirmatively con-

tributory negligence and assumption of risk on the part of the plaintiff (pp. 10-11).

Plaintiff testified that on June 9, 1932, after having received dental treatment upon the second floor of said premises at the hands of a dentist, a tenant thereof, and while going down a stairway leading from the second to the ground floor, her heel became caught in a raised nosing on one of the steps of the stairway. She was caused to fall and sustained a broken tooth and right shoulder (pp. 17-19).

As the jury was being selected plaintiff's attorney asked juror No. 3, who had admitted, on being questioned in the course of plaintiff's peremptory challenge, that he was employed by an insurance company, what kind of insurance he and his employer wrote and whether or not his company wrote insurance risks covering tenement house and apartment house property (pp. 13-14). Defendant's attorney thereupon moved for a mistrial (p. 12) which the court denied (p. 13) and allowed an exception to the defendant. After the denial of this motion for a mistrial and the allowance of an exception, the trial court further commented upon the questions asked by plaintiff's attorney of the prospective juror, for purposes of peremptory challenge, and after the motion for mistrial stated as follows (p. 13):

"The Court: Yes. I might say that the attitude of the Court in this particular, for the purpose of the record in case this case is carried up, is because of the fact that a case was tried here yesterday that took the best part of two days. The jury was out for six hours. One of the jurors was listed as a broker and as a matter of fact he was in the insurance business and he is alleged to have made certain remarks in the jury room with relation to matters of this sort, and I think as a matter of justice that no man should be

permitted to sit on a jury where there is any possible question of bias; and I think, therefore, if a man is in the insurance business insuring tenement house properties—which I know nothing about but which I take from the questions of counsel—that he should not in fairness to the litigants be permitted to sit on a jury.”

To the foregoing comments and remarks of the trial court defendant’s attorney prayed an exception, which was allowed (p. 13).

From a judgment of the Trial Court in favor of plaintiff and against defendant, the latter appealed to the New Jersey Supreme Court (p. 1), assigning as errors (grounds of appeal), *inter alia* (pp. 3-4), that

“1. The Trial Court denied defendant’s motion for a mistrial during the selection of the jury, which defendant contends was an abuse of discretion on the part of the Trial Court and reversible error. Plaintiff’s attorney, in selecting the jury, asked Number 3 in the box for the name of his employer and the kind of business in which said employer was engaged, and whether the juror or his employer was in the insurance business. Being informed by the juror that his employer was an insurance company, plaintiff’s attorney asked said juror what kind of insurance, and was told by the juror that his employer wrote all kinds of insurance. Plaintiff’s attorney then asked whether said juror’s employer wrote insurance risks covering tenement house and apartment house properties and received answer in the affirmative.

2. The Trial Court, in denying defendant’s motion for a mistrial during the selection of the jury, used the following language, which defendant contends was highly prejudicial to defendant and constituted an abuse of discretion on the part of the Trial Court and reversible error:

'The Court: Yes. I might say that the attitude of the court in this particular, for the purpose of the record in case this case is carried up, is because of the fact that a case was tried here yesterday that took the best part of two days. The jury was out for six hours. One of the jurors was listed as a broker and as a matter of fact he was in the insurance business and he is alleged to have made certain remarks in the jury room with relation to matters of this sort, and I think as a matter of justice that no man should be permitted to sit on a jury where there is any possible question of bias; and I think, therefore, if a man is in the insurance business insuring tenement house properties—which I know nothing about but which I take from the questions of counsel—that he should not in fairness to the litigants be permitted to sit on a jury.' "

The Supreme Court reversed the judgment of the Trial Court, holding that the trial judge committed manifest error, which the instructions to the jury failed to cure,

"first, in bringing into the case, and in the presence of the jury, his account of what had happened the day before, including hearsay as to what some juror in another case had said in the jury room, together with a ruling on the eligibility of a certain class of juror, which under the statute was for the decision of counsel and not of the court (the statute looking only to peremptory challenges) and secondly, in overruling the request for a mistrial, which was a fitting challenge to something in the way of testimony by the court, unsworn and irrelevant, or if relevant, incompetent" (Opinion, Case, pp. 147-148; reported in 114 N. J. Law 399).

ARGUMENT.

POINT I.

The judgment of the Supreme Court, reversing the judgment of the Hudson County Court of Common Pleas, should be affirmed.

A.

The Trial Court committed error in stating, in the presence and hearing of the jury in this case, what a juror in another case had been said to have remarked in the jury room while deliberating on the evidence in the latter case.

While, as will appear from the State of Case, the proceedings in the selection of the jury on the trial were not reported by the stenographer, they were, to use the language of Mr. Justice PARKER in the Supreme Court's Opinion "epitomized" by the Trial Judge in connection with the defendant's objection, as quoted at length in the Supreme Court's Opinion and as is set forth in the State of Case (pp. 13-14). Defendant's attorney had moved for a mistrial for alleged improper questions propounded by plaintiff's attorney for purposes of peremptory challenge while the jury was being selected, the jury box having been filled and a large number of remaining members of the petit jury panel being in the court room. The Trial Judge, after allowing defendant an exception to his denial of the motion for mistrial, stated in open court from the bench not only to counsel but to, and in any event, in the hearing of the twelve jurors who were in the box and the remaining members of the panel who were in the court room, without being sworn, certain alleged facts which may be paraphrased serially as follows:

(1) That on the preceding day a case had been tried in that court occupying the best part of two days, and in which the jury had been out on its deliberations for six hours;

(2) That one of the jurors in that other case was shown on the printed jury list as being engaged in the occupation of a broker;

(3) That the particular juror in the other case was, as a matter of fact, in the insurance business;

(4) That the particular juror last referred to "is alleged to have made certain remarks in the jury room with relation to matters of this sort;"

(5) That the Trial Judge who made these remarks considered that "as a matter of justice * * * no man should be permitted to sit on a jury where there is any possible question of bias;"

(6) That the same Trial Judge was further of the opinion that "if a man is in the insurance business insuring tenement house properties—which I know nothing about but which I take from the questions of counsel—that he should not, in fairness to the litigants, be permitted to sit on a jury" (Case. p. 13, l. 9 to 27).

It is submitted that, whether or not a case was tried in the same court either the day before or a year before, or how long a time the trial occupied, or for how long a time the jury deliberated, was manifestly irrelevant and immaterial to the case then before the court for trial. Moreover, whether one of the jurors in the other case was a broker or a blacksmith, or whether his occupation as set forth on the jury list was correct,

or whether his actual occupation was in the insurance business or in some other vocation, is obviously equally irrelevant and immaterial, as far as this case is or was concerned.

Evidence to be relevant must bear on the issue joined between the parties,

Kahala v. Aldrich, 11 N. J. Misc. Rep. 680; affmd. 112 N. J. Law 18;

and that which has no relevancy should be excluded as being immaterial.

U. S. Agency v. Metropolitan Lumber Co., 5 N. J. Misc. Rep. 564.

The Trial Judge continuing, went further, however, and said that a certain juror in the case which was tried the day before, which case admittedly had no connection with or relation to the case then on trial, is alleged to have made certain remarks in the jury room. We will not be so presumptuous as to endeavor to justify, by reference either to judicial decision or to the dictionary, our contention that the phrase "is alleged to have made" can have but one meaning, viz., that the speaker (the Trial Judge) had been told or otherwise informed that the juror in the other case made a certain remark in the jury room. This statement by the Trial Judge, in the presence of the jury, obviously not made under oath, was more particularly the purest kind of hearsay, in addition to being tainted with the same vice as were the preceding remarks, *i. e.*, that of being irrelevant and, therefore, immaterial.

It is error to admit hearsay evidence even though the jury be charged to pay no attention to it.

Demoney v. Walker, 1 N. J. Law 33.

It is, moreover, elementary that one may not go behind the jury room door to establish how a verdict was arrived at, nor how the individual members of the jury expressed themselves during their deliberations in the privacy of the jury room. In fact, the instant rule goes further by precluding the use of a sworn affidavit by a juror to prove how a verdict was arrived at.

Lindauer v. Teeter, 41 N. J. Law 255;
Queen v. Jennings, 93 N. J. Law 353;
Bragg v. King, 104 N. J. Law 4;
Isenberg v. Kent, 7 N. J. Misc. Rep. 1089;
Marconi v. MacElliott, 8 N. J. Misc.
 Rep. 69.

B.

The Trial Court committed error in ruling that a juror who had been duly drawn to sit upon the trial was ineligible by reason of the fact that he was employed by an insurance company.

Reference is made to our paraphrase analysis under subdivision A (*supra*) of the comments made by the Trial Judge, following his allowance of an exception to the defendant to the denial of said defendant's motion for a mistrial, more particularly the following portion of said remarks (Case, p. 13):

"I think as a matter of justice that no man should be permitted to sit on a jury where there is any possible question of bias; and I think, therefore, if a man is in the insurance business insuring tenement house properties—which I know nothing about but which I take from the questions of counsel—that he should not in fairness to the litigants be permitted to sit on a jury."

The complaint charged (Case, p. 7) that the defendant was the owner of a building containing

separate offices rented out by defendant to various persons, and that the defendant reserved to himself control of the hallways, stairways, etc., and designated by street number the building referred to. The answer (Case, p. 10) admitted the ownership of the particular premises.

The Trial Court's language above quoted referred to the opening of counsel from which, although said opening was not taken down by the stenographer, it had appeared that the building might be generally referred to as one of the tenement house type. The Trial Court, therefore, still in the presence of the twelve jurors who were in the box and of the other members of the panel who were in the court room, subject to being called into the box to fill any vacancy created by challenge, undertook to rule not only that no juror should be allowed to sit where there was any possible question of bias, but that if such juror was in the insurance business insuring tenement house properties, he should not be permitted to sit on the jury selected to try the particular case.

Our Legislature has prescribed in "An act concerning juries," 3 Comp. Stat. 1910, page 2965, Sec. 6 (a), as amended by Chapter 28 of the Laws of 1921, the qualifications for petit jurors in civil cases. They are as follows:

- (1) He shall be a citizen of the state;
- (2) He shall reside within the county from which he shall be drawn;
- (3) He shall be above the age of 21 years and under the age of 65 years;
- (4) He shall not, at the time of his selection, be an official having, directly or indirectly, any official interest in or connection with the administration of justice.

This statutory enactment, prescribing as it does what shall be the qualifications of a petit juror in a civil suit, is obviously barren of any reference to the occupation, means of livelihood, vocation or avocation of an individual from the standpoint of determining his qualifications to serve upon a jury. Yet, in the very face of this definite expression of the legislature, the Trial Judge in this case undertook to state that, "if a man is in the insurance business insuring tenement house properties * * * he should not in fairness to the litigants be permitted to sit on a jury." Surely, such a statement cannot be reconciled, by any stretch of the process of reasoning, with the section of the statute which we have discussed, and in making the remark, the Trial Court not only deprived the defendant of the benefit of a category of jurors eligible under the statute, but precluded counsel from exercising his right to determine whether or not the fact that a juror's occupation was the insurance business rendered him unsuited, unfit, unqualified or undesirable for service as a juror in the particular case.

The Supreme Court, in the opinion below, has through Mr. Justice Parker, discussed the further act concerning jurors, Chapter 151 of the Laws of 1911, particularly Section 3 thereof, permitting either party to question any juror, after his name is drawn from the box and before such juror is sworn, for the purpose of eliciting information upon which he may determine whether or not to interpose a peremptory challenge; the act going further in pointing out that such questions shall be permitted for the purpose of disclosing whether or not the juror is impartial as between the parties to the suit and without interest therein or in result thereof. The comments of the Trial Judge in the instant case and hereinabove immediately discussed were made in conjunction with the exer-

cise by counsel for the respective parties of their right of peremptory challenge. It was to a question or series of questions by counsel for the plaintiff that the Court evidently referred in its remarks. Such question or questions tended to show that a particular juror was employed in the insurance business, which involved the issuing of policies against the liability of an owner of a tenement house for injuries sustained by reason of the condition of the premises. The Trial Court, therefore, in stating that any man in such a business should not in fairness be permitted to sit on a jury, undertook to expand the provisions of the statute and, in the form of a judicial pronouncement, excluded from jury service as unqualified therefor every man who had the good or ill fortune of finding himself in an occupation such as that referred to. Since, therefore, the nature of the particular juror's occupation was elicited upon a question permitted only for the purpose of peremptory challenge, the answer to the question could not constitute a cause for the disqualification of the juror or any other juror engaged in a similar occupation.

Lamble v. State, 96 N. J. Law 231.

C.

The Trial Court committed error in overruling defendant's motion for a mistrial for counsel's reference to insurance in the presence and hearing of the jury.

We have mentioned that the stenographer did not take down nor does the State of Case contain the proceedings in the selection of the jury, which prompted the motion for a mistrial. The Trial Court, however, summarized these proceedings (Case, pp. 13-14) to the effect that plaintiff's attorney stated that he noticed juror No. 3, Alex-

ander McKenzie by name, was listed as a bookkeeper, and asked the juror for whom he was bookkeeper, whereupon the juror gave the name of his employer. Counsel then asked the juror what kind of a concern his employer was, and the juror replied that it was an insurance company. Counsel then asked the juror in what kind of insurance his employer dealt, and was informed by the juror that his firm wrote all kinds of insurance. Thereupon the same attorney asked the same juror whether or not his employer wrote "insurance risks covering tenement house and apartment house properties" and was answered in the affirmative. Defendant's attorney thereupon moved for a mistrial (Case, p. 12), and was allowed an exception to the Trial Court's denial of the motion (Case, p. 13). It was after the allowance of this exception that the Trial Court made the comments which we have discussed *supra*.

In a case of this kind the fact, or absence of such fact, that defendant carried liability insurance as a protection against a casualty such as that here involved, had no bearing whatsoever on the issues presented for trial.

Sutton v. Bell, 79 N. J. Law 507; 77 Atl. Rep. 42;

Brown v. Walter, U. S. C. C. A., 2nd Cir., 62 Fed. (2d) 798.

The questions propounded to the juror by plaintiff's attorney, when emphasized as they were by the comments of the Trial Judge on the subject of insurance, could have had but one effect upon the jury, *viz.*, that of prejudicing the jurors against the defendant in the case.

In *Patterson v. Surpless*, 107 N. J. Law 305, our Court of Errors and Appeals, speaking through Mr. Justice Lloyd, said (at page 308):

“To propound to the jurors a question as to their stockholdings in the insurance company named could have had but one purpose and effect, viz., to prejudice the jurors against the defendants in the trial of the case. It would at once instill in their minds the thought that the defendant would ultimately not be called upon to pay any verdict that the jury might render, but that this burden would fall upon an insurance company which had been paid to take the risk. The prejudicial effects of such an impression are obvious and can scarcely be magnified.”

It is respectfully submitted that it was obviously harmful to the defendant for plaintiff's attorney, in selecting the jurors with the remainder of the panel sitting in the court, to ask one of the jurors whether his firm wrote insurance risks covering tenement house and apartment house properties, the premises in question in the case at bar being of the general type referred to.

We are aware, of course, of the many decisions in this jurisdiction which constitute authority for the general rule that the exercise of the inherent judicial discretion of a Trial Court will not be reviewed except in cases of flagrant abuse thereof. These authorities are so numerous that we see no reason for citing them here. *Watson v. Detroit Fidelity & Surety Co.*, 109 N. J. Law 71, however, is one of the more recent of the decisions referred to.

Since, therefore, it was irrelevant, and therefore, immaterial whether the defendant in this case carried insurance against the liability sought to be imposed by the plaintiff in the case, and since this Court, in *Patterson v. Surpless* (*supra*) recognized that reference to the matter of insurance would obviously prejudice the defendant's case in the minds of the jury, we contend that the motion for a mistrial invoked the exercise of

a sound but not arbitrary discretion in the Trial Court, and that, under all the circumstances, the Trial Court, in denying that motion, abused its discretion.

Counsel's questions to the particular juror not only interjected the element of insurance into the case, and that not only before the twelve jurors in the box, but the remainder of the panel in the court room, but also served to suggest more pointedly that the particular defendant was covered by insurance against the very liability sought to be imposed in the case. Counsel not only asked whether the particular juror was employed by an insurance company, or in the business of insurance, but went further and asked whether that insurance included the writing of policies on multi-tenant buildings such as that involved in this very case. In denying the motion for a mistrial, the Trial Court not only in effect said that it did not consider that the remarks of plaintiff's attorney caused substantial harm to the defendant's rights, but, in adding its own further comments on the general question, it drove home to and more firmly fixed in the minds of the jurors, both in the box and in the court room, the conviction not only that the defendant in the case must be covered by insurance, and therefore, would not suffer greatly if burdened with a verdict, but that the insurance business was in all its features so inherently vicious or conducive to unreliability as to disqualify from such an important function as jury service everyone who had any connection with it. Thereby was distorted the entire picture of the meritorious issues in the minds of the various jurors. All of this should have been obvious to the Trial Judge, and being so, afforded no room for the exercise of a discretion moving to one decision or the opposite, but irresistably impelling to the granting of the motion.

The number of cases, of which *Watson v. Detroit Fidelity & Surety Co.*, 109 N. J. Law 71 is typical, holding that this Court will not review the exercise of the inherent judicial discretion of a trial court, do not go so far as to preclude a review and, if appropriate, a reversal of the rulings or action of a trial court which, though ordinarily falling in the general category of discretionary matters, in the particular instance may disclose apparent abuse of such discretion. The defendant contends here that the denial of his motion for a mistrial, when examined in the light of all of the surrounding circumstances and events, constituted an abuse of discretion justifying a reversal.

D.

The foregoing errors, or some of them, injuriously affected the substantial rights of the defendant.

We have noted that our adversaries have strenuously argued that, even if it be assumed that the Trial Court in this case committed error, that error or those errors did not injuriously affect the substantial rights of the defendant; invoking in this connection Section 27 of the Practice Act (1912) 2 Comp. Stat. Supp. 1924, page 2819, Section 163-303. The section referred to has been considered as in effect precluding a reversal "because of an irregularity that does not go to the question of jurisdiction or of judicial authority" or "error in procedure that did not affect the substantial rights of a party."

Higgins v. Egg, 87 N. J. Law 185;

Cook v. American Smelting etc. Co., 99 N. J. Law 81.

We, however, most earnestly contend that the errors alleged and herein discussed obviously and

injuriously affected the substantial rights of the defendant.

In the language of Mr. Justice LLOYD, in *Patterson v. Surpless* (*supra*), herein already quoted, the interjection of the question of insurance into the case created in the minds of the jury prejudicial effects which are "obvious and can scarcely be magnified."

As we have already indicated, the matter of insurance first came into the situation through the questions of plaintiff's attorney in selecting the jury. Even if it be assumed that up to this point the harm to defendant was not so great but that it could be, as was attempted, corrected by the Court's instructions, the Court, of its own accord, uninvoked by either counsel or any situation which existed in the trial, emphasized and magnified the harmful effects of what had already been done by his remarks and comments following his allowance of an exception to the denial of the motion for a mistrial.

The Trial Court said in effect that anyone connected, by employment, contract or otherwise, with an insurance company was inherently unreliable. The jury doubtless had already grasped the innuendo created by the questioning on the part of plaintiff's attorney in the selection of the jury that the defendant in the case was covered by insurance, and was, therefore, connected by contract at least with an insurance company. The Trial Court then proceeded to explain that, in a previous case tried in his court there had been an insurance company employee on the jury, who had made certain remarks in the jury room. It is true that the Trial Court did not specify what those remarks were, but it requires very little literary appreciation to conclude that the Court's comments on the unsuitability of insurance employees for jury service, immediately following

the Court's statement that such an employee had made remarks in the jury room in a prior case, indicated that, in the Court's mind, anyone connected with an insurance company must have something radically wrong with him. If the jury in this case had any doubt after the questioning of plaintiff's attorney whether there was any insurance in the case, that doubt must have been irretrievably dispelled by the judicial comment referred to.

A reasonable analysis of the probable effect on the minds of the jury of this contention is susceptible, we submit, of but two conclusions, first, that the defendant was insured and, therefore, would probably not have to pay any verdict that was rendered in favor of the injured plaintiff, and secondly, that if there were any member on the jury who was employed by an insurance company, and who voted in favor of the defendant, there would be brought down upon his devoted head and those of his colleagues the stigma implied in the Court's remarks. In this situation, if there was ever a more subtle yet compelling influence on the minds of the jury against a finding in favor of the defendant such would be difficult to imagine.

We do not pass unnoticed the direction of the Trial Court to counsel for the defendant, following the allowance of the exception to defendant on the remarks of the Court complained of (p. 14), that defendant submit a request to charge on the subject of insurance, nor do we fail to notice that portion of the Court's charge to the jury (pp. 112-113) which instructed the jury to ignore any and all reference that may have been made at any time to the question of insurance in the case. It is submitted that this attempt by the Trial Court to correct the evident harm which had already been done was ineffective and insufficient for the reason that at no point in the particular instruc-

tions referred to did the Trial Court withdraw the remarks which it had addressed to the jury during the latter's selection. While it is true that in its instructions aforesaid the Court definitely directed the jury to disregard the question of insurance in the case, the irrelevant, incompetent and, we respectfully submit, prejudicial reference by the Trial Court to a prior occurrence in another case was still before the jury, subject to the deduction by the latter of the variety of inferences which might be expected under all the circumstances of the case.

In other words, from the judicial remarks excepted to the jury might have inferred that an evil practice had been going on in the court in question engineered by insured defendants or their insurers to obstruct justice, and the innuendo in this direction, though supported by no competent evidence whatsoever, very probably instilled in the jury which was finally selected in this case a suspicious attitude toward the defendant which was reflected in the verdict which was awarded.

If no limits are to be set upon judicial remarks during the course of a trial of the kind here involved or if such remarks are to be deemed corrected by formal instruction to the jury at the close of the case after the harm has been done, it is respectfully submitted that a party litigant utterly fails of achieving that fair and impartial trial to which he is entitled under our juristic ideals.

Respondent respectfully contends that, on the trial of this case, he was entitled, under the law of this State, to have the issues raised in the pleadings determined under the evidence by a jury whose minds were free of any suspicion of the bona fides of respondent's position in the cause, of any suggestion that, by reason of insurance, he would not have to pay the amount of any verdict rendered against him, and of any

duress or controlling persuasion resulting from the misconception of law and of fact which obviously flowed from the remarks of plaintiff's attorney and the Court to which respondent took exception. It is, moreover, respectfully submitted that respondent was deprived, by the remarks complained of, of his rights above described, and that deprivation existed and continued despite the attempts of the Trial Court by its instructions to the jury to correct the obvious errors.

Brown v. P. S. Railway Co., 98 N. J. Law 747;

J. D. Loizeaux Lumber Co. v. O'Reilly, 104 N. J. Law 510;

Erie Land & Improvement Co. v. Symi-takos, 112 N. J. Law 320.

Thus, when the jury took the case into its deliberation, the defendant's substantial rights had been injuriously affected and continued to suffer from such injury despite the cautionary instructions which the Trial Court had given the jury before it retired. See *State v. Raymond*, 53 N. J. Law 260, particularly at page 262.

Conclusion.

For the reasons hereinbefore argued and set forth at length, the respondent respectfully contends that the judgment of the New Jersey Supreme Court, reversing the judgment of the Hudson County Court of Common Pleas, should be affirmed, and that this appeal should be dismissed.

Respectfully submitted,

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REYNIER J. WORTENDYKE, JR.,

Of counsel with Defendant-Respondent.

address or counselling persuasion resulting from
the misconception of law and of fact which ob-
viously flowed from the remarks of plaintiff's at-
torney and the Court to which respondent took

