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Notice of Appeal and Grounds.

(Filed August 21, 1934.)

Hudson County Circuit Court

DOROTHY PRANGE and GEORGE
PRANGE,

Plaintiffs,

vs.

HUGH F. McLAUGHLIN,
Defendant.

Action at Law. 10
Notice of Appeal
and Grounds.

*To David M. Klausner, Esquire, Attorney for
Plaintiffs:*

Sir:

PLEASE TAKE NOTICE that the defendant appeals
to the Court of Errors and Appeals in the Last
Resort in all Causes in New Jersey, from the
whole of the judgment entered in this cause, on
the following grounds: 20

(1) Because the Circuit Court erred in deny-
ing defendant's motion for a non-suit.

(2) Because the Circuit Court erred in denying
defendant's motion for a direction of the verdict
in favor of the defendant. 30

Dated: July 18, 1934.

JOHN J. FALLON,
Attorney for Defendant.

Service of the within Notice of Appeal and
Grounds is hereby acknowledged this 18th day of
July, 1934.

DAVID M. KLAUSNER, 40
Attorney for Plaintiffs.

Summons.

(Filed July 16, 1932.)

State of New Jersey to Hugh F. McLaughlin:

(SEAL)

10 YOU ARE SUMMONED to answer the annexed complaint of Dorothy Prange and George Prange in an action at law in the Hudson County Circuit Court.

20 AND TAKE NOTICE, that unless you file your answer to the said complaint with the Clerk of the Hudson County Circuit Court, at Jersey City, N. J., within twenty days after service upon you of this writ and the annexed complaint, the plaintiffs may proceed in the suit and judgment may be entered against you.

WITNESS, THOMAS BROWN, Esq., Judge of the Hudson County Circuit Court, at Jersey City, N. J., this 29th day of June, 1932.

GUSTAV BACH,
Clerk.

KINKEAD & KLAUSNER,
Attorneys of Plaintiffs.

30

40

Complaint.

(Filed July 16, 1932.)

HUDSON COUNTY CIRCUIT COURT.

DOROTHY PRANGE and GEORGE PRANGE, Plaintiffs, <i>vs.</i> HUGH F. McLAUGHLIN, Defendant.	}	Action at Law. Complaint.	10
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First Count.

The plaintiff, Dorothy Prange, residing in the City of Jersey City, County of Hudson, and State of New Jersey, says that: 20

1. On or about January 28, 1932, and at all times hereinafter mentioned, the defendant, Hugh F. McLaughlin was the owner in fee of a certain building and premises known as 64 Glenwood Avenue, Jersey City.

2. At all times hereinafter mentioned, as owner of the aforesaid premises, the said defendant retained possession, and was in control and charge of the said premises and the walks and sidewalks in front of said premises and on said premises. 30

3. It thereby became and was the duty of the said defendant to use due and proper care to keep and maintain the said premises and sidewalks in such a condition that they would be reasonably safe and fit for persons lawfully using the same. It also became and was the duty of the said de- 40

Complaint.

10 fendant to make a reasonably careful investigation and inspection with reasonable frequency of the said sidewalk. It also became and was the duty of the said defendant to keep and construct and maintain said premises and sidewalks thereof so that the same would be in a reasonably safe condition for persons lawfully using the same. It also became and was the duty of the said defendant to use reasonable care in repairing the said premises and sidewalks, so that the same would be reasonably fit and safe for persons lawfully using the same.

4. At the same time and place, plaintiff was lawfully proceeding along the aforementioned sidewalk.

20 5. The said defendant, disregarding his said duty, did negligently and carelessly keep and maintain, construct, inspect and repair said walks and sidewalks, that the plaintiff, as a result thereof, was severely injured.

6. The negligence of the defendant consisted in this:

30 (a) Said defendant failed to use reasonable care to keep and maintain said premises and the walks and sidewalks thereon in such a condition that they would be reasonably fit and safe for persons lawfully using the same.

(b) Defendant permitted said premises to remain in an unsafe and dangerous condition, although he had notice and knowledge of such condition.

40 (c) Defendant failed to make a reasonable and careful inspection with reasonable frequency of the said walks and sidewalks.

Complaint.

(d) The said defendant constructed and maintained said sidewalks in such a fashion as to permit and allow protuberances, obstructions, holes and depressions thereon.

(e) Defendant maintained and permitted to be maintained the said sidewalk in an unsafe and dangerous condition, although he had notice and knowledge of such condition. 10

(f) The said defendant failed to use reasonable care in repairing of said sidewalks.

(g) The said defendant failed to use reasonable care in selecting careful and competent servants and agents, and the said defendant repaired and permitted the said sidewalk to be repaired in a dangerous and negligent manner. 20

7. By reason of the above premises, the plaintiff sustained severe injuries, and was hurt, cut, wounded, bruised and injured, internally and externally, in and about her ankles, feet, legs, back, body, ligaments, knees, arms, fingers, heels, nerves, toes, which injuries are of a permanent and lasting nature, and she has suffered from the results of said injuries ever since that time.

8. By reason of the said premises, plaintiff, Dorothy Prange has sustained and undergone and will continue to suffer and undergo great pain and torment, her nervous system has been and will continue to be shocked and injured, she has been made and will continue to be shocked and injured; she has been made and will continue to be sick, sore, lame and disordered; she will suffer great losses by reason of her reduced earning capacity and has been forced and obliged and will 30 40

Complaint.

continue to be obliged to pay out and expend large sums of money for medicines, medical supplies, doctors bills and other large sums of money in efforts to recover from her said injuries.

10 Plaintiff Dorothy Prange demands against the defendant the sum of Twenty-five Thousand (\$25,000) Dollars damages.

Second Count.

The plaintiff, Dorothy Prange, residing in the City of Jersey City, County of Hudson, and State of New Jersey, says that:

1. Plaintiff repeats the allegations of paragraphs 1 and 2 of the first count herein, and makes them a part hereof.

20 2. Some time prior to January 28, 1932, the defendant improperly constructed, maintained, repaired and permitted repairs to said sidewalk in the aforementioned premises in a careless, reckless and dangerous manner, so as to create protuberances, obstructions, depressions and holes, and to constitute and maintain a public nuisance, and a source of great danger to all persons lawfully walking thereon.

30 3. At the same time and place the plaintiff, while lawfully walking on the said sidewalk, tripped and fell, and was painfully injured as a result of the aforementioned public nuisance constructed, maintained, repaired and permitted to be repaired by the said defendant.

4. Plaintiff repeats the allegations of paragraphs 7 and 8 of the first count herein, and makes them a part hereof.

40 Plaintiff, Dorothy Prange, demands against the defendant the sum of Twenty-five Thousand (\$25,000) Dollars damages.

*Complaint.**Third Count.*

The plaintiff, George Prange, residing in the City of Jersey City, County of Hudson, and State of New Jersey, says that:

1. The plaintiff repeats the allegations of the first and second counts and makes them a part hereof. 10

2. On or about January 28, 1932, the said plaintiff was and still is the husband of the plaintiff, Dorothy Prange.

3. By reason of the said premises he lost the society, companionship, aid, comfort and assistance of his said wife, and will thereafter continue to lose the same; he was obliged to and did expend and will in the future be obliged to expend large sums of money in effecting a cure of the injuries suffered by his wife. He was obliged and will in the future be obliged to employ other persons to do the housework which his said wife had heretofore performed. 20

The plaintiff, George Prange, demands against the defendant, the sum of Ten thousand (\$10,000) Dollars damages.

KINKEAD & KLAUSNER, 30
Attorneys of Plaintiffs.

I hereby deputize William O'Leary to serve the within Writ. Witness my hand and Seal this 29th day of June, 1932.

WILLIAM V. O'DRISCOLL, Sheriff.

By: THOMAS J. PRIOR, Under Sheriff.

Answer.

Served within Summons and Complaint, July 8th, 1932, on the Defendant, Hugh McLaughlin, by leaving a true copy of same for him at his usual place of abode, 64 Glenwood Avenue, Jersey City, N. J., with a member of his family above the age of fourteen years, whom I informed of the contents thereof.

WILLIAM V. O'DRISCOLL, Sheriff.

By: WILLIAM O'LEARY,
S. D. S.

Answer.

(Filed May 6, 1933.)

HUDSON COUNTY CIRCUIT COURT.

DOROTHY PRANGE and GEORGE
PRANGE,

Plaintiffs,

vs.

HUGH F. McLAUGHLIN,
Defendant.

Action at Law.
Answer.

Defendant, Hugh F. McLaughlin, residing in the City of Jersey City, in the County of Hudson and State of New Jersey, answering the complaint filed herein says that:

As to the First Count.

1. He admits the allegations contained in paragraph one.

Answer.

2. He denies the allegations contained in paragraph two.

3. He denies the allegations contained in paragraph three.

4. He has no knowledge or information as to the truth or falsity of the allegations contained in paragraph four and therefore leaves plaintiffs to their proof thereof. 10

5. He denies the allegations contained in paragraph five.

6. He denies the allegations contained in paragraph six.

7. He denies the allegations contained in paragraph seven. 20

8. He denies the allegations contained in paragraph eight.

As to the Second Count.

1. In answer to paragraph one the defendant repeats his answers to paragraphs one and two of the first count herein.

2. He denies the allegations contained in paragraph two. 30

3. He denies the allegations contained in paragraph three.

4. In answer to paragraph four, the defendant repeats his answers to paragraphs seven and eight of the first count.

As to the Third Count.

1. In answer to paragraph one, defendant repeats his answers to the allegations of the first and second counts. 40

Answer.

2. Defendant has no knowledge or information as to the truth or falsity of the allegations contained in paragraph two and therefore leaves plaintiffs to their proof thereof.

10 3. He denies the allegations contained in paragraph three.

First Separate Defense.

The defendant was not guilty of any negligence and violated no duty which it owed to the plaintiff.

Second Separate Defense.

20 Whatever damages and injuries were sustained by the plaintiffs at the time and place mentioned in the complaint were caused and contributed to by the negligence of Dorothy Prange in that she negligently and carelessly exposed herself to the risk of such an accident and neglected to take precautions or to exercise care to guard and protect herself against such an accident; moreover, at the time and place mentioned in the complaint she was conducting herself in a careless, negligent and reckless manner and was not exercising care or taking proper precautions.

30 *Third Separate Defense.*

The alleged accident was caused by the contributory negligence of the plaintiff, Dorothy Prange.

Fourth Separate Defense.

Plaintiff, Dorothy Prange assumed the risk of any injury she may have suffered.

40

JOHN J. FALLON, JR.,
Attorney for Defendant.

Reply.

(Filed May 6, 1933.)

HUDSON COUNTY CIRCUIT COURT.

DOROTHY PRANGE and GEORGE PRANGE, Plaintiffs, <i>vs.</i> HUGH F. McLAUGHLIN, Defendant.	}	Action at Law. Reply.	10
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The plaintiffs deny each and every allegation 20
contained in the answer of the defendant.

KINKEAD & KLAUSNER,
Attorneys of Plaintiffs.

30

40

Amended Second Count of Complaint.

(Filed May 25, 1934.)

HUDSON COUNTY CIRCUIT COURT.

10

DOROTHY PRANGE and
 GEORGE PRANGE,
 Plaintiffs,
vs.

HUGH F. McLAUGHLIN,
 Defendant.

Action at Law.
 Amended
 Second Count
 of Complaint.

Second Count.

20

The plaintiff, Dorothy Prange, residing in the City of Jersey City, County of Hudson and State of New Jersey, says:

30

1. On February 21, 1925, and down to and including January 28, 1932, and at all times herein mentioned, the defendant, Hugh F. McLaughlin, was the owner in fee of a certain building and premises known as 64 Glenwood Avenue, Jersey City, N. J., which building was an apartment house and part of which building consisted of separate apartments and were rented out by the said defendant to various persons as places of abode, the said Glenwood Avenue being a public highway in the City of Jersey City aforesaid.

40

2. At all times herein mentioned, as owner of the said premises, the said defendant retained possession and was in control and charge of the said premises and the walks and the sidewalk in front of the said premises.

Amended Second Count of Complaint.

3. At all times herein mentioned, the defendant subjected the said sidewalk in front of the said premises to a use that was unusual and to a use that was beneficial to him as distinguished from the use that it was subjected to for the public; the defendant used the said sidewalk and permitted the use of the said sidewalk for the purpose of having motor trucks pass from the roadway proper upon and across the said sidewalk to deliver merchandise and fuel into the said building premises for the benefit and use of the said defendant, and a hole was made in the said sidewalk as a result thereof, and that the said hole so created and maintained by the defendant was a public nuisance and a source of great danger to all persons lawfully using and walking upon the said sidewalk. 10
20

4. The said sidewalk became broken up and defective and unsafe as the result of a use for which it was not normally designed in that the defendant permitted motor trucks to pass upon and over the said sidewalk for the purpose of delivering merchandise and fuel into the said building and premises for the benefit and use of the said defendant, and as a result of the said use, a hole was made in the said sidewalk and the ground beneath, and the said hole so created and maintained by the defendant was a public nuisance and a source of great danger to all persons lawfully walking upon the said highway. 30

5. The condition of the said sidewalk became and was a public nuisance during the period above mentioned.

6. The condition of the above sidewalk as above set forth, during the period above mentioned, existed for such a long time that the defendant 40

Amended Second Count of Complaint.

should have and did have knowledge of the said condition and nuisance.

10 7. It became and was the defendant's duty to abate the said nuisance and to properly maintain the said sidewalk which the defendant failed and neglected to do as hereinabove set forth.

8. On January 28, 1932, the plaintiff, while lawfully walking upon the said sidewalk, tripped and fell and was painfully injured as a result of the aforementioned public nuisance so created and maintained, and permitted to be maintained by the said defendant as hereinabove set forth.

20 9. By reason of the above premises, the plaintiff sustained severe injuries, and was hurt, cut, wounded, bruised and injured, internally and externally, in and about her ankles, feet, legs, back, body, ligaments, knees, arms, fingers, heels, nerves, toes, which injuries are of a permanent and lasting nature, and she has suffered from the results of said injuries ever since that time.

30 10. By reason of the said premises, plaintiff, Dorothy Prange, has sustained and undergone and will continue to suffer and undergo great pain and torment, her nervous system has been and will continue to be shocked and injured; she has been made and will continue to be shocked and injured; she has been made and will continue to be sick, sore, lame and disordered; she will suffer great losses by reason of her reduced earning capacity and has been forced and obliged and will continue to be obliged to pay out and expend large sums of money for medicines, medical supplies, doctors' bills and other large sums of money in efforts to recover from her said injuries.

40

Stipulation.

Plaintiff, Dorothy Prange, demands against the defendant the sum of Twenty-five thousand (\$25,000) Dollars damages.

DAVID M. KLAUSNER,
Attorney of Plaintiff.

10

Stipulation.

(Filed September 16, 1934.)

NEW JERSEY COURT OF ERRORS AND
APPEALS.

DOROTHY PRANGE and GEORGE
PRANGE,
Plaintiffs-Appellees,

vs.

HUGH F. McLAUGHLIN,
Defendant-Appellant.

Action at Law.
On Appeal from
Hudson County
Circuit Court.
Stipulation.

20

It is hereby stipulated and agreed by and between the attorneys for the respective parties hereto that the testimony of the following witnesses shall be and has been omitted from the State of Case:—

30

(a) Testimony of Dr. Leo Crowley, witness in behalf of plaintiffs,

(b) Testimony of Dr. Harry J. Perlberg, witness in behalf of plaintiffs,

40

Stipulation.

(c) Testimony of Carl Lutdge, witness in behalf of plaintiffs,

(d) X-ray admitted in evidence in behalf of plaintiffs as Exhibit P-5,

10 (e) Testimony of Dr. George E. Meehan, witness in behalf of defendant,

the aforesaid testimony pertaining solely to the question of the injuries suffered by the plaintiffs, and not to the questions raised on appeal.

Dated: September 14, 1934.

20 DAVID M. KLAUSNER,
Attorney for Plaintiff-Appellees.

JOHN J. FALLON,
Attorney for Defendant-Appellant.

30

40

Testimony.

HUDSON COUNTY CIRCUIT COURT.

DOROTHY PRANGE and GEORGE PRANGE	}	10
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vs.

HUGH F. McLAUGHLIN.	}	10
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Before:

Hon. THOMAS BROWN, J.,
and a Jury.

Jersey City, N. J., May 24, 1934.

20

Appearances:

DAVID M. KLAUSNER, Esq., for the Plaintiffs.

JOHN J. FALLON, Esq., for the Defendant.

—

A jury was duly impanelled; being found satisfactory, they were sworn.

Counsel opened to the jury.

30

—

Mrs. DOROTHY PRANGE, sworn for the plaintiff:

Direct examination by Mr. Klausner:

Q. On January 28th, 1932, where did you live?

A. 50 Glenwood Avenue.

Q. That is commonly known as Gothic Towers?

A. Yes, sir.

40

Mrs. D. Prange, for Plaintiffs—Direct.

Q. When did the accident occur? A. January 28th, 1932.

Q. How long before the happening of the accident had you been living at 50 Glenwood Avenue?

A. A little over two months.

10 Q. On the day of this accident, about what time did you leave your house? A. Some time after one.

Q. In the afternoon? A. Yes, sir.

Q. Who was with you? A. Mrs. Beddinger and Mrs. Poillon.

Q. Mrs. Poillon is your sister? A. Yes, sir.

Q. Mrs. Beddinger is a good friend of yours? A. Yes, sir.

20 Q. Where were you three going? A. We were going to the Boulevard.

Q. Then, where were you bound for? A. We were bound for New York.

Q. As you were leaving your house at 50 Glenwood Avenue, and you were going towards the Boulevard on your way towards New York, please tell us where you were walking with reference to the curb? A. I was on the outside.

Q. You were on the outside, nearest the curb? A. Yes, sir.

Q. Who was next to you? A. Mrs. Beddinger.

30 Q. And Mrs. Poillon was on the inside? A. Yes, sir.

Q. Now, as the three of you were walking, how were you walking, abreast of each other? A. Yes, sir.

Q. Talking to one another? A. Yes, sir.

Q. As you were walking along, were you walking along on the same side of the street where your house was, 50 Glenwood Avenue? A. Yes, sir.

40 Q. And that is between Bergen Avenue and the Boulevard? A. Yes, sir.

Mrs. D. Prange, for Plaintiffs—Direct.

Q. Now, as you were walking along from your house, the three of you, with you on the outside, towards the Boulevard, please tell the Court and jury what happened? A. Well, I tripped, or rather, I fell in a hole, and fell down into the curb and from it I broke my ankle.

Q. You say that you went down into a hole? 10
A. Yes, sir.

Q. Where was this hole? A. In front of 68 Glenwood.

Q. Are you sure of the number? A. I think that is the number.

Q. I show you a photograph and ask you whether you recognize the photograph? A. Yes, sir.

Q. By looking at that photograph, does that now refresh your mind as to the right number? A. 20
Yes, sir.

Q. What is the number? A. 64.

Mr. Klausner: I might state, for the purposes of the record, that it is admitted in the pleadings that 64 Glenwood Avenue was owned on January 28th, 1932 and prior thereto by Hugh F. McLaughlin.

Mr. Fallon: Yes, the defendant concedes that he owned and was in possession of these premises on this date, January 28th, 1932. I am giving that information particularly because you have a nuisance count in you complaint. 30

Q. Now, Mrs. Prange, you say your foot went down into a hole? A. Yes, sir.

Q. Which foot? A. My left foot.

Q. What happened then? A. As it did, it turned; it threw me and I fell. 40

Mrs. D. Prange, for Plaintiffs—Direct.

Q. Where did you fall? A. I fell in the gutter.

Q. How did you fall; where did you land, what part of your body? A. On my back.

Q. Who picked you up? A. Mrs. Beddinger and Mrs. Poillon.

10 Q. When they picked you up, did you look to see where you fell? A. Yes, sir.

Q. Did you look——

Mr. Fallon: I want to object to counsel leading the witness along. I didn't mind before.

Q. I show you a photograph and ask you whether you recognize that photograph? A. Yes, sir.

20 Q. What is that photograph a picture of? A. It is a picture of where I fell.

Q. Does that show the hole where you fell? A. Yes, it does.

Q. Is that a true and correct representation of the condition of the sidewalk and the hole there on the day of the accident?

30 Mr. Fallon: I object to that, this witness undertaking to describe this paper now that it is offered as a picture of the condition just described. I don't know when this picture was taken; there is no proof of that.

The Court: That is true; reframe your question.

40 Q. Does that photograph show a true and correct representation of the condition of the sidewalk on the date of the accident, when you fell in front of 64 Glenwood Avenue, Jersey City, on January 28th, 1932?

Mrs. D. Prange, for Plaintiffs—Direct.

Mr. Fallon: I want to object to that, characterizing this as a true and correct representation of the condition and so forth. The photographer ought to be here to prove this picture, in the first place. I don't mind this witness saying in her judgment this picture depicts the premises or situation; but characterizing the sidewalk in the manner in which counsel's question is stated, there is something I do object to, giving a conclusion by this witness that this picture truly and correctly indicates that condition. 10

The Court: That is usually accepted as being a proper question; but properly it should be approached in another way. What does that photograph show? 20

Q. Will you please answer the Judge's question? A. Where I fell at 64 Glenwood Avenue?

The Court: What have you to say as to whether or not that photograph shows the conditions?

The Witness: It shows the conditions of the sidewalk.

The Court: As they existed on the day you fell? 30

The Witness: Yes, sir.

The Court: Is there any variance of any kind?

The Witness: No.

The Court: What have you to say as to its being an exact representation?

The Witness: Well, I would say it was.

Mr. Klausner: I offer it in evidence.

The Court: Any objection? 40

Mrs. D. Prange, for Plaintiffs—Direct.

Mr. Fallon: I have no objection, in view of what the witness stated.

(Accepted and marked as Plaintiffs' Exhibit P-1 of this date.)

10 Q. Will you please point out on that picture and mark it with a pen, where you fell?

The Court: You don't mean where she fell; the hole she stepped in. You fell in the street, didn't you?

The Witness: Yes, sir.

Q. The hole in which you stepped just prior to falling? A. Yes, sir.

20 Q. You marked an "X" there? A. Yes, sir.

Mr. Klausner: I would like to withdraw this witness now, and put Dr. Perlberg on.

MRS. DOROTHY PRANGE, recalled:

Direct examination by Mr. Klausner:

30 Q. I believe my last question was that you marked an "X" on Exhibit P-1 the hole in which your foot went just prior to the fall. Do you recall marking this with an "X"? A. Yes, sir.

Q. I show you three other photographs.

The Court: Show them to your adversary; he might consent to them.

40 Mr. Fallon: I don't consent. I don't object to the same line of examination, to identify them. If she will say what she said before, that they truly depict the situation as of that date.

Mrs. D. Prange, for Plaintiffs—Direct.

Q. Mrs. Prange, would you say that these truly depict the condition of the sidewalk, these three pictures, the condition of the sidewalk on January 28th, 1932, the date of the accident? A. Yes, I would.

Mr. Klausner: I offer them in evidence.

10

(Accepted and marked respectively P-2, P-3 and P-4 of this date.)

Q. I believe you said you fell on your back?

A. Yes, sir.

Q. Were you able to get up? A. No, Mrs. Beddinger and Mrs. Poillon helped me.

The Court: Complete the picture by a verbal description of this hole so that you won't have to go back to it; a verbal description of the hole, the length, depth and height and all the other dimensions.

20

Mr. Fallon: If she is going to say it is a hole; all I can see is evidence of a broken sidewalk.

The Court: Have your witness describe on the record the dimensions. She said it is a hole. You may introduce the photographs and they may show it is an exact representation, but where is the testimony to show the depth of the hole or its width or its height. You might say from the level of the street or any other comparative degree. In other words, you ought to have the hole described.

30

Mr. Klausner: The only reason I didn't attempt to do it, was because I believed the photograph gave it.

The Court: The Court is not going to conduct your case.

40

Mrs. D. Prange, for Plaintiffs—Direct.

Q. Mrs. Prange, looking at these photographs, will you please tell me how wide, on the sidewalk, measuring from the curb, is the hole or the depression in which you fell?

10 Mr. Fallon: Which is it, a hole or a depression?

Mr. Klausner: All right; call it a hole.

The Court: Do you understand the question?

The Witness: Well, I don't know whether I do or not.

The Court: Describe the size of this hole that you stepped in?

The Witness: Well, it was big enough for my foot to go in.

20 The Court: How many inches wide or long; how long was it, for example?

The Witness: I would say it was maybe a foot and a half long.

The Court: How wide?

The Witness: A couple of inches.

The Court: Was it regular or irregular in shape?

The Witness: Irregular.

The Court: Now go on.

30 Q. Now, Mrs. Prange, I believe you said that you were unable to get up yourself; who helped you? A. Mrs. Poillon and Mrs. Beddinger.

Q. Where did they take you? A. They took me back to my apartment.

Q. This was 64 Glenwood Avenue and your apartment is 50 Glenwood? A. Yes, sir.

Q. Just a few houses away? A. Yes, sir.

40 Q. Were you able to walk there alone? A. No; Mrs. Beddinger and Mrs. Poillon helped me home.

Mrs. D. Prange, for Plaintiffs—Direct.

Q. When you got to your apartment, what did you do? A. I went to bed immediately.

Q. Will you please tell us what injuries you sustained, as a result of the fall on that date? A. I had an infection in my right knee; my right leg was swollen, and my left ankle, was hurt, my left leg was swollen and it hurt my finger, right index finger of my right hand; my elbow, and I fell on my back and it hurt my back. From it I have had headaches ever since and pain in my left leg. 10

Mr. Fallon: I ask that that be stricken. She is only asked what injuries she had on that day, as a result of the happening.

The Court: She can tell whether she has had pain since.

Q. You said what? A. I have had pains in my left leg and my left ankle; it swells. 20

Q. You said something about headaches? A. Yes, sir, headaches since then.

Q. Before this accident on January 28th, 1932, what was the condition of your health? A. Perfectly all right.

Q. Now, I believe you said that was your right knee? A. Was infected.

Q. Was infected? A. Yes, sir.

Q. Was it bleeding? A. Yes, it was. 30

Q. Where? A. My right knee, down my right leg. My stocking was torn; in fact, both stockings were torn.

Q. How long did you have pain in your right knee?

Mr. Fallon: I object to counsel leading the witness along. I have been sitting here listening to it too long. I cannot permit it to go on. 40

Mrs. D. Prange, for Plaintiffs—Direct.

Q. You had these various injuries; how did you feel? A. Well, I felt miserable. I had pain in my right knee and my left leg. I had very bad pain for about ten days.

Q. Where else? A. And my elbow and my back, and I felt quite badly shaken up.

10 Q. How long did the pain in your right knee continue? A. For the next three or four weeks.

Q. And that pain, will you please describe to us the pain in the right knee during these three or four weeks? A. It was pain like you would have from an infection.

Mr. Fallon: I certainly must object to that. I object as a conclusion of this witness.

20 Mr. Klausner: I assume it should be stricken.

Q. Please tell us—I am trying not to lead—Please describe the pain in the right knee? A. Throbbing pain.

Q. Was it severe or not severe? A. Very severe.

Q. For how long was it very severe? A. For the next couple of weeks.

30 Q. Now, you had pain, you told us, in your back? A. Yes, sir.

Q. Describe the pain in the back? A. When I would move, I had a lot of pain in my back.

Q. Was that pain severe or not? A. Quite severe, yes, sir.

Q. How long did you have pain in your back? A. About two weeks.

Q. You had something the matter with your finger? A. Yes, my left index finger.

40

Mrs. D. Prange, for Plaintiffs—Direct.

Q. What was the matter with that? A. When I fell, I bent the finger back. My finger was black and blue and was swollen.

Q. Will you tell us how that felt? A. It pained very badly and was swollen.

Q. How long did it pain; how long was it swollen? A. Pained me for about two or three weeks and was swollen, I guess, most of that time. 10

Q. Now, you say that you had pain in your left ankle, I believe you said? A. Yes, sir.

Q. Will you please describe how you felt in your left ankle? A. Well, I had very bad pain, for about ten days after it happened; in fact, I could not put my foot under me. I could not stand on it.

Q. That was the left ankle? A. Yes, sir.

Q. Describe to us that left ankle? A. You mean how it still is? 20

Q. No, after the accident, tell us how it looked? A. It was swollen, black and blue.

Q. You say the left ankle was swollen and black and blue? A. Yes, sir.

Q. How long was that left ankle swollen? A. About six weeks.

Q. The left ankle was swollen about six weeks? A. Yes, sir.

Q. How long was this left ankle black and blue? A. I guess most of that time it was black and blue. 30

Q. Will you please tell us how you felt in that left ankle? A. Well, I could not stand on my feet.

Q. I mean how it felt, the pain; you say you had pain. Was it severe or not? A. Yes, was severe.

Q. Where in your body was the pain most severe? A. My left ankle.

Q. How long was it so severe in the left ankle? A. For a couple of weeks. 40

Mrs. D. Prange, for Plaintiffs—Direct.

Q. Then after that? A. Well, it still pains me.

Q. Now, for a few weeks it was very severe; then you say that it pained you at least for six or seven weeks. Is that what you said? A. Yes, it did.

10 Mr. Fallon: She didn't say anything of the kind. She said it was swollen for six or seven weeks, not pain in it. I object to leading the witness.

The Court: She described the condition, both as to pain and as to swelling. Why should we go over it again? You have got the description.

20 You have already described the extent of your pain and suffering, haven't you, in your ankle?

The Witness: I don't know that I have. It still bothers me.

The Court: Possibly that feature you have not testified to.

Q. After the six weeks, did your left ankle bother you? A. Yes, sir.

30 Q. In what way? A. That I can't stay on my feet any length of time. If I am on my feet any length of time it will swell; swells practically every night. It is all right in the morning; it is swollen by night. If the weather changes, I can always tell. I will have a bad pain in my ankle. I cannot get a shoe on sometimes, and if I stay in one position a long time, it will pain me, to hold my foot in one position.

40 Q. Is that condition of the pain upon change of weather and the swelling when you stand on it, has that continued down to the present time? A. Yes, it has.

Mrs. D. Prange, for Plaintiffs—Direct.

Q. Now, you have told us that you have had headaches after the accident? A. Yes, sir.

Q. How often did you have headaches? A. Maybe once or twice a week.

Q. From the time of the accident? A. Yes, sir.

Q. Down to the present time? A. Yes, sir.

Q. How is your general condition since the accident? A. Well, I have been nervous since then and upset. I am sort of afraid to walk. I am really afraid to use my foot. 10

Q. After the accident, how long were you in bed? A. I was in bed ten days.

Q. And after the ten days, were you able to get about without using something? A. No, with the help of a cane, and crutch and chair.

Q. How long did you use a cane and crutch after you got out of bed? A. For about six or seven weeks. 20

Q. Who attended you in your home? A. Dr. Crowley.

Q. How many times did Dr. Crowley attend you at your home after the accident? A. About 25 times.

Q. Did you have an X-ray taken? A. Yes, sir.

Q. Where was this X-ray taken? A. Dr. Perlberg's office.

Q. In his office? A. Yes, sir. 30

Q. The same picture which was here before? A. Yes, sir.

Q. Did you have to use any medicines? A. Yes, I did.

Q. How much did the medicines cost? A. Around \$10.

Q. Does that include all the medical expenses, other than doctor's bills? A. Yes; not the X-ray, though. 40

Mrs. D. Prange, for Plaintiffs—Direct.

Q. Did you have to buy a crutch? A. Yes, I did.

Q. What did the crutch cost you? A. One dollar.

10 Q. Prior to this accident, did you have anyone helping you in your home? A. Yes, I had, but I would not keep her.

Q. Who did you have? A. I had a nurse.

Q. For whom? A. For my children.

Q. How many children? A. I have two.

Q. This nurse you had for your children, did she in any way attend to you after the accident? A. Yes, she did.

Q. In what way? A. Well, she took care of me and helped me in whatever way I would have needed any help.

20 Q. Was it necessary for you to have her after the accident? A. Yes, it was.

Q. Had you intended doing something with reference to the nurse before the accident?

Mr. Fallon: I object to what her intentions were.

Mr. Klausner: I withdraw the question.

Q. How much was the nurse paid? A. \$75 a month.

30 Q. She lived with you? A. Yes, sir.

Q. When did the nurse finally leave you? A. The following October.

Q. Of 1932? A. Of '32 yes, sir.

Q. By the way, the defendant, Hugh F. McLaughlin, is related to you, is he not? A. Yes, sir.

Q. What is the relationship?

40 The Court: What difference does that make?

Mrs. D. Prange, for Plaintiffs—Cross.

Mr. Fallon: I am glad to have it come out.

Mr. Klausner: Because I know they are going to ask about it. I just want to explain the whole thing to the Court and Jury.

The Court: There is no defense that this suit is not brought in good faith? 10

Mr. Fallon: No.

The Court: I suppose you can fall on your relative's sidewalk, as well as anywhere else.

(Witness temporarily withdrawn.)

Mrs. Dorothy Prange recalled:

Cross-examination by Mr. Fallon: 20

Q. I show you a paper and ask you to look at it and tell me whether or not that is your signature to it? A. It is.

Mr. Fallon: I offer it for identification.

(Marked D-1 for identification.)

Q. Mrs. Prange you lived a little over two months at No. 50 Glenwood Avenue before this happening? A. Yes, sir. 30

Q. You were accustomed to go out during the day to various places weren't you? A. Yes, sir.

Q. You were accustomed to going to the Boulevard and in the opposite direction at times, were you not, from your house? A. Yes, sir.

Q. In other words, it was quite a common thing for you to traverse this sidewalk over to the Boulevard or other places? A. No.

Q. How did you go to the Boulevard except by going on the sidewalk? A. Well, I generally went in my car. 40

Mrs. D. Prange, for Plaintiffs—Cross.

Q. How often did you walk along there to the Boulevard? A. Not more than once or twice a week.

Q. You never had any mishap before on your walks, in going towards the Boulevard and passing No. 64? A. No.

10 Q. On this particular day, you were travelling along there with two lady friends? A. Yes, sir.

Q. One of them your sister, in fact? A. Yes, sir.

Q. You were conversing one with another? A. Yes, sir.

Q. You were on the outside towards the curb as you were walking along? A. Yes, sir.

20 Q. You were not paying much attention to where you were walking, were you, you were engaged in your conversation? A. Yes, sir.

Q. This so called condition of the sidewalk you speak of, you say that was there for some time before this? A. So I was told.

Q. Well, didn't you see; you travelled once or twice a week to the Boulevard? A. No, I didn't.

Q. You mean to say you never on your once or twice a week travelling to the Boulevard from your home, never saw that condition before? A. No.

30 Q. Was there anything to hide it from your view? A. I don't know, but I never saw it before.

Q. So that it was not particularly noticeable, was it? A. Well, I don't know. I didn't realize it until I had fallen in it.

Q. Now, something happened as you were walking past No. 64, which resulted in your landing on your back in the street; is that right? A. Yes, sir.

Q. Did you slip? A. No, I didn't slip.

40 Q. Sure of that now? A. Yes, sir.

Mrs. D. Prange, for Plaintiffs—Cross.

Q. Do you remember saying to Dr. Meehen, when he called to see you, that you did slip?

Mr. Klausner: Pardon me, Dr. Meehen didn't so testify.

A. No.

10

Mr. Fallon: I overlooked asking him.

The Court: She answered in the negative, anyway.

Q. Did you step into the depression or hole? A. Into the hole.

Q. You are sure it was a hole? A. Well, I call it a hole.

Q. Did you ever use the word depression when you were describing it before today? A. No, not that I know of.

20

Q. Did your sister so describe it? A. No.

The Court: Supposing she did; how is it evidential.

Mr. Fallon: Just a question of veracity, that's all. Ultimately, as a matter of law, it might not make any difference. I am only trying to bring out the facts.

Q. Have you been treated by a physician since March, 1932, for any of these injuries that you are speaking of now? A. No.

30

Q. Why not? A. Well, I don't know what you mean.

Q. Have they bothered you much? A. They have bothered me. Dr. Crowley told me they would bother me, told me they would be permanent.

Q. Told you that they would bother you? A. Yes, sir.

40

Mrs. T. Poillon, for Plaintiffs—Direct.

Q. When did you move away from 50 Glenwood Avenue? A. Some time in April, 1932.

Q. You don't live in Jersey City at the present time? A. No.

Q. How old are you, Mrs. Prange? A. Thirty-one.

10 Q. And this nurse you say you had in your home, for how long a period of time did you have her in your home before January 28th, 1932? A. From October the year before, of 1930.

Q. And she was an attendant upon your two children, was she? A. Yes, sir.

Q. She remained in your home until October, 1932? A. Yes, sir.

Q. And she was in attendance upon your children all of that time also? A. Yes, sir.

20 Q. What time of the day did you say this thing happened? A. A little after one; between one and two; between half past one and a quarter to two.

MRS. TERESA POILLON sworn for the Plaintiffs:

Direct examination by Mr. Klausner:

30 Q. Mrs. Poillon, you are a sister of Mrs. Prange who was just on the witness stand? A. Yes, sir.

Q. On January 28th, 1932, where did you live? A. 50 Glenwood Avenue.

Q. In the same house where your sister lived? A. Yes, the same apartment house.

Q. You don't live there today? A. No.

Q. Mrs. Poillon, on that date, were you in the company of your sister, Mrs. Prange? A. Yes, sir.

40

Mrs. T. Poillon, for Plaintiffs—Direct.

Q. About what time did you leave 50 Glenwood Avenue? A. Between one o'clock and half past, I think.

Q. Who else was with you? A. Mrs. Beddinger.

Q. Where were you going? A. To New York.

Q. From 50 Glenwood Avenue? A. We were going to the Boulevard to get a bus. 10

Q. And going from 50 Glenwood Avenue, towards the Boulevard to get a bus, did you continue on the same side of the street as 50 Glenwood Avenue? A. Yes, sir.

Q. As you were walking along, do you recall who was walking outside, near the curb? A. Mrs. Prange.

Q. Your sister? A. Yes, sir.

Q. Who was next to her? A. Mrs. Beddinger. 20

Q. You were on the inside? A. Yes, sir.

Q. As you were walking along, I assume you were talking? A. Yes, sir.

Q. Then, as you were walking along there on that day, on January 28th, 1932, just tell us what happened? A. Well, we were walking along, my sister fell in the hole and hurt her ankle. We had to assist her home.

Q. Now, I show you a photograph marked P-1 and ask you if you recognize that? A. Yes, sir. 30

Q. And what does that photograph P-1 show? A. The sidewalk in front of 64 Glenwood Avenue.

Q. And can you tell us where your sister fell? A. Right in the hole that is marked "X".

Q. When she fell, where did she fall? A. She fell into the gutter, fell over on her back.

Q. Now, does that show the condition of the sidewalk on that day, the place where she fell? A. Yes, sir.

Q. I show you this other photograph, marked P-2, and these marked P-3 and P-4, and ask you 40

Mrs. T. Poillon, for Plaintiffs—Direct.

whether they show the same sidewalk, but taken from a different angle? A. Yes, sir.

Q. All showing and depicting the condition of the sidewalk on that day? A. Yes, sir.

Q. Now, after she fell in the gutter, what did you do? A. We helped her up and took her home.

10 Q. When you say "we", you mean who? A. Mrs. Beddinger and myself.

Q. Was Mrs. Prange able to walk home alone? A. No. We had to assist her.

Q. When you got her to her home, did you notice anything the matter with her? A. Yes, she had her knees out of both stockings and she seemed to be in great pain.

Q. Had the knees out of what? A. Both stockings.

20 Q. And seemed to be in what? A. In great pain. Her ankle bothered her very much.

Q. How long did you stay there? A. We stayed with her about half an hour.

Q. Was there a nurse there that day? A. Yes, sir.

Q. Then did you leave? A. Yes, sir.

Q. Did you have occasion to visit her after that date? A. Yes, sir.

Q. Where did you visit her? A. At her home.

30 Q. When you came to see her after the accident, where did you find her? A. In bed.

Q. Approximately how long was she in bed? A. About ten days.

Q. After the ten days in bed, did you notice whether she needed assistance in moving about? A. Yes, she could not get around at all by herself.

Q. What did she use? A. A cane, or chair or crutch.

40 Q. How long did she use a cane or crutch? A. About six weeks.

Mrs. A. Beddinger, for Plaintiffs—Direct.

Q. During that time, what did you notice her condition to be? A. She was in great pain, and suffering from the injury.

Q. Now, after that and since the time, down to the present time, have you had occasion to be in her company? A. Yes, sir.

Q. About how often? A. About every other week. 10

Q. Has she ever complained to you about her condition? A. She is always complaining about having headache.

Q. Anything else? A. No, she complained about her ankle.

Q. What did she say about the ankle?

The Court: Is there any objection to this? How is this material, conversation between them? 20

Mr. Klausner: I withdraw it.

Mr. Fallon: No questions.

MRS. ANNA BEDDINGER, sworn for the plaintiffs.

Direct examination by Mr. Klausner:

The Court: You were walking with this lady who was injured on the day in question? 30

The Witness: Yes, sir.

The Court: Along the sidewalk?

The Witness: Yes, sir.

The Court: Tell us what happened?

The Witness: We intended to go to New York. We left the apartment about 1.30. We started on Glenwood Avenue and Mrs. Prange was on the outside. I was on the inside. Before I knew it, Mrs. Prange was 40

Mrs. A. Beddinger, for Plaintiffs—Direct.

on the ground and she was out in the street. Mrs. Poillon and I had to pick her up and take her to the apartment. We had an awful time getting her into the apartment.

Mr. Klausner: I am wondering whether the jurors can hear this.

10

Juror No. 12: A little louder.

The Witness: When we got to the apartment, Mrs. Prange was crying. She was terribly nervous. Her stocking was torn. I do remember her right knee was bleeding, and her left ankle was swollen. Then the nurse attended to her and we left. We didn't want to stay.

The Court: Did you see what caused her to fall; how she fell?

20

The Witness: No, it happened so suddenly.

Q. Mrs. Beddinger, do you remember about where she fell? A. It was about the middle of the block, I think. I haven't much occasion to go down that way.

The Court: Do you remember anything about the place where she fell?

30

The Witness: Yes, in front of the apartment house.

The Court: Anything else?

The Witness: Yes, the sidewalk was all torn up. I noticed it after she fell. We were afraid we would fall in it ourselves. I noticed that.

Q. I show you Exhibit P-1 and ask you whether you recognize that photograph? A. Yes, I do.

40

Q. What is that photograph? A. That is the hole that Mrs. Prange fell into.

Mrs. A. Beddinger, for Plaintiffs—Cross.

Q. How is it designated there? A. By a "X".

Q. Does that picture show the condition of the sidewalk on the day that she fell? A. Yes, it does.

Q. I show you three other photographs marked P-2, P-3 and P-4 being different views of the sidewalk? A. Yes, sir.

10

Q. And I ask you whether they show the condition of the sidewalk on that day? A. Yes, they do.

Cross-examination by Mr. Fallon:

Q. You don't find any holes in the sidewalk as shown on these pictures?

Mr. Klausner: If the Court please, the pictures speak for themselves.

The Court: This is proper investigation. Proceed. 20

Q. Is there anything on these pictures to indicate any hole in the sidewalk? A. Yes, sir. I think it is quite a large hole.

Q. A hole? A. Yes, sir.

Q. Do you know the difference between a hole and a depression? A. Yes, I do.

The Court: Don't they both go together.

Q. I show you this paper and ask you if you recognize your signature upon it; that is your signature, isn't it? A. Yes, sir. 30

Mr. Fallon: I will ask to have it marked for identification.

(Marked D-2 for identification.)

Adjourned to 10 A. M.

May 25, 1934.

May 25, 1934. 10 A. M.

Met pursuant to adjournment. 40

H. F. McLaughlin, Jr., for Plaintiffs—Direct.

HUGH F. McLAUGHLIN, JR., duly sworn for the plaintiffs:

Direct examination by Mr. Klausner:

10 Q. You are the son of the defendant in this action? A. That is right.

Q. On January 28th, 1932, were you familiar with the premises in question, known as 64 Glenwood Avenue?

Mr. Fallon: I object to the use of the word "familiar".

The Court: Did you know the premises?

The Witness: Yes, I did.

20 Q. I show you a photograph marked Exhibit P-1 and ask you whether that photograph depicts the condition of the sidewalk in front of the premises 64 Glenwood Avenue, Jersey City, on January 28th, 1932, the day of this accident? A. That is true.

Q. I show you other Exhibits P-2, P-3 and P-4 and ask you whether those are photographs taken from another angle of the same sidewalk as of that date, January 28th, 1932? A. They are.

30 Q. Now, Mr. McLaughlin, you notice a place marked "X" on P-1. Can you tell us how that condition came to be?

Mr. Fallon: I object to it on the ground it is immaterial, irrelevant and in no wise binding on the owner, what this witness may know.

The Court: He can state how it came about. First, do you know?

The Witness: Yes, I do, your Honor.

40 The Court: Do you know what caused that condition?

H. F. McLaughlin, Jr., for Plaintiffs—Direct.

The Witness: Yes, your Honor, I do.

Mr. Fallon: I still object. No matter what he may know, that could not be binding on the owner.

The Court: The Court will receive the testimony at this juncture. If later on it is found not material, you may move to strike it. 10

Q. Will you tell us how that condition came about? A. I would say——

Mr. Fallon: I object to this witness saying "I would say".

Q. Tell us? A. This condition came about by the running over this particular spot and the entire sidewalk, up into the driveway, by coal trucks and occasionally a moving van backing up on the sidewalk. 20

Q. In what year did your father take title to that property?

Mr. Fallon: I object as incompetent, irrelevant and immaterial, and calling for a conclusion of this witness.

The Court: Yes, it is not the best evidence. 30

Q. Do you know how long, prior to January 28th, 1932, your father lived in the premises 64 Glenwood Avenue? A. About two years.

Mr. Klausner: If the Court please, it was admitted on the opening that the defendant, Hugh F. McLaughlin, was the owner of the premises in question at that time and for some time prior thereto.

Mr. Fallon: Some time prior thereto? I said Hugh F. McLaughlin, was the owner 40

H. F. McLaughlin, Jr., for Plaintiffs—Direct.

of the premises, in possession of the premises as of the date of this happening. That is all I was concerned about.

Mr. Klausner: I have in my possession an Abstract of the deed, which is on record.

10 For the purposes of the record, this title was taken by the defendant by deed dated February 20th, 1925, recorded February 21st, 1925, in the Hudson County Register's Office in Book 1556, page 223.

Mr. Fallon: If you say that is an Abstract of the record, I will concede it without formal proof.

20 Mr. Klausner: And that Mr. McLaughlin was the owner of the premises from that date down until the date of the happening of this accident.

Mr. Fallon: Yes, I will concede that.

Q. You say that trucks went up on the sidewalk in front of the premises 64 Glenwood Avenue, and caused this condition to come in existence?

Mr. Fallon: I object to the question. He didn't say that.

The Court: Sustained.

30 Q. Now, Mr. McLaughlin, prior to January 28th, 1932, approximately how many trucks during the preceding winter did you see on that sidewalk on that side?

Mr. Fallon: I object to that; this is not a guessing contest. The word "approximately" means a guess.

Mr. Klausner: I withdraw it.

40 Q. Prior to January 28th, 1932, how many trucks did you see go up on the sidewalk at this

H. F. McLaughlin, Jr., for Plaintiffs—Direct.

spot, during the winter prior to that? A. Well, I would say that I saw myself at least six or seven.

Q. That would be the winter of 1931? A. That would be the winter of 1931.

Q. Did you see what kind of trucks they were? A. They were coal trucks. 10

Q. And these coal trucks, when they went up on this sidewalk, what did you see these coal trucks do? A. Well, they just backed along the sidewalk and got as close as possible to the entrance of the apartment, and from there, they were unloaded by carrying bags of coal into the coal shoot which was in front of the house.

Q. That is to say, these coal trucks that were on the sidewalk in front of these premises, coal would be taken near the entrance of the house and would be put into the coal shoot in front of the house? A. That is right. 20

Q. Now, will you mark please on Exhibit P-1 where this coal shoot is? A. What kind of mark do you want?

Q. Suppose we mark it "C". A. There is where the coal shoot was.

Q. The black opening under the mark "C". They would open this.

Q. Pointing to a black space under the mark "C". A. That is right. 30

Q. On the photograph marked Exhibit P-1? A. And dump their coal in there.

The Court: How far was this from the delapidated condition of the sidewalk?

The Witness: It was approximately 15 feet.

The Court: The coal shoot is on one side of the entrance and the cracked con- 40

H. F. McLaughlin, Jr., for Plaintiffs—Direct.

dition referred to by "X" is on the other side of the entrance?

The Witness: That is right.

The Court: You say putting coal in "C" broke the flagging at "X".

The Witness: Yes, sir.

10

Q. Now, Mr. McLaughlin, did they carry the coal from the truck to that coal shoot, or would there be——

Mr. Fallon: I object as leading.

20

Q. Please explain to us in detail how the coal was transferred from the coal truck on the sidewalk to this coal shoot? A. They would back the truck up as close as possible to the front of the apartment, which was the closest possible place they could carry the coal from the truck to the coal bin, and drop it through the window.

Q. So then, as I understand you, it would be carried? A. Absolutely.

Q. In what? A. In bags.

Q. From the coal truck, which was parked in front? A. Directly in front of the entrance.

Q. Carried to the shoot over here? A. That is correct.

30

Q. In bags, you say? A. In bags.

Q. And these bags came from where? A. They had them on the coal truck.

Q. Now, these trucks, when they were so backed which way would they be facing? A. They would be facing west, towards the Boulevard.

Q. Can you tell us approximately how wide Glenwood Avenue is in front of 64 Glenwood Avenue? A. It is very narrow; I would say it is approximately forty feet.

40

H. F. McLaughlin, Jr., for Plaintiffs—Direct.

Q. Is traffic one way or two ways? A. Two ways.

Q. Is there much traffic on that street? A. Very much, very much traffic.

Q. During the day? A. During the day and there are cars usually parked on both sides of the street.

Q. In front of 64 Glenwood Avenue? A. In front of the entire block.

Q. Now, you say that you saw, I think, six or seven trucks during the winter of 1931. During the course of the entire year of 1931, how many trucks did you see on the sidewalk? A. I would not say I saw any more than that six or seven.

The Court: Well, were they on the sidewalk. When this truck backed in, or these coal trucks you mentioned, did they back in to the curb or what did they do?

The Witness: You see, your Honor, the way this truck is: this up here is the driveway, and in order to get as close as possible to the entrance of the apartment, they would drive to the entrance and back one wheel on the sidewalk and then they would have one wheel on the sidewalk and one wheel in the gutter and that is how they would leave the truck.

Q. When you say one wheel, the wheel on what side of the truck? A. The wheel on the right side would be on the sidewalk.

Q. And the front of the truck would be facing where? A. The Boulevard.

Q. Towards the Boulevard? A. That is correct.

Q. So that the truck, with reference to the house, would the truck be parallel to the house or

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H. F. McLaughlin, Jr., for Plaintiffs—Direct.

at right angles to the house? A. It would be parallel to the house, to the front of the house.

Q. Now, during the year 1930, did you see any trucks backed up in a similar fashion, on the sidewalk? A. Yes, I would say I saw four or five; it was the usual method of delivering coal.

10

Mr. Fallon: I ask that that be stricken out, that last remark.

The Court: It will be stricken.

Mr. Fallon: These things are very valuable and helpful to you.

The Court: Proceed, without criticizing or referring to the testimony.

20

Q. Now, Mr. McLaughlin, in 1930 you say that you saw yourself about four or five trucks in similar fashion backed up on the sidewalk? A. That is correct.

Q. What kind of trucks were they?

Mr. Fallon: You are speaking of coal trucks?

Mr. Klausner: I am trying not to lead.

A. Coal trucks and perhaps occasionally a moving van.

30

Q. The trucks that you saw in 1930, these coal trucks, was the coal delivered in the same fashion as you have described as to the trucks in 1931? A. That is correct.

Q. Did you see any there in 1929? A. I was not interested in the house in 1929.

Q. How long prior to January 28th, 1932 would you say that this condition of the sidewalk, as shown on these photographs was in that condition?

40

Mr. Fallon: I object to this witness guessing at this at all. If he can state with

H. F. McLaughlin, Jr., for Plaintiffs—Direct.

any degree of certainty, I have no objection.

The Court: Do you know?

The Witness: I do know, your Honor.

The Court: You tell it.

The Witness: In October, 1930, while this sidewalk was not in this exact condition, was broken, and there was a hole there, but not as much as this photograph shows. 10

Q. That was in 1930? A. That is correct.

Q. This shows a photograph in January, 1932. Now, will you please describe the condition of the hole in October, 1930? A. In 1930, I would say about half as large as this photograph depicts it.

Q. And did it continue from October, 1930, to 1932 to enlarge from the condition it was in in October, 1930 down until you see it here in 1932? 20

A. That is right, yes, sir.

Q. Now, did your father live in the house prior to January 28th, 1932? A. Yes, sir; he did.

Q. For how long did he live in the house prior to January 28th, 1932? A. Two years.

Q. Did you ever discuss the condition of this sidewalk with your father?

Mr. Fallon: I object to the form of the question. 30

Q. Did you ever talk to your father about the condition of this sidewalk? A. No, I did not.

Q. Do you know who had charge of the property during these two years?

Mr. Fallon: I object to the question as calling for a conclusion of this witness, the manner in which the question is stated. 40

H. F. McLaughlin, Jr., for Plaintiffs—Direct.

The Court: Well, it may call for a conclusion. What control did your father exercise over this property?

The Witness: My brother was in charge of the property.

10 Q. For your father? A. Yes, sir.

Mr. Fallon: I ask to have that answer stricken as calling for a conclusion of the witness.

The Court: It is.

Mr. Fallon: Does that stand or is it stricken out?

The Court: It is stricken out. What one person may say is in charge another may not.

20 When you say "in charge" what do you mean?

The Witness: That he handled all my father's affairs, through having power of attorney.

Mr. Fallon: I object to the statement and ask to have it stricken out as a conclusion of this witness. Also the characterization of power of attorney.

The Court: It will.

30 Do you know anything about the relationship between your father and brother with regard to this property?

The Witness: Yes, I do, your Honor.

The Court: Was it in writing?

The Witness: It was; not this property in particular. Everything that my father owned.

The Court: Including this property?

The Witness: Including this property.

40 The Court: Was this a tenement house?

H. F. McLaughlin, Jr., for Plaintiffs—Cross.

The Witness: It is an apartment house, sixteen families.

The Court: What is the difference between an apartment house and a tenement house. I suppose if it is in one section of the City it is a tenement house and another section an apartment house.

10

Do you know to whom this coal was being delivered?

The Witness: It was the building, for this apartment, paid for by my father.

The Court: Do you know that?

The Witness: I know.

The Court: What was there, a central heating system?

The Witness: It was a central heating system.

20

The Court: That is, the landlord provided the heat?

The Witness: That is right.

Cross-examination by Mr. Fallon:

Q. How do you know that the coal was delivered to the house for the apartment house? A. How do I know it?

Q. Yes? A. I saw it.

Q. How do you know; do you know who ordered the coal? How do you know it didn't go into somebody else's bin? A. At times, I ordered it.

30

Q. How do you know this coal didn't go to some tenant's bin, coal bin? A. Because we kept track of when we had coal delivered and how long it lasted.

Q. Have you got that paper by which you kept track? A. No, I have not.

Q. You have talked this matter over with counsel before, or somebody in this case? A. I saw counsel yesterday for the first time.

40

H. F. McLaughlin, Jr., for Plaintiffs—Cross.

Q. You know Mrs. Prange pretty well, she is related to you? A. She is.

Q. What relationship is it? A. Step-aunt.

Q. Your father was the son of Dennis McLaughlin of Jersey City?

10 Mr. Klausner: I object; that has nothing to do with this case.

Mr. Fallon: I will show it has in a minute.

The Court: The Court can't see it; maybe it is by way of introduction.

Mr. Klausner: I withdraw the objection.

Q. And you are the son of Hugh McLaughlin?

A. That is correct.

20 Q. Your father has been a confirmed invalid for many years? A. I would say eight years.

Q. He has been sick for at least twenty years to your knowledge, pretty sick? A. Yes, sir.

Q. His sickness is more of a mental condition, isn't it? A. Somewhat, not entirely.

Q. You know what the cause of the sickness was, don't you?

Mr. Klausner: I object.

The Court: He can answer yes or no.

30 Mr. Fallon: It is very important, for this reason. They are trying to charge this man, the owner, with knowledge of some of these events. I want to show the condition of this man, that he could not be charged with knowledge of any of these events.

Q. What was the condition of your father's mind, if you know, during the past twenty years?

A. I don't know.

40 Q. Has he been bedridden for a long period of time? A. No.

H. F. McLaughlin, Jr., for Plaintiffs—Cross.

Q. He is unable to attend to business, is he not?

A. Yes, he is unable to attend to business.

Q. That condition has prevailed for a long time, hasn't it? A. A good many years.

Q. Who is the doctor that has attended your father, do you know? A. The last doctor?

Q. The doctor that has been attending him all these years, for the ailment, all these years? A. 10
Dr. Halligan was the last one to operate on him.

Q. Is Dr. Halligan still alive? A. Yes, sir.

Q. Were you subpoenaed to come here? A. I was.

Q. When? A. About ten days ago.

Q. You said the first time you saw anybody was last night? A. Yesterday; that is correct.

Q. What about the subpoena? A. I said yesterday was the first day I saw counsel. 20

Q. You were subpoenaed ten days ago? A. Yes, sir.

Q. For today or yesterday? A. Yesterday.

Q. Have you got the subpoena with you?

The Court: It doesn't matter. Proceed; he is in Court.

Q. There was no hole in this sidewalk at any time, what you might call a hole? A. Yes, sir.

Q. There was a broken up condition of the cement; isn't that what it was? A. I would call it a hole, too. 30

Q. Was it a broken condition of the cement? A. That is correct; it was that.

Q. You know the difference between a hole and a depression, do you? A. Yes, sir.

Q. What is a depression, in your judgment? A. A depression, I would say, is when land—

Q. I am speaking about this sidewalk now; as to this sidewalk? A. You didn't say that. 40

H. F. McLaughlin, Jr., for Plaintiffs—Cross.

Q. I am telling you now; I am directing your attention to it. A. A depresison would be, I would say, very slight—

Q. Do you know what a depresison is, as compared with a hole? A. I do in the ordinary sense of the word.

10 Q. In the ordinary sense of the word, as you understand it, would you say this was a hole in this particular sidewalk? A. I would say a hole.

Q. Not ordinarily a hole, but I am speaking about this particular situation; in this situation, what do you classify this as? A. In this particular spot, I would say it is a rapid drop off from level surface, from the level surface.

20 Q. Will you point that condition out on any of these pictures? A. Right where the "X" is; I would say that is a hole.

Q. That indicates to you only a breaking up of the cement? A. No, it indicates to me a hole.

Q. You mean by that that the cement has been broken, and the surface has been washed away, leaving the subsurface showing; that is what you mean? A. Yes, leaving a hole.

Mr. Fallon: I ask to have that last stricken out.

30 The Court: It will remain; you asked what was left.

Q. You are very anxious to classify this as a hole; why do you do that? A. Because I would call it a hole.

Q. You know that Mrs. Prange called that a hole, too? A. I know that.

Q. And you would like to help Mrs. Prange? A. No.

40 Mr. Klausner: I object.

H. F. McLaughlin, Jr., for Plaintiffs—Cross.

The Court: I think it is perfectly proper to show bias, or interest in the case.

(To the Witness): Well, is it your opinion as to the condition that you have spoken of, this out of repair condition, that the trucks cause this result?

The Witness: Yes, your Honor. 10

The Court: Well, did you see it?

The Witness: No, your Honor.

The Court: Now, do you want it stricken out?

Mr. Fallon: No, I do not.

Q. You say that the coal trucks that were upon this sidewalk were facing the Boulevard? A. That is right.

Q. And this driveway that you speak of, do you mean the driveway west of 64 Glenwood Avenue, towards the Boulevard? A. That is right. 20

Q. That is not the driveway that belongs to 64; it belongs to the corner property doesn't it? (Indicating) A. That driveway, yes, sir.

Q. You know that Boulevard corner property? A. No.

Q. These pictures do not show that driveway?

Mr. Klausner: I think they do. 30

Q. I show you another picture, Mr. McLaughlin, and ask you if you can identify this picture as the lay-out of the sidewalk and the front of the house 64 Glenwood Avenue, disregarding the fine character of the sidewalk as shown on the picture? A. That is 64 Glenwood Avenue.

Q. Now, this driveway you speak of is the driveway west of this Street, isn't it? A. Yes, that is correct. 40

H. F. McLaughlin, Jr., for Plaintiffs—Cross.

Q. There is another little alleyway of some kind to the east of 64 Glenwood Avenue, as shown on this picture? A. Yes, there is.

Q. Dividing that and another house to the east of that? A. Yes, sir.

10 Q. The driveway west of 64 Glenwood Avenue is approximately 14 feet wide? A. About.

Q. Do you mean that the driveway is part of the property of 64 Glenwood Avenue? A. I didn't say that, no.

Q. Well, you know it is not? A. I don't know.

Q. You don't know? A. No.

Mr. Fallon: I ask to have this marked for identification.

(Marked D-1 for identification.)

20

Q. What is the name of this brother you mentioned a moment ago? A. Dennis J. McLaughlin.

Q. He has been ill? A. Yes, sir.

Q. He is in the hospital at the present time? A. Yes, sir.

Q. Has been for quite some time? A. He has.

Q. Do you know that we have been endeavoring to subpoena him here? A. No.

30 Q. Well, you know, as a matter of fact that your father is in no condition to come into Court? A. I know that he is sick.

Q. You know that he has a mental condition, and he can't be brought into Court? A. No, I don't know that.

Q. You know that for many years past he has not attended to any of his business affairs? A. That is quite true.

40 Q. This driveway that has been mentioned, or this spot rather that you marked "C" on this picture, that has been shown to you, P-1 I believe is

H. F. McLaughlin, Jr., for Plaintiffs—Cross.

the number of it, is a spot towards the east of 64 Glenwood Avenue and approximately how many feet distant from this so-called driveway west of 64 Glenwood Avenue, the place where the coal trucks back in, which you marked "C".

The Court: Haven't you your directions confused? C is east of the entrance to the apartment, and the out of repair condition is put on the driveway, west. 10

Q. I show you this paper called P-1?

The Court: The "X" he says is 15 feet.

Q. Did you say that from this mark "C" on this picture, over to the driveway west of 64 Glenwood Avenue is only about 14 feet? A. No, I said that from C to X is about 15 feet. 20

Q. The sidewalk in front of 64 Glenwood Avenue is nine and a half feet wide? A. That I don't know.

Q. You don't know that. About how much would you say it was; you used to live there? I am willing to have you give your estimate of the width of the sidewalk?

The Court: What is your best judgment?

The Witness: Ten feet.

Q. I show you this paper, Mr. McLaughlin, and ask you if you can tell me whether this paper depicts the lay-out of the property 64 Glenwood Avenue and the sidewalk in front of it, and the dirt piles alongside of it, which form part of the garden in front of the house? A. Yes, that is right. 30

Mr. Fallon: I ask to have it marked for identification.

(Marked D-2 for identification.) 40

H. F. McLaughlin, Jr., for Plaintiffs—Cross.

Q. Did you say there were four or five trucks, coal trucks, in 1930, to your knowledge drawn up on the sidewalk? A. I said I saw.

10 Q. Can you tell us whether it was four or five. You are guessing at four or five. I am trying to find out how definite your recollection is? A. Approximately five.

Q. Why do you say approximately five, rather than four? A. That is four years ago.

Q. That is the reason I am asking. I am just wanting to know how good your memory is of that event? A. My memory would not be that good.

20 Q. You are pretty certain, to be able to say four or five coal trucks that year passed over the sidewalk? A. Yes, right.

Q. In the winter of 1931, you are pretty certain that six or seven coal trucks passed over that sidewalk at that time? A. That is correct.

Q. To deliver coal to the building for heating purposes of the building; is that what you mean? A. That is right.

Q. You say you also observed some moving trucks a few times. I think you said a few times?

30 The Court: How far is this hole from the curb, that you have in mind?

The Witness: It runs to the curb.

The Court: To the curb. Well, these coal trucks you saw on the sidewalk; where was the right wheel, how far from the curb?

The Witness: I would say about a foot.

The Court: That is, they backed their coal trucks along the curb for a distance of thirty feet?

40 The Witness: Yes, sir; from the driveway to the entrance to the apartment.

H. F. McLaughlin, Jr., for Plaintiffs—Cross.

The Court: Within one foot of the curb?

The Witness: That is as close, I imagine, as they could keep to the curb.

The Court: Well, it is not what you imagine; it is what you saw?

The Witness: I saw it.

The Court: That would throw the left wheel away from the curb five feet or more; was it at least five feet? 10

The Witness: It would.

Q. This picture you have in front of you, which is the one you have been referred to in your examination by Mr. Klausner, does that show the broken condition of the sidewalk, the east part which is marked with an "X"; does it? A. East?

Q. I mean over this way? A. There is the broken part. 20

Q. It does not show any such condition as this which is marked by an "X"? A. No.

Q. When you say it is a broken part, will you mark that there so that we will know what you are referring to, with an "M"? Just the part you say is a broken part? (Witness indicates.)

Q. Is there anything of a hole about that, the one that you have marked "M"? A. No.

Q. And the rest of the sidewalk, then, other than what you have marked here by "M", which is east, lying east of this so called hole, which is marked "X" shows an unbroken condition, doesn't it? 30

The Court: The Photographs P-2, P-3 and P-4 show a broken condition through the cement surface to the subsurface, near the garden that has been referred to. Do you know what caused that break? 40

H. F. McLaughlin, Jr., for Plaintiffs—Cross.

The Witness: No, I don't know, your Honor.

The Court: It looks more of a break near the curb?

The Witness: Perhaps it broke up.

10 The Court: See it here on P-4, in here, two slabs; did any of the wheels of the truck get in there?

The Witness: No, not that I saw. I only saw them here.

Mr. Fallon: Referring to the point marked "X" on the other photo.

The Court: Yes, near the curb.

20 Q. Do you know when any of these pictures were taken that you have been referred to? A. No, I don't know.

Q. But you say they depict the condition as of January 28th, 1932? A. As I remembered the condition.

Q. You said also that the condition was not the same in 1931 or 1930. Now, you are sure that this condition shown by this "X" on P-1 is the exact condition as of January 28th, 1932? A. I could not say exactly.

30 Q. You have said so? A. The photographs, I don't believe lie, and that is the way—

Q. You would be surprised. A. You may be right. That is in my memory the way I recall it.

Q. As to the condition as of that time? A. That to my mind is the way it was.

Q. Now, to your mind, what was the condition in 1931, at that point? A. In 1931? I said in 1930 about half of this.

Q. I am speaking of 1931? A. I would not say it was quite as bad as it is there.

40 Q. What you mean to say is, when your father went into possession of this property, there was a

H. F. McLaughlin, Jr., for Plaintiffs—Cross.

break in the sidewalk caused by the crushing of the cement?

The Court: He didn't say that.

Mr. Fallon: I am going to try to find out if he didn't mean that.

Q. While he was in possession, the condition became enlarged from time to time, and that it ultimately resulted in this condition shown by "X"? A. No.

10

Q. What was the condition of the property when your father went into possession of the property; what was the condition of the sidewalk?

A. The condition of the sidewalk; it was all right when he came in possession.

Q. Are you sure of that? A. Positive.

20

Q. You didn't discuss this matter with your brother who is in the hospital? A. No, I haven't seen him.

Q. You say that the condition of the sidewalk was not broken at the time your father bought this property? A. No.

Q. Not broken in any respect? A. No.

Q. What is your business now? A. I haven't any business.

Q. You live with your parents? A. That is right.

30

Q. This other brother in the hospital, he is married, isn't he? A. He is.

Q. He does not live with his parents, or does he? A. No.

Q. Your parents now live where? A. In Bogota.

Q. How long have they lived there? A. Since October.

Mr. Fallon: Are you willing to tell me when these pictures were taken?

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*H. F. McLaughlin, Jr., for Plaintiffs—Re-direct—
Re-cross.*

Re-direct examination by Mr. Klausner:

Mr. Klausner: I have just been informed that these pictures were taken about a week or ten days after the happening of the accident.

10 Mr. Fallon: I am willing to have that noted on the record.

Q. In answer to the Court's question, I wasn't certain whether you made it clear where the right rear wheel of the coal truck would be when it was backed up, on or off the sidewalk? A. Where?

Q. The right rear wheel? A. The right rear wheel would be on the sidewalk.

20 Q. Now the left rear wheel? A. Would be in the gutter.

Re-cross-examination by Mr. Fallon:

Q. You have told us that the sidewalk was ten feet in width, in your judgment; do you mean to tell us that this truck was ten feet in width? A. I don't know anything about how large the truck was.

30 Q. You have told us the left wheel was out in the gutter and the right wheel of the truck was in the position you have stated? A. Right.

Q. You have also told us that the truck was driven up as close to the house as possible? A. I didn't say as close to the house as possible.

Q. How close was it driven to the house? A. I would say it was driven a foot from the curb on the sidewalk.

40 Q. Were both wheels on the sidewalk, or not? A. No, they were not; one rear and one front on the right side.

H. F. McLaughlin, Jr., for Plaintiffs—Re-direct.

Q. The right rear on the sidewalk, left wheel in the street, or was it up on the curb? A. It was in the gutter.

Q. And the truck was facing west? A. Right.

The Court: Where is the testimony as to what caused this break?

Mr. Klausner: Why, this man has stated that in the first answer. 10

The Court: He expressed his opinion; he was asked if that was his opinion, and he said "yes." Then, "Did you see it" and he said "no".

Re-direct examination by Mr. Klausner:

Q. Mr. McLaughlin, can you tell us what caused this out of repair condition as shown and marked "X" on the photograph P-1? 20

Mr. Fallon: I object to that.

The Court: Sustained, in view of the fact that his testimony heretofore was an expression of opinion to the same question. This invites the same sort of answer.

Q. Did you see trucks on the sidewalk?

The Court: He said he did.

Mr. Klausner: I am trying not to lead. 30

The Court: You don't have to lead.

Q. Will you tell us what you saw with reference to this out of repair condition, as to how it came into being?

Mr. Fallon: I object to that last interpolation in the question as calling for a conclusion, as to how it came into being.

The Court: Where were you when these six trucks were driving over this sidewalk? 40

H. F. McLaughlin, Jr., for Plaintiffs—Re-cross.

The Witness: I was up in my father's apartment.

The Court: Where is that?

The Witness: 64 Glenwood Avenue, one flight up.

The Court: One flight up?

10

The Witness: Yes, sir.

The Court: Is that in the front or back?

The Witness: Front.

The Court: You saw trucks on the sidewalk?

The Witness: Yes, sir.

The Court: You saw them go up?

The Witness: Yes, sir.

The Court: Is that all you saw?

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The Witness: I have seen particles of the sidewalk break as a result of these trucks unloading and standing in that way, that position.

The Court: When did you see that?

The Witness: I saw that on two or three occasions.

The Court: Is that your opinion, or did you see it?

The Witness: I saw it.

Re-cross-examination by Mr. Fallon:

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Q. But you didn't report that to your father?

A. I told my brother about it.

Mr. Fallon: I ask to have that stricken.

Q. You told Mr. Klausner that you didn't report it to your father? A. No, I didn't.

Mr. Klausner: I now rest.

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Motion for Nonsuit.

MOTION FOR NONSUIT.

Mr. Fallon: I ask for a non-suit for a number of reasons:

First, I want to call the Court's attention to the nature of the complaint here.

There are several counts in the complaint filed. The first count relates that on January 28th, 1932 the defendant was the owner of this particular property and in possession of it. That we concede.

The complaint then charges that by reason of such ownership and possession, it then and there became and was the duty of the defendant to use due and proper care to keep and maintain the premises and the sidewalks in such condition that they would be reasonably safe for persons lawfully using the same. I say that there is no rule of law sustaining that allegation.

The Court: What do you say about that?

Mr. Klausner: He is right.

Mr. Fallon: It then goes on and says that it also became and was the duty of the defendant to make reasonable and careful investigation and inspection with reasonable frequency of the said sidewalk. I say there is no rule of law holding that requirement. Will you concede that also?

Mr. Klausner: I think there is.

Mr. Fallon (After discussion): I ask for a non-suit as to the first count.

The Court: It appears now that you are entitled to that. There is no allegation in the use of the sidewalk that would require or charge the owner with beneficial use as

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Motion for Nonsuit.

distinguished from the general benefit to the public.

The motion as to the first count will be granted.

10 Mr. Klausner: It is the second ground that we rely on, on the ground of a public nuisance.

Mr. Fallon: As to that, I say that there is nothing in the complaint that charges a nuisance, either in fact or by law.

Mr. Klausner: I think in the first count there is a distinction between nuisance and negligence. No, the first count is not on the nuisance doctrine, whereas the second count is on the nuisance doctrine, as your Honor will notice.

20 Mr. Fallon: That seems to be the distinction.

Mr. Klausner: I am limiting myself to the public nuisance doctrine. I think that the testimony might be considered in this light, that the owner permitted these trucks to go on the sidewalk.

30 The Court: You might consider it in that light, but have you charged it? Where is the charge in this complaint that this owner subjected this sidewalk to a use that was unusual, that is to say, a use that was beneficial to him, as distinguished from the use that it was subjected to for the public. Where is there anything in here to charge that?

Mr. Fallon: He will look till he's black in the face for that; it isn't in there.

40 Mr. Klausner: I don't know whether it is in exactly those words.

Motion for Nonsuit.

The Court: Can you read that complaint and show a charge that this defendant used this sidewalk for the purpose of having vehicles pass from the roadway proper across the sidewalk to deliver merchandise, or fuel or whatever it was, into the building?

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Mr. Fallon: And thereby subjected the sidewalk to an unreasonable use other than that accorded to the general public.

Mr. Klausner: I thought I had that in the allegations that he permitted the premises to remain in unsafe and dangerous condition.

The Court: I know; those are all general statements.

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(DISCUSSION.)

The Court: The Court will invite an amendment; however, it will have to be upon terms. You will be subject to your adversary's objection, I mean, by the terms that he wants.

The Court does not want this case to go out simply because of some omission, and at the same time does not want to put the defendant to the penalty, you might say, of proceeding with a case that he reasonably could not expect from the pleadings.

30

It wasn't until this last witness got on the stand that this Court knew what you were after. Then, when the question was propounded to Mr. McLaughlin, whether he saw this, or whether it was his opinion, he first expressed an opinion and then there was a change thereafter, so that I

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think as a matter of justice, it should be subject to your adversary.

10 Mr. Fallon: With respect to the amendment, I think that ought not be granted at this stage of the litigation. Counsel ought not to be permitted to experiment with the Court and then when his adversary calls his attention to his omission, then ask leave to amend.

The Court: Ordinarily, the Court would hold counsel to a strict account in this case, but the Court is considering all of the features of the case and I am going to allow Counsel to amend his pleadings.

20 Mr. Fallon: May I know what the amendment is to be. I would like to finish this case today.

(SHORT RECESS.)

(AFTER RECESS.)

30 Mr. Klausner: I have prepared an amendment, as paragraph 2-A of the first count, to insert a paragraph, 2-A, because I included all of the first count in the second count. That will be the simpler way of doing it.

Mr. Fallon: The first count, as I understand, the Court has already ruled on.

Mr. Klausner: I will call this paragraph 3 and insert the paragraph as follows:

40 Defendant subjected the said sidewalk in front of the said premises to a use that was unusual and to a use that was beneficial to him, as distinguished from the use that it was subjected to for the public.

Motion for Nonsuit.

Defendant used said sidewalk and permitted the use of the said sidewalk for the purpose of having vehicles pass from the roadway proper across the sidewalk, to deliver merchandise and fuel into said building and premises for the benefit and use of the said defendant. The said sidewalk became broken up and defective and unsafe, as a result of a use for which it was not normally designed, namely, the passage of motor trucks over the said sidewalk and in which use the said sidewalk was broken and a hole was made in the said sidewalk, making it unsafe and dangerous to the public. 10

The Court: That last one is evidently to show that the use that you have referred to, that is the passage of the trucks, was for the delivery of the material you have spoken of. You state the fact in the first part and you state the principle of law in your second and you don't connect both. 20

Mr. Fallon: I have no objection to that being filed as it is.

Mr. Klausner: May I just put it in this fashion.

As a result of a use for which it was not normally designed, namely the passage of motor trucks over the sidewalk for the purpose of delivering merchandise and fuel into the said premises known as 64 Greenwood Avenue, Jersey City for the benefit and use of the said defendant, and then finish it, and in which use the said sidewalk was broken and a hole was made in the sidewalk, making it unsafe and dangerous to the public. 30

Mr. Fallon: I would like to know what it is, whether it is going to stand in its 40

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original form, or in the second. He has changed some. I can't understand what he is relying upon now.

10 If he wants to charge that this condition of the sidewalk, that it was broken up by the use of the automobile trucks, as described by the witness, Mr. McLaughlin, I have no objection to that.

The Court: I think you had better take time to draw your pleadings.

Mr. Klausner: May I have fifteen minutes more.

Mr. Fallon: I am agreeable.

20 The Court: We will take an adjournment now and return at half past 12. In the meantime, prepare your amendment, and file it with the Clerk.

(Recess to 12:30 P. M.)

(After recess, 12:30 P. M.)

(In Chambers.)

Mr. Fallon: The first count is out; I mean your Honor ruled on the first count.

30 The Court: Counsel has this new count in the case.

Mr. Fallon: I renew my application on the first count as amended.

The Court: On the second count, as amended; this is entitled the second count.

Mr. Fallon: On the second count as amended, which is sought to be a count upon which nuisance is predicated.

40 Mr. Klausner: May I ask that is as to Dorothy Prange, but of course, the hus-

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band's right is predicated upon that; that is the third count.

Mr. Fallon: The second count alleges in paragraph three that the defendant subjected the sidewalk in front of the premises to a use that was unusual and to a use that was beneficial to him, as distinguished from the use that it was subjected to for the public, and that the defendant used the said sidewalk and permitted the use of the said sidewalk for the purpose of having motor trucks pass upon the roadway proper and pass across the said sidewalk to deliver merchandise and fuel into said premises for the benefit and use of the said defendant, and a hole was made in the said sidewalk as a result thereof, and that the said hole was created and maintained by the defendant and was a public nuisance and a source of great danger to all persons lawfully using and walking upon the sidewalk.

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Now, the fourth and subsequent clauses, I think, relate to that which I have just read and I hardly think it is necessary for me to read them all into my motion, except in another form.

The fourth recites that the said sidewalk became broken up and defective and unsafe, as a result of a use for which it was not normally designed, in that the defendant permitted motor trucks to pass upon and over said sidewalk for the purpose of delivering merchandise and fuel into the said building and premises for the benefit and use of the said defendant, and as a result of said use a hole was made in the said sidewalk and the said hole so created

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and maintained by the defendant was a public nuisance and source of great danger to all persons lawfully walking upon said sidewalk.

10 Fifth, the condition of the said sidewalk became and was a public nuisance during the period above mentioned.

Sixth, the condition of the above sidewalk, as above set forth, during the period above mentioned, existed for such a length of time that the defendant should have and did have knowledge of such condition and nuisance.

20 Seventh, it became and was the duty of the defendant to abate said nuisance and to properly maintain said sidewalk, which the defendant failed and neglected to do, as hereinabove set forth.

Paragraphs 8 and 9 relate to the injuries alleged to have been sustained, and paragraph eight states she tripped and fell and was painfully injured and so forth.

I urge my motion as to that count also on the ground that there is no proof before the Court to sustain the allegations of the count.

30 The Court: (After hearing extended argument) I will deny your motion, and you may have an exception, Vice-Chancellor.

Mr. Fallon: I ask exception.

(Counsel and the Court returned to the Court room, where the trial proceeded.)

(Hearing resumed in the Court room.)

40 Mr. Fallon: I want to offer in evidence the papers that heretofore have been

Edward Hahn, for Defendant—Direct.

marked for identification. One is the statement of Dorothy Prange, which she said she signed.

Mr. Klausner: I object to this offer at the present time.

Mr. Fallon: She identified it.

The Court: That was just her signature. 10

Mr. Fallon: I offer in evidence then, Exhibit D-2 for identification which was identified by Mr. McLaughlin as a sketch of the property there, 64 Glenwood Avenue.

Mr. Klausner: I have no objection except to the typewriting on the top.

Mr. Fallon: I will tear that off.

(D-2 for identification now marked in evidence.) 20

EDWARD HAHN sworn for the defendant.

Direct examination by Mr. Fallon:

Q. What is your business? A. Building and repairing; mason work.

Q. That is sidewalks? A. Yes, sir.

Q. Do you recall having made repairs to the sidewalk at 64 Glenwood Avenue, Jersey City, at some time or another? A. Yes, I do. 30

Q. Do you remember when it was? A. We put a new sidewalk down.

Q. Before you put the new sidewalk down; did you observe the condition of the sidewalk, as it was? A. I did.

Q. Can you describe its condition?

Mr. Klausner: May I ask when this was, your Honor? 40

Edward Hahn, for Defendant—Direct.

Q. Did you state when it was you put in the new sidewalk? A. No, I didn't.

Q. Tell us when it was you put in the sidewalk?

A. It is about two years ago.

10 Mr. Klausner: I think we ought to have something more definite.

Mr. Fallon: That would be within a few months after this happening.

Mr. Klausner: The witness ought to be asked what month and what year.

The Court: Well, can you tell us about when?

The Witness: No, I do not remember.

The Court: Fall or winter?

20 The Witness: I believe it was in the summer. It was real hot.

The Court: The summer of 1932.

Mr. Klausner: That is satisfactory.

Q. I show you a picture here marked as Exhibit P-1 and ask you if you can tell us whether at the time you put down that sidewalk, you found the then existing sidewalk in any condition such as it shows there in this picture? A. Why, it was partially like this.

30 Q. Was there a hole in the sidewalk at that time?

Mr. Klausner: If your Honor please, I think if it was in the summer of 1932, I think that is perhaps too far from January of 1932; something may have happened between January, 1932 and the summer.

40 The Court: Well, it may have some bearing on the case. The Court will permit the testimony to show the condition at that time.

Edward Hahn, for Defendant—Direct.

Mr. Fallon: As of January, 1932.

The Court: It may have some bearing.

Mr. Klausner: I won't press it.

Q. (Question read as follows: Was there a hole in the sidewalk at that time?) A. Why, it is a hard thing to say. When I looked at the sidewalk, the sidewalk was crumbling in certain spots. I didn't notice any hole at that time, but it was crumbled on this particular spot here. 10

Q. In your judgment, as a man engaged in that line of business you were engaged in, can you tell us what that crumbling resulted from?

Mr. Klausner: I object to that.

The Court: Can you answer that?

The Witness: I believe I can. 20

Mr. Klausner: That was in the summer of 1932.

Mr. Fallon: This all related to the same time. The difficulty is I don't know when this other photograph was taken.

The Court: This man has said that he can tell what caused this sidewalk to be disintegrated or broken up.

Can you tell that?

The Witness: I believe I can in fairly accurate manner. 30

The Court: Well, tell us what it is. If it is not material, it will be stricken.

The Witness: In winter time, places in a sidewalk like this bulges out; in the summer time, it breaks it, and it is a work of expansion and contraction. There is always crumbling, affecting the joints like that.

The Court: Can you tell whether this was caused by the elements? 40

Philip Tumulty, for Defendant—Direct.

The Witness: It looks to me it was caused by the elements.

10 Q. Did it look to you that way when you saw it on the ground? A. When we got on the job, we got on the job to get the job done; we didn't look at the sidewalk.

The Court: Can you tell us whether the disintegration or breaking up of the cement part of the sidewalk was caused by vehicles going over it or by frost?

The Witness: That would be a little bit too hard to say, right off the reel.

20 Q. You expressed your dislike to come here at all? A. Yes, sir.

(No cross-examination.)

PHILIP TUMULTY, sworn for the defendant:

Direct examination by Mr. Fallon:

Q. What is your business? A. Real estate and insurance.

30 Q. Are you in business in Jersey City? A. Yes, sir.

Q. How long have you been in business? A. About 12 or 15 years.

Q. Are you familiar with the premises 64 Glenwood Avenue? A. Yes, I was the Receiver there.

Q. When did you become Receiver? A. The 29th of February, 1932. I got the Order here; do you want to see it.

40 Q. On this date, February 29th, 1932, did you go to the property and inspect it and do anything

Philip Tumulty, for Defendant—Direct.

with? A. I did, the day I was appointed, I served notice on the different tenants, restraining them from paying the rent to anybody outside of the Receiver.

Q. What did you observe, if anything, about the condition of the sidewalk? A. No, I didn't. I thought it was in apparent good repair and condition. 10

Q. What did you do to observe the condition; did you look at the sidewalk? A. At the sidewalk; went around the property.

Q. On the 29th of February, 1932, when you went to these premises, did you observe the sidewalk in any such condition as shown by Exhibit P-1, in that picture? A. No, I didn't.

Q. Did you observe the condition of the sidewalk on that date, to be as shown on these three pictures here known as P-2, P-3 and P-4, starting with this one? A. No, I didn't notice them in that condition. 20

Q. Well, did you notice anything about the sidewalk being broken up? A. The first time my attention was brought to the sidewalk was about in June, around the first of June.

Q. I am not concerned about June now. I am trying to find out about February? A. I didn't notice any condition. If I did, I would have had it repaired. 30

The Court: Will you please tell us; these twelve men didn't observe it. What we want to us: was it that way?

Q. Did you examine the sidewalk on that date when you went there, and can you tell us what the condition of the sidewalk was? A. No, I didn't, any further than to go in the front way and out the side way. 40

Motion for Direction of Verdict.

Q. Was this sidewalk on January 29th, 1932, in this broken condition as shown on this picture?

Mr. Klausner: Just a minute.

The Court: Not January, February.

Mr. Fallon: I want to change my question.

10

Q. On February 29th, 1932, when you went to 64 Glenwood Avenue, can you tell us whether on that date this sidewalk was in the broken condition such as shown on these several pictures here?

A. I could not because I didn't take notice to it.

Mr. Klausner: No questions.

(Both parties rest.)

20

 MOTION FOR DIRECTION OF VERDICT.

Mr. Fallon: I wish to renew the motion I made heretofore for a non-suit, and ask for a direction of verdict in behalf of the defendant. I presume it is not necessary for me to repeat the reasons I urged before.

30

I stress particularly that which I have stressed heretofore that this condition that is complained of is one which, if it existed, or was brought about through the passage of coal trucks upon this sidewalk, and the felicitations of the drivers or helpers on these coal wagons to deposit coal in the shoot of the building at 64 Glenwood Avenue, that there is no proof before this Court that shows that the owner of this property authorized these automobile truck drivers or any drivers or coal drivers, whichever you may call them, to go upon that sidewalk for any such purpose, and the proof is

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Motion for Direction of Verdict.

that the only one who claims that he saw the automobile trucks go upon that sidewalk in the manner stated, was Hugh McLaughlin, who expressly stated, in answer to counsel for the plaintiff that he did not notify his father, the owner, of the fact that this happened and he answered, to a question propounded by me, that he did not notify his father. 10

In supplementing what I have said before, I only wish now to say that the burden of proof is upon the plaintiff here to show that the happening took place in the manner which is charged it took place, that the duty devolved upon the defendant as charged by him, that the defendant was in some manner negligent in the discharge of that duty and that as a result of his negligence and failure to perform the duty cast upon him, that this accident happened to this woman on the occasion stated. 20

Because these drivers, in their desire to find a shorter carriage from the wagon to the chute, took this course, certainly cannot be in any wise binding upon this owner. These coal drivers, in whatever respect they may have done what it is charged that they have done, were acting independently of the owner, and the owner was in no wise responsible for the act; they were not in any wise under the control of the owner. 30

Further, there is no proof here that this owner was out and about the premises whereby he could observe these conditions which are said to have existed, for such a time that he must have noticed them.

I submit that there ought to be a direction of verdict for the defendant.

The Court: The Court has heretofore indicated on the motion for a non-suit, the proposition that 40

Motion for Direction of Verdict.

the Court had in mind, that this case should be submitted to the Jury, and it is unnecessary to enlarge upon that other than to say that, no matter how slight the testimony is, if there is any testimony that might indicate that the owner participated or permitted this operation to go on and it resulted in a condition of out of repair, or that

10 resulted in a condition of sidewalk that might be unsafe, or unfit for use, that the Jury might find under proper instructions that he was liable, and then again, they might find that he was not.

It is a Jury question, as the Court sees it, and the motion will be denied, and you may have an exception.

Mr. Fallon: Thank you; I ask an exception.

20 (Counsel summed up to the Jury.)

The Court: I don't know what shape the filed record is in regard to your Answer to these amended pleadings.

Mr. Fallon: It is not in as yet. I want to enter a general denial as to the matters alleged in the amended pleadings.

The Court: And set up a separate defense?

Mr. Fallon: Yes, the same as we set up in the original Answer, one of which is assumption of risk, as I remember.

30

The Court: The requests to charge were a little out of time, under the Practice Act. If counsel has any request to make, you should have your request in.

Mr. Klausner: May I say, for the purpose of the record, that my Reply to the separate defenses will be the same?

Charge to Jury.

The Court then charged the jury as follows:

The Court: Gentlemen of the Jury:

This is your last day of service, as the Court understands it, having been called for two weeks' service, and for the past two days, you have been listening to the testimony in an interesting case. 10

It has been interesting in many ways. During your service here, at least some of you have sat as jurors where there has been what is known as a sidewalk case. But this particular case, as the Court sees it, is a little out of the ordinary case.

You have listened with attention to the testimony and the Court will make an effort to instruct you in the law as plainly as possible, so that when you retire you will know what the law is. Then all you will have to do is to apply that law to the facts as you determine them. 20

The service that you have rendered during your term here, has been very much appreciated by the Court. Let me say to you that the past three or four years, while this Court has been sitting here, it has been a pleasure in the trial of civil cases, to have verdicts returned that were in conformity with the testimony. Seldom has a jury in this Court made a mistake. If they have, they have been honest mistakes. In other words, jurors have been rendering conscientious services, and I want to take this opportunity of thanking you now for the service you have rendered during your two weeks of office, and I know that you won't let that good service end until you decide this case that is before you conscientiously. 30

As the Court has very often instructed you, you know your duty is to act as judges of the facts and you know how serious a job that is, how honorable 40

Charge to Jury.

10 a job that is. You took your oath here, out in public, where everybody can hear you, that you are going to decide the case as honest men. You make your bargain with yourselves, you make your bargain with your Creator, and you make your bargain with your country, your State. So that you have every reason to do what is right, and absolutely no reason to do what is wrong.

20 Sometimes jurors in the consideration of a case, will let matters of emotion impel them or influence them one way or another. Well, in the exercise of human mercy, you might say, feelings of what is right are sometimes overcome. In other words, it is a common thing for men to say, "Well, these men were liberally minded or not liberally minded," as the case may be, and it is a human feeling, "We will let it go." Bear in mind, in your duty as jurors, there is no place for emotion, no room for sympathy, passion or prejudice. Justice and emotion cannot sit in the same seat. Your single proposition is to decide the case conscientiously, not because you personally, as a matter of feeling or a matter of emotion, would like to see it some way else in the way of a determination; but you should decide it according to the truthful evidence.

30 If the evidence is truthful, and you believe it is so, and it indicates a certain result, even though you don't like the person who gave the testimony, or you don't like the effect of the testimony, you are judges of the fact and you should take it and give it that truthful effect that it is entitled to.

40 On the other hand, if the testimony is not truthful, of course, it is not to be considered by you in determining the case, except that the testimony is not to influence your judgment other than to give it that effect that untruthful testimony should receive and merit.

Charge to Jury.

Before you decide the case, or before you attempt the consideration of it, it is well for you to understand what the issues are. You have been charged time and again that after all, the first place or mark in going through this path that you are going to follow, in order to arrive at your destination, the first thing to know, is where you are going, or how you are going there. 10

Well, let us see what are the whereabouts in this case. The pleadings, as you know, or have heard possibly, have been amended and the parties in the case are Dorothy Prange and George Prange, her husband. There are two plaintiffs. There is one defendant, Hugh F. McLaughlin.

The plaintiffs charge in the complaint that on the 21st day of February, 1925, and down to and including the 28th of January, 1932, the defendant was the owner of a property situated at 64 Glenwood Avenue in this City, consisting of an apartment house which was rented to various persons. 20

It is charged that the owner was in possession and in control of the premises and walks and sidewalks abutting the premises; that at the times mentioned, the defendant subjected the sidewalk in front of his premises to an unusual use that was beneficial to him, as distinguished from a use that is usually enjoyed by the public. 30

It is charged that the defendant permitted his sidewalk to be used for the purpose of having motor trucks pass thereon in the delivery of merchandise and fuel to the premises for the benefit of the owner, and that in the use to which the sidewalk was thus put, the sidewalk was worn, and holes were created.

It is charged that after the holes were created, that the defendant permitted them, and main- 40

Charge to Jury.

tained them, his acts in this connection amounting to what is known as a nuisance.

It is charged that the woman plaintiff, while passing or going along this sidewalk, stepped into one of the holes, and sustained the injuries of which she complains.

10 The woman plaintiff seeks to recover for the pain and suffering that she incurred and the injuries sustained. She wishes to receive compensation at your hands for that pain and suffering and the injury.

Her husband predicates his case, or the case of the man-plaintiff, upon the same state of facts, and seeks to recover at your hands the losses which he alleges that he sustained because of his wife's injuries in the nature of moneys expended or expenses incurred in an endeavor to cure her, and also for the loss of her society during her period of illness, and also for the expenses incurred, or moneys expended in an endeavor to have her cared for.

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Those, gentlemen, are the statements of claim made by the plaintiffs.

The defendant denies the allegations of negligence and sets up separate defenses, wherein he charges that this woman assumed the risk that resulted in injury to her.

30

You see, those issues are plain, and having the issues before you, then you can determine the case.

Repeated, they are these: the plaintiffs charge the defendant with being negligent, and that the negligence amount to nuisance. The defendant denies that he was negligent, and goes a step further and says if this woman was injured, she assumed the danger that caused her injury.

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Charge to Jury.

Now, the next thing, as the Court sees it, in an orderly way to decide this case—and whether on earth or elsewhere, if you don't proceed orderly, there is usually confusion. Someone has said order is heaven's first law. I often wonder if it is not the first law of a happy existence, if there is such a thing on this earth. Particularly in determining an issue, it is quite necessary to proceed in an orderly way. 10

Having the issues, what are you next to consider? The Court thinks it would be well for you to consider the rules that you are going to use in determining those issues, and one rule is that the person or party who brings a case, is obliged by the greater weight of the evidence, to prove his charge. Now in this case, both plaintiffs are obliged in law, if they are to be favored with a verdict, to prove to your satisfaction by the greater weight of the evidence,—and greater weight means, as the Court has time and again indicated, the preponderating weight,—that the defendant was negligent as charged, that is, he did the acts of which the plaintiffs complain. 20

Is that enough? No. They are obliged also to prove by the greater weight of the evidence that these acts complained of by the plaintiff were the proximate and natural cause of the injuries sustained. That is to say, that the acts complained of by the plaintiffs, as against the defendant, resulted in and effected the injury of which this woman plaintiff complains. 30

Are you through there? No. The burden of proof is still upon the plaintiffs. If you should decide that this defendant was guilty as charged in the complaint, of negligence, or maintaining this nuisance and you should have proof that the injuries sustained were the proximate and natural 40

Charge to Jury.

result of that act of commission or omission, then you come to the question of damages. The burden is still upon the plaintiffs to prove the extent of the recovery to which they are entitled.

10 The woman plaintiff, mind you, has two elements of damages, for which she seeks to recover. One is that she was injured; she wishes to be compensated for those injuries; and also for the pain and suffering which she claims attended or flowed from those injuries. She has to prove that by the greater weight of the evidence, and the amount that she is entitled to, if she is entitled to anything for those items.

20 Now, at first blush, it seems that on the question of damages, you would not have much trouble, but there is a contrariety there, probably. As the Court remembers the testimony, though you may disregard the Court's recollection of the testimony, if it does not accord with your own. As to the extent of the injury, you have heard reputable physicians, who gave opinions that were at variance, to say the least, from each other. One said there was a fracture, and one said there was not. What are you to do when there are two men, of a reputable profession, and evidently are qualified to testify, do not agree? When two able men disagree, what are laymen going to do? Well, men, as the Court sees it, you are to take the testimony and use your conscientious judgment. It is not always the testimony that a person gives, especially in expressing an opinion, that is binding on you. You are only bound by the testimony that you think is relevant and truthful, and carries that conviction to you conscientiously that you should receive from such testimony.

40 In examining these photographs, for instance, and the Court is not pointing out particularly any

Charge to Jury.

item of testimony in preference to any other, but by way of example to show you that you can use your own judgment, and should look at these photographs carefully. What part of the photograph was this bone located in? Was it a bone situated on the anterior side of the foot, guarded by other bones on the outside, or was it a bone without, on the rim of the foot, that was injured? Was it a fracture? You can determine that. What are the earmarks of a fracture? You have heard it said in this case, I believe, that when a fracture occurs, there is an exudation of calcium, sometimes known as bone cells, a sort of natural cement that nature throws out to heal the fractured parts, to heal them together. The Court does not remember whether there was any testimony, either for or against the proposition that there was an indication of such union brought about by nature.

You take all the testimony and weigh it, bearing in mind, however, throughout, that the burden is upon the plaintiffs to prove their case.

In the matter of negligence, too, the same rule prevails. The burden is upon the plaintiffs.

Now, in this case, if you find a verdict for the plaintiff woman, she should receive such compensation or such a verdict as will compensate her reasonably for the pain and suffering she had endured, the injuries she has sustained; no more than that; you are not to speculate on damages. The proof should be brought to you so that you will be convinced by the greater weight thereof that allowance should be made, whatever it is.

The mere happening of an accident, or the mere happening of a thing such as complained of here, that is the injury sustained, the fall, is not in and of itself an item of liability. Many people

Charge to Jury.

are injured through no fault of anyone. Sometimes it might not be through their fault or the fault of the person that is charged. Bear in mind that the mere happening of an accident or the happening of an occurrence, is not in and of itself liability for negligence.

10 Now, the Court has dwelt upon the issues, and the burden that rests upon the plaintiff. What burden or rule should you apply to the defendant in the cause. The defendant sets up as a defense, not only a general denial, but asserts that this woman plaintiff assumed the risk of the danger that resulted in her injury. What does that mean? It means, in plain language, that this defendant charges, in effect, that this woman plaintiff knew the danger that was there, and having knowledge
20 of the danger, that she placed herself in such a position that she was injured.

Now, if you come to that conclusion, by the greater weight of the evidence, and mind you, the burden is upon the defendant to prove that defense, it being an affirmative defense, then your verdict would be in favor of the defendant, "no cause for action." Or, if you come to the conclusion that this was an accident, a happening against which the exercise of reasonable foresight of an ordinary prudent man, could not have prevented, why then, your verdict would be "no
30 cause for action."

If the testimony in this case is evenly balanced, in your opinion, as to the defendant being guilty of the acts of omission or commission charged in the complaint, that is to say, that the plaintiff has not carried the burden of proof, your verdict should be "no cause for action."

40 Now, you have had the issues presented to you and you have had the rules by which you should consider those issues.

Charge to Jury.

The next thing, it seems to the Court, in order for you to intelligently decide the case, is to understand the law. It has been stated that this is a sidewalk case. It might not be amiss to charge you in some detail the legal effect of the duties cast by law upon a property owner, so that you can appreciate what is intended by the issues framed. 10

The property owned by a property owner is intended to be enjoyed by him. It is an old axiom of English law and of our law that a man's property or house is his castle, and that he can enjoy it to the full. I think it was Lord Chatham who said "No matter whether the wind blows through the windows and they rattle and they shake, nevertheless, it is a man's castle," and he can use it as he will, as long as he does not in the use, do something that injures another. 20

Descending then to the particulars of our present situation, in having roads and sidewalks and buildings abutting thereon. At Common Law and the law originally in our State was, and is to this day, that if a man owns a piece of property, he is not obliged to touch his sidewalk. That is to say, primarily, he is not obliged to make any repairs at all. He can leave it in its native state, you might say; he can leave it in its original state, earth and all the contours that nature has made. 30

Now, in a suit of this kind, you notice that is not the rule; in fact, it is the exception, and you may question why the Court makes such a reference to the law. Well, it is so that you will appreciate the difference.

The Legislature has delegated the City Fathers, as they are sometimes called, with the power of regulating and requiring improvements to be 40

Charge to Jury.

made. The Legislature itself had the power to pass laws, but it has delegated that power to the City. The City then undertakes legislation. It is law, but it is not known as law; it is known as an ordinance, and these ordinances provided by the City, require that the property owner, we will say,
 10 shall lay curbs and lay sidewalks in front of his property.

Now, if he omits to do that, obey that legislative mandate of the City, can anyone complain as a member of the public? No, they cannot. The City has the remedy itself, to penalize by fines on the property owner who fails in that connection. So that you see, up to that point, a property owner is not liable to a member of the public, even though he is compelled by an ordinance to improve his sidewalk and he fails to do so.
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Well, then, supposing a property owner does comply with the ordinance of the City, and does repair the sidewalk. What is his duty after that? Why, as the Court sees it, he is not obliged to do anything, except he is compelled to do so by ordinance, and then, when compelled to do so by ordinance, a member of the public cannot complain if he falls, because the legislative mandate to require improvements is quite similar to the mandate to keep improvements in good repair, and a member of the public can get no comfort out of the failure, in either respect.
 30

So that when a property owner places a sidewalk in front of his property, if that sidewalk gets out of repair, sometimes known as in disrepair, by the natural wear and tear caused by the elements, such as freezing and buckling, as it is sometimes called, and disintegration brought about by freezing, then the law does not charge the property owner with being neglectful. You
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know how the application of natural forces raise sidewalks, in fact there does not appear to be anything that the human mind can conceive that will withstand the result of the elements, heat, light, water and cold. Just a change of temperature seems to have an effect on even the most adamant substance. The law contemplates that and does not charge the property owner with being neglectful. 10

Around the City, you see, for example when you come to your work here as jurors, you walk over sidewalks. You see some of them that have broken sections, broken here and there. Is a property owner liable? Not as a rule, if it is the way he originally placed it, and it has become broken up by the elements, wear and tear, or where it has been broken by the use of members of the public in walking over it in ordinary use. He is not obliged to repair. 20

Now, that is an element in this case, because as the Court understands the proposition as presented, or one of the propositions advanced by the testimony at least, is to the effect that this out of repair condition, if it did exist, was the result of ordinary wear and tear, by the elements, or in use by members of the public in passing to and fro over that sidewalk. 30

The plaintiffs in the case, however, contend that that is not so, that this sidewalk was caused to be placed in disrepair by a use that it was put to that was extraordinary.

Now, let us get to that. If a property owner, whether the property be a store or a private dwellinghouse, places a drain across a sidewalk, or places an areaway in the sidewalk, those two illustrations indicate to you and the Court so charges you, that they are placed there for his 40

Charge to Jury.

benefit. One is for water to run from his property across the sidewalk out into the street. If he puts a cover over that drain, he is obliged to use reasonable care to see that the cover is properly constructed and properly maintained.

10 If he builds an areaway or a coal hole in his sidewalk, he is obliged to see that it is properly created, properly constructed and properly maintained. Why? The law and reason given is because he received at his own participation, and through his own act and through his own design, a benefit from a thing that he made himself, and the law says that when you subject a public sidewalk to your own design, and by your own act and by your own participation, you subject that to an unusual use that is directly made for your benefit.

20 Then the law requires that you should see to it that that unusual thing is properly constructed and properly maintained.

Now, in this case, then, we descend to the particular of whether or not the acts complained of here were participated in, permitted and maintained by the property owner. Another illustration might assist you so that you will carry on to its logical conclusion the application of the law. You know, men, that business men at least, use, and residences use, the sidewalk. Why, if the law was that a man could not use the sidewalk abutting on his premises to deliver merchandise to his place of business, or to take things in and out of the house, or to move his furniture in and out, why the property would not be of any use, to say the least. You see then, it is a reasonable attitude or a reasonable attachment, you might say, to a property that the property owner should have the right to go over the sidewalk so that he can bring things that are necessary into his house, at

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40 his reasonable pleasure.

Charge to Jury.

In this case, as the Court remembers it, the coal hole was not out in the sidewalk. In this case, the property owner, and everybody dealing with him, had a right to go over that sidewalk with the commodity they were delivering. A merchant has a right to subject temporarily the sidewalk abutting on his property, and also a property owner, to have vehicles temporarily placed thereon for the purpose of enjoying that use that the Court has just mentioned.

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A property owner has the right to build a building on his premises. He has the right to build a scaffolding over the sidewalk. He has a right to dig a sidewalk up and have an oil tank placed in there, and he should have a reasonable time to conduct and do all these things, and if the structure that is placed over the sidewalk, the scaffolding, or the hole that is made for the insertion of the tank, is made by an independent contractor, the owner is not liable for the contractor's omission, whether it is leaving the sidewalk open, or by leaving the scaffolding there for a reasonable length of time.

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The owner of premises is not liable for anything that occurs by reason of leaving a vehicle upon the sidewalk for a reasonable length of time, for using the sidewalk reasonably.

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Now, in this case, it is said that the owner had no knowledge of the use to which this sidewalk was put. First, the defendant says that it was not put to any unreasonable use, as far as the owner is concerned; secondly, that the owner had no knowledge that it was being used the way it was. Well, if the owner had no knowledge of the use to which it was being put, why, then, the case ends right there and then, because you cannot charge him with something he does not know

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Charge to Jury.

about. But knowledge may come in two ways. It may come by someone bringing notice to the party directly, or it may come by a custom or practice, that has been carried on so long that a man of ordinary prudence and reasonable care should have known that it was being carried on.

10 Now, in this case, as the Court sees it, you have got a fine legal proposition to determine from the facts of the case. Did this property owner do something that a reasonably prudent man would not have done? Did this truck have a right to go on that sidewalk? Temporarily possibly. The Court is not saying it is so.

Is this property owner liable for the method or practice pursued by a merchant in delivering coal? No, he is not liable for what the merchant does, because he has no control over the merchant. If
 20 you are sitting up in your house and the merchant drives in with his wagon and he backs it up to the sidewalk, you are not responsible because he forces it up—you are responsible possibly, if he puts the wheels up on the sidewalk, if that thing continues for an unreasonable length of time and you knew about it, and it becomes dangerous to occupants of the sidewalk, or those who are using it, naturally and in the customary way, and you
 30 might be held responsible, depending upon whether or not a reasonable man should permit such a thing to be done on his sidewalk.

Was it an unreasonable thing for a property owner, if he didn't know about it, to be charged with the act of a merchandiser or delivery man, or whatever you might call it in delivery of coal for four or five or six times through the winter, bringing coal through and driving over the sidewalk? That is for you to determine.

40 Gentlemen, the theory of this case, as the Court sees it, is this: that it is not in the use of the

Charge to Jury.

sidewalk, by trucks driving therein, in and of itself, that casts liability upon the defendant. The plaintiffs' contention, as the Court sees it, reduced to its simplest form, is that the property owner participated in this operation, or knowingly permitted it to go on, and he permitted it to go on so often as to make it an unreasonable use of the sidewalk for his own benefit; and that is the question that you are to decide. And further, that because of the unreasonable use, the sidewalk became out of repair, and this property owner knew about it, and that, notwithstanding having that knowledge, permitted it to remain in a dangerous condition so that it was likely to cause injury to others in the lawful use of the sidewalk. 10

Now, considering all those elements, and coming back to whether or not the trucks actually did break up that sidewalk. Did they? You have those photographs of both sides, of the place that is pointed out as being the cause of the injury, or as being the result of the use of the sidewalk in that way. Look at every place and see what the result has been. It may help you to determine whether or not this breaking up was caused by trucks going over there, or whether it was caused by general wear and tear or by the elements. 20

You have heard where these wheels passed over this sidewalk. There is no dispute about that. If they did pass over at all, they passed along near this curb. So, take all of these facts into consideration and determine the case according to the law as the Court has given it to you. 30

The Court has been requested by the plaintiffs to charge you as follows:

A pedestrian is not obliged to look constantly where he is going, nor to give unremitting attention to his steps, and it follows that he is not 40

Charge to Jury.

guilty of contributory negligence as a matter of law, merely because in failing to do so, he falls into a hole or trips over an obstruction in the way. You are so charged.

10 However, in that connection, the Court also charges you: the rule is settled that the traveling public has a right to presume that there is no dangerous impediment in any part of the highway, in the absence of notice of the presence of such impediment. This principle applies to all interference with the safety of travel arising from temporary uses of the highway that are not normal and permanent incidents thereof, and relieves persons passing along the highway from any obligation to look for such interference with travel. If a traveller sees these, he must of course use
20 reasonable care to avoid them, but he is not negligent merely because he does not look for them.

 A property owner is required to exercise reasonable care to see that, after he has knowledge of an out of repair condition that is brought about by his participation or his permission in the use thereof for his benefit, to see that within reasonable time that out of repair condition shall be repaired.

30 A pedestrian is obliged to use that degree of care that a pedestrian ordinarily uses. They are not obliged constantly to look at the sidewalk, but to enjoy it as people usually do, whether by looking towards the property line or in the street or whatever way they might look.

40 The duty cast upon the property owner, however, in this case, is to be applied only when you find that this alleged out of repair condition, by the greater weight of the evidence, was known by the property owner to have existed, and that it was brought about, not by wear and tear or from

Charge to Jury.

the elements, or by ordinary use, but by a use that was unreasonable, and that was participated in and consented to or permitted by the property owner.

The defendant in the case has requested me to charge you as follows :

A person walking along the sidewalk and public street is not bound as a matter of law to look for obstructions or depressions in the nature of a nuisance ; but this rule is inapplicable if the jury found that the plaintiff in this case herself saw there was an unusual situation ahead in the existence of the condition in the sidewalk complained of, for it is incumbent on the plaintiff, seeing the situation, to use such care and circumspection as the obvious conditions require. 10

That is so, and you are so charged. 20

For if the jury find that the plaintiff, being aware of the extraordinary risk to which she was exposed, rashly placed herself in the way of danger, there can be no recovery.

You are so charged.

The adjudged cases all recognize the necessity for the use of ordinary care while walking on the sidewalk of a public street if recovery is to be had for injury due to the maintenance of a nuisance, and recognize also that failure to exercise such care may defeat a recovery, although the existence of a nuisance and its attendant danger may be unknown to the pedestrian. 30

The Court has already charged you the law as required by this request.

The property owner cannot be made out to be an insurer of the safety of pedestrians using the sidewalk.

You are so charged.

The landlord cannot be held liable where he permits a sidewalk to remain in a defective con- 40

Charge to Jury.

dition unless it be shown that there is some legal duty cast upon the owner to repair.

That is true, and you are so charged.

10 The mere fact that the sidewalk became depressed and in a broken condition due to coal trucks coming upon the sidewalk is not in itself sufficient to charge the defendant with any liability in this case, unless it be also shown that the coal trucks went upon the premises with the permission, consent or acquiescence of the landlord, or that the landlord subsequently ratified the acts. The mere ordering of coal does not imply such permission. Some element must be shown whereby the act of the coal driver became the act of the landlord.

You are so charged.

20 It is settled that the owner of premises may make any reasonable use thereof. For if it was necessary in order for coal to be delivered to the premises, that the coal trucks should go upon the sidewalk and this use of the sidewalk constituted a reasonable one, under the circumstances, the landlord cannot be held liable for any injury resulting from such use for it is settled that a landlord may obstruct the sidewalk temporarily to receive and deliver goods.

30 Since in such a case no legal duty was violated which the defendant owed to the plaintiff, there can be no recovery for injury sustained by reason of the failure of the defendant to repair.

That last part of the sentence will be omitted; the rest of the request will be charged.

40 The mere proof that coal trucks went upon the sidewalk, and that the sidewalk became defective as a result thereof, in itself, is not sufficient to charge the owner with any duty with respect to the plaintiff. It must also be shown that the de-

Charge to Jury.

defendant himself permitted such use and if you find that the defendant did not authorize the trucks, either expressly or impliedly, to go upon the sidewalk, then you must find for the defendant.

That is true, gentlemen. Bear in mind, however, that authorization may come about either impliedly or by express authorization. 10

If the jury find that there may be inferred from the circumstances that the defendant contracted with the coal people to deliver coal to the premises, the defendant does not become liable for the negligence of the coal people in going upon the sidewalk, unless he authorized such use. For it is settled that where one employs a contractor exercising an independent employment and hiring his own servants to do a work not in itself a nuisance, the contractor alone is liable for injury resulting from the negligence of himself or his servants unless the employer is in default in selecting an unskilled or improper person as contractor. 20

That is so, and you are so charged.

The mere fact that the defect existed for such a length of time as to put the owner upon notice does not charge him with the maintenance of the condition, unless it be shown that the defendant by some act of his own contributed to such defective condition. That is true. The Court, however, has charged you more particularly on that proposition, as to the maintenance of the out of repair condition, if there was such a maintenance. 30

Are there any exceptions to the Court's charge before the Jury retires?

Mr. Fallon: None from me.

Mr. Klausner: No. 40

*Plaintiffs' Request to Charge.**Defendant's Requests to Charge.*

The Court: There being none, you may retire, Gentlemen.

(The Jury retired.)

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 PLAINTIFFS' REQUEST TO CHARGE.

Van Pelt vs. Sturgis, 102 N. J. L. 708, C. of E. & A., 1926. HETFIELD, J.—A pedestrian is not obliged to look constantly where he is going, nor to give unremitting attention to his steps, and it follows that he is not guilty of contributory negligence as a matter of law, merely because in failing to do so, he falls into a hole or trips over an obstruction in the way.

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 DEFENDANT'S REQUESTS TO CHARGE.

1. A person walking along the sidewalk and public street is not bound as a matter of law to look for obstructions or depressions in the nature of a nuisance, but this rule is inapplicable if the jury found that the plaintiff in this case herself saw that there was an unusual situation ahead in the existence of the condition in the sidewalk complained of, for it is incumbent on the plaintiff, seeing the situation, to use such care and circumspection as the obvious conditions require. *Nerney v. Stanley-Fabian Corp.*, 106 N. J. L. 317. For if the Jury find that the plaintiff, being aware of the extraordinary risk to which she was exposed, rashly placed herself in the way of danger, there

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Defendant's Requests to Charge.

can be no recovery. *New Jersey Express Co. v. Nichols*, 33 N. J. L. 434.

2. The adjudged cases all recognize the necessity for the use of ordinary care while walking on the sidewalk of a public street if recovery is to be had for injury due to the maintenance of a nuisance, and recognize also that failure to exercise such care may defeat a recovery, although the existence of a nuisance and its attendant danger may be unknown to the pedestrian. *Quimby v. Filtern*, 62 N. J. L. 766. 10

3. The property owner cannot be made out to be an insurer of the safety of pedestrians using the sidewalk. *Taggart v. Bouldin*, 111 N. J. L. 464. 20

4. The landlord cannot be held liable where he permits a sidewalk to remain in a defective condition unless it be shown that there is some legal duty cast upon the owner to repair. *Rose v. Slough*, 92 N. J. L. 233.

5. The mere fact that the sidewalk became depressed and in a broken condition due to coal trucks coming upon the sidewalk is not in itself sufficient to charge the defendant with any liability in this case, unless it be also shown that the coal trucks went upon the premises with the permission, consent or acquiescence of the landlord, or that the landlord subsequently ratified the acts. The mere ordering of coal does not imply such permission. Some element must be shown whereby the act of the coal driver became the act of the landlord. 30

Defendant's Requests to Charge.

6. It is settled that the owner of premises may make any reasonable use thereof. For if it was necessary in order for coal to be delivered to the premises, that the coal trucks should go upon the sidewalk and this use of the sidewalk constituted a reasonable use, under the circumstances, the landlord cannot be held liable for any injury resulting from such use, for it is settled that a landlord may obstruct the sidewalk temporarily to receive and deliver goods. *Mann v. Max*, 93 N. J. L. 191. Since in such a case no legal duty was violated which the defendant owed to the plaintiff, there can be no recovery for injury sustained by reason of the failure of the defendant to repair. *Rose v. Slough*, 92 N. J. L. 233.
7. The mere proof that coal trucks went upon the sidewalk, and that the sidewalk became defective as a result thereof, in itself, is not sufficient to charge the owner with any duty with respect to the plaintiff. It must also be shown that the defendant himself permitted such use. And if you find that the defendant did not authorize the trucks, either expressly or impliedly, to go upon the sidewalk, then you must find for the defendant.
8. If the jury find that there may be inferred from the circumstances, that the defendant contracted with the coal people to deliver coal to the premises, the defendant does not become liable for the negligence of the coal people in going upon the sidewalk, unless he authorized such use. For it is settled that where one employs a contractor exercising an independent employment and hiring his own servants to do a work not in itself a nuisance, the contractor alone is liable for injury resulting from the negligence of himself or his

Defendant's Requests to Charge.

servants unless the employer is in default in selecting an unskilled or improper person as contractor.

The mere fact that the defect existed for such a length of time as to put the owner upon notice, does not charge him with the maintenance of the condition, unless it be shown that the defendant by some act of his own contributed to such defective condition. 10

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Exhibit P-1.



(*Opposite* )



Exhibit P-2.

(Opposite )

p26



Exhibit P-3.



(*Opposite* )



Exhibit P-4.


(*Opposite* )

P-4

P4



Exhibit D-2.

(Opposite )

ENCLOSURE

DRIVEWAY.

~~EXHIBIT~~
Indeuse



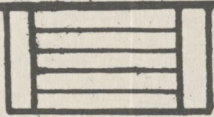
BRICK APARTMENT
NO 64.

BRICK APARTMENT.

ENCE.



DIRT



WALK



DIRT.

CEMENT

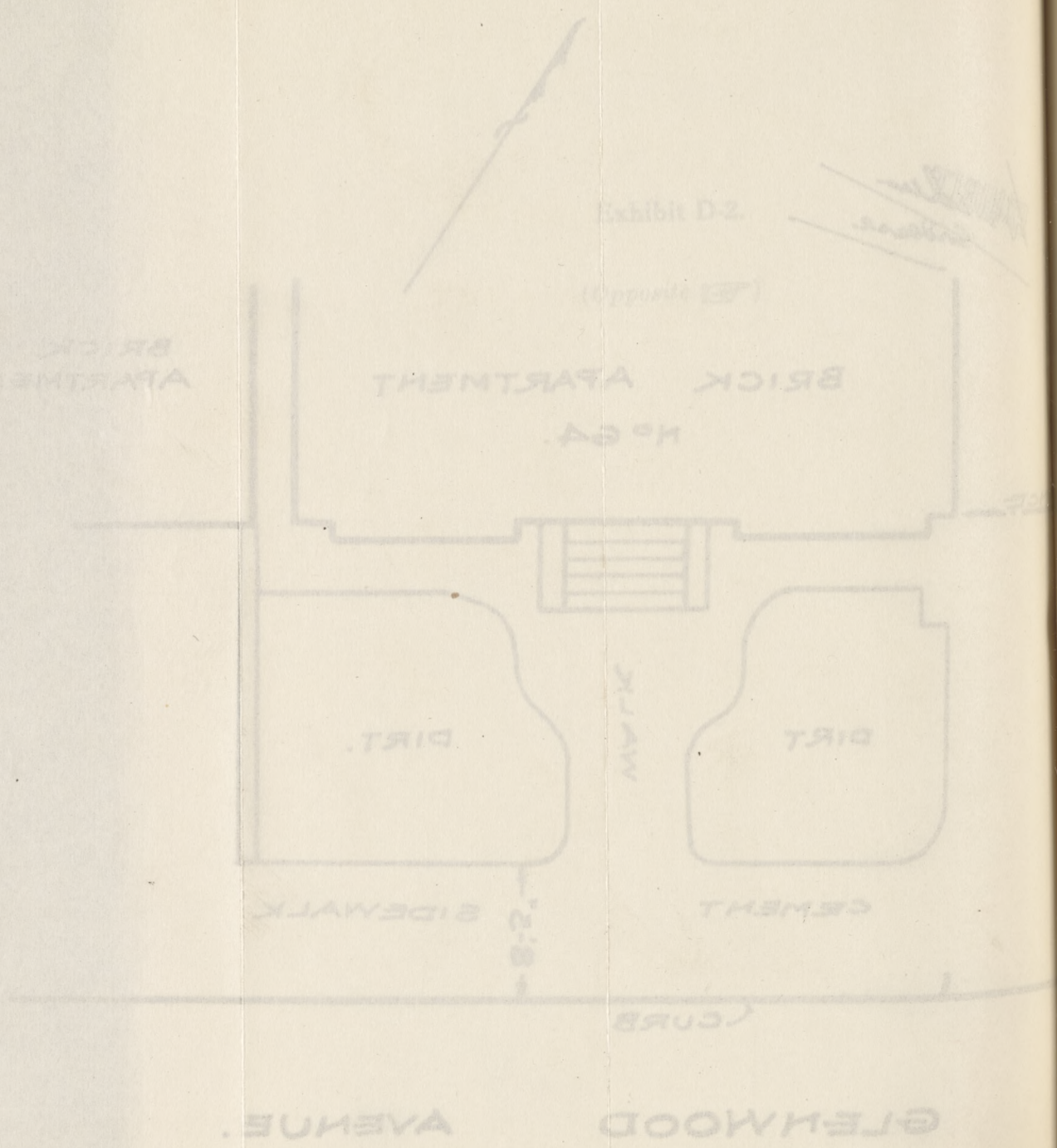
SIDEWALK

8'5"

CURB

GLENWOOD

AVENUE.



BRICK APARTMENT

BRICK APARTMENT No 64

DIRT

DIRT

SIDEWALK

CEMENT

CURB

AVENUE

GLENWOOD

Exhibit D-2

(Footings)

8'-2"

Judgment Record.

HEDSON COUNTY CIRCUIT COURT

Plaintiff, vs. Defendant.	Doroxy Tazzer and Gerson Tazzer, Plaintiff, vs. Thon F. Metzenick, Defendant.	10
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This action was tried before Judge Thomas Brown with a jury at the Hedson County Court House on May 25th and May 26th, 1921.

The cases having been heard and submitted to the jury, they returned their verdict as follows: the sum of Eighteen Hundred and Fifty Dollars to Dorothy Frantz, and the sum of Two Hundred and Fifty Dollars to George Frantz against the defendant, Hugh F. Metzenick.

Whereupon, it is adjudged that the plaintiff Dorothy Frantz, recover of the defendant, Hugh F. Metzenick, the sum of Eighteen Hundred and Fifty Dollars, and the plaintiff, George Frantz, recover of the defendant, Hugh F. Metzenick, the sum of Two Hundred and Fifty Dollars, and costs of suit to be taxed.

Judgment entered this 25th day of May, 1921.

Thomas Brown,
 Judge.

Judgment Record.

HUDSON COUNTY CIRCUIT COURT.

10	<p style="text-align: center;">DOROTHY PRANGE and GEORGE PRANGE, Plaintiffs, <i>vs.</i> HUGH F. McLAUGHLIN, Defendant.</p>	<p style="font-size: 4em; line-height: 1;">}</p> <p style="text-align: center;">Action at Law. Judgment.</p>
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This action was tried before Judge Thomas Brown with a jury at the Hudson County Court House on May 24th and May 25th, 1934.

20 The cause having been heard and submitted to the jury, they returned their verdict as follows: the sum of Eighteen Hundred (\$1800) Dollars to Dorothy Prange, and the sum of Two Hundred (\$200) Dollars to George Prange, against the defendant, Hugh F. McLaughlin.

30 Whereupon, it is adjudged that the plaintiff, Dorothy Prange, recover of the defendant, Hugh F. McLaughlin, the sum of Eighteen Hundred (\$1800) Dollars, and the plaintiff, George Prange, recover of the defendant, Hugh F. McLaughlin, the sum of Two Hundred (\$200) Dollars, and costs of suit to be taxed.

Judgment entered this 25th day of May, 1934.

THOMAS BROWN,
Judge.

Judgment Record.

HUDSON COUNTY CIRCUIT COURT.

DOROTHY PRANGE and GEORGE PRANGE, <p style="text-align: right;">Plaintiffs,</p> <p style="text-align: center;"><i>vs.</i></p> HUGH F. McLAUGHLIN, <p style="text-align: right;">Defendant.</p>	Judgment entered May 25, 1934. Damages \$2,000.00 Costs 76.52 <hr style="width: 50%; margin-left: auto; margin-right: 0;"/> Total \$2,076.52 David M. Klausner, Attorney for Plaintiffs.	10
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Judgment on Verdict in the above entitled cause was entered in this Court on the twenty-fifth day of May, in the year of our Lord One Thousand Nine Hundred and thirty-four, in favor of the Plaintiffs Dorothy Prange and George Prange and against the Defendant Hugh F. McLaughlin in a plea of Action at Law for the sum of Eighteen Hundred Dollars in favor of the Plaintiff Dorothy Prange, and for the sum of Two Hundred Dollars in favor of the Plaintiff George Prange, damages and Seventy-six Dollars and Fifty-two cents costs of suit.

Judgment entered and signed this 25th day of May, 1934.

THOMAS BROWN,
 Judge.

Notice of Argument.

(Filed September 14, 1934.)

NEW JERSEY COURT OF ERRORS AND
APPEALS.

10	<p style="text-align: center;">DOROTHY PRANGE and GEORGE PRANGE, Plaintiffs-Appellees,</p> <p style="text-align: center;"><i>vs.</i></p> <p style="text-align: center;">HUGH F. McLAUGHLIN, Defendant-Appellant.</p>	<p>Action at Law. On Appeal from Hudson County Circuit Court.</p> <p>Notice of Argument.</p> <p>Sat below: Brown, C. C. J.</p>
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20 *To David Mr. Klausner, Esq.,*
 Attorney for Plaintiffs-Appellees:

Sir:

PLEASE TAKE NOTICE that the argument of the appeal in this cause will be brought on at the next term of the Court of Errors and Appeals of New Jersey to be held at the State House, in the City of Trenton, on Tuesday, the 16th day of October next, at eleven o'clock in the forenoon, or as soon thereafter as the said Court can attend to the same.

30

Dated: September 13, 1934.

Respectfully,

JOHN J. FALLON,
Attorney for Defendant-Appellant.

Service of a copy of the within Notice of Argument is duly acknowledged this 13th day of September, 1934.

40

DAVID M. KLAUSNER,
Attorney for Plaintiffs-Appellees.

136 OCT. T. 1934

New Jersey Court of Errors and Appeals

DOROTHY PRANGE and GEORGE
PRANGE,
Plaintiffs-Appellees,
vs.
HUGH F. McLAUGHLIN,
Defendant-Appellant.

Action at Law.
On Appeal from
Hudson County
Circuit Court.

**BRIEF ON BEHALF OF DEFENDANT-
APPELLANT.**

Statement of Facts.

The plaintiffs below instituted an action to recover damages for personal injuries sustained by plaintiff, Dorothy Prange, occasioned by a fall on the sidewalk in front of the defendant's apartment house.

The complaint, in the first count, set out a cause of action in negligence, and at the conclusion of the plaintiffs' case, a non-suit was granted as to said count (Case, p. 63, l. 36).

The second count, as amended in the course of the trial, is based upon the theory of public nuisance. It alleges in Paragraph Three (Case, p. 13) that

“at all times herein mentioned, the defendant subjected the said sidewalk in front of the said premises to a use that was unusual and to a use that was beneficial to him as distinguished from the use that it was subjected to for the public; the defendant used the said

sidewalk and permitted the use of the said sidewalk for the purpose of having motor trucks pass from the roadway proper upon and across the said sidewalk to deliver merchandise and fuel into the said building premises for the benefit and use of the said defendant, and a hole was made in the said sidewalk as a result thereof, and that the said hole so created and maintained by the defendant was a public nuisance and a source of great danger to all persons lawfully using and walking upon the said sidewalk.”

It alleges in Paragraph Four (Case, p. 13) that

“the said sidewalk became broken up and defective and unsafe as the result of a use for which it was not normally designed in that the defendant permitted motor trucks to pass upon and over the said sidewalk for the purpose of delivering merchandise and fuel into the said building and premises for the benefit and use of the said defendant, and as a result of the said use, a hole was made in the said sidewalk and the ground beneath, and the said hole so created and maintained by the defendant was a public nuisance and a source of great danger to all persons lawfully walking upon the said highway.”

It alleges in Paragraph Six (Case, p. 13) that

“the condition of the above sidewalk as above set forth, during the period above mentioned, existed for such a long time that the defendant should have and did have knowledge of the said condition and nuisance.”

In support of such allegations, plaintiffs submitted the following proofs:

That a coal company or companies, by means of automobile trucks, delivered coal to the defendant's apartment house (Case, p. 56, l. 23; p. 49, l. 11) which had a central heating system for the furnishing of heat to the defendant's said build-

ing (Case, p. 49, l. 20); that the coal merchants' trucks went upon the sidewalk at least six or seven times in the winter of 1931 (Case, p. 42, l. 40; p. 43, l. 9) and four or five times in the year 1930 (Case, p. 46, l. 3); that in order to get as close as possible to the entrance of the apartment house, the truck drivers would back the truck so that the right wheel of the truck would be about a foot from the curb on the sidewalk (Case, p. 56, l. 32), and that as a result, particles of the sidewalk became broken (Case, p. 62, l. 19), and it was in such broken condition of the sidewalk that the plaintiff, Dorothy Prange, stepped into a hole and fell (Case, p. 19, l. 35). The proofs also show that the defendant owned the apartment house for a period of approximately seven years preceding the date of accident (Case, p. 42, l. 10), and lived in the premises about two years prior to the date of accident (Case, p. 41, l. 31). The proofs further show that the defendant had been sick for at least twenty years (Case, p. 50, l. 21), for many years past had not attended to any of his business affairs (Case, p. 54, l. 35), and that the alleged broken condition of the sidewalk was never brought to his attention (Case, p. 47, l. 31; p. 62, l. 30).

At the conclusion of the plaintiffs' case, counsel for the defendant moved for a non-suit which was denied and exception was duly taken (Case, p. 70, l. 30). Upon the conclusion of the case, counsel for the defendant moved for a direction of verdict in favor of the defendant and against the plaintiffs, which motion was denied and exception was duly taken (Case, p. 78, l. 19).

The defendant now appeals, urging as grounds for reversal:

- (1) That the lower court erred in denying defendant's motion for a non-suit;

(2) That the lower court erred in denying defendant's motion for a direction of verdict in favor of the defendant and against the plaintiffs.

The questions now before this court are:

(1) Did the court below err in its denial of the motion for a non-suit?

(2) Did the court below err in its denial of the motion for a direction of a verdict in favor of the defendant and against the plaintiffs?

(3) Did the proofs adduced substantiate the allegations of the complaint and impose a liability upon the defendant?

ARGUMENT

POINT I.

The proofs were uncontroverted that the condition of the sidewalk complained of was occasioned by the acts of an independent contractor by and through its servants, agents or employees.

The rule is now firmly established that where the owner of lands undertakes to do a work which, in the ordinary mode of doing it, is a nuisance, he is liable for any injuries which may result thereby to third persons, though the work is done by an independent contractor exercising an independent employment and employing his own servants. *But when the work is not in itself a nuisance, and the injury results from the negligence of such contractor or his servants in the execution of such work, the contractor alone is*

liable, unless the owner is in default in employing an unskillful or improper person as a contractor. (Italics mine.) *Cuff v. Newark and New York R. Co.*, 35 N. J. L. 17 at p. 22; aff'd. 35 N. J. L. 574; *Redstrake v. Swayze*, 52 *Id.* 129, aff'd. 52 *Id.* 414; *Sarno v. Gulf Refining Co.*, 99 *Id.* 340, aff'd. 102 *Id.* 223; *Riley v. Jersey Leather Co.*, 100 *Id.* 300; *Busch v. Seaboard By-Products Co.*, 100 *Id.* 304; *Bush v. Margolis*, 102 *Id.* 179; *Giroud v. Stryker Transportation Co.*, 104 *Id.* 424; *Messina v. Terhune*, 106 N. J. L. 119. For cases which bring truckmen within the category of independent contractors see 39 Corpus Juris 1327 sec. 1530.

In *Cuff v. Newark &c. supra*, the Court discusses at length the reason for the aforesaid salutary principle, and says (at p. 23),

“the point of inquiry consists in the search for the principle upon which one man incurs a liability for an act not done by himself. That liability flows from the relation of *master and servant*, a relation incident to which is the power to select the servant, and to direct him in the execution of the duties of his employment, and to discharge him when found to be incompetent; and also the duty to so control his acts that no injury may be done to third persons.” (Italics mine.)

In *McGuire v. Grant*, 25 N. J. L. 356, the court held (on p. 369) that where the act complained of was not done by the defendant himself, the relation of master and servant must subsist between the defendant and those by whose instrumentality the work was done in order to render the defendant liable.

And as was stated by Justice Minturn in the case of *Courtinard v. Gray Burial Co.*, 98 N. J. L. 493, at page 496,

“Fundamentally, as we have demonstrated in subsequent cases, the theory of master and

servant, like that of principal and agent, is based upon the legal conception of representation in a chosen and accepted line of service, by which the employee practically becomes, for that particular duty, the *alter ego* of the master. It becomes manifest, therefore, that the vicarious responsibility of a third party for injury resulting from the negligent act of another can be legally or logically supported upon no other recognized conception."

And in expounding the doctrine of liability arising out of the master and servant relationship, the court further said (on p. 495),

"The doctrine of master and servant from which emanates the principle of *respondeat superior*, is based in essence upon the legal theory inherent in the maxim, *qui facit per alium facit per se*, involving fundamentally the fact of control, direction and representation in the service at hand."

Applying the aforesaid principles to the facts in the case *sub judice*, it appears that there was not even an iota of proof which would give rise to an inference that the relation of master and servant existed between the defendant and the drivers of the coal trucks or their employers. The case lacks proof that the defendant exercised any control or authority over the actions of the drivers of the coal trucks, and in such respect is therefore substantially similar to the case of *Giroud v. Stryker Transportation Co.*, *supra*, where the court said (at p. 426) that the relation of master and servant exists whenever the employer retains the right to direct the manner in which the business shall be done, as well as the result to be accomplished, or, in other words, not only what shall be done, but how it shall be done; and found as a fact that the defendant exercised no control

over the driver in the performance of the work other than to direct where the material should be delivered. It is manifest from the undisputed facts in the instant case that the defendant neither hired, directed or controlled the drivers of the coal trucks, leaving to them the exclusive management, direction and control of the vehicles, which factors under the authority of the *Giroud* case, *supra*, present the substantial inquiries and determinative tests for ascertaining the existence of the legal relationship of master and servant, and consequent liability thereunder.

The case *sub judice*, then, being governed by the independent contractor theory, the question for this court to determine is whether the delivery of coal to the defendant's apartment house by the coal truck drivers involved, in the ordinary mode of performing the work, the commission of any acts creating a nuisance. That the work of delivering coal, which was the work of the drivers of the coal trucks, did not inherently involve the doing of any act which might result in the creation of a public nuisance is manifest. The ordinary mode of delivering coal did not require the driving of the coal trucks upon the sidewalk. The injury to plaintiff in the instant case may be said to have resulted from the negligence, if any, of the coal merchant, or its servants, in the manner of the delivery of coal to defendant's apartment house. It is manifest from the testimony that the alleged negligent act which it is claimed was the cause of the happening to the plaintiff, Dorothy Prange, was not inherent in such undertaking, but such happening was caused entirely by the negligent manner of operation by the employees of such coal merchant. In this respect the instant case is essentially like that of *Sarno v. Gulf Refining Co.*, *supra*, in which it appears that a gasoline tank had been installed under the sidewalk

abutting defendant's premises which exploded, causing a manhole cover situated on the sidewalk to be blown into the air, injuring plaintiff. The owner of the premises had engaged a plumber to remove the tank, and because of inexperienced handling, gasoline escaped therefrom, causing the explosion. The plaintiff endeavored to hold the defendant liable, upon the ground that the work of removing the tank was inherently dangerous and tantamount to the existence of a nuisance, from the effect of which in its dangerous transmission the defendant could not legally absolve itself, by contracting the work out to another. The court judicially observed that there is nothing inherently dangerous in gasoline, and that the danger, if any, arises not from its use in ordinary transportation, but from its negligent use or misuse in a dangerous environment; and found as a fact from the testimony, that the negligent act which was the origin of the accident and which in legal contemplation was *causa causam* of the explosion, was not inherent in the work of removal itself, but inherent entirely in the negligent manner of operation of the employees of the contractor.

There was no proof whatever in the case submitted tending to show that the defendant was in default in employing an unskillful or improper coal merchant. A coal merchant, or its servants, cannot in the absence of affirmative proof to the contrary be adjudged an improper party to contract with for the delivery of coal. The burden of proving his unfitness, or the impropriety of employing him for the work was upon the plaintiff, and the case is devoid of such proof. *Sarno v. Gulf Refining Co., supra.*

In *Mann v. Max*, 93 N. J. L. 191, the owner of land abutting on a public street employed a contractor to erect a building thereon. The contractor

employed a subcontractor for the mason work, and the latter in the prosecution of his work erected scaffolding projecting over the sidewalk, against which plaintiff, passing at night, struck his head and was injured. The court said that the building of a new building was not a nuisance *per se*; nor was the doing of the mason work thereon, nor was the erection of a proper scaffold for the execution of the work, and observed that the owner had no control over either contractor as to the methods of his work.

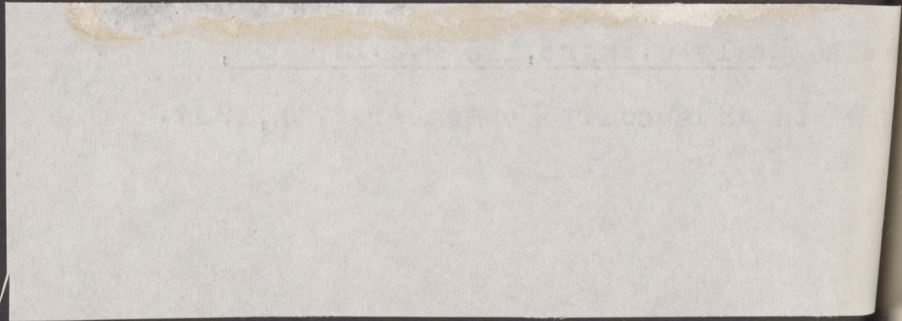
In *Savarese v. Fleckenstein*, 111 N. J. L. 574, the plaintiff instituted an action to recover damages for personal injuries occasioned by a fall on the sidewalk in front of the premises of the defendant. It appeared that the defendant had contracted with an oil burner company for the installation of an oil burner in the premises and the contract of installation called for placing an oil tank under the sidewalk and replacement of the pavement which would necessarily be opened for the purpose. After the burner had been installed, the sidewalk that had been removed was refilled with cinders and the sidewalk permitted to remain in that condition for about three weeks. This resulted in the fill becoming uneven and holes forming to the depth of four or five inches below the adjacent concrete sidewalk, and it was such condition which occasioned plaintiff's fall. It was sought in that case to hold the owners of the adjacent premises liable upon the theory that a nuisance was created for which, by reason of the delay of the contractor in making the proper repair, the owners became liable. Our Supreme Court held that such contention was unsound; that the owner of lands is not liable for the acts of an independent contractor who constructs a building on abutting premises and dangerously obstructs the sidewalk as incident thereto. The

court discussed the case of *Mann v. Max, supra*, at length and said (at p. 576),

“The case of *Mann v. Max, supra*, relied on in the opinion of the court below, seems to us an authority exactly to the contrary of liability. There, as here, there was a contract to do work on the premises abutting a sidewalk. In that case it was the construction of a building; here it was the installation of an oil heating system. Both contemplated certain uses of the sidewalk by the contractor. There the plaintiff struck his head against a beam of a scaffold extending over the sidewalk; here the plaintiff fell over the partly repaired sidewalk, the replacement of which was called for in the contract. The trial judge submitted to the jury to find *whether the obstruction of the scaffold was a nuisance, and if so whether it had existed as such long enough for a reasonable owner to notice the fact and take proper steps to abate it.* The Court of Errors and Appeals in an opinion by Justice Parker held that *this was error*, and that *no liability of the owner of the property could be predicated on the theory of a duty to abate if it existed there by the act of the independent contractor.* The only difference between that case and the present is that here it was a sidewalk which was disturbed in the placing of the oil tank instead of a beam extending over it. When the fill was made, it, like the scaffold, was left in a dangerous condition by the contractor prior to the replacement of the sidewalk as required by the contract. In the one case an affirmative act of negligence, in the other a negative. In principle there is no difference between the two cases. If in the *Mann* case the *owner did not become liable by reason of failure to abate a nuisance remaining on the sidewalk long enough for such owner to notice the fact and take steps to abate it*, he did not become liable for failure to abate a nuisance which an independent contractor had created through neglect to properly tamp or other-

See also Healy v. Sayre, 113 N.J. Law 308,

decided by this court September 27th, 1934.



wise guard against holes in the incompleting repair of the sidewalk'' (*Italics mine*).

Applying the principles aforesaid, the court said that the *Savarese* case presented a clear case of an independent contractor, negligently performing his work, and observed that although the general scheme of the improvement was for the benefit of the owners, they could not become liable except upon the implied adoption of the acts of the wrong-doer, of which there was no proof.

It is significant in considering the principles of the *Savarese* case with relation to the case *sub judice*, to note that although the testimony in that case showed that the condition of the sidewalk was made known to the owners, and that it had existed long enough for them to have been put on notice, such set of facts were not considered in the majority opinion of the court as amounting to an implied adoption by the owners of the acts of the wrong-doer.

The learned Justice Perskie filed a dissenting opinion in which he urged that the owner of property should be held liable in such circumstances where the condition complained of was found to have existed for such an unreasonable length of time as to put the owners upon notice and charge them with knowledge. The majority opinion of the court, however, did not consider that the question of notice to, or knowledge of the owners was material in such case in determining the question of liability.

In the case *sub judice* the plaintiffs established that the condition of the sidewalk existed over a period of time. So far as it relates to defendant's liability, this aspect is unimportant. *Savarese v. Fleckenstein, supra*.

POINT II.

The case *sub judice* is distinguishable from that of *Zak v. Craig* upon which the plaintiffs relied in the court below.

In *Zak v. Craig*, 136 Atl. 410 (New Jersey Supreme Court—not officially reported), the facts were that the plaintiff, while walking on a sidewalk in front of and abutting premises owned by the defendant, fell and was injured as a result of a defective condition of the sidewalk. It appeared that the defendant leased the premises for the use of a stable and ingress to and egress from such stable and street for horses and vehicles could be accomplished only by driving over the sidewalk. The court supported a verdict in plaintiffs' favor, upon the theory that a public nuisance was created by the extraordinary strain put upon the sidewalk by the tenants of the defendant *who were authorized by her to use the premises for a purpose which caused the sidewalk to be subjected to unusual pressure and strain*, and for which use the sidewalk was not normally designed, that is, for motor trucks or other heavy vehicles to be driven over it. The court found that the condition of the sidewalk was the result of *participation by the owner of the premises in the creation of the nuisance alleged*, and stated,

“The participation was to be inferred from the fact that the premises were leased for a purpose which subjected the use of the sidewalk for the passage of heavy carts from the street to the lot in question.”

In the case *sub judice*, the facts adduced from the testimony essentially differ from those in the *Zak* case. The instant case is barren of any proof showing participation by the defendant, either

expressly or impliedly, in the acts which caused the sidewalk to become in a condition of disrepair, whereas, in the *Zak* case, the owner had authorized the lessee to use the premises for the purpose of passing trucks over the sidewalk so as to make the act of the lessee her own.

In the case *sub judice*, the act of the coal truck operators in driving upon the sidewalk was neither participated in by the defendant, nor authorized by him.

The defendant's purchase of coal from a coal merchant did not contemplate that coal trucks should go upon the sidewalk, nor was there any personal interposition by the defendant, as a result of which the relation of master and servant between the defendant and the coal merchant would be inferable, and under well settled principles hereinbefore referred to, the defendant could not be held responsible for the negligence or other unlawful act of such coal merchant or its employees. *Messina v. Terhune, supra*, 106 N. J. L. 119 at page 122.

CONCLUSION.

It is respectfully submitted, therefore, that the action of the trial court in refusing the defendant's motion for a non-suit was error; and that the action of the trial court in refusing the defendant's motion for a direction of a verdict in favor of the defendant and against the plaintiffs was error, and that the judgment appealed from should be reversed.

Respectfully submitted,

JOHN J. FALLON,
Attorney for and of Counsel
with Defendant-Appellant.



New Jersey Court of Errors and Appeals

DOROTHY PRANGE and
GEORGE PRANGE,
Plaintiffs-Appellees,

vs.

HUGH F. McLAUGHLIN,
Defendant-Appellant.

Action at Law.

On Appeal from
Hudson County
Circuit Court.

BRIEF ON BEHALF OF PLAINTIFFS- APPELLEES.

Statement of Facts.

This appeal brings before this Court for review a judgment of Eighteen Hundred (\$1,800) Dollars in favor of the plaintiff, Dorothy Prange, and a judgment of Two Hundred (\$200) Dollars in favor of the plaintiff, George Prange, her husband, against the defendant, Hugh F. McLaughlin.

The action was brought by the plaintiffs to recover damages sustained as the result of a fall by the plaintiff, Dorothy Prange, on the sidewalk in front of the defendant's apartment house.

On January 28, 1932, the plaintiff, Dorothy Prange, together with her sister, Mrs. Poillon, and a friend of theirs, Mrs. Beddinger, were walking along Glenwood Avenue, Jersey City. The plaintiff, Dorothy Prange, was walking on the outside, nearest the curb (p. 18, ll. 22 to 40). As they were walking along in front of the defendant's apartment house at 64 Glenwood Avenue, the left foot of the plaintiff, Dorothy Prange, went down into a hole in the sidewalk in front of the said premises, causing her to fall out into the gut-

ter (pp. 19, 20, l. 2). The hole where she fell is shown on the four photographs, Exhibits P-1, P-2, P-3 and P-4 (pp. 102, 104, 106, 108), the hole being marked "X" on Exhibit P-1 (p. 22, ll. 10 to 20, ll. 29 to 40; p. 23, ll. 1 to 12; p. 35, ll. 24 to 40; p. 36, ll. 1 to 5; p. 38, ll. 36 to 40; p. 39, ll. 1 to 12). This hole was quite big, and was a rapid drop off from the level of the surface of the sidewalk (p. 52, ll. 10 to 20).

The defendant owned the apartment house for a period of approximately seven years preceding the date of the accident, and lived in the premises about two years prior to the date of the accident (p. 41, l. 31, to p. 42, l. 21). The apartment house had a central coal heating system by which the defendant landlord provided the heat for the entire apartment house (p. 49, ll. 1 to 36). Coal was delivered to the defendant's apartment house by automobile trucks which went up on the sidewalk and were there unloaded by carrying bags of coal from the trucks to the coal chute, which was in the front of the house, and is marked "C" on Exhibit P-1 (p. 43, ll. 9 to 32). The testimony also showed that these coal trucks went up on the sidewalk at least six or seven times in the winter of 1931 (p. 42, l. 40 to p. 43, l. 9), and four or five times in 1930 (p. 46, ll. 3 to 21; p. 56, ll. 1 to 7). The trucks would be backed up on the sidewalk so that the right wheel of the truck would be about a foot from the curb on the sidewalk, the side of the truck being parallel to the front of the house, and the left wheel of the truck out in the gutter (p. 45, l. 19 to p. 46, l. 2; p. 56, l. 29 to p. 57, l. 13). As a result of these coal trucks going up on the sidewalk, unloading and standing in that position on the sidewalk, particles of the sidewalk broke, and the defective condition of the sidewalk, where the plaintiff, Dorothy Prange, fell, resulted (p. 61, l. 19, to p. 62, l. 28). At the

time that the defendant came into possession of the property in 1925, the sidewalk was in good condition (p. 59, ll. 15 to 20). The testimony showed, however, that in 1930 the hole in the sidewalk was about half the size it was on the date of the accident on January 28, 1932 (p. 58, ll. 35 to 39).

In the case at issue, the action is based upon the theory of a public nuisance, and is set forth in the amended second count of the complaint (pp. 12 to 14).

The Court below denied the defendant's motions for a non-suit and for the direction of a verdict in favor of the defendant, and the defendant is now appealing on the grounds that the Court below erred in denying these two motions.

ARGUMENT.

POINT I.

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

In considering this appeal, it is important to bear in mind that the element of nuisance charged to the defendant is the gravamen of the complaint.

In the early case of *Durant vs. Palmer*, 29 N. J. L., 544, this Court at page 547, said:

“The street, and every part of it, by force of the common law, is so far dedicated to the public that any act or obstruction that unnecessarily incommodes or impedes its lawful use by the public is a nuisance.”

In the instant case, the defective condition of the sidewalk clearly constituted a public nuisance.

A view of the photographs marked Exhibits P-1, P-2, P-3 and P-4, amply supports that fact.

In *Braelow vs. Klein*, 100 N. J. L., 156, this Court held that one who purchases property, the sidewalk in front of which was approximately three inches above the adjoining walks, is chargeable with maintaining a nuisance in the public highway, and liable for injuries therefrom. The Court, speaking through Justice Lloyd, said:

“Taking up the questions thus raised, the motions for a nonsuit and the direction of a verdict in favor of the defendant are first in importance. To properly consider them it must be borne in mind that the element of nuisance charged to the defendant was the gravamen of the complaint. It was contended, and there was proof to establish, that the sidewalk of the defendant Klein was approximately three inches above the sidewalk of Lemkin, and above that of other sidewalks in the block; that this created a dangerous menace to the users of the foot-walk of the street. There was also proof that the condition had existed for a number of years during the ownership by the defendant of the premises 283 Prince Street, and from which a jury could infer an adoption by him of the condition of the walk when he purchased. We have, therefore, presented the construction of a footwalk in a public highway so far out of alignment with the true pavement level as to constitute a danger in its use, and the continuance of that condition by the defendant without any effort on his part to correct the misalignment or to remove the danger. *It is difficult to escape the conclusion of law that he would be chargeable with at least maintaining a nuisance in the public highway.*” (Italics mine.)

In the case at issue, a consideration of the facts is subject, of course, to the well settled principles of law enunciated by Justice Perskie, speaking

for this Court, in *Repasky vs. Novich*, 113 N. J. L., 126, at page 129:

“That in passing upon a motion to nonsuit and for the direction of a verdict the evidence will not be weighed. All the evidence which supports the claim of the party against whom the motion is made must be accepted as true, and he is entitled to the benefit of all legitimate inferences which may be drawn therefrom. Where fair-minded men might honestly differ as to the conclusion to be drawn from facts, whether controverted or uncontroverted, the question at issue should be submitted to the jury. *Lipschitz v. New York and New Jersey Produce Corp.*, 111 N. J. L. 392.”

In the instant case, the jury could infer that the defendant permitted the coal trucks to go up on the sidewalk for the purpose of delivering the coal into his building for his benefit and use from the number of times that the evidence showed it happened in 1930 and 1931. Such a use of the sidewalk was admittedly not a normal use for the public, and was an unusual one. The jury could also infer that it was an unreasonable use for the defendant's own benefit. The testimony further showed that this unusual use of the sidewalk, which was beneficial to the defendant, caused it to become broken up, defective and unsafe, and created a big hole therein, which was a dangerous menace to all persons walking upon this sidewalk, thus including the plaintiff, Dorothy Prange. This public nuisance, according to the evidence, existed for a period of at least two years, from which the jury could readily infer that the defendant should have and did have knowledge of the said nuisance. *McKeown vs. King*, 99 N. J. L. 251; *Stark vs. The Great Atlantic & Pacific Tea Company*, 102 N. J. L. 694. The defendant clearly owed a duty to the plaintiffs to abate this nuisance within such an

unreasonable length of time, and since he did nothing to remedy the danger, we respectfully contend that he is responsible for the injuries sustained by the plaintiff, Dorothy Prange.

The above proof is surely sufficient to show that the defendant adopted or accepted the defective condition of the sidewalk. In any event, the conclusion here is also inescapable that the defendant is chargeable with at least maintaining this nuisance.

The defendant, in his brief at page 4, argues that he should not be held liable because the proofs were uncontroverted that the condition of the sidewalk complained of was occasioned by the acts of an independent contractor by and through its servants, agents or employees, and that since this nuisance was created during the work of a contractor, which was not in itself a nuisance, the defendant is relieved from any liability. In so arguing, the defendant is entirely ignoring the proof as to the adoption or the acceptance of the nuisance, and also the proof as to the maintenance of the nuisance. The defendant relies principally upon the cases of *Savarese vs. Fleckenstein*, 111 N. J. L. 574, and *Mann vs. Max*, 93 N. J. L. 191.

In the case of *Savarese vs. Fleckenstein*, *supra*, the Supreme Court held that the defendant, owner of premises adjacent to a sidewalk, was not liable for failure to abate a nuisance which an independent contractor, in installing an oil burner on the premises, had created by failure to properly tamp, or otherwise guard against holes, in the incomplete repair of such a sidewalk. Justice Lloyd, speaking for the Supreme Court, at page 577, said:

“The general scheme of the improvement was of course for the benefit of the owners, but as we have seen the owners are not responsible for the acts of an independent sub-

contractor, illustrated in many cases. They could only become liable upon the implied adoption of the acts of the wrongdoer, and of this there was no proof. *The installation had been but recently completed and the sidewalk not yet replaced. There was no evidence that it had been accepted or even paid for at the time of the plaintiff's fall.* If, invoking the doctrine of *Braelow v. Kline, supra*, we should hold that acceptance by the owner of the faulty condition of the sidewalk left by the sub-contractor imposed a duty on the owners to remedy the defects, the absence of proof of such acceptance precludes its application and brings the owners within the protection of the numerous decisions in which the rules of non-liability first laid down in this opinion are declared." (Italics mine.)

In the case *sub judice*, however, the trucks of the coal company, the wrongdoer, went up on the sidewalk to deliver coal to the defendant at least four or five times in 1930, and six or seven times in the winter of 1931, and created the hole in the sidewalk existing on January 28, 1932, the date of the accident. This hole was in existence at least two years at the time of the accident, for in 1930, it was about half the size it was on the date of the accident. Surely, this is sufficient proof from which a jury could infer both the implied adoption of the acts of the coal trucks and also the acceptance by the defendant of the faulty condition of the sidewalk left by the coal trucks.

Justice Perskie in the dissenting opinion in *Savarese vs. Fleckenstein, supra*, held at page 581:

"The owners permitted the public at large, including the plaintiff, to use the premises. The premises were hazardous and unsafe. They constituted a public nuisance. The owners owed a duty to the plaintiff to abate the nuisance, within a reasonable time after

they had notice thereof, actual or constructive. For the breach of that duty, they should respond to the plaintiff unless, of course, it can be held, in a case of this character, that she was guilty of contributory negligence, or that she assumed the risk."

Under the above rule of law, the question of whether or not the defendant in the case at issue was liable was clearly one for the jury to decide.

The following remarks of Justice Perskie in the above dissenting opinion at page 578, as to the case of *Mann vs. Max*, *supra*, are also applicable to the case *sub judice*:

"The case of *Mann v. Max*, 93 N. J. L. 191, is cited and urged as supporting the conclusion reached by the majority, *i. e.*, that there is no liability on the part of the owners in the premises. In that case it was held that the owner of real estate abutting upon a highway may become liable for the act of an independent contractor, even though the thing done is itself not a nuisance *where a continuation of the condition complained of for an unreasonable length of time does result in a nuisance*. Mr. Justice Parker, in that case at (p. 194) held: 'The building was unfinished, and, normally such a scaffold would remain till no longer needed, for the front wall which was under erection; so *the question of its maintenance for an unreasonable time is out of the case.*' (Italics mine.)"

In Point II of the defendant's brief, he attempts to distinguish the instant case from *Zak vs. Craig*, 136 Atl. 410 (New Jersey Supreme Court, not officially reported), which was one of the cases submitted by the plaintiffs in the Court below. In that case, the defendant, lessor of premises for use as a stable, accessible from street for horses and vehicles only by driving over sidewalk, was liable in damages to a pedestrian injured by fall

because of defective condition of sidewalk where such use created a nuisance causing the injury.

The Court at page 411 said:

“The theory upon which the liability of the defendant was submitted to the jury was the maintenance of a nuisance in the public highway. There was plenary proof that the sidewalk did not become defective and unsafe from the ordinary use thereof by the general public, but it became broken up as the result of a use for which it was not normally designed, namely, the passage of heavy motor trucks over it to and from the defendant’s garage, leased to tenants, for the storing of motor trucks, and in which use the flagstones were broken, and a hole seven inches in diameter and six inches in depth was made in the sidewalk, making it unsafe and dangerous to the public having occasion to use it. The condition of the sidewalk constituted a public nuisance. *The only question in the case was whether there was any evidence tending to establish that the defendant caused or maintained a nuisance.*” (Italics mine.)

The Court held that since the defective condition of the sidewalk constituted a nuisance and did not have its origin from the ordinary wear and tear of a sidewalk, resulting from a normal use by the public, but was created by the extraordinary strain put upon the sidewalk by the tenants of the defendant, who were authorized by her to use the premises for a purpose which caused the sidewalk to be subjected to unsafe pressure and strain, and for which use the sidewalk was not designed, that is, for motor trucks or other heavy vehicles to be driven over it, the defendant became answerable to respond to the plaintiff in damages for the injuries she sustained.

The Court further found that the condition of the sidewalk was the result of participation by the owner of the premises in the creation of the nui-

sance alleged, which participation was to be inferred from the fact that the premises were leased for a purpose which subjected the use of the sidewalk for the passage of heavy carts from the street to the lot in question.

The Court thus found that the defendant was liable for the creation as well as for the maintenance of the nuisance.

We respectfully contend that in the instant case, the jury could also infer that the defendant participated in the creation of the nuisance in permitting the coal trucks to go up on the sidewalk the number of times that they did. The defendant could be held to have impliedly participated in this practice or impliedly authorized this practice.

The rule is that an owner of premises abutting upon a public street is not responsible for a sidewalk which has been impaired and rendered dangerous by reason of the wear and tear of the elements and a normal use by the public. *Rupp vs. Burgess*, 70 N. J. L. 7. *Braelow vs. Klein*, *supra*. *Glass vs. American Stores Co., Inc.*, 110 N. J. L. 152.

In the instant case, it is manifest that the faulty condition of the sidewalk did not have its origin from the ordinary wear and tear of a sidewalk resulting from a normal use by the public, and that when the coal trucks went up on the sidewalk and created the hole in question, the nuisance was created by an extraordinary strain put upon the sidewalk which was subjected to unusual pressure, and for which use the sidewalk was not designed.

In concluding, we therefore respectfully contend that the defendant impliedly participated in the creation of the nuisance, and in any event, the defendant clearly adopted and accepted the nuisance occasioned by the acts of the independent contractor. And we further respectfully urge that

what Justice Lloyd said in *Braelow vs. Klein, supra*, is particularly applicable to the liability of the defendant in the case *sub judice*, "*It is difficult to escape the conclusion of law that he would be chargeable with at least maintaining a nuisance in the public highway.*"

Conclusion.

We therefore respectfully submit that the Trial Court did not err in denying defendant's motions for a non-suit and for the direction of a verdict.

October Term, 1934.

Respectfully submitted,

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Attorney for and of Counsel with
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