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NEW JERSEY SUPREME COURT
SUSSEX COUNTY

HULDA NILSSON,)	Action at Law.	
Plaintiff			
—vs—)	Notice of Appeal to New Jersey Court of Errors and Appeals.	10
JOSEPH ABRUZZO,			
ANNA FORSTER			
ABRUZZO and PAUL			
MONEVASIS,			
Defendants,			

TO MESSRS. DOLAN & DOLAN, ATTORNEYS
OF PLAINTIFF

TAKE NOTICE that the defendants, Joseph Abruzzo and Anna Forster Abruzzo, appeal to the New Jersey Court of Errors and Appeals from the whole of the judgment entered in this cause, against the said defendants. 20

Dated—Nov. 29, 1929

MORRIS & DOWNING,
Attorneys of Defendants
Appellants.

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NEW JERSEY SUPREME COURT
SUSSEX COUNTY

HULDA NILSSON, Plaintiff

—vs—

JOSEPH ABRUZZO, ANNA FORSTER ABRUZZO
and PAUL MONEVASIS, Defendants

Action at Law

10

Notice of Appeal to New Jersey Court of Errors
and Appeals

Morris & Downing,
Attorneys for Defendants Appellants
Newton, N. J.

Service of the within notice is hereby acknow-
ledged this 30th day of November, 1929.

20

DOLAN & DOLAN,
Attorneys for Plaintiff.

30

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NEW JERSEY SUPREME COURT
SUSSEX COUNTY

HULDA NILSSON,	Plaintiff	Action at Law	}	
—vs—				
JOSEPH ABRUZZO,	Defendants	On Appeal to New Jersey Court of Errors and Appeals.	}	10
ANNA FORSTER				
ABRUZZO and PAUL				
MONEVASIS,				
		GROUNDS OF APPEAL		

TO MESSRS. DOLAN & DOLAN, ATTORNEYS OF
PLAINTIFF

TAKE NOTICE that the following are the Grounds of Appeal on which the defendants appellants, Joseph ^{of} Abruzzo and Anna Forster ^{of} Abruzzo, will depend in this cause.

20

1. Because the court erroneously refused to grant the motion of the defendants, Joseph Abruzzo and Anna Forster Abruzzo, for a non suit made after the opening of the case on the part of the plaintiff.

2. Because the court erroneously refused to grant the motion of the defendants, Joseph Abruzzo and Anna Forster Abruzzo, for a non suit made at the close of the plaintiff's case.

30

3. Because the court erroneously refused the motion of the defendants, Joseph Abruzzo and Anna Forster Abruzzo, for the direction of a verdict made at the close of the case.

4. Because the court erroneously charged the jury as follows: "Her contention is that there was negligence on the part of the owners of this building in that they undertook to do something in con-

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nection with these premises which was not done in a proper manner; that the workmen that they engaged to do the work did not do the work in a proper manner; that they did it as reasonably prudent persons would not have done it; and that the proximate cause of the falling of this radiator within a few weeks from the time that they negligently performed that work, was their having done this work in a way that reasonably prudent persons would not have done it, and if that be so, of course, the owners of the building would be responsible for the negligence of their servants, who would be the persons who did the work in this case, on this alteration work.”

10

5. Because the court erroneously charged the jury as follows: “The law further says that when a landlord does do something that he was not called upon to do, when he does make repairs, then he is under an obligation to the people that may lawfully be upon those premises, to do those repairs as a reasonably prudent person would do them.”

20

6. Because the court erroneously charged the jury as follows: “If you find here, as a matter of fact, that the proximate cause of this radiator falling was the negligent alteration of this building, as has been claimed by the plaintiff, then, of course, your verdict will be against the owners of this building, or the people that were then the owners, the Abruzzos.”

30

7. Because the court erroneously charged the jury certain requests to charge on the part of the defendant, Monvasis and enlarge upon the same as follows:

“1. If the injuries sustained by plaintiff were due to the faulty or defective construction of the building or installation of the radiator, and the de-

40

fendant, Paul Monevasis, used ordinary care in maintaining that part of the building under his control, the defendant, Monevasis, is not liable in this action."

"2. The said defendant, Monvasis, would not be liable under such circumstances set forth in this case, if the accident was entirely due to a latent defect in the construction or repair of the building or the hanging or placing of the radiator, if the jury believes that no notice of the same was had by this defendant, Monevasis." 10

"I add to that, and also that he had not only no notice but that he had no constructive knowledge, that is, that he did not have any expressed notice, that is, by having it called to his attention, or that he had by his negligence failed to discover it."

"3. Where injuries to a third person are due to the faulty or defective construction of the premises or because of a continuing nuisance thereon, the landlord is liable for such injuries and the tenant would not be, in the absence of notice of such defects to him." 20

"4. The tenant of premises is alone liable for a nuisance resulting from his own acts or negligence in the use of the premises, but for a nuisance resulting from the structure of the building the owner is liable." 30

"5. The rule that makes a landlord liable for injuries sustained by an invitee of the tenant on account of the nuisance at the time of the letting where the letting is of a public or semi-public purpose a landlord is liable."

"6. In this case the landlord was under no contract to supply the tenant with heat and the radia- 40

tor which existed in the premises was not used by the tenant. It was not incumbent upon the tenant nor had he a right to remove the radiator, nor was it the duty of the tenant to examine the building or the radiator for latent defects which existed at the time of the letting, which was on November 15, 1926 and if the tenant exercised ordinary care in the use of the premises the tenant would not be liable."

10 "That is, the last letting was on that date; the original letting was prior to that time. I do not know that it develops just how long. I think a year, perhaps, but I am not sure about that."

20 "7. The law imposes upon an ordinary tenant the duty of keeping the demised premises in repair and of returning them to his landlord at the end of his term in approximately the same condition in which he received them. That being so, it follows, as a necessary result, that a lessee is under no obligation to a third person to tear down a structure upon the demised premises, which, in the state in which it was at the commencement of the term, constituted a nuisance."

30 "8. The law does not impose upon anyone the duty of performing an act for the benefit of one person which would necessarily subject him to liability at the hands of another. In those cases in which the nuisance exists at the time of the creation of the estate and the lessee does nothing except to maintain the demised premises in the condition in which he received them, the person who suffers from the nuisance must look to the landlord, and not to the tenant, for redress. If the jury believes that the premises were in the same condition at the time of the accident as they were at the time of the letting, which was November 15, 1926, the tenant would not be liable in this case."

40

8. Because the damages awarded by the jury are excessive.

MORRIS & DOWNING,
Attorneys for Defendants,
Appellants, Joseph Abruzzo and
Anna Forster Abruzzo.

10

NEW JERSEY SUPREME COURT
SUSSEX COUNTY

HULDA NILSSON, Plaintiff

—vs—

JOSEPH ABRUZZO, ANNA FORSTER ABRUZZO
and PAUL MONEVASIS, Defendants.

20

Action at Law

On Appeal to New Jersey Court of Errors and
Appeals.

GROUNDS OF APPEAL

30

Morris & Downing
Attys. for Defendants Appellants
Newton, N. J.

Service of the within Grounds of Appeals is
hereby acknowledged this 30th day of November,
1929.

DOLAN & DOLAN,
Attorneys for Plaintiff.

40

THE STATE OF NEW JERSEY TO JOSEPH
ABRUZZO AND ANNA FORSTER ABRUZZO
AND PAUL MONEVASIS.

You are summoned to answer the annexed
amended complaint of Hulda Nilsson, in
L. S. an Action at Law in the Supreme Court.
And take notice that unless you file your
answer to said complaint with the Clerk
10 of the Supreme Court at Trenton, within twenty
days after service upon you of this writ and the
annexed complaint, the plaintiff may proceed in
the suit and judgment may be entered against
you.

WITNESS, WILLIAM S. GUMMERE, Chief
Justice of the Supreme Court at Trenton, New
Jersey, this Twenty-Fifth day of August, One
Thousand Nine Hundred and Twenty-Eight.

20 DOLAN & DOLAN
Attorneys.

FRED L. BLOODGOOD
Clerk.

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NEW JERSEY SUPREME COURT
SUSSEX COUNTY.

HULDA NILSSON,	}	Action at Law.	10
Plaintiff,			
—vs—	}	COMPLAINT.	10
JOSEPH ABRUZZO and			
ANNA FORSTER			
ABRUZZO, and PAUL			
MONEVASIS,			
Defendants.			

The plaintiff, Hulda Nilsson, residing at 66 Woodside Avenue, in the Town of Newton, County of Sussex and State of New Jersey, says that:

1. At the times hereinafter mentioned, the defendants, Joseph Abruzzo and Anna Forster Abruzzo, were the owners of the building and lot known as 222 Spring Street, in the Town of Newton, County of Sussex, and State of New Jersey. 20

2. The defendants, Joseph Abruzzo and Anna Forster Abruzzo, rented or leased a portion of said building to the co-defendant, Paul Monevasis, said portion of the building being located on the ground floor. 30

3. The said co-defendant, Paul Monevasis, conducted and operated a public barber shop in the portion of the premises rented by him.

4. On the morning of November 22, 1926, at about 9 o'clock the plaintiff lawfully entered the said public barber shop and seated herself to await her turn to be served.

5. By reason of the nature of the business con- 40

ducted therein, the defendants owed the plaintiff the duty to maintain the premises in a safe condition and with due regard to the health and welfare of the plaintiff.

6. Totally disregarding the said duty, the defendants allowed the premises to become in an unsafe condition, and in a state of disrepair, and were negligent in that they failed to maintain the premises in a safe condition and with due regard to the health and welfare of plaintiff.

7. Because of their negligence, a large iron wall radiator, affixed to and a part of the premises, became loose and without warning fell on the plaintiff.

8. The said radiator had been placed in the said public barber shop on the said premises for the comfort and convenience of the said defendants and customers attracted to said public barber shop.

9. As a result of being struck by the said radiator, the plaintiff was severely injured and sustained a broken back, three broken ribs, severe bruises and contusions, and suffered great shock to her nervous system.

10. As a result of the said injuries, the plaintiff is permanently disabled, is compelled to wear a brace to support her neck and head, and is still suffering great pain and inconvenience.

11. As a result of said injuries the plaintiff was obliged to and did expend large sums of money for medical aid and attention, and will in the future be obliged to expend large sums of money for medical aid and attention.

12. At the time of said injuries the plaintiff was employed on the farm of her father, at a profit to herself, but since the time of the injury the plaintiff has been unable to work.

The plaintiff demands as damages, the sum of twenty-five thousand dollars (\$25,000.00).

DOLAN & DOLAN,
Attorneys for Plaintiff.

10

NEW JERSEY SUPREME COURT

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Between

HULDA NILSSON, Plaintiff,

—vs—

JOSEPH ABRUZZO and ANNA FORSTER ABRUZZO and PAUL MONEVASIS,

Defendants.

Action at Law

SUMMONS AND AMENDED COMPLAINT

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Dolan & Dolan
Attorneys of Plaintiff,
Newton, N. J.

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NEW JERSEY SUPREME COURT
SUSSEX COUNTY

	HULDA NILSSON,	}	Action at Law.	
	Plaintiff,			
	—vs—	}	ANSWER OF DE-	
	JOSEPH ABRUZZO			FENDANTS
	and ANNA FORSTER			JOSEPH ABRUZZO
10	ABRUZZO, and PAUL			AND ANNA FORSTER
	MONEVASIS,			ABRUZZO
	Defendants.			

The Defendants, JOSEPH ABRUZZO and ANNA FORSTER ABRUZZO, residing in the Borough of Brooklyn in the County of Kings and State of New York, answering the said plaintiff, says:

- 20 1. Paragraph 1 of the complaint is admitted.
2. Paragraph 2 of the complaint is denied.
3. As to the matters and things contained in Paragraph 3 of the complaint these defendants have not sufficient knowledge or information to form a belief.
- 30 4. As to the matters and things contained in paragraph 4 of the complaint these defendants have not sufficient knowledge or information to form a belief.
5. Paragraph 5 of the complaint is denied as to these defendants.
6. Paragraph 6 of the complaint is denied.
7. Paragraph 7 of the complaint is denied.

8. Paragraph 8 of the complaint is denied.

9. As to the matters and things contained in paragraph 9 of the complaint these defendants have not sufficient knowledge or information to form a belief.

10. As to the matters and things contained in paragraph 10 of the complaint these defendants have not sufficient knowledge or information to form a belief. 10

11. As to the matters and things contained in paragraph 11 of the complaint these defendants have not sufficient knowledge or information to form a belief.

12. As to the matters and things contained in paragraph 12 of the complaint these defendants have not sufficient knowledge or information to form a belief. 20

FIRST DEFENSE

1. The matters and things set forth in the answer are made a part of this defense.

2. These defendants are not guilty of the negligence charged in the complaint and owed no duty to the plaintiff. 30

SECOND DEFENSE

1. The matters and things set forth in the answer and the first defense are made a part of the defense.

2. These defendants not admitting any carelessness, negligence or the violation of any duty on their part say, that if the said plaintiff was injured as alleged in the complaint, such injury was due 40

directly to negligence and carelessness on the part of the plaintiff.

MORRIS & DOWNING,
Attorneys for the defendants,
Joseph Abruzzo, and Anna
Forster Abruzzo.

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NEW JERSEY SUPREME COURT

HULDA NILSSON, Plaintiff

—vs—

20 JOSEPH ABRUZZO and ANNA FORSTER ABRUZZO and PAUL MONEVASIS, Defendants

Action at Law

ANSWER OF THE DEFENDANTS

JOSEPH ABRUZZO and ANNA FORSTER ABRUZZO

30 Morris & Downing
Attorneys for Joseph Abruzzo and Anna Forster
Abruzzo, defendants
Newton, N. J.

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NEW JERSEY SUPREME COURT
SUSSEX COUNTY.

HULDA NILSSON, Plaintiff,	}	Action at Law.	
—vs—			
JOSEPH ABRUZZO and ANNA FORESTER ABRUZZO and PAUL MONEVASIS, Defendants.	}	ANSWER OF DEFEN- DANT PAUL MONEVASIS.	10

PAUL MONEVASIS, one of the defendants in the above cause, residing at 180 Spring Street, in the Town of Newton, County of Sussex and State of New Jersey, says:

1. As to the matters and things set forth in the first paragraph of the complaint this defendant has not knowledge or information sufficient to form a belief. 20

2. Paragraph 2 of the complaint is admitted.

3. Paragraph 3 of the complaint is admitted.

4. As to the matters and things contained in paragraph 4 of the complaint this defendant has not knowledge or information sufficient to form a belief. 30

5. Paragraph 5 of the complaint is denied as to this defendant.

6. Paragraph 6 of the complaint is denied.

7. Paragraph 7 of the complaint is denied. 40

8. Paragraph 8 of the complaint is denied.

9. As to the matters and things contained in paragraph 9 of the complaint this defendant has not knowledge or information sufficient to form a belief.

10 10. As to the matters and things contained in paragraph 10 of the complaint this defendant has not knowledge or information sufficient to form a belief.

11. As to the matters and things contained in paragraph 11 of the complaint this defendant has not knowledge or information sufficient to form a belief.

20 12. As to the matters and things contained in paragraph 12 of the complaint this defendant has not knowledge or information sufficient to form a belief.

13. This defendant further says that he was not careless or negligent in the maintenance of said premises as the lessor thereof and while not admitting any negligence or carelessness on his part says that if the said plaintiff was injured such injury was due to the negligence and carelessness of said plaintiff.

30 This defendant therefore prays that said complaint as to him be dismissed with costs.

HENRY T. KAYS,
Solicitor for Defendant,
Paul Monevasis.

NEW JERSEY SUPREME COURT

Between

HULDA NILSSON,

Plaintiff,

—vs—

JOSEPH ABRUZZO and PAUL MONEVASIS,
Defendants.

Action at Law. 10

ANSWER OF PAUL MONEVASIS, Defendant.

Henry T. Kays,
Solicitor for Paul Monevasis, defendant
Newton, N. J.

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NEW JERSEY SUPREME COURT
SUSSEX COUNTY.

	HULDA NILSSON,	}	Action at Law.
	Plaintiff,		
	—vs—		
	JOSEPH ABRUZZO and	}	R E P L Y.
	ANNA FORESTER		
10	ABRUZZO and PAUL		
	MONEVASIS,		
	Defendants.		

The plaintiff denies each and every allegation contained in the Answer of the Defendants, Joseph Abruzzo and Annie Forster Abruzzo and Paul Monevasis.

	DOLAN & DOLAN,
20	Attorneys of Plaintiff.

NEW JERSEY SUPREME COURT
SUSSEX COUNTY.

	Between	
30	HULDA NILSSON,	Plaintiff,
	—vs—	
	JOSEPH ABRUZZO and PAUL MONEVASIS and	Defendants.
	ANNIE FORSTER ABRUZZO,	

Action at Law

40	REPLY.
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NEW JERSEY SUPREME COURT
SUSSEX COUNTY

HULDA NILSSON, Plaintiff,	}	Action at Law.	
—vs—			
JOSEPH ABRUZZO and ANNA FORSTER ABRUZZO and PAUL MONEVASIS, Defendants.	}	AMENDED ANSWER OF DEFENDANTS JO- SEPH ABRUZZO AND ANNA FORSTER ABRUZZO	10

The defendants, Joseph Abruzzo and Anna Forster Abruzzo, residing in the Borough of Brooklyn, in the County of Kings and State of New York, answering the said plaintiff, say:—

1. Paragraph 1 of the complaint is admitted.
2. Paragraph 2 of the complaint is admitted. 20
3. As to the matters and things contained in paragraph 3 of the complaint these defendants have not sufficient knowledge or information to form a belief.
4. As to the matters and things contained in paragraph 4 of the complaint these defendants have not sufficient knowledge or information to form a belief. 30
5. Paragraph 5 of the complaint is denied as to these defendants.
6. Paragraph 6 of the complaint is denied.
7. Paragraph 7 of the complaint is denied.
8. Paragraph 8 of the complaint is denied. 40

9. As to the matters and things contained in paragraph 9 of the complaint these defendants have not sufficient knowledge or information to form a belief.

10. As to the matters and things contained in paragraph 10 of the complaint these defendants have not sufficient knowledge or information to form a belief.

10 11. As to the matters and things contained in paragraph 11 of the complaint these defendants have not sufficient knowledge or information to form a belief.

12. As to the matters and things contained in paragraph 12 of the complaint these defendants have not sufficient knowledge or information to form a belief.

20 FIRST DEFENSE:—

1. The matters and things set forth in the answer are made a part of this defense.

2. These defendants are not guilty of the negligence charged in the complaint and owed no duty to the plaintiff.

30 SECOND DEFENSE:—

1. The matters and things set forth in the answer and the first defense are made a part of the defense.

2. These defendants not admitting any carelessness, negligence or the violation of any duty on their part say, that if the said plaintiff was injured as alleged in the complaint, such injury was due directly to negligence and carelessness on the part

of the plaintiff.

MORRIS & DOWNING,
Attorneys for the defendants,
Joseph Abruzzo and Anna Forster Abruzzo.

10

NEW JERSEY SUPREME COURT

HULDA NILSSON, Plaintiff, 20
—vs—
JOSEPH ABRUZZO and ANNA FORSTER ABRUZZO and PAUL MONEVASIS, Defendants.

Action at Law

AMENDED ANSWER OF THE DEFENDANTS,
JOSEPH ABRUZZO and ANNA FORSTER
ABRUZZO

Morris & Downing 30
Attorneys for Joseph Abruzzo and Anna Forster
Abruzzo, defendants
Newton, N. J.

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NEW JERSEY SUPREME COURT
SUSSEX COUNTY

	HULDA NILSSON,	}	Action at Law.
	Plaintiff,		
	—vs—		
	JOSEPH ABRUZZO and	}	REPLY TO AMENDED ANSWER.
	ANNA FORSTER		
10	ABRUZZO and PAUL		
	MONEVASIS, Defendants.		

Plaintiff denies the truth of the matters contained in the amended answer of the defendants, Joseph Abruzzo, Anna Forster Abruzzo.

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DOLAN & DOLAN,
Attorneys of Plaintiff.

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NEW JERSEY SUPREME COURT

HULDA NILSSON,

Plaintiff,

—vs—

JOSEPH ABRUZZO and ANNA FORESTER
ABRUZZO, and PAUL MONEVASIS,

Defendnats.

Action at Law

10

REPLY TO AMENDED ANSWER OF THE DE-
FENDANTS, Joseph Abruzzo, Anna Forster
Abruzzo.

Dolan & Dolan
Attorneys of Plaintiff
Newton, N. J.

We hereby consent to filing of the within reply
as of time.

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MORRIS & DOWNING

Attorneys of Joseph Abruzzo,
Anna Forster Abruzzo.

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NEW JERSEY SUPREME COURT
SUSSEX COUNTY

HULDA NILSSON,

Plaintiff,

—vs—

JOSEPH ABRUZZO and
ANNA FORSTER

ABRUZZO and PAUL
MONEVASIS,

Defendants.

Action at Law.

STIPULATION.

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It is hereby agreed and stipulated between Dolan and Dolan, attorneys for the plaintiff, Hulda Nilsson and Morris and Downing, attorneys for Joseph Abruzzo and Anna Forster Abruzzo, that the reply filed by the plaintiff, Hulda Nilsson, shall be considered a reply to the amended answer filed by the defendants, Joseph Abruzzo and Anna Forster Abruzzo.

DOLAN & DOLAN,

Attorneys for Plaintiff.

MORRIS & DOWNING,

Attorneys for Defendants,
Joseph Abruzzo and Anna
Forster Abruzzo.

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NEW JERSEY SUPREME COURT
SUSSEX COUNTY

HULDA NILSSON,

Plaintiff,

—vs—

JOSEPH ABRUZZO and ANNA FORSTER
ABRUZZO and PAUL MONEVASIS,

Defendants.

10

Action at Law

STIPULATION

Dolan & Dolan
Attorneys for Plaintiff
Newton, N. J.

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NEW JERSEY SUPREME COURT
SUSSEX CIRCUIT

HILDA NILSSON,
Plaintiff,)
—vs—)
JOSEPH ABRUZZO,) ACTION AT LAW.
ANNA FORSTER)
10 ABRUZZO and PAUL)
MONEVASIS,)
Defendants.)

Newton, N. J., May 6, 1929

TRIED BEFORE—

HON. NEWTON H. PORTER, Judge, and a Jury.

APPEARANCES:

Messrs. Dolan & Dolan (Jos. Coult, Esq., of Coun-
sel,) for Plaintiff;
20 Messrs. Morris Downing, for Defendants Abruzzo
Hon. Henry T. Kays, for Defendant Monevasis.

A jury of twelve was duly empaneled and sworn.
Counsel for the respective parties opened the case
to the jury.

Before opening on behalf of the Defendants
Abruzzo, the following motion was made:

30 MR. DOWNING: If the court please, on behalf of
the defendants Joseph Abruzzo and Anna Forster
Abruzzo, I desire to make a motion for a non-suit,
on the opening of the plaintiff, on the ground that
his opening discloses no cause of action against the
defendants Abruzzo. I think that the law was
wrongfully stated to the jury as to the liability of
the landlord of leased premises. (Citing various
cases in support of the motion.) We submit that,
40 under the law, no case has been stated against the

defendants Abruzzo, who are landlords in this case, and that, therefore, our motion for a non-suit should be granted.

THE COURT: (After argument) The cases you cite, that this is a contractual matter, I do not think that is sound; I do not think it is applicable to this situation. This is not a contract suit; it is a negligence suit.

MR. DOWNING: It is a suit for a breach of duty arising out of a contract between landlord and tenant.

10

MR. COULT: No.

THE COURT: Yes, but there is a duty, that is the charge, when the landlord repairs, not only to the tenant but to the tenant's guests, I have no doubt about that.

20

MR. DOWNING: The allegation is not that there were repairs made to this part of the building or to this radiator, but that there were repairs made to some other part of the building.

MR. COULT: I think that we are going to connect it up to the radiator.

THE COURT: Of course, if he does not show that the repairs were made to the radiator—

30

MR. COULT: I do not know that I am going to show repairs to the radiator, but I am going to show that there were repairs made, changes in the building—

THE COURT: That caused the radiator to fall.

MR. COULT: Yes. In other words, I am going to

40

"show that by faulty construction or repairs, there is a connection between that and the falling of the radiator.

THE COURT: I will deny the motion.

MR. DOWNING: I ask an exception.

THE COURT: You may have an exception.

10 Mr. Downing thereupon opened to the jury on behalf of the Defendants Abruzzo.

PLAINTIFF'S CASE

HILDA NILSSON, sworn.

DIRECT EXAMINATION BY MR. COULT:

Q You are the plaintiff in this case, are you not?

20 A I am.

Q Where do you live? A Near Beemerville, Sussex, New Jersey; there is no post office in Beemerville.

Q You said something about Beemerville. A Well, there is no post office there.

Q You live on a farm, don't you? A Yes, sir.

Q How far away from the Borough of Sussex?

A Seven miles.

30 Q Your post office is Beemerville? A No, it is Sussex.

Q The post office is Sussex, but you live in Beemerville? A I live on a farm out about two miles from Beemerville.

Q But that is the nearest town? A Yes, sir; it is.

Q Your post office is in Sussex; that is seven miles away; is that right? A Yes, sir.

Q Now, who lives on the farm with you? A My mother, father and myself.

40 Q How long have you lived there with your

mother and father? A A good part of my life.

Q You say "a good part of your life"; how long before this accident happened? A Six years.

Q During the six years that you lived at home with your father and mother before this accident happened, did you do any work? A I did.

Q What kind of work did you do? A General housework, general household duties.

Q Well, what did they include? A Washing, ironing, baking—

Q Yes? A —cleaning—

Q Anything else? A —milking cows—

Q Yes? A —feeding chickens.

Q Did you ever help with the milk? A Milk-
ing cows.

Q I mean, after the milk was in the cans.
A About ever loading the cans on the wagon,
you mean?

Q Yes; did you have to lift the cans into the
wagon? A Yes, sir.

Q You say you would do housecleaning?
A Yes, sir.

Q Did you scrub the floors? A Yes, sir.

Q And did the cooking? A Cooking also.

Q And the washing? A Yes, sir.

Q Now, on the 22nd day of November, 1926,
did you have an accident? A I did.

Q Where was that? A In a barbershop at
Newton.

Q Had you ever been in that barbershop be-
fore? A Yes, sir; I did.

Q When? About? A In the summer time.

Q Had you ever been there more than once?
A No, sir.

Q On that occasion you suffered an injury be-
cause of something falling on you. A I did.

Q What was the thing that fell on you? Do
you know? A Radiator.

Q Had you ever seen that radiator before?

A No, sir.

Q Did you know there was a radiator there?

A No, sir.

Q About what time did you go to the barber shop? A It was before school was called, half—

Q In the morning? A —past eight. Yes, sir; in the morning.

Q Just where was the barber shop located?

A Over near the Two Tree Tea Room, they call it.

10 Q Well, that gives the location of one store by another one; that doesn't help us much. Which side of Spring street? A It is on this side.

Q When you say "this side," you mean the side toward the park, on that side? A Yes, sir.

Q That would be the south side, wouldn't it?

A Yes, sir.

MR. COULT: Am I right in that?

MR. DOWNING: Yes.

20 MR. COULT: Call that south, can't you?

THE WITNESS: Yes.

Q Now, as you entered this barber shop, how was it arranged? A Very small and long.

Q When you say "long," do you mean that the distance as you go back from the street is greater than from side to side; is that it? A I do.

Q How is it arranged inside? A Three chairs.

30 Q You mean barber chairs? A Three barber chairs.

Q Where were they? On the left or right, as you come in? A Left.

Q What was on the right hand side? A Chairs for people that were waiting to have their shaving and haircutting done.

Q What did you go in there after? A To have my hair bobbed.

40 Q Was there anybody there when you went in?

A There was two men when I first went in, and

one was finished and went out, and the other went in the chair.

Q And this other who had went into the chair afterwards, I suppose, had been waiting, just as you were? A He was.

Q Did this accident happen before you got in the barber chair? A Yes, sir; it did.

Q Just what happened to you? A Why, I was sitting as I am now, and the radiator comes and hit me on my shoulder, and the fall and it hitting me, broke my vertebra. 10

Q What was the first thing that you know, in the way of a warning, that anything was going to happen? A It cracked.

Q What kind of a crack was it? A It sounds as if it was hot water going up, heat coming up.

Q Did you pay any attention to that? A Not particularly, no, I didn't.

Q How soon after that did it drop? A Why, not very long. 20

Q Well, give us some idea. A About a couple of minutes.

Q You mean, minutes of sixty seconds each now, or do you mean sixty seconds? A I mean sixty second minutes.

Q About two minutes, as you were sitting there— A Yes, sir.

Q —and then this thing happened? A It come all of it crashing down, all of the way around the room. 30

Q Can you tell us what that radiator looked like? A A lot of heavy pipe.

Q What did it feel like when it hit you? A It felt pretty heavy.

Q What happened to you when you were hit on the shoulder? A I was knocked down and pinned under it for quite a while.

Q Where were you pinned? On the floor?

A I was on the floor; yes, sir.

Q When you got the first blow on your shoul- 40

ders, what happened to your body? A Knocked me down.

Q Where were you when you got the blow on the back? A Under the radiator.

Q Where was your body? On the floor, then, or where? A On the floor.

Q How did the radiator get off of your body? Have you any recollection of it? A I don't remember.

10 Q What was the first thing you knew after that happened? A I don't remember.

Q Well, you must remember something. Just where were you when you came to? A I was there in the barber chair.

Q You were there in the barber chair? A The two gentlemen picked me up.

Q You don't know how you got there? A (No audible response).

20 THE COURT: Don't shake your head. Answer is, "No".

Q They helped me walk there.

Q How did you walk there? A I walked there.

Q Do you remember getting there? A Yes, sir; I do.

Q You got into the barber chair? A Yes, sir.

30 Q Then what happened to you, after you got in there? A Two men came and got me.

Q Where did they take you? A Took me in a car.

Q Do you remember getting from the barber chair into the car? A Yes, I do.

Q Do you know how you got there? Did you walk? Were you carried? Were you helped, or how? A I was helped.

Q By whom? A By these men.

40 Q How did they help you? Can you remember? A (No answer).

Q Well, you remember you got in the car somehow. A I got there somehow.

Q Where did you go in the car? A I went to my sister's.

Q Where is that? A 18 Hamilton.

Q In Newton? A Yes, sir; it was at that time.

Q You lived where? Or, where did your sister live? A 18 Hamilton street.

Q About how far is that from the barber shop? A I couldn't say. 10

Q Well, how many squares or blocks? A Oh, a couple of blocks, I think.

Q Now, did you suffer any pain? A I suffered terribly; I hollered and that scared the man.

Q Can you give us any idea what it felt like? A As if somebody hit me with a hammer or something where it fell.

Q Where did you have your pains? A In my back; in the hips and the side; my arm was helpless; my nose was knocked and bled. 20

Q Do you remember getting to your sister's home? A Yes, I do.

Q How did you get in from the cab? A Why, there was two men with me, and they assisted me somehow, and I hollered all of the way.

Q Did you cry? A Yes, sir; cried and yelled—scared them. 30

Q When you got there, what did they do for you at your sister's house? A Why, they undressed me and put me onto a couch, and I laid there until the doctor said he was coming back.

Q What doctor? A Dr. Voorhees.

Q How did he get there? A Why, he took me.

Q Was he one of the two men? A He was.

Q Well, I see. Did Dr. Voorhees treat you?

A No, sir; Dr. Morrison was the doctor. 40

Q Dr. Voorhees took you home? A Yes, sir.

Q You never saw him again in connection with this case? A Yes, he has been to my home.

Q When was that? A Just before Christmas.

Q He did not treat you? A Oh, no; no, sir.

Q What happened to you after they got you in the house? A Why, they loaded me into Mr. Smith's taxi and took me to the Sussex hospital.

10 Q Now, did you see any physician between the time that Dr. Vorhees went away and the time you got into the cab? A I don't remember.

Q You cannot recall? A I can't recall, no.

Q Can you recall being put in the cab? A Yes.

Q How were you put in there? A I was on a mattress of a bed couch, and carried out in the car.

20 Q How did they arrange you in the cab? Can you remember that? A I don't know.

Q Do you remember whether you were sitting down or laid down? A I laid down.

Q On the floor of the cab? A Yes, and I suffered terribly.

Q How far is it, do you know, from your house, from Newton up to Sussex? A Five miles.

Q More than that, isn't it? A (No answer).

Q Well, that distance, whatever it is, you went in that cab, did you? A I did.

30 Q What did it feel like? A It felt sort of uncomfortable; I suffered terribly.

Q This is your case, madam. Tell the jury. How did that radiator feel like? How did you enjoy it? A It felt just as if I was sitting under the radiator and then had the radiator on top of me.

Q Did you have pain? A I had all kinds of pain all over, everywhere.

40 Q How did they get you into the hospital? A Why, they lugged me in the hospital on this mat-

tress.

Q What happened to you after you got there?

A They put me onto the X-ray table.

Q Yes; you had X-rays taken? A Yes, sir.

Q Then what happened? A They come and put the—what is that?

THE COURT: A cast?

Q A cast? A No.

Q What happened next? Do you remember? 10

A No; they took me up to bed in the elevator.

Q I see. That is what you were trying to think about.

Q Did you have a cast put on? A Yes, sir.

Q When did they do that? That same day?

A No.

Q Well, when? A Well, after that week, I believe; I am not sure about that.

Q Can't remember precisely? A No. 20

Q Well, we will prove that some other way. How long did you wear that cast? A Four months.

Q How long were you in the hospital? A Three months.

Q Did you ever have the cast off while you were in the hospital? A No, sir.

Q What was your condition as to pain while you were in the hospital during those three months?

A Very severe. 30

Q Was there any time you did not suffer? A No, there was not.

Q How did you sleep? A Sometimes pretty good.

Q How much sleep did you average of a night? Can you tell us? A Hours after before I used to go to sleep, you mean? About three hours.

Q About three hours? Did they give you anything to make you sleep, or don't you know? A I don't remember, but I imagine— 40

Q Well, no; you cannot tell what you imagine. Now, got that cast here?

(Cast produced by person from audience.)

Q I show you what appears to be a cast of plaster and straps, and I ask you if you recognize this thing. A I recognized it when I wore it.

Q Well, do you recognize it now? A I do.

10 Q Is that the cast you wore? A Yes, sir, it is.

Q You say that you had that on for four months altogether? A Yes, sir.

Q It appears to be cut down the center. Was it in that condition while you were in the hospital?

A Well, I cut some straps off it.

Q Well, when was it cut? A Well, just before I went out.

Q Just before you left there? A Because I wore it cut that way until I got my brace.

20 Q You say it was cut just before you left the hospital? A Yes, sir.

Q You wore that for three week— A Yes, sir.

Q —or three months, I mean? A Yes, sir.

Q Now, after you left the hospital, you continued to wear it as it is now with this cut here?

A Yes, sir.

Q Until you got a brace A Yes, sir.

30 Q Where did you get your brace? A New York City.

Q Do you know who got it for you? Do you know who got it for you? A My sister.

Q I show you what appears to be a brace, and ask you if that is the brace you wore? A That is the brace.

Q It appears to be somewhat damaged by fire. How did that happen? A It was brought down to Newton and my sister put it back of the gas stove and started the gas stove, and she got the paper

40 afire and set fire to my brace.

Q When did this happen? How long ago?

A Oh, just last week.

Q It wasn't in this condition when you wore it?

A Oh, no.

Q When did you discard that brace? A First of November, 1928.

MR. COULT: Now, Your Honor, may I have the cast and the brace marked in evidence?

THE COURT: Let them be marked.

10

MR. COULT: I will offer them both in evidence.

(CAST MARKED PLAINTIFF'S EXHIBIT P-1.)

(BRACE MARKED PLAINTIFF'S EXHIBIT P-2).

Q Now, at the time that you discarded the brace, what was your condition then as to your ability to get around? A Why, I discarded the brace and occasionally had to put it back on again to strengthen my back. I didn't discard it entirely. Sometimes I would take it off, and sometimes I would put it back on again.

20

Q What did you do that for? A To strengthen my back.

Q What was the matter with your back? Couldn't you use it? A It was weak.

30

Q What do you mean by that exactly? You say your back was weak. How did you find out it was weak? A (No answer).

Q Well, could you do your work? A No, sir; I couldn't work.

Q What was the reason you couldn't work? A My back was limsy, it had no support.

Q Did you have pain in it? A Oh, I had plenty of it.

Q That is what I am trying to find out. Where 40

did you have pain? A In my back, ribs and side.

Q Now, was there anything wrong with your ribs? A I had three broken ones, three cracked ones.

Q Where were the broken ribs, on which side?

A On my right hand side.

Q Where were the cracked ribs? A On the left side.

10 Q What is your condition now as to your ability to get around and work? A Why, I can't do anything; it tires me out and it hurts me.

Q Have you tried to work? A I have.

Q What kind of work are you able to do?

A Not much of anything; it tires me out too much.

Q Have you done any washing since this accident? A No, sir.

Q Have you done any milking? A No, sir.

20 Q Have you done any scrubbing? A No, sir.

Q Have you done any cooking? A Well, very little.

Q What is the reason that you don't do these things now? A Because my back is broken and my ribs is all tore to pieces.

Q Well, I know; what is it that you feel that makes the difference. Do you have any pains?

A I have violent pains.

Q You still have it? A Yes, sir.

30 Q Now, don't—I didn't mean to upset you.

A (Witness crying).

Q You suffer from pain now? A I do.

MR. COULT: Cross-examine.

THE COURT: Mr. Downing?

MR. DOWNING: I do not think I have any questions.

THE COURT: Judge Kays?

CROSS-EXAMINATION BY MR. KAYS:

Q How long did you say you lived with your father and mother? A All of my life.

Q Were you always at home with them?

A I worked out occasionally.

Q Whom did you work for? A Mr. Brandt.

Q Where does he live? A New York City. 10

Q Where? A New York City.

Q When was that? A I haven't the dates down.

Q Well, about when? How long ago? A I don't remember.

Q Were you ever in the Morris Plains hospital?

A I don't remember.

Q You don't remember that? A (No answer). 20

MR. KAYS: That is all.

MRS. BERTHA NALLY, sworn.

DIRECT EXAMINATION BY MR. COULT:

Q Where do you live, madam? A 66 Woodside avenue, Newton, N. J.

Q Where did you live on the 22nd day of November, 1926? A Hamilton street, 18 Hamilton street, Newton, N. J. 30

Q Are you related to the plaintiff? A I am her sister.

Q Do you recall the occasion of her being hurt? A I certainly do.

Q Do you remember her coming to your house?

A Yes, sir.

Q What was the first you knew about it?

A Why, there was a stranger come to my door; I was washing dishes, and I opened the door, and 40

as I opened the door I heard terrific hollering, and I realized the voice.

Q Whose voice was it? A My sister, Hulda Nilsson.

Q Where was she? A I was in the door.

Q Where was she? A She was in the automobile across the street.

Q Across the street? A Across the street; it wasn't parked in front of the door; it was parked across the street.

10 Q Yes? A And I says—

Q No; not what you said A No?

Q What happened? A The party told me—

Q No, cannot tell—

THE COURT: Cannot tell us the conversation.

Q Just what happened. Did you see your sister? A Yes.

20 Q Where did she come from? A She was in the car.

Q And what did they do with her? A Two men brought her in the house.

Q Did they drive the car up to the front? A No, they carried her.

Q They carried her in? A They carried her in the house.

Q What was she doing at the time? A She was hollering and screaming.

30 Q Where did they bring her? A Into my house on a lounge.

Q What was her condition? A Dr. Vorhees—

THE COURT: No, no; what was her condition?

A What was her condition? I saw that she was very badly hurt.

40 Q What was she doing? A Why, she was

hollering.

Q How did she look? A Badly.

Q In what way? How did she look? A She looked to me as if she had broken something, I didn't know what, of course,—I have learned of course, the back.

Q What did you do about it? A Why, I telephoned the doctor, tried to get in touch with Dr. Cole—

Q Yes? A —but that wasn't possible, so I 10
got in touch with Dr. Morrison, and he ordered her to the Linn Memorial Hospital at once.

THE COURT: Did he come, Dr. Morrison?
Did he call at the house?

THE WITNESS: Did Dr. Morrison call at the
house?

THE COURT: Yes. 20

THE WITNESS: No, sir.

THE COURT: All right.

THE WITNESS: Dr. Vorhees called at the
house, brought her in.

THE COURT: All right. 30

Q What did you do with her? A I got the
taxi sec, a large taxi, and they made a bed right in
the taxi; I had a lounge mattress, and they carried
her right out with that mattress, into the taxi, and
made her as comfortable as possible, but Mr. Smith
had to drive very careful, because her pain was
very severe.

Q Did you go with her? A I went with her.

Q How did she appear to be during that trip to
the hospital? A In severest pain. 40

Q Was she conscious or unconscious? A Conscious.

Q How do you know she had pain? A Because she was complaining, and I asked him to please drive careful.

Q What did you do when you got to the hospital? A Why, Dr. Haggerty took her in charge for his X-rays.

10 Q Did you go in the hospital? A I went in the hospital.

Q Where did they take her? A To the X-ray department.

Q From there where did she go? A Well, I wasn't there after they took the X-rays; I went home.

Q When did you see her next? A That night.

Q Where was she then? A In the hospital, in bed.

Q Was she suffering then? A Yes, sir.

20 Q How long did you stay with her? A Well, I didn't stay so very long; I was anxious to hear the results of the X-rays.

Q You cannot tell what they were. How many times did you see her in the hospital while she was up there? A That is a question I can't answer, but as often as convenient, as I could.

Q Give us some idea. Did you go there once a week? Once in two weeks? A No, I went practically every other day.

30 Q For how long did you go there? A For the time she was there—three months.

Q Did you see a lot of her? A Yes, sir.

Q What was her condition while she was in there? A Why, her condition was very bad.

Q Did she seem to be in pain? A Yes, sir.

Q How did she show it? I say, how did she show the fact that she was in pain? A I don't know just how she showed it, but she suffered; she said she felt like—

MR. DOWNING: No, no.

THE COURT: Don't tell us what she said.

Q What did she do? A I don't remember.

THE COURT: Well, did she cry?

THE WITNESS: Yes, she did.

THE COURT: Then she did do that, didn't she? 10

THE WITNESS: Yes, she cried; she would go on very badly when I come—

THE COURT: All right.

THE WITNESS:—as if she was in bad pain.

Q What happened to her after she came out of the hospital? A I got a taxi and took her to New York right to Pomeroy's to have the brace fitted. The doctor removed the brace, and then they placed adhesive plaster across. We went the first time for measurements, and then we had to take her on a bed over to the taxi—took her right as a bed patient down to New York; and then the second time she had the fitting, and then the brace was sent to her parcel post. Then this plaster cast was removed, and the brace was put onto her body and the cast taken off. 20 30

Q Did you go with her to New York? A I did.

Q I understood you to say you went in a taxi?

A Yes, sir; in a bed taxi.

Q How was she put in the taxi? A We made a regular ambulance out of it, took her, drove just like an ambulance, regular bed, right in the bed.

Q Who paid the taxi bill? A I did; it is not paid, practically; I am paying it through a note.

Q You expect your sister to repay you for that? 40

A Why, I should hope so.

Q I show you— A \$143.00—

THE COURT: How much was it?

THE WITNESS: \$143.00.

Q What does that include? A That includes the trip to Sussex, that we paid.

10 MR. KAYS: Well, if the court please, is this money that she paid out?

MR. COULT: Yes.

THE COURT: For her sister, she says.

THE WITNESS: (Interrupting) Yes.

20 MR. COULT: Yes; she expects to be repaid.

Q I show you a bill, Smith's Auto Livery to Hulda Nilssen. Hulda Nilssen is your sister, isn't she? A Yes, sir.

Q That is her bill? A Yes, sir.

Q Is that the bill you are paying? A Yes, sir; that is the bill I am paying—

Q How much— A —\$143.00.

30 Q How many trips is included in that? A November 22, November 24, November 25th, February 5th, February 10th, February 25th, March 1st, March 15th.

Q Now, can you tell us—

MR. DOWNING: If the court please, do I understand that this contains trips on her visits to the hospital?

40 MR. COULT: I will have her explain. If it is not connected up, it will be stricken out.

Q What was the first trip for? A First trip was to Pomeroy's, New York.

Q Madam, where did your sister go first?

A Oh, the first trip was from Newton to the hospital.

Q And your sister was in the taxi on that occasion going to the hospital? A Yes.

Q Where was the next trip? A From the hospital to New York.

Q Did you go to Beemerville? A I guess the car went right through Beemerville; I don't remember that. 10

MR. COULT: I may have to recall the plaintiff for that item.

Q Then you went twice to New York?

A Twice to New York.

Q You say that you have paid this \$143.00 partly in cash— A Yes, sir. 20

Q —and partly by a note— A Yes, sir.

Q —of yours? A Yes, sir.

Q You say you were present when the brace was fitted? A Yes, sir; I was.

Q Who paid for that? A I did.

Q Do you expect to be repaid for the money you expended for it? A I certainly do.

Q How much did this brace cost? A I could give you just an estimate, about fifty dollars,—forty-eight dollars, some odd cents. 30

Q Forty-eight dollars, some odd cents?

A Yes, it runs into fifty, because there was parcel post on when it was paid of one dollar about.

Q To whom did you pay that? A Pomeroy Company.

Q Have you paid out any other money on account of your sister that you expect to be repaid for—reimbursed for? A I have had cars I feel I ought to be paid something, outside cars I have hired for service— 40

Q Well, we will let that go. A —for subpoenas, and, of course, I don't feel that is—

Q Did you ever see your sister in Beemerville before this accident happened? A Why, I saw her at my residence before the accident happened.

Q Saw her at your own home? A Yes.

Q Did you ever go up there, to Beemerville? A I was there every Sunday.

Q Were you familiar with your sister's activities before this accident happened? A Yes, sir.

10 Q Was she able to work? A Yes, sir.

Q What did she do? A She always did the washing and ironing and the milking. She could take a forty quart milk can chuck it into the milk car.

Q You have seen her do that? A I have seen her do that; I have helped the other side—I could do it myself, too,—with her.

20 Q What has been her ability to work since the accident? A Practically very little. She helped with the cooking and the cleaning and the meals, that is all—about all—she can do. When it comes to bending down work, she can't do it; she can't even carry wood. She used to carry all of the wood. She can't carry the wood that there has to be done for the house.

MR. COULT: Cross-examine.

30 CROSS-EXAMINATION BY MR. DOWNING:

Q How many acres in this farm, Mrs. Nally?

A 105.

Q How many cows did you keep? A At the time of her accident, I think father was milking fifteen; just what he keeps, I couldn't tell.

Q Milking fifteen cows at the time of the accident? A Now, that is not positive.

Q Did your sister help to milk those cows?

40 A She used to help to milk night and morning.

Q How many can she milk? A She can milk eight or ten.

Q Did she, at that time? A I think she milked around eight.

Q How long has she been doing that? A Well, she has been practically doing that all of her life on the farm.

Q Did she always live home? A No, she lived in New York about ten years ago.

Q How long did she work there? A I couldn't say because I wasn't home myself at the time. 10

Q You couldn't tell how long she worked in New York? A No, I wasn't home.

Q Did she work for anyone else besides working in New York? A Yes, she worked for Wes *Huffner*.

Q Where did he live? A He lived—I should imagine you should call it Coleville—district between Sussex and there that his farm was. 20

Q How long ago was that? A I couldn't say how long she was there.

THE COURT: How long ago, madam? Was it before she worked in New York? A I couldn't tell you that.

The Court: All right.

Q Don't know how long ago it was she worked for Wes *Huffner*? A Oh, quite some years ago, maybe fifteen. 30

Q Maybe fifteen years ago worked there. Did she ever work for anyone else? A Yes; Albert *Johnson*.

Q When did she work for Albert *Johnson*? A She was quite young then.

Q She was quite young then? A Yes.

Q Well, how young? A I should imagine, about eighteen, nineteen, seventeen, something 40

around that; I couldn't give you the exact dates of it.

Q How old is she now? A Thirty-nine.

Q About twenty years ago she worked for Albert Johnson? A Yes, sir.

Q Are they the only persons she ever worked for? A I don't remember anybody else; there may have been, however, but I couldn't recall them.

10 Q When did she go to the Morris Plains asylum—before or after she worked in New York City? A I don't know that either.

Q Do you remember her being in Morris Plains? A Yes, sir.

Q She didn't go there to work, did she? A She went there to build up.

Q Went there as a patient? A We are talking about her physical condition today.

Q Did she go to Morris Plains as a patient? A I answered, "Yes, sir."

20 Q How long ago? A I would have to look up the dates.

Q Was it in 1921 that she went to Morris Plains? A I couldn't tell you; I would have to look the dates up.

Q Do you know how long she stayed there? A Not very long.

Q Did she ever have a guardian appointed for herself? A Yes, sir.

30 Q How long ago was that? A I don't remember how long ago that was.

Q Well, that was only about three years before accident, wasn't it? A I don't remember that; I would have to look it up.

Q Wasn't that in 1923? A I don't remember.

Q You do not remember. You are paying all of these bills for her? A I certainly am.

Q You paid the witness fees for this case? A I certainly have.

40 Q Paid them all? A Yes, sir.

Q Your sister was working, earning money, wasn't she, prior to this accident? A She was home with father and mother.

Q She wasn't earning any money home?
A No, sir.

Q You say that your sister cried a good deal while she was in the hospital at Sussex? A Yes; she felt bad, with pain.

Q She was always very emotional, cried easily, didn't she? A I don't know—no more than myself. 10

Q Nothing more than yourself? You don't cry very easily, do you? A I don't know—I get nervous very easily.

Q Well, your sister was especially nervous, wasn't she? A Well, I think it runs in the family.

Q Isn't that what she went to Morris Plains for, because she was particularly nervous? A I don't know.

Q Well, wasn't her condition that she was always imagining she was sick? A I thought we were talking about her physical condition today. 20

THE COURT: Yes, we are; but this has to do with her physical condition.

THE WITNESS: This is her mental condition we are talking about.

THE COURT: No; we are talking about her nervous condition. That is physical. You must answer the question please. 30

A No.

Q What other help did your father and mother have on the farm? A I couldn't tell you.

Q Did they have any other help? A I couldn't tell you exactly that question.

Q Do they have any other help now? A No, 40

not at the present time.

Q How long had your— A (Interrupting) They have a man for the day occasionally. Hired help for today to take care of mother while she is down here. Mother is very feeble.

Q Your mother is very feeble? They are hiring help because your mother is down here?

THE COURT: No?

10 A No.

THE COURT: Because the sister is down here? Is that correct?

THE WITNESS: (Indicating affirmatively).

Q How long had your sister been with you before this accident? A She came down to spend the holidays with me for Thanksgiving. She had only been with me a few days; I don't remember just—

20

Q This was before Thanksgiving, wasn't it?

A Yes, that she was hurt, the 22nd.

Q You don't know just when she came with you? A She came with me, I think it was that night before I went up and got her.

MR. DOWNING: That is all.

30 CROSS-EXAMINATION BY MR. KAYS:

Q Do you know what day of the week this accident happened? A I think it was Monday; it was November 22, 1926.

Q What time was she brought back to your house? A Nine-thirty.

Q How do you know it was nine-thirty? A Because she went up with the school children, and I was washing the dishes, and I hadn't them

40

finished when the door bell rang, and I looked at the time, and it was nine-thirty.

Q You are sure it was nine-thirty? A I am positively sure; I just glanced at my clock.

MR. KAYS: All right; that is all.

REDIRECT EXAMINATION BY MR. COULT:

Q How old is your father? A My father is seventy-seven, I believe. 10

Q How old is your mother? A My mother will be eighty the 10th of May.

Q Are they in good health? A No, sir; neither one of them. Father is feeble and cannot work; and mother is very miserable.

Q Since this accident, have your mother and father had help besides your sister? A Yes, sir.

MR. COULT: That is all.

20

JOHN D. HAGGERTY, D. D. S., sworn.

DIRECT EXAMINATION BY MR. COULT:

Q Where do you live, doctor? A Sussex, N. J.

Q You are a practicing physician of the State of New Jersey? A I am not, sir.

Q You are not? A No, sir.

Q Well, are you a licensed physician of the State of New Jersey? A No, sir. I am a dentist and an X-ray technician. 30

Q What is your degree? A D. D. S.

Q Where did you get your medical education. A Baltimore.

Q What school? A Baltimore College of Dental Surgery; post graduate, Johns Hopkins.

Q Do you specialize in making and interpreting radiographs? A I haven't specialized in 40

them, but I have done X-ray work generally for ten years.

Q Are you connected with the hospital at Sussex? A I am, sir.

Q What is your connection with that hospital?

A I am on the X-ray service, and Secretary and Manager.

Q Now, in the course of your education as a dentist, did you study anatomy? A Yes, sir.

10 Q And what else? A The general course,—anatomy, physiology, chemistry, bacteriology, oral surgery, X-ray work.

Q How many X-rays have you taken in the last seventeen years? A I am unable to tell you.

Q Well, can you give us an estimate? I don't want you to tell us exact, but approximately.

A I can tell you how many I have taken within the last year,—386.

Q In the last year? A Yes, sir.

20 Q How does that compare with the other years of your ten years of service? A Oh, it averages up about—well, with the exception of the first three or four years not as many, possibly.

Q Has it been on the average of between three and four hundred since that time? A It has been an average year in cases the past year.

Q Have you during that time interpreted X-rays? A Yes.

30 MR. COULT: Do you want to cross-examine as to the doctor's qualifications?

MR. DOWNING: No.

MR. KAYS: No.

MR. COULT: Do you want to admit them?

MR. DOWNING: No.

MR. COULT: All right.

Q Did you take an X-ray in this case? A Yes, sir.

Q Where did you take it? A At—where did I take it?

Q Yes. A I took it at the Alexander Linn Hospital.

Q That is located in Sussex, N. J. A Yes, sir.

Q When did you take it? A November 22, 1926. 10

Q Can you recall about what time of day it was? A No, I cannot.

Q Where is that X-ray that you took on that occasion? A I believe that Dr. Morrison has it.

MR. COULT: Is the X-ray here?

(Produced by a member of the audience).

THE COURT: There it is. 20

Q I show you a radiograph, marked No. 273, November 22, 1926, Mrs. Hulda Nilssen; and I ask you if that is the X-ray which you took on that occasion. A It is, sir.

MR. COULT: May I have it marked for identification?

THE COURT: It may be marked. 30

(MARKED EXHIBIT P-3 FOR IDENTIFICATION)

Q How did you take that? A That was taken, sir, from the chest from the twelfth pair of ribs, the patient lying on her back.

Q What did you take it with? A With an X-ray machine, sir.

Q Who developed the plate? A I did. 40

Q Do you recognize it? A Yes, sir.

MR. COULT: I will offer it.

THE COURT: Any objection?

(No audible response).

(MARKED PLAINTIFF'S EXHIBIT P-3 IN
EVIDENCE.)

10

Q Doctor, can you tell us what that X-ray shows?

MR. DOWNING: I object to that.

MR. KAYS: I object to that, if the court please; he is not qualified as an expert.

20

MR. COULT: I will submit him for cross-examination.

THE COURT: Do you wish to cross-examine?

MR. KAYS: Yes.

THE COURT: You may.

30

CROSS-EXAMINATION BY MR. KAYS:

Q Doctor, you say that you are not a licensed physician? A No, sir.

Q What experience have you had other than taking X-rays and anatomy? Any? A Dissections.

Q Dissections of what? A Of the cadaver,—of the corpse.

Q Where? A Where was it done?

40 Q Yes. A It has been done in Baltimore and

it has been done in New York City.

Q How many did you ever dissect? A In my D. D. S. degree, we were required to dissect three.

Q Three? A Yes, sir.

Q That was in your study of dentistry? A Yes, sir.

Q Then, these X-rays that you took, did that come under your qualifications as a dentist?

A Not as a dentist; no, sir.

MR. KAYS: Well, if the court please, I do not think the witness is qualified to testify as to what the anatomy of this body may have been. 10

THE COURT: But he is a Roentgenologist.

MR. COULT: I am not going to ask him what the anatomy is. I am going to ask him what these X-rays show. 20

THE COURT: He is a Roentgenologist. That is his business; that is his profession. I will allow it.

MR. KAYS: All right.

Q What does the X-ray show, doctor? A This X-ray is what we call a follower. There should be two other X-rays to accompany it. 30

Q There are. A This X-ray shows nothing.

Q Why? A Because I did not know where her trouble was, and I had to have a starting place until I found the exact location.

Q You took that for the purpose of finding that? A I took this for the purpose of getting two others—three others.

Q Of what portion of the anatomy is that taken? A This is taken above the twelfth pair of ribs, sir. 40

Q Now, did you take any other X-rays after you took that one? A Yes, sir.

Q When did you do that? A Same date, 22nd of November, 1926.

Q Here are two X-rays, dated November 29, 1926. What are these? A Those are the two X-rays following this picture.

Q Well, did you take them on the same date? A No, sir.

10 Q Were you in error about that? A No, I was in error about this first.

Q Then you took one on the 22nd? A Yes.

Q Followed it up with two on the 29th. A Yes, sir.

Q All right. Do you recognize the two that I hand you? A Yes, sir.

Q Did you take them? A I did.

Q Did you make an inscription on them? A Yes, sir.

20 Q What? A I ought to have a reading box to read this.

Q Did you take them the same way you took the one you have described? A Practically the same angle as before.

MR. COULT: I want to offer these in evidence before the doctor begins to talk about them.

30 THE COURT: Let them be marked.

MR. COULT: I will offer in evidence the two X-rays, marked "November 29, 1926, Hulda Nilsen."

(MARKED PLAINTIFF'S EXHIBITS, P-4 and P-5, IN EVIDENCE.)

40 Q Doctor, I will hand you Exhibit P-4, an X-ray plate, and ask you what that shows,

A May I say that in taking these X-rays, I did not attempt to diagnose them at the time? I do mark my supposed diagnosis on these X-rays, passing them to the physician in charge, to see whether he verified that which I have done.

Q Can you state whether or not there is any pathology on that plate? A Yes, sir.

Q What is it? A I find the condition here to be, the first vertebra below the twelfth pair of ribs out of alignment.

Q What does it show? A It shows that the vertebrae are very much out of alignment. 10

Q Yes? A Shows a slight separation of the vertebrae but not enough to separate the cord—the spinal cord, I mean,—

Q Yes? A —because there was an absence of paralysis, and with that section of the spinal cord you would get paralysis, if there were a separation of the cord. I find that extends down for three or four vertebrae here, in the lumbar region.

Q What is the nature of that injury? A The nature of it? 20

Q What would you call it? Displacement? Dislocation? Fracture? What? A I would diagnose that as a semi-displacement and with a slight fracture of the vertebrae.

Q Which vertebrae are fractured? A The first and second below the twelfth pair of cranial nerves.

Q I did not hear that answer. A First and second below—I mean the—twelfth pair of ribs. 30

Q Does that plate show any injury to any other bones? A I see none.

Q I show you X-ray marked P-5, and I ask you if that plate shows any pathology. A It shows practically the same, only another position, of what I have just mentioned.

Q What is the difference in the position? A Of about fifteen degrees.

Q And which way? A Side view of the pa- 40

tient, fifteen degrees off of center.

Q Does that plate show the same injury?

A Same injury; yes, sir.

Q Does that plate show any other injury to any other of the bones, besides the spine? A I see none.

Q Did you take any other X-rays, doctor?

A Yes.

Q When did you take those? A May 3, 1929.

10 Q Now, have you got those with you? A I have.

Q All right; that is good. A (Witness produces X-rays).

Q Just one of these, doctor? A Just one.

Q Where did you take the X-ray on May 3, 1929? A At the Alexander Linn Hospital.

Q Using the same method? A Same machine; same method.

Q And the same machines? A Yes, sir.

20 Q Is this plate which I hand you, marked "No. 366, Mrs. Hulda Nilssen, May 3, 1929," the X-ray that you refer to? A It is.

MR. COULT: I will offer it.

MR. KAYS: I suppose that is an X-ray of the plaintiff, isn't it?

MR. COULT: So he said.

30 Q It is an X-ray of the same plaintiff?

A Yes, the same.

MR. KAYS: What is the date of this?

MR. COULT: May 3, 1929.

THE COURT: To show her present condition.

40

MR. COULT: Yes.

THE WITNESS: (Interrupting) Taken in the—

BY MR. KAYS:

Q Is this plate in the same position as the last one? A —same position as the one wherein I found the condition below the twelfth pair of ribs; yes, sir. I only took one to verify my finding. 10

Q This is an X-ray of a different position of the body? A No, the same position.

Q Same part of the body? A Same part and the same as this one marked—I don't know what the mark is.

THE COURT: You will find it in red crayon.

A (Continuing) P-4, same position exactly, same angle. 20

Q Did you say that this plate shows a different condition from the other plate? A Yes, it does; it shows a different condition.

MR. KAYS: Well, if that is the situation, if the court please, it seems to me that some other injury may have happened since that time.

A (Interrupting) Both the same injury. 30

THE COURT: You may cross-examine on that. I assume that it shows the—

THE WITNESS: (Interrupting) The result of it.

THE COURT: —the cure, what nature has done in the meantime, perhaps. 40

MR. KAYS: Yes, sir; different injury.

THE COURT: It may be. If it does, of course, we do not want it; but if it develops that it does, I will rule it out.

BY MR. COULT:

Q Doctor, does this show the same injury as
the one exhibited in the other two plates?
10 A Same injury; yes, sir.

MR. COULT: I will offer this last mentioned plate.

(MARKED PLAINTIFF'S EXHIBIT P-6
IN EVIDENCE).

Q Now, doctor, I show you P-6, the photograph
20 which was taken May 3, 1929, and ask you what
that shows. A It shows the same condition as
this one taken in the same position of November
29, 1926, with this exception,—it shows an exostosis,
enlargement of the joints.

Q What is exostosis? A An extra growth of
bone thrown out due to irritation.

Q Is that a natural process? A In fractures;
yes, sir.

Q Is that what we call callus? A No, that
30 would hardly be a callocity, but some—

Q What is the difference? A Practically a
difference without a distinction; only callocity
you get on the bottom of your feet, callocity of
the feet, and an exostosis is an enlargement of the
bone.

Q Could you get exostosis without fracture?
A I think so, but not to that degree.

MR. KAYS: I object to that line of testimony.
40

MR. COULT: I will withdraw it,—consent it be stricken out.

THE COURT: Strike it out.

MR. COULT: Cross-examine.

CROSS-EXAMINATION BY MR. KAYS:

Q Do I understand, doctor, that that plate which was made on May 3rd is the same as Exhibit P-4? A Taken in the same position, at the same angle, and from the same spot of the spine. 10

Q It shows the same injuries? A Same injuries; yes, sir.

Q These are injuries simply to the vertebrae; is that right? A Yes.

Q And no other injury? A No, this plate shows no other injuries. 20

Q Who directed you to make those plates? A My office. The first plate, you mean, the first day I took them? 20

Q Yes. A November 22, 1926? I couldn't tell you. Someone called at the hospital, and through my nurse I got the order; she told me—she always does—that there is a case over there for an X-ray.

Q Were you manager of the hospital at that time? A I was not, sir. 30

Q You were not? A No, sir; I was on the X-ray service only.

MR. KAYS: All right; that is all.

REDIRECT EXAMINATION BY MR. COULT:

Q Doctor, have you anything to do with the keeping of the records of the Alexander Linn Hospital? A No; not the bills. 40

Q You do not know anything about the bills?
A No, sir.

MR. COULT: That is all. Cross-examine.

THE COURT: Mr. Downing, have you any questions?

MR. DOWNING: No, that is all.

10 BLACE COLE, M. D., sworn.

DIRECT EXAMINATION BY MR. COULT:

Q Where do you live, Dr. Cole? A Newton, N. J.

Q Are you a practicing physician and surgeon of the State of New Jersey? A I am.

20 Q Where did you receive your medical education, doctor? A University of Pennsylvania.

MR. KAYS: We will admit the doctor's qualifications, Judge.

MR. DOWNING: We will admit the doctor's qualifications, Judge Coult.

30 Q Doctor, your qualifications being admitted, I will ask you if you made an examination of the plaintiff in this case? A I have made two.

Q Where did you make the first one? A Same place I made the second one, down on Woodside avenue.

Q When was the first one? A First was in December, I don't exactly know the date; it was before Christmas sometime.

Q Of what year? A Last year.

Q 1928? A Yes, sir.

40 Q Of what did your examination consist?
A Of stripping the patient and going over her to

find out what, if any, physical disability she had.

Q Did you at that time have as assistance of X-rays? A No, sir.

Q You made a clinical diagnosis? A Yes, sir.

Q In what method did you make the clinical diagnosis? A By inspection, by palpation. Those are what we see, what we feel, what we elicit from the patient by those methods.

Q Did you treat her? A No, sir.

Q Were you called in for the purpose of qualifying as a witness? A I was. 10

Q Is that right? A Yes, sir.

Q Now, doctor, what did you find by inspection of this lady? A I found by inspection that she was of a rather nervous type individual. She could not do the things that the ordinary type individual might do, and as I had reason to believe she could do before the injury, inasmuch as I had seen her prior to this injury. 20

Q Oh, you had; when was that, doctor? 20

A Oh, several years ago.

Q Where? A In my office at Newton, in association with Dr. Hood.

Q What was the occasion of that, doctor?

A The occasion of that, at that particular time, she was a patient—inmate of Morris Plains,—

Q Yes? A Dr. Hood and I were appointed by the Judge, I believe, as a commission, to determine her sanity, whether or not she could come out of that institution and go to her home. 30

Q What did you find then? A We arrived at the conclusion that she was able to return to her home.

Q Just when was that, doctor? Can you give us, as near as you can recall? A Well, that must be six or seven years ago, I should say.

Q What was her physical condition as to ability to work and ability to get about? A At that time? 40

Q Yes. A Oh, I would say she could do most anything.

Q Now, you say, by inspection, you found at the time that you made your examination last December, that, in your opinion, she was not able to do what she had been able to do before?

A Yes, sir.

10 Q What was preventing her, doctor? A She could not—she was limited in motion; she, for instance, couldn't bend very well, she couldn't move her back from either forward or backward or from side to side.

Q Did you come to any conclusion as to what caused that condition. A Yes, sir.

Q What was it? A I believed that she had a fracture of the vertebrae. There was the deformity that you could see, slight deformity of the main line of the vertebrae; in one particular place it projected out further than it did in the others.

20 Q Where was that deformity, doctor? A The first lumbar vertebra was the beginning of it.

Q Now, let's see, taking the vertebrae from the neck, starting with the cervicals—? A Below the ribs, below where the first vertebra—below where the ribs come in,—the vertebrae above are the thoracic; those below are the lumbar. It is the first.

Q About where on the person?

30 MR. COULT: I will withdraw that.

Q You say that it is just below where the ribs branch out from the back? A Yes, sir.

Q Did you, at that time, find evidence of any other pain or injury? A I did not. It was rather hard to tell. There might have been further injury below this first lumbar, but that I could not find out.

40 Q Did you make any examination as to fracture of the ribs? A I did, but I couldn't find

any fracture. I felt that she had tender areas, on pressure, where I was told she had fracture.

Q Yes. Now, how did you find out that she had painful areas? A By asking her questions and by pressing on different parts of her body.

Q How could you tell when you pressed on different parts of her body that she suffered?

A By her actions; she was nervous, and she would tell me she had pain.

Q Aside from what she told you, could you see it from your observation? A Yes, by her actions, I was satisfied that she had pain when I would press on certain areas. 10

Q Where were those areas? A In the line of where I observed where the deformity was and going from there up the spine; she was very sensitive. She had what we might call a painful spine.

Q How far did it extend up the spine? A Up to,—well, the region between the shoulders.

Q Doctor, you are familiar with the use of X-rays, I suppose? A Yes, sir. 20

Q You have interpreted radiographs yourself, haven't you? A Yes, sir.

Q How much experience have you had in the interpretation of radiographs? A Well, I have seen a good many,—I don't just know what you might call by "experience"—quite a considerable experience, I would say.

Q Well, how many would you say you could see within a year's time? Give us some idea. 30

A Oh, four or five hundred.

Q You are familiar with the use of X-rays and the interpretation of them, are you not? A To a certain extent; yes, sir.

MR. COULT: Do you want to cross-examine the doctor as to his ability to read a plate?

MR. DOWNING: No.

MR. KAYS: No.

Q I show you Exhibit P-4, and ask you if that radiograph shows any pathology? A Yes, sir.

Q Have you ever seen it before? A No, sir.

Q What does it show, doctor? A Well, it shows deviation of the spine at the point where I designated on my other examination, at the first lumbar vertebra, and the second also appears deviated and also, besides the deviation, you can see fracture—what I believe to be fracture there.

Q Which one is fractured? A The first spinous process of the first vertebra—first lumbar vertebra.

Q What is the spinous process? A Well, that is the part that sticks out of the back; as you run your hand over a spine, that is the part you feel, with your finger as you go up and down the backbone,—that is called the spinous process.

MR. DOWNING: Do I understand this is P-4 he is examining?

THE COURT: Yes.

MR. COULT: Yes.

THE WITNESS: Yes.

Q Now, I show you P-5, doctor, and ask you if there is any pathology on that plate? A Well, that, I happened to hear the doctor testify as to what this showed, and I agree with the testimony that he offered at that time, that it shows bony exostosis, which was undoubtedly callus in the beginning and now developed into bone, as I understand it.

THE COURT: Enlargement, you mean, on the vertebra at that point?

THE WITNESS: Yes, sir; it is the *enlargement* that shows at that particular part.

Q Now, doctor, what is exostosis? A Exostosis is bone; it is the bone grown around a bone that is healed there, as you might say. It is like a spavin on a horse; that is exostosis, that comes from sprain. It comes from sprain. In a person, you will find it where there is a fracture, where there is anything that irritates and causes inflammation; that inflammation will become, first, callus, and later on bone. 10

Q I was about to ask you if there is any—is there any distinction between callus and exostosis? A Well, callus really is spoken of more as a cartilaginous growth, as a first stage of exostosis.

Q Well, is exostosis a normal result of injury or abnormal? A Yes, sir; is is a normal result.

Q What is it? It is nature's remedy for what? A Nature's way of healing bone. 20

Q Makes a splint, doesn't it? A Yes, sir.

Q Is that what occurred in this case? A I would think so.

Q Does that indicate to you as to whether or not there was fracture of bone? A I would say there was fracture.

Q Now, doctor, would the presence of this fracture and the exostosis that you indicate have any effect upon this lady's ability to perform her ordinary duties? A Yes, sir; it would have a great deal of effect. It would produce pain, produce lack of motility, lack of motion. 30

Q You said you made another examination? A They were both the same.

Q Eh? A Which one do you refer to now?

Q Apart from the examination that you made before Christmas in 1928,— A Yes, sir.

Q —did you examine her again? A Yes, sir; Thursday of this week—of this past week. 40

Q What change, if any, was there in her condition? A No change.

Q No change? A No, no change; no, sir.

Q Doctor, what is your prognosis as to this lady's condition? A Oh, she is as good as she will be.

10 Q Having in mind the condition that she was in at the time you examined her, when she was discharged from the hospital—I mean, having in mind her physical condition—and having in mind the condition that you found in these two examinations, one in December, 1928, the other last week, what percentage of disability would you say this lady has sustained by reason of this condition in her back? A I would say at least seventy-five percent.

20 Q By that you mean, if I might offer the further illustration, it is your answer that she now has twenty-five percent of the physical—general physical ability that she had before the accident? A That is my opinion.

Q Your opinion was, I believe you said, that that will not improve? A No, sir.. it will not.

30 Q Now, doctor, assuming that on the 22nd day of November, 1926, this lady while sitting in a barber shop at Newton, on Spring street, was struck on the shoulders by a radiator which fell from a wall, hitting her first on the shoulders, threw her to the floor, then striking her again in the back; that she was then taken to her home with assistance, and that she was put on a stretcher, taken in a taxicab to the hospital at Sussex; that she was put in a plaster cast which remained on about four months; that she was in the hospital three months; and that after the removal of the plaster cast she wore a brace for about one year, until a time about one year after the date of the accident; that she has pains and unable to perform her household duties between the time she took the brace off and up to
40 the date of your examination. Can you state wheth-

er or not, in your opinion, there is any casual connection between the accident that she suffered and the condition that she has now? Can you? A I believe there is.

Q What is that casual connection? A A falling radiator striking her back.

MR. COULT: Cross-examine.

THE COURT: We will take a recess now until one o'clock. 10

(NOON RECESS)

May 6, 1929; 1:00 P. M.

CROSS-EXAMINATION BY MR. KAYS:

Q Doctor, the growth that you say was apparent on the vertebra was due to a healing process, wasn't it? A Yes, sir. 20

Q It wasn't any disease? A I would not say so, no, sir; that was healing.

Q That would occur, I suppose, as a result of the breaking of any bone, wouldn't it? A Yes, it would occur, but not in the back as a result of any bone.

Q It would what? A It would not occur in the back as a result, for instance, of a breaking of any bone in the leg. 30

Q No, but I mean when a bone was broken, that would occur? A Yes, sir.

Q Wouldn't it? A Yes, sir.

Q From your examination, it was properly healed? A Oh, it has healed.

MR. KAYS: That is all.

CROSS-EXAMINATION BY MR. DOWNING:

Q You examined Miss Nilssen in September or October of 1923, also, didn't you doctor? A 1923? It was around there; I do not just remember the date.

Q Did that in conjunction with Dr. Hood? A Yes, sir.

10 Q And as a result of that examination, a guardian was appointed for her, was there not? A I do not recall, except that I remember that it was our opinion that she was fit to be brought home.

Q She was not in the hospital that time, was she? A I think she was home on furlough, or leave, as they do sometimes at the institution,—send them out on probation.

Q Wasn't it your recommendation that someone here in the county be appointed to take care of her? A Sir?

20 Q Wasn't it your recommendation that someone here in the county be appointed to look after her? A Well, only as that it seemed at that particular time, that was the only way she could come from the asylum, that someone had to assume responsibility for her behavior, as I understand.

Q She was not in the asylum at that time, was she? A I am not positive; she was under the control of the asylum.

30 Q This enlargement of the bone that you speak of, could it come from disease as well as from injury? A Not that particular kind, it would not be from disease.

Q They do, sometimes, though, get that condition from diseased vertebrae? A Yes, evidently you do, but your X-rays shows the other part, which doesn't show up in this X-ray, to be normal as far as that condition is concerned.

MR. DOWNING: That is all.

REDIRECT EXAMINATION BY MR. COULT:

Q You say this fracture healed. Did it heal with the bones in normal position? A No, sir; they are still out of line. That is, that displacement is still there, but the bones themselves healed.

Q What has that displacement to do with her present disability? A It hinders the motion of her back.

MR. COULT: That is all, doctor.

10

RE-CROSS-EXAMINATION BY MR. DOWNING:

Q Do you remember what disease Miss Nilssen was suffering from when you examined her in 1923? A I do not consider she was suffering from any disease.

Q What was the matter with her? A We did not feel there was enough the matter with her to keep her in the asylum.

20

Q Did you think there was anything the matter with her? A I did not consider her—do you refer to the mental disease or physical disease?

Q Either. A I did not think she had any physical or mental disease; no, sir.

Q At that time? A No, sir.

Q You thought she was entirely recovered from any that she had had? A If she had any, I would say she had recovered from any disease, which I mean by "disease" a pathological condition; I do not mean something imaginary or something of that kind.

30

Q Was her mental condition not normal? A Was her mental condition not normal?

Q Yes. A I would not say so, or I would not recommend that she come out.

MR. DOWNING: That is all.

40

LOUIS RATTI, sworn

DIRECT EXAMINATION BY MR. COULT:

Q Where do you live, Mr. Ratti? A Newton.

Q What is your business? A Merchant.

Q Did you see this accident? A No, I didn't exactly see it.

10 Q Where were you at the time? A I was in the barber's chair.

Q What was the first thing you knew about it?

A I heard the crash and a scream.

Q What did you do when you heard that? A After I saw what had occurred, I immediately rushed out to call a doctor.

Q Did you look when you heard the crash and the scream to see what had happened? A Yes, I naturally did.

20 Q What did you see? A I saw the radiator, which had been hung on the wall, had fallen and was on a diagonal with the floor, and Miss Nilssen was beneath it, about half-way up.

Q Where was she? A Beneath the radiator.

Q On what? A On the floor.

Q Where was the radiator lying with relation to her person? A The radiator was on a *slant*, I should judge about forty degrees it was about; she was beneath the radiator, about half-way up; that is, from the radiator—from the floor.

30 Q I know, but what part of her was the radiator on? A The back.

Q Did you see what part of her back? A No; I only had a glance.

Q What did that radiator look like? Can you describe it to the jury? A Why, it was between six and nine feet long, and I would say possibly two feet high.

Q What was it made of? A Iron, I imagine.

Q What do you mean? Iron pipes? A No.

40 Q What form was it? Can you describe it? A

It was in a sort of a rectangular position, possibly nine feet long or six feet or seven feet long, two feet high.

Q Was it solid or otherwise? A Like the ordinary radiator.

THE COURT: There is one behind you. Was it like that?

THE WITNESS: Yes, something like that. 10

Q Can you estimate the weight of it?

MR. KAYS: If the court please, I object to that. That is only a matter of opinion.

THE COURT: Well, he may have a good opinion. If he has, I think we might have it.

Q Well, I will ask you first: Could you estimate it? A Not with any degree of accuracy, no. 20

Q Well, could you estimate it roughly, approximately? You can just answer that yes or no. A No.

Q If you want to say "no," all right. You say you went for a doctor? A Yes, sir.

Q Where did you go? A I went to the next door to phone to him.

Q When you left the shop, was the lady still under the radiator? A Yes, sir. I rushed out immediately. 30

MR COULT: Cross-examine.

CROSS-EXAMINATION BY MR. KAYS:

Q How long were you in the shop before this accident, Mr. Ratti? A Why, before the accident? Possibly twenty minutes.

Q Were you in the barber's chair when this 40

woman came in? A No.

Q You were waiting? A I was waiting.

Q Did you sit under this radiator? A Yes.

Q The same chair that the woman sat in? A
No, I was directly beneath the end that hit the floor.

Q Did you notice the radiator prior to the accident? A No.

Q Did you notice whether it was against the wall, or not? A No.

10 CROSS-EXAMINATION BY MR. DOWNING:

Q This radiator was fastened to two walls, was it not? A I don't know.

Q Isn't there a wall at the right of the barber-shop, as you enter? A As I entered, there is a wall to the right.

Q And this wall to the right, that is the wall that the radiator that fell was fastened to, is it not?

20 A Yes, that is right.

Q Then there is a pipe to which the radiator was fastened, to another wall, at right angles, isn't there? Isn't that right? A There is a little wall opposite to that, but I don't think the pipe was fastened to that, but the pipe was there.

Q The pipe came through there and was attached to the radiator? A Yes.

30 Q And the end of the radiator was still attached to the pipe after it had fallen, was it not? A That is right.

Q Only the one end of the radiator was on the floor? A Yes.

Q The other was fastened to the pipe? A That is right.

MR. DOWNING: That is all.

THE COURT: How far from the floor was the part that was still attached.

40

THE WITNESS: It was—it was in its normal position.

THE COURT: Well, where was its normal position?

THE WITNESS: About a little bit below my shoulder, as I am standing; that would be about between four and five feet.

THE COURT: So that the one end that had hit the floor had dropped about four or five feet? 10

THE WITNESS: That is right.

REDIRECT EXAMINATION BY MR. COULT:

Q You say that one end was still attached to a pipe. Where did that pipe run to? A I don't know; it was fastened. 20

Q You do not know where that run to. Was the pipe torn out of the wall? A No.

MR. COULT: That is all.

RECROSS-EXAMINATION BY MR. DOWNING:

Q When Miss Nilssen came in, she sat about the center of that radiator? A Yes, sir. 30

Q That was not the part of the radiator that came in contact with the floor? A No.

MR. DOWNING: That is all.

FREDERICK H. MORRISON, M. D., sworn.

DIRECT EXAMINATION BY MR. COULT:

Q Where do you live, Dr. Morrison? A 61 40

High Street, Newton, N. J.

Q You are a practicing physician and surgeon of the State of New Jersey? A I am.

Q Where were you graduated? A P. & S., Columbia, 1917.

MR. COULT: Do you admit the doctor's qualifications?

10 MR. KAYS: Yes.

MR. DOWNING: Yes.

Q Doctor, you attended this plaintiff after her accident, did you not? A I did.

Q When were you first called in? A I think the first call came in about, as I recall, about eleven o'clock, on the morning of November 22, 1926.

20 Q In response to that call, what did you do?
A At the time I had an accident case in my office which needed immediate attention, and as I understood that this was a serious injury from the degree of her pain, as given over the phone, I advised that she immediately be removed to the Linn Memorial Hospital for further treatment.

Q When did you see her next? A Oh, within an hour.

Q Where? A At Linn Memorial Hospital.

Q How did you get up there? A By car.

30 Q What did you find when you got there? A
A woman suffering a great deal of pain, almost impossible to examine her. It was impossible to roll her over, to make any palpable examination of the back; she was very excitable, very nervous.

Q What did you do for her? A Put her to bed, with proper sedatives, for observation, until proper time, when we could complete the X-ray and determine the exact condition.

40 Q Do you remember—do you know whether any X-rays had been taken up to that time? A

Not to my knowledge.

Q When did you X-ray her? A I believe, November 22nd.

Q Was that the same day of the accident? A No, sir—yes—same day of the accident.

Q Did you make a diagnosis of her condition?

A Yes, sir.

Q When were you able to make a diagnosis?

A Definite diagnosis on the completion of the X-rays.

Q Where did you make that? A At the hospital.

10

Q Did you take any X-rays? A I did not.

Q Doctor, I call your attention to Exhibit P-4, which bears date November 29, 1926, and ask you if you recall that X-ray. A I do.

Q I call your attention to P-5, which bears the same date. Do you recall that X-ray? A I do.

Q Now, doctor, what do these—without going into it with too great particularity, what do these X-rays show, 4 and 5? A Each of these X-rays reveal a partial fracture of the first lumbar vertebra of the spine, and also of the spinous process of the lumbar vertebra.

20

Q Which one? A First.

Q Doctor, here are two other X-rays that have been handed to me. Do you recognize them? A I do.

Q Well, now, what is that one that I just handed to you? A That is a view of the spine, taken above the position of the injury.

30

THE COURT: Whose spine?

Q How do you know it?

THE COURT: Whose spine?

THE WITNESS: There is no way of identifying it.

40

Q That is what we want, to try to identify it, if we can. Do you know what that X-ray is? A It is an X-ray of a human spine, showing the first lumbar vertebra, with apparently a misplaced position.

Q Do you recognize it? Do you know who took it? A I notice an inscription on the back, which I believe to be the same as that on the other film, taken by Dr. Haggerty.

10

MR. COULT: Is Dr. Haggerty here?

THE COURT: Yes, he is here.

MR. COULT: Well, I will have to recall Dr. Haggerty.

Q Just step aside for a moment, doctor.

20

(Witness withdrawn)

JOHN D. HAGGERTY, D. D. S., recalled.

DIRECT EXAMINATION BY MR. COULT:

Q Dr. Haggerty, here is a radiograph dated November 22, 1926. I ask you if you recognize that.

A Yes, sir.

Q Did you take that? A Yes, sir.

30 Q Did you take it on the 22nd? A Well, I assume that I did, because it is so dated that, sir.

Q Is that in your handwriting on the picture?

A Yes, sir.

Q Does that refresh your recollection as to when you took it? A 22nd of November, 1926, is the record; I have no other way of telling that I didn't take it on that day.

40

MR. COULT: I will offer it.

THE COURT: Let it be marked.

(MARKED PLAINTIFF'S EXHIBIT P-7 IN EVIDENCE)

Q I show you another X-ray, dated November 29, 1926, and I ask you if you took that picture.

A Yes, sir; I did, sir.

Q What is that? A You mean, diagnosis of it?

10

Q Yes; what does it show? A That doesn't show much, other than that I am hunting for the exact spot.

Q So, this is the picture, is it not, that you took to find the spot— A At the time—

Q —on the day of your second examination?

A Yes, second or third picture; yes, sir.

MR. COULT: All right, that is all, doctor. Cross-examine.

20

THE COURT: Have you offered that one?

MR. COULT: I will offer it.

THE COURT: All right.

(MARKED PLAINTIFF'S EXHIBIT P-8 IN EVIDENCE)

30

THE COURT: Any cross-examination?

(NO CROSS-EXAMINATION)

FREDERICK H. MORRISON, M. D., recalled

DIRECT EXAMINATION BY MR. COULT:

Q - Doctor, I show you a radiograph of Miss Nilsen, marked P-7 in evidence, dated November 22, 40

1926, and I ask you whether or not you had that before you at the time you made your diagnosis?

A I believe that was prepared earlier, before we completed our diagnosis.

Q Doctor, the reason I am asking you is, you said you made your diagnosis on the taking of the X-ray plates; you said that was on November 22nd. Do you recall that? A One on the 22nd, two on the 29th.

10 Q All right; do you recall the radiograph taken on the 29th? A Yes, sir.

Q Look at P-4 and P-5, if you can find them. A P-4.

Q And tell me whether or not you had those X-rays before you at the time you made your diagnosis on the 29th. A Yes, sir.

20 Q Now, what do those X-rays, the one taken on the 22nd and two on the 29th, disclose? A A fracture of the body of the first lumbar vertebra is disclosed in each film. On the one which has a lateral view, there is also indication of a fracture of the spinous process of the first lumbar vertebra.

Q Now, did you rely entirely upon the pictures for your diagnosis? A No, sir.

Q What other means did you have of diagnosing the condition? A Physical examination,—examination of the patient, including the areas of pain, tenderness, function.

30 Q Where did you find those? A There was an area of pain in the lumbar region, of the back,—

Q Yes? A —particularly over the first lumbar vertebra.

Q Now, at the time you first saw this lady, was she suffering? A Yes, sir.

40 Q How was that evidenced? A By her personal remarks of pain, by her inability to move without physical pain, inability—pain was so great that she would not move—refused to move—indicated a tensed condition of the body muscles to avoid any motion which might cause pain.

Q Did you treat her during her confinement in the hospital? A I did.

Q Now, without going into it with too great particularity, just tell the jury generally what your course of treatment was and how she progressed during the time she was there, doctor. A The course of treatment was, after the diagnosis had been completed, of immobilization, fixation of the part, in a plaster cast. That simply means putting a solid material around the spine—around the back.

Q I show you Exhibit P-1, and ask you if that is that cast which you put on the lady. A That looks very much like it.

Q How was that put on? By whom? A That was put on by myself and Dr. Wilbur.

Q What was her condition as to mobility after she had that on? A Mobility after that was on? She was unable to move, which was exactly what we wanted to do, to fix the spine.

Q What was the purpose of that? A To keep the parts quiet and to prevent one part rubbing against another, to keep the injured bone in position, in one place, and to permit the natural process of healing to take place.

Q Do you recall how long she was in that cast before it was opened? A Roughly, I think it was two months—between two and three months.

Q Then what did you do with it? A Took the cast off and advised her—restrapped it so as to keep the same position—and advised that she should go to an orthopedic appliance concern who could make a proper support.

Q Now, I show you P-2, a brace. A Yes, sir.

Q Did you ever see that before? A I believe so; yes, sir.

Q What was that used for? A The purpose of that was to give support to the side, to keep the parts in place.

Q Did this lady wear that brace? A To my knowledge, she did.

Q How long did you treat her, doctor, altogether? A Why, I saw her from November 22nd until February, I think it was, about the 28th, and then after that I saw her once—

Q Well, you had her under treatment until February 28th? A Yes, sir.

Q What was her condition at the conclusion of your treatment of her? A This woman was suffering some pain, but she was much improved over that at the time of her injury, she was regaining her strength, but still unable to perform her usual duties.

Q Now, when did you see her again, doctor? A I think it was about in April 19—

Q Of this year? A In 1928.

Q What was her condition at that time? A At that time she was able to walk around, although she was not able to do her full duties.

Q Have you seen her since then? A I have not.

Q Now, what was your prognosis at the time you last saw her? A Continuation of the condition as it was, at that time.

Q Were you of the opinion that she would improve over what she had improved then, or that she would not? A That she would not.

Q That is, her condition, as you found it at that time, you believed permanent? A Yes, sir.

Q What would you say is her ability, measured in percentage, if you can, to perform her household duties and get about at the time when you last examined her, and when you say her condition was permanent? A That is rather difficult to estimate, but I should judge in the neighborhood is 25 to 35%.

Q You had a bill for your services? A Yes, sir.

Q How much was that? A \$135.00.

Q Is that reasonable? A Yes, sir.

40 MR. COULT: Cross-examine.

CROSS-EXAMINATION BY MR. DOWNING:

Q I understand you to say, doctor, you had her under treatment until February 28, 1927? A I did

Q During the time that she was in the hospital, did you change this cast? A I opened the cast up and advised that she be taken to the Pomeroy company for adjustment of the mechanical cast.

Q That is the only cast she ever had? A To my knowledge.

Q What was the reason for opening it up? A After a certain period of time I felt that the plaster cast had answered its purpose and then it would be advisable to remove that cast, and use a less oppressive, cooler more efficient brace.

Q Did you have X-rays taken of her at the time you opened the cast? A I did not.

Q Did you take the cast off at that time or simply open it up? A Opened it up.

Q You did not take it off? A Not at that time.

Q This patient was difficult to get along with, wasn't she? A At times, she was.

Q Had difficulty to keep her in bed, didn't you? A I believe there were one or two instances when they had a little difficulty, but in general—

Q Fight the nurses? A I couldn't say about that.

Q Oh, you do not know. Did she throw water on the nurses? A I did not see any of that; no, sir.

Q But she did finally become troublesome and difficult to handle in the hospital, didn't she. A I didn't quite hear that.

Q But she did finally become troublesome and difficult to handle in the hospital, didn't she? A She gave them a little trouble for a time; I wouldn't say "very troublesome"—some trouble.

Q Don't you know, as a matter of fact, that the hospital authorities insisted that she be removed?

10

20

30

40

A She had been there until the time when it would be possible to be removed.

Q But they did finally insist that she be removed from the hospital? A I do not recall that.

MR. DOWNING: I think that is all.

10 MR. COULT: (Exhibiting bill) Now, I understand you are admitting this bill, as to the amount of it.

MR. DOWNING: Yes.

MR. KAYS: Yes.

MR. COULT: I want to offer in evidence or I will stipulate on the record, with counsel, that the hospital bill was \$399.00.

20 MR. DOWNING: What was the amount of Dr. Morrison's bills?

MR. COULT: \$135.00.

PAUL MONEVASIS, sworn for Plaintiff

DIRECT EXAMINATION BY MR. COULT:

30 Q You are one of the defendants in this case, aren't you, sir? A Yes, sir.

Q You conducted a barber shop on the south side of Spring street in the City of Newton on November 22, 1926? A Yes, sir.

Q Do you recall an accident that happened that day? A No, I was out.

Q Well, what was the first you knew about it?

A I don't understand very good English now.

Q What is the first that you knew about the accident? A If I know the accident?

40 Q When did you find out about it? A It is

very difficult to explain right.

THE COURT: You are doing very well.
When did you first find out somebody was hurt in your barber shop?

A When I come back to the barber shop, I had my hand hurt, and I heard of it in the store, in the shop, that night.

Q Do you rent that store? A Yes, sir. 10

Q From whom? A From Abruzzo.

Q Mr. Abruzzo is also a defendant in this case, isn't he? A Yes, sir.

Q When did you rent the store of him? A When? 1925, November.

Q Did he make some changes in the store?

MR. DOWNING: I didn't get that date.

MR. DOLAN: November 1925. 20

THE WITNESS: 1925, yes.

A He cut part of the corner in the store through.

Q Where was the corner he cut? A Corner was in the middle of the shop, right in the middle of the shop.

Q When did the landlord do that? A He done it a month before the happens, one month before it happens. 30

Q Where was this radiator? A It was right in the back, in the front of the store, right where we work there, behind where we work, in the front; in the window was the shop, radiator was behind us, corner is in the middle of the store, inside.

Q You say the radiator is in the front on the right hand side as you come in? A Yes.

Q And the corner he cut off was right behind the radiator? A Behind the radiator.

Q Did the pipe from the radiator go through 40

that corner? A No, it is about two feet away from the corner, there, the main pipe that was there main pipe was right to the corner but two feet was the connection of the main pipe to the radiator.

Q Where does the radiator make connection with the heater? A What is that? I don't understand.

Q Is there a heater in the building? A No, I never had heater there.

10 Q A furnace? A No furnace; no, I don't have no furnace.

Q Where did the steam come from? A From next door, the tea room; but I never had no heater.

Q And the pipe from the furnace comes through the other building into your building? A From the other building; yes, sir.

Q Where does it—before this accident, where did that pipe come through into your building?

20 A Before the pipe? I don't understand. When the pipe was there come through from the other store right in my shop there.

Q Where did it come into your shop?

A Where did it come from? Right little bit on the other side in the corner.

Q That is the same corner that the landlord cut off, wasn't it? A Same corner but feet away from the corner was the main pipe, it was.

Q Was that corner a part of another building?

30 A No, my shop was the corner, no part of the other building.

Q Are you familiar with the house to the left of your store, the building to the left of your store? A I don't understand that.

Q Do you know the Dr. Hood property?

A Yes.

Q Is there a tea room in that building?

A Yes.

Q Did the corner of that building come into your barber shop? A Yes, one corner in the

40 middle of the barber shop, but I don't know how

the corner fixed there, how the corner fixed there, I don't be there when the corner fixed there.

Q In other words, that corner was there when you took the shop; is that it? A Yes.

Q Did you want that out of the way? A I don't understand.

Q Did you want that corner removed?

A That corner removed?

Q Yes. A Well, he cut a little bit in front of the corner.

Q Didnt you want the corner out to give you more room? A Yes, I wanted little more room. 10

Q Did you go to your landlord about that? A Yes.

Q Did he undertake to, cut the corner out?

A No—little bit—the point of the corner out, not all, part of the corner, just in the middle.

Q And who paid for it? A Mr. Abruzzo, the landlord of the place.

Q Who got the men to do the work? A Mr. Kellam, I guess, it is Kellam, the contractor. 20

Q He was the man that did the work? A Yes, sir.

Q Who hired him? A Mr. Abruzzo.

MR. COULT: Cross-examine.

CROSS-EXAMINATION BY MR. DOWNING:

Q Paul, as you come into your barber shop, on the right there is a wall, is there not? A Yes, sir. 30

Q And that runs back for quite a little ways until it strikes another wall that is erected at right angles to it, doesn't it? A They are what?

Q The walls come together at right angles, do they not? A Yes.

Q And the steam pipe to which the—to which this radiator is attached— A Yes.

Q —comes out in the wall close to the corner 40

that is cut off? A Close to the corner, yes.

Q Close to the corner? A Close to the corner.

Q The corner of the rear wall that was cut off was about two or three feet from where that steam pipe came out? A Yes, about two feet, little more, two feet.

Q That corner was simply cut off, rounded, is that it? A Yes.

10 Q It was nowhere near the radiator? A Nowheres what?

Q Nowheres near the radiator? A Near the—

Q It wasn't near the radiator, I said. A No, the radiator was about two feet away from the corner, yes.

Q It wasn't behind the radiator, as you told Judge Coult, was it? A I don't understand.

20 Q The wall wasn't cut off behind the radiator, was it? A Behind the radiator? No, beside the radiator, about two or three feet that side of the radiator.

Q That wall that was cut wasn't the same wall that the radiator was screwed fast to, was it? A No, different wall.

Q Different wall entirely? A Different wall.

MR. DOWNING: That is all.

30 REDIRECT EXAMINATION BY MR. COULT:

Q That was the wall the pipe went in, wasn't it? A Well, the main pipe was in the same—middle of the store, same wall, different pipe, was the radiator, that was in the other wall.

MR. COULT: That is all.

CROSS-EXAMINATION BY MR. KAYS:

Q You say that you never had any heater?

A No, sir; never had any heater.

Q What do you mean by that? A Why, I intended to get steam to my room, I expect the next door tea room to give me, but she bought never coal enough, never had no heat, just I warm the place by oil stove; I had two oil stoves.

Q In other words, you did not use the radiator for heat. A No. 10

Q Was that so? A Yes, no have no heat or anything.

Q You never made any arrangement with your landlord, Mr. Abruzzo, for heat? A Well, I asked with him, I asked him fix it with Mr. Leeper because Mr. Leeper owns the place back there; Mr. Leeper never give me no heat. I said, "What is the use bothering with the radiator?"

Q So you never made any arrangement with Mr. Abruzzo for heat? A No, I never paid him anything, never give him anything. 20

Q This corner that was cut off, how far was this out from the corner that was cut off? A The pipe was right in the same wall. The pipe was right in the same wall where they cut the corner off, but the radiator was far, you know, three feet from it.

Q How far did this radiator extend along the wall? A About two feet and a half or about three. 30

Q No; how long was the radiator? A How long was the radiator? Eight feet.

Q Do you know how high it was? A How high was? Why, I don't know, it was about high exactly is this (indicating).

Q How high is that? A I don't know.

THE COURT: Twenty inches.

A It is about, I don't know how much it is; I never measured anything.

Q How was that radiator hung on that wall?

A How hung on that wall?

Q Yes. A By screws.

Q Were the screws in the radiator itself?

A Screws was that in the radiator all of the time?

Q No— A How can I—

10 Q Were there screws in the radiator? Were there screws in the radiator itself, or were they in hooks that held the radiator? A I don't understand.

THE COURT: How was the radiator fastened to the wall? Is that the question?

A How was the radiator fastened to the wall?

20 Q Yes. A I don't know; I see the screws there; I don't know how it hung on the wall, just I seen the radiator on the wall, I don't know how, I just seen the screws there.

Q What were the screws in? The radiator itself? A No, had hooks.

Q That is what I mean. A Had some hooks—across the hooks.

Q Was the radiator resting on those hooks, hung on those hooks, hooks coming out through the radiator? A No, I don't see anything like that, never.

30

MR. KAYS: That is all.

RE-CROSS-EXAMINATION BY MR. DOWNING:

Q How long ago did you say you rented that building? A About a year before it happened.

Q About a year before it happened? A (No answer).

40 Q You say you made new arrangements after the corner was cut off? A Yes, ((when I) first

come used to pay forty dollars a month, and I raised eight dollars more.

Q When was that? When was it raised?

A November—November.

Q November? A First month because cut off last days October and the first day of October I gave check for forty dollars, after I give eight dollars without check, after started to pay forty-eight with checks.

Q That was before this accident happened, was it? A (No audible response). 10

THE COURT: Is that all?

Q Did you rent this for a barber shop when you first rented it? A Yes.

Q Was that what you used it for? A Yes, just for barbershop.

Q How many chairs were in it? A Two.

Q Never any more than that. A No, never. 20

MR. DOWNING: That is all.

FREDERICK E. WILBUR, M. D., sworn.

DIRECT EXAMINATION BY MR. COULT:

Q Where do you live, Doctor? A Franklin, N. J.

Q You are a practicing physician and surgeon of this state? A Yes, sir. 30

Q Where were you graduated? A Johns Hopkins Medical School, Baltimore, Maryland.

MR. COULT: Do you admit the qualifications?

MR. MORRIS: Yes, sir.

Q Were you connected with the hospital in Sus- 40

sex, 22nd day of November, 1926? A Yes, sir; on the advisory board of the hospital.

Q Do you know the plaintiff in this case? A Yes, sir.

Q Where did you see her first after her accident? A In the Sussex hospital.

Q When? A Shortly after the first of December, 1926.

10 Q Did you examine her? A I did, with Dr. Morrison.

Q Did you see the X-rays? A I did.

Q Doctor, can you pick out X-rays 4 and 6? A I couldn't remember what the X-rays were; I just saw them at that time, and never seen them since.

Q Doctor, did you make a diagnosis of her condition? A Yes, sir.

Q What was that? A That she had a broken vertebra without pressure on the cord, without any pressure on the spinal cord.

20 Q What did you advise? A Advised immobilizing the spine with a plaster cast.

Q Did you do that? A We did; yes, sir.

Q Who put the cast on? A Dr. Morrison.

Q Did you have anything to do with it? A I helped him.

Q Did you see her after that? A No, sir.

MR. COULT: Cross-examine.

30 MR. DOWNING: No questions.

MR. KAYS: No questions.

JOSEPH ABRUZZO, sworn for Plaintiff.

DIRECT EXAMINATION BY MR. COULT:

Q Mr. Abruzzo, you are one of the defendants.

A Yes, sir.

40 Q You and your wife were the owners of the

store, or of the building in which there was a barber shop in which this accident occurred on November 22, 1926; is that right? A Yes, sir.

Q How long had you owned the premises before that? A Oh, I don't know; we bought the property about couple of years before, I think, two or three years before, I couldn't remember very well when we bought the property.

Q Is that what was known as the Dr. Hood property? A Yes.

Q Was there a building on that property? A Yes, it was an old building.

Q Did you make any improvements there? A Yes, sir; I did.

Q What did you do? A We built a store, first built the store on 218, and then we added, with the consent of the tenant, to the main building.

Q So you just put a store onto the original building; is that right? A No, first we built a store on the empty lot; then after that when I see the work was satisfactory for myself, we had him build another store on the extension in the front of the house.

Q Now, was that the barber shop the last extension that you put on? A Yes, extension, and the other was the Three Tree Tea Room, they call it.

Q Did the corner of the old Hood building go into the barber shop? A Well, the corner is the original corner, what was the old building.

Q That went into the barber shop? A Yes, that is the corner we cut off.

Q Now, you cut that corner out, didn't you? A Yes, just a little bit.

Q When did you do that? A Because to make more room.

Q When did you do that? A Mr. Kellam is here; he can tell you when he done it.

THE COURT: How long before the accident did he?

THE WITNESS: About a month or month and a half before the accident.

Q Whom did you get to do that work? A Mr. Kellam.

Q Do you know Mr. William I. Houghton? A I know him well, sure.

Q Did you ever have him look at that job? A No, never.

10 Q Did you ever take Mr. Houghton to the premises— A No, sir.

Q Where does the steam pipe come from that goes into that building, into the barber shop? A Comes from the tea room.

Q Tea room on the old Hood property? A Yes.

Q Does the pipe to this radiator go through the corner of the Hood house? A No, not through the corner, through the corner, through the walls, corner got nothing to do with the pipe; I can't explain it nice. This is corner house, this is wall for the radiator, and the radiator from the corner is about three feet away.

Q Yes, but the pipe to the radiator goes through that corner, doesn't it? A No, sir.

Q How does it go into the Hood house? A Pipe ain't got nothing to do with that, that comes from Mr. Leeper's house, Three Tree Tea Room house.

30

THE COURT: Tea Room?

THE WITNESS: Yes.

Q Does the pipe which leads to the radiator come in from the old Hood building? A Yes.

Q And the corner that you cut away, is that the corner of the old Hood building? A Yes.

Q And the corner that was cut away, was that
40 the front of the old Hood building? A Yes, but

instead of putting the pipe around the corner, he swung around in the direction, see, of the radiator.

Q You had that work done yourself, didn't you? A Sir?

Q You had that work done yourself, didn't you? A Well, we called the man, Mr. Kellam.

Q You paid for it? A Yes, we paid. You see, I didn't want to do that corner, because it was too much trouble for a little room, charged little more rent; he said to me, "Mr. Abruzzo, if you do that, pay you little more money,"—cost hundred dollars and I charge him eight dollars, I pay a hundred and I got ninety-six. 10

Q Who paid the man that cut the corner away? A I paid,—

MR. COULT: Cross-examine.

A —and I got the money from Mr. Monevasis after one year. 20

CROSS-EXAMINATION B YMR. KAYS:

Q The pipe which comes into this barber shop, does that come from the tea room side? A From the tea room; yes, sir.

Q Is that the main pipe for the radiator in the tea room also in the barber shop? A I couldn't tell you, because Mr. Kellam can explain to you better. He done the work, everything, because I never look inside, to the pipe, what the main pipe come in through the corner to the old building, or to the wall in the corner. 30

Q That is all.

THE COURT: That is all, Mr. Abruzzo.

Q Did you have any arrangement with Paul to furnish him heat? Did you furnish any heat for Paul—Paul Monevasis? A No, the arrange- 40

ment was made like this—

Q Did you furnish him heat? A —Mr. Leeper promises to him they to furnish him heat.

THE COURT: Strike it out, if you wish it.

MR. KAYS: Yes, please.

10 THE COURT: Strike it out. The question is: Did you furnish heat? Did you furnish heat?

THE WITNESS: No, he paid—I don't furnish nothing.

THE COURT: That is the answer. You did not. You did or you did not. Which was it?

20 THE WITNESS: The thing is this—

THE COURT: No, the thing is, did you furnish heat or didn't you?

THE WITNESS: Why, I didn't furnish no heat.

THE COURT: Then, you did not; that is the answer.

30 THE WITNESS: Well—

THE COURT: Next question.

THE WITNESS: —Mr. Leeper.

THE COURT: No, no; he didn't ask you anything more than that. He just asked you if you furnished him heat.

40 THE WITNESS: All right.

CROSS-EXAMINATION BY MR. DOWNING:

Q As you enter this barber shop, on the right is the wall between it and the tea room; is that right? A Yes, sir.

Q And that goes back for a considerable distance; then there is another wall at right angles to it, that runs toward the theatre? A Yes.

Q And then another wall continuing back, between the barber shop and the tea room—
A Yes. 10

Q —to the end of the building? A End of the building; yes, sir.

Q The part of the wall that you cut off—
A That was the old building.

Q —is that part that was nearest to the theatre; is that right? A Not close to the entrance to the left side.

Q Yes— A But the left side ain't got nothing to do with the building— 20

Q Answer the question only, Mr. Abruzzo.
A All right.

Q The part of the wall that you cut off was to the left of where the radiator hung, wasn't it?
A Yes.

Q How close was that to where the pipe comes through the wall? A It was—the radiator was far from the corner where it was cut off about three feet.

Q About three feet? A About three feet. 30

Q The part that you cut off? A Yes.

Q So that the cutting was done nowhere near that radiator? A Not at all, not even a small—

MR. DOWNING: That is all.

REDIRECT EXAMINATION BY MR. COULT:

Q How near the radiator was it?

40

MR. DOWNING: Three feet, he said.

MR. COULT: I am asking him.

A Well, the radiator this way, radiator was so high.

10 THE COURT: No, he didn't ask you how high. How near the radiator was the corner that was cut off?

A About three feet.

Q Did you look at the radiator after the accident? A After the accident? No, it was call from Mr.—

Q Huh? A —that day—

THE COURT: No, you were not asked that.

A I come from the farm.

20

THE COURT: Did you look at it then?

A Then I see the screw in the radiator, after three or four men helped me, took it away from the store, helped me put new one up.

Q Did you keep the screws? A I don't know whether they kept the screws, or not.

Q Did you see the screws? A Yes.

Q Where are they? A Well, who has got the screws, I don't know where are they.

30

MR. COULT: All right.

WILLIAM I. HOUGHTON, sworn.

DIRECT EXAMINATION BY MR. COULT:

Q Where do you live, Mr. Houghton?
A Newton, Spring street, New Jersey.

40 Q What is your business? A General contractor.

Q How long have you been in that business?

A Ever since the war and before the war.

Q In that connection, have you built any structures? A Plenty of them.

Q Near here? Near Newton? A Yes, quite a few.

Q Which ones? A Theatre, Newton Trust, *Herald* building, any number of stores along Spring street.

Q Have you built any buildings outside of Newton? A Yes. 10

Q What places? A Built a school in *Pinesville*, New York, and ———, two or three foundaries down there; built the hotel for John Manville people.

Q Do you know Mr. Abruzzo, one of the defendants in this case? A Yes, sir.

Q Did he ever call on you to look at some work that he wanted done in the barber shop on Spring street? A Yes, sir.

Q When was that? Can you tell us about? You do not have to be exact about it. A No, I couldn't—I know it was quite some time before he had the work done. 20

Q Now, you say quite some time; can you make it a little more definite than that? A Oh, possibly three or four months.

Q All right. What did you do in connection with that? Did you look at the place? A I looked at the place.

Q Did Mr. Abruzzo point out what he wanted done? A Yes. 30

Q Did you look at what he proposed? A I did.

Q What was it that he was inquiring about? A Taking off the corner of the old Hood building that stood into the barber shop; he wanted to get more room in there.

Q What did you tell him with regard to that? A The way he wanted it done then, I told him it 40

was very poor construction, and I wouldn't do it.

Q Why not?

MR. DOWNING: I object to this.

Q I do not mean why you would not do it, but why was it poor construction?

10 MR. DOWNING: I object to this line of testimony, unless it is shown that the construction proposed was the construction work that was finally done.

THE COURT: Of course, if it was not done that way, it is not evidential. I am assuming that it will be connected up.

20 MR. COULT: If the court please, I do not know whether I can connect it up any further than I can with this witness, but it is with regard to the cutting off the corner of this building that was finally done.

THE COURT: It may have been cut off a different way.

MR. COULT: All right.

30 Q How much of that corner did he want to take off?

MR. DOWNING: He has not shown yet how much of the corner was taken off.

40 MR. COULT: The witnesses have shown it by their hands. I do not know that the distances are all in the record, but they made motions with their hands to indicate how much was taken off.

THE COURT: Yes.

Q How much of that corner was it proposed to take off at that time?

MR. DOWNING: I ask an exception.

THE COURT: I will allow it, subject to being stricken out, if I find it is not connected up properly. How much was taken off? 10

THE WITNESS: About two feet, I would say.

THE COURT: Or, how much he wanted taken off?

THE WITNESS: About two feet, I would say.

Q Was that what he wanted taken off or what was taken off? A That is what he wanted taken off. 20

Q Did you see the interior of the barber shop after it was remodeled? A I have not.

Q What would be the effect of taking away about two feet of that corner?

MR. DOWNING: I object.

THE COURT: I will allow it. 30

MR. COULT: Now, if the court please, it is just simply a question of the memory of what these witnesses said. They said something about like that (indicating), one of them.

THE COURT: I will allow it.

MR. DOWNING: May I have an exception. 40

THE COURT: You may have it.

Q What would be the probable result of that?

A Well, if he did it the way he explained to me, it would weaken that partition, that wall.

MR. DOWNING: That is not responsive, if Your Honor please.

10 MR. COULT: Of course, I am the one that complains about irresponsible answers, not counsel.

THE COURT: I will allow it to stand.

MR. DOWNING: I think that should be stricken out.

MR. COULT: I will consent to it.

20 THE COURT: Strike it out.

Q Now, listen to me. What would be the probable effect of taking off two feet of that corner, as you have described it? A It would weaken the partition, cause settlement there, probably.

Q Cause settlement? Now, did you ever see the radiator that was hung on that side of the barber shop, on the right hand side? A I saw it when it was put in there.

Q Did you see it in there? A Yes, I saw it three or four years ago, when it was put in.

Q When it was put in? A When it was put in.

Q Did you have anything to do with its putting in? A No, I didn't put it in.

Q About how much would that weigh? A I don't remember how many section there were.

A VOICE: Two

40

THE WITNESS: How many?

MR. DOWNING: Quiet.

A They weigh about forty-five pounds to a section.

Q To a section? A Of a seven foot radiator; I don't know how many sections went in there.

Q About how long is a section? A About twenty two inches, I think.

Q How many? A About twenty-two inches, I think,—two feet. 10

Q Twenty-two inches; how many sections would be in a nine foot radiator? A About four.

Q About five, wouldn't it? A About five—either four or five.

Q Then, if it was nine foot long, it would weigh — A 250 pounds, about.

Q —250 pounds about? A 225 to 250 pounds.

Q Did you notice how that radiator was attached to the wall? A No. 20

Q Now, assuming, sir, that that radiator was about nine foot long, weighed about 250 pounds, was attached to the wall by hooks which fastened in the walls by screws, and the corner of the Hood building should subside, what would you say would be the probable effect of that on the security of the radiator? A Well, it might cause a settlement also in that wall, loosen up the screws.

MR. COULT: Cross-examine. 30

CROSS-EXAMINATION BY MR. DOWNING:

Q That is very problematical, isn't it, Will?

A It is a question, yes.

Q You say you had nothing to do with the putting of this radiator in. You were the general contractor who built the building? A I was.

Q You let out the contract for plumbing? A I did. 40

Q And the radiator was put up in good workman like manner? A It was.

Q And is substantial, as far as jobs are usually put up? A That is the way they are always put up.

10 Q And the pipes to which the radiator was attached come in through the end of the building next to the wall between the Three Trees? A That I cannot answer, whether it comes in from the Hood building, through the corner that was taken out, or whether it went into the tea room and then across into the barber shop.

Q You do not know then whether it came through the corner that was taken off or whether it came through the opposite corner which was opposite that? A I do not know.

Q So you do not know what the effect would be? A I guess the pipe came through there, very close to it.

20 Q If the pipe came through the corner that was taken off, then the result you say would happen would happen? A Probably.

Q If it came anywhere else, it would not happen? A I say, if it came a couple of feet away from the corner, it would not happen; but if it comes too close to the corner, it would effect that too.

MR. DOWNING: That is all.

30

REDIRECT EXAMINATION BY MR. COULT:

Q If the pipe went from the barber shop into the Hood building, would it have to go through this same corner? A No, they could have went through the barber shop into the tea room, then into the Hood building.

40 Q No, you do not get my assumption. If it went from the barber shop direct into the Hood building, without going into the tea room, would it go

through this corner? A Yes.

MR. COULT: That is all.

THE COURT: Any questions, Judge?

MR. KAYS, No.

RUSSELL MOORE, sworn.

DIRECT EXAMINATION BY MR. COULT: 10

Q Mr. Moore, where do you live? A Newton, N. J.

Q What is your occupation? A Why, nothing just at the present time.

Q What was your last occupation? A I was in the laundry business.

Q Now, how long ago was that? A That was, up to the 1st of May.

Q Do you recall the barber shop on the south side of Spring street that was run by Mr. Monevasis? A I do; yes sir. 20

Q Do you recall the accident that happened in there, when the lady got hurt? A I didn't see the accident.

Q No, but do you know the day of it? A Approximately.

Q Did you hear about it? A Approximately, yes. 30

Q Were you in the barber shop before that accident happened? A I was.

Q About when? A Well, as my recollection, in the neighborhood of about a week.

Q Before the happening of the accident? A (Indicating affirmatively).

Q Did you notice anything—

MR. COULT: I will withdraw that.

Q Do you know where the radiator was on the right hand side? A I do.

Q Had you ever seen that before? A Yes, sir.

Q Had you been in the barber shop before that? A Yes, sir.

Q Often or not? A Every two weeks.

Q Now, on this occasion, did you notice the condition of the radiator? A About a week before the accident happened?

10 Q Yes; did you notice it? A Yes, sir.

Q What was the condition of it?

MR. KAYS: I object to it as being too remote from the date of the accident.

THE COURT: I will allow it.

MR. KAYS: Exception.

20 THE COURT: You may have an exception.

Q What was the trouble with it, if anything?

A When I saw it, it was in very poor shape.

Q Now, that doesn't mean anything. How was it in poor shape? A The screws were pulling out of the wall on which it was hung.

Q Where were those screws fastened? A There was screws on each end and in the middle.

30 Q To what were those screws? What did the screws hold to the wall? A Supposed to hold the radiator.

Q Well, were they in the radiator direct or in something else? How was the radiator attached?

A Onto the hooks, hooks held the radiator.

Q Well, were the hooks screwed onto the wall, and the radiator hung on the hooks?

40 THE COURT: Don't shake your head. He nods his head, "yes;" it makes no noise; he

has to put it down.

THE WITNESS: All right.

Q How many of those screws, if you recall, were pulling out? A I couldn't say how many screws there were that was pulling out; on the end next to the door, furthest away from where the pipe was fastened to it, they were practically all of the way out.

Q How about the others? A In the middle, they were not so far; on the end where the pipe which held that end the radiator was hardly moved. 10

Q Did you do anything about that? A Did I do anything?

Q Did you speak to anybody? A Yes.

Q To whom did you speak? A The barber.

Q What is the barber's name? A Well, I call him Paul.

Q What? A We always call him Paul; I don't know what his last name is. 20

Q Would you know him if you saw him? A Yes, sir.

Q Where is he? A Right behind you.

Q This gentleman sitting? A Yes, sir.

Q I am indicating one of these defendants. A Yes, sir.

Q Is that the man? A Yes, sir.

Q What did you tell him? A What is that? 30

Q What did you say to him? A I asked him if he knew the condition that the radiator was in.

Q Yes; what did he say? A He said, yes; he said, that was all right.

Q What did you say to him? A I told him I didn't think it was; it might be all right, I was no judge, but I was afraid of it.

Q Did he say anything in reply to that?

A Nothing more than he said it had been that 40

way a good while, it must be all right.

Q Did you say anything further to him?

A I don't know as I did.

MR. COULT: Cross-examine.

CROSS EXAMINATION BY MR. KAYS:

Q Are you any relation to the plaintiff in this case? A No, sir.

10 Q Never lived with her? A No, sir.

Q Or in her family? A How is that?

Q Ever live with her family? A No, sir.

Q Any of your family ever live with any of her family? A No, sir.

Q How long have you known her? A Why, I have known her since the accident.

Q Knew her before that, didn't you? A No.

Q Did you know her family before that?

20 A I knew some of her relation.

Q You didn't know her? A No.

Q Did you have a conversation with Paul, the barber, the defendant in this case, within the last two or three days, about the accident? A Within the last two or three days?

Q Yes. A Last Thursday, I believe.

Q Yes. On that occasion, did you say to him that you had to testify in favor of the plaintiff in this trial, because you were a friend of the family? A I don't get you; I don't understand you.

30 Q Did you tell him on that occasion that you had to testify in favor of the plaintiff in this case because you were a friend of the family? A I don't know as I did; he asked me if I was for him on the case.

Q You don't know whether you had said that, or not? A I didn't say what you said, not to my knowledge.

40 Q What did you say?

MR. COULT: I object to that.

THE COURT: Objection sustained.

Q Now, how did you happen to make such a close examination of this radiator, to find that all of the screws were all out on one end, part way out in the middle? A I didn't have to make any examination; it was plain enough to be seen.

Q What did you have to do? A I say, I didn't have to do it; it was plain enough to be seen. 10

Q You cannot see those screws in the hooks, can you, when the radiator is hung on them? A Yes, sir; on that end you could.

Q See what did you see? A You can look through the radiator, down that way (illustrating).

Q See all of these prongs on those hooks? A You could; yes, sir.

Q Then the radiator rested on the hooks, didn't it? A Oh, the radiator being up so high, you could see it. 20

Q As a matter of fact, the radiator rested right on top of the hooks, didn't it? A What is that?

Q As a matter of fact, the radiator rested right on top of the hooks, didn't it? A Well, there were hooks to the top and the bottom.

Q I didn't ask you that. The radiator itself rests right on the hooks, doesn't it? A I won't say whether it rested right on the hooks or whether the hooks were caught into it or how it is fastened to the radiator. 30

Q Flange around that, and the radiator was on top of the flange, wasn't it? A Well, the back of the radiator was toward the wall.

Q How could you see these screws without going up and down, looking up under the radiator? A Here is the wall with the radiator, see, up on the wall; I was sitting there, looking up under it.

Q That was the examination you made of it? 40

A That is all.

Q You say you sat on the chair and looked up under the radiator at these screws? A I looked back, saw how it was, and I got up.

Q How did you happen to look back? A Just happened to look incidentally back there, and I could see it; that is all.

Q Was the radiator tilted away from the wall?
A A little bit.

10 Q About how far? A foot? A Oh, no, probably an inch and a half, something like that,— maybe not quite so much; maybe a little more.

Q Was there any other barber in the shop at the time beside Paul? A I wouldn't say for sure.

Q You wouldn't say sure? A Not to be positive.

Q You told Paul that the other barber was there at the time, didn't you? A Not that I know of.

20 Q When you had this conversation with him last Thursday? A Not to my knowledge.

Q You don't remember that? A No, sir; I don't remember that.

Q Well, how long were those screws that were sticking out of the wall? A That I couldn't say.

Q You couldn't tell that? A I couldn't say.

Q What day of the week was this on that you were in there? A I am not positive about that. No doubt it was the latter part of the week; that is generally when I went to the barber shop.

30 Q Was there anybody else in the shop at the time? A I couldn't say that.

Q You do not remember that? A Not for certain.

Q Did you notice how the radiator was fastened onto the wall where the pipe came out? A Pipe comes through the wall, fastened to the radiator.

Q Did you notice that pipe? A Huh-huh.

40 Q What is the wall it came out of? A Side of the wall, same as the place that the radiator was hung.

Q Oh— A Same wall that the radiator was hung.

Q —came out the same wall? Then the statement of all of these other witnesses it came out of a different wall is incorrect?

MR. COULT: I object to that.

THE COURT: Objection sustained.

Q Then if somebody said it came out of another wall, you are sure that they must be mistaken? 10

MR. COULT: Objected to—

A (Interrupting) They are.

THE COURT: Objection sustained; strike it out.

Q You are sure that it came out of the same wall that the radiator was hanging on, are you? 20

A Positive.

Q You are positive of that? Yes? A (No audible response).

Q Well, did you continue to sit under the radiator? A I did not.

Q Got in the barber chair right away, did you? A No, sir.

Q Was there somebody in both chairs? A I am not positive. 30

Q Not positive about that? A Not about that.

Q Well, now, do you know Philip *Brodts*? A Yes, sir.

Q You don't remember whether he was there that day? A I am not sure.

Q Only thing you remember is that the radiator was about to fall down? A Yes, sir; I said, not about to fall down, but it was the condition I said I saw it in. 40

Q Yes. All right.

CROSS-EXAMINATION BY MR. DOWNING:

Q This was about a week before this accident that you noticed this, Russell? A Yes, about a week, as near as I can remember; it wasn't very long.

10 Q If the accident happened on Monday, it would probably have been— A Latter part of the week before, I would say.

Q —latter part of the week before, Thursday or Friday? A (No audible response).

MR. COULT: He shook his head, "yes."

THE COURT: Don't shake your head, please

20 Q Paul told you at that time that this radiator had been in that condition for a good while? A Well, he said that it had been that way a good while, yes,—all right, it had been that way a good while.

Q Did he say how long that good while was?

A No, sir.

Q Now, as you enter this barber shop, on your right is the wall between it and the Three Trees Lunch Room, it is? A Yes, sir.

30 Q That extends for a considerable distance back; then there is another wall at right angles to it? A Yes, sir.

Q And the pipe to which the radiator was attached comes out of the wall that is at right angles to the wall between the barber shop and the Three Trees Tea Room, does it not? A The wall that the pipe comes out of is the same wall that the radiator hung on.

Q Same wall that the radiator hung on? A That is my recollection.

40 MR. DOWNING: That is all.

MR. COULT: We rest.

(PLAINTIFF RESTS)

DEFENDANT ABRUZZO'S MOTION FOR NON-SUIT

MR. DOWNING: If the court please, on behalf of the Defendant Abruzzo, I again move for a non-suit on the ground that the landlord is not liable for an accident happening on leased premises. There has been nothing in this case to show that any repairs were made to this radiator or anywheres near it. All of the evidence is that any repairs that were made, they were made at least two or three feet away from the wall through which the pipe came that went to the radiator, and that the wall is an entirely different wall from the wall on which the radiator hung.

THE COURT: There is some testimony that it is the same wall.

MR. DOWNING: There is the testimony of this last witness that it is the same wall, and there is also the testimony of the last witness that the radiator had been in a bad condition for quite a while, and this repair that is alleged to have been made, or this alteration in the construction of the building was made a considerable length of time before the accident, so the two of them jibe up, that the repairs had not been made at the time the radiator was in bad condition.

THE COURT: I think you are wrong about that. I think that one man said that the repairs had been made but a short time before the accident.

MR. DOWNING: He said the repairs had been made October 31st, last October, he said.

THE COURT: That was a month before, ap-

proximately.

MR. DOWNING: This witness says that on the 15th to 20th of November, a few days before the accident happened, that the barber told him the radiator had been loose for quite a while.

THE COURT: That is correct.

MR. DOWNING: Which would indicate that it had been loose before anything had been done.

10

MR. COULT: The barber wasn't under oath then.

MR. DOWNING: What is that?

MR. COULT: The barber wasn't under oath then.

THE COURT: He was your witness.

MR. DOWNING: Your witness was under oath. I think, from the fact that the accident happened on leased premises, without any contract on the part of the landlord to repair, entitles the Defendants Abruzzo to a non-suit in this matter.

20

THE COURT: I feel not; motion denied.

MR. DOWNING: May I ask an exception?

THE COURT: Exception allowed.

DEFENDANT MONEVASIS' CASE

PAUL MONEVASIS, recalled in his own behalf.

30

DIRECT EXAMINATION BY MR. KAYS:

Q You are one of the defendants in this case, Paul? A (No answer).

BY THE COURT:

Q You are being sued? He asks you: You are being sued, are you not? A I don't—

40

Q You are a defendant? A I know I am a

defendant.

Q You know you are; all right A Sure I am.

Q Then say you are. A They are suing me in court here.

BY MR. KAYS:

Q You testified a little while ago about the condition of the radiator. When did you last examine that radiator, to see whether it was tight against the wall? A Every day the last Saturday before that Monday comes it happens. 10

Q On the Saturday before the accident happened? A Before the accident.

Q Were you in the building at the time, or in town, at the time the accident happened? Were you in Newton at the time the accident happened? A No, I have been in (partly unintelligible) I went to New York that day; I had cut my hand the day before, and I went to New York to get a barber. 20

Q Now, did you notice any screws loose in that radiator, as you have made an examination of it?

A No, never.

Q Was it pulled away from the wall? A Yes, sir.

Q Was it pulled away from the wall? A No. it was right in the wall, because I see the screws was in the hooks every day when I cleaned with the brush.

Q Did you hear Russell Moore's testimony? A Never— 30

Q Did you hear what he said on the witness stand? A I heard him here; I am surprised about it, I never told him that.

Q Did he ever speak to you about it being loose? A Never told me about being was loose the crews.

Q Did anybody ever call your attention to its being loose? A No, never, nobody.

Q Did your customers always sit under that radiator? A All of my customers, my wife, my 40

children, all people sit by there every day.

Q Every day? A Evrery day, last day it happens; I was there the day before it happened, I set there too.

Q They sat there the day it happened?
A In the morning, before I had my hand cut, I sat there and I see was all right; I set there and waited for to go to the train. I set by the radiator there in the morning about fifteen minutes by the radiator myself.

10 Q Did you have a talk with Russell Moore several days ago about this accident? A I think I talk that Wednesday or Thursday, I don't remember exactly date.

Q Last week? A I asked him, I say I am surprised.

Q Never mind. You had a conversation with him last Thursday? A Last Thursday, I think, Thursday or Wednesday.

20 Q Did you ask him, say to him, at that time that you were surprised that he was telling—
A Yes.

Q —a story about this radiator being loose,—
A Yes.

Q —and asked him why he did it? A Yes.

30 Q Did he say at that time that he was a friend of this plaintiff, and that he was compelled to testify for that reason? A He told me something like that, but I don't understand; he said—
relation — something — relation—somebody—live with the woman—something—sister—something like that,—but I don't understand very good exactly what he said.

Q You rented this store from Mr. Abruzzo, did you? A Yes, sir.

Q When you rented it, did he know what it was to be used for? A Yes, he knows for barber shop.

40 Q That was, you say, sometime in 1925? In the year 1925? A 1925, in the year.

Q And you continued to use it as a barber shop ever since, have you? A Yes.

Q I think you testified that he doesn't furnish you with heat. Mr. Abruzzo doesn't furnish you with heat for the building? A No.

Q How do you heat the barber shop? A By oil stoves.

Q Were the oil stoves there at the time of this accident? A Yes. I had kerosene stove, oil stoves; I had different things to heat in the place. 10

MR. KAYS: That is all.

CROSS-EXAMINATION BY MR. DOWNING:

Q Mr. Monevavis, this corner that was cut off that building, after that was cut off, and in consideration of it being cut off, you paid Mr. Abruzzo eight dollars a month more rent, didn't you?

A Yes, sir. 20

MR. DOWNING: That is all.

CROSS-EXAMINATION BY MR. COULT:

Q Now, who was working for you as a barber at the time this accident happened? A At the time when the accident?

Q Yes; who was in your shop? A Phil Brodt. 30

Q He is here, is he? A He is here.

Q You made an inspection of this radiator quite frequently, didn't you? You know what "inspection" is? A No? Inspection? No.

Q Well, did you know what an inspection was when Mr. Kays was talking about it? A I don't understand what you mean.

Q You don't understand what an inspection is when I ask you, do you? A I know something inspected but I don't know. 40

Q Did you understand what an inspection was when Mr. Kays asked you about it? Do you know what it is? Inspection,—what is that? A I don't know.

Q Did you do anything to this radiator at all?

A If what?

Q Did you do anything to this radiator at all?

A No, never.

Q You didn't get any heat through it, did you?

A No.

10 Q You heated the place with oil stoves?

A Huh?

Q You just let it hang on the wall there, didn't you? A Yes.

Q Did you ever look at it? A Who?

Q You. A Look at the radiator or the wall?

Q No, at the radiator? A I see the radiator every second when I am there.

Q What for? A What for?

20 Q Yes. A I see the radiator there in my mind now for I work behind the radiator, it was about two feet behind me, when I was in my own chair.

Q You have your back to it don't you—
A Back to it?

Q —when you are working at the chair?

A Of course, when I am here, standing this way at the chair, the radiator is there back of me, on the wall, about two feet behind me. See?

30 Q Was there anything so interesting—do you know what "interesting" is? Do you know what "interesting" means? A "Interesting?"

Q Yes. A No.

Q Don't know. Was there anything about this radiator that made you look at it instead of keeping your eyes on your hair cutting? A Keep my eyes upon on the radiator when the hair cut?

40 Q You say you could see the radiator when you were cutting hair, because you stood sideways, as you illustrated. Where were you look-

ing at the radiator instead of the man's head?
 A Well, I look on my job; I see no difference with the radiator, on the screws in the radiator all of the time, only when I go in there, just when I go in the shop, I see the radiator there, pass the radiator two or three times a day.

Q I thought you told Judge Kays that you inspected this radiator every day. Did you?

A Inspected radiator?

Q Yes. A Yes, every day I see.

Q Did you? A Every day I see the screws was all right all of the time I see the radiator. 10

Q Were you afraid it was going to fall?

A No; I inspected the radiator, so if I see anything wrong, I fix it.

Q Were you looking at the screws on this radiator every day because you expected something to happen? A No, just like I see anything in the shop. If I see anything wrong, I fix it.

Q Just looked at the radiator the same way you would look at everything else in your barber-shop? A I look the same as in here; I see the screws was on the hooks there, sure, all of the time. 20

Q I say, just the same way you could tell this bench was not going to fall over and hurt anybody, you knew that this radiator was not going to fall and hurt anybody, because you saw it had all of the screws held it on the wall nice and tight?

A Yes. 30

Q You looked at the screws, did you? A Screws was there because the radiator was all right.

Q Did you look at all of the screws to see that they were in tight? A All of the screws was in all right.

Q Every one? A Yes, every screw was in, sure, tight.

Q You saw that every day? A Every day; yes, sir, 40

Q For how many years? A For how many years?

Q For how many years? A For two years.

Q For two years, you have looked at every screw on the top and bottom of that radiator to see if it was all right? A Yes, sir; since I was there, I looked at the radiator all of the time.

Q Every time it was all right? A It was all right.

10 Q Did you look at it the day that the accident happened? Were you in there that morning?

A No.

Q Wasn't in there all day? A I was there that morning, yes, before accident happened.

Q But the screws were all in good condition then, at that time, were they? A Sure, I see nothing wrong. I was there Saturday, my wife, my kids come down to see me Saturday, I see the screws was all in.

20 Q Now, you don't know what made that radiator fall, do you? A No, I don't know.

Q Radiator was there and it had all these screws in it, in good condition, one day and the next day it dropped; is that so? A Saturday was all right; I don't know if Monday fell down Monday,—I don't know if the tea room fixed something else there, I don't know; Sunday I was closed.

30 Q Do you know Russell Moore, a customer of your shop? A Yes.

Q Comes there about every other two weeks? A Every three weeks, two weeks, yes.

Q And he talked to you about other things, didn't he? A No, never, not about radiator.

Q I know, but about other things, not radiators; he talked to you often, didn't he? A He talked to me, yes.

Q You can remember what Russell Moore said to you and what you said to him, can't you?

40 A No, he never talked to me about radiator.

Q No, not about the radiator; politics, horse-racing, anything, different things, news, and so on?

A Yes, we talked.

Q You can remember what he said? You can remember what you said, can't you? A Sometimes people come into the shop, I don't understand all they ask me.

Q You wouldn't undertake to tell us everything that you and Russell Moore have talked about ever since he has been a customer in your shop, would you? A Yes. 10

Q Could you? A Yes, he was in my shop.

Q Just wait a moment. You can't tell these ladies and gentlemen here everything that you and Russell Moore talked about when he was in your shop, can you? A He asked to me lot of things.

Q I say, you can't tell what they are, can you? A No, sometimes talk to me, sometimes, because I don't understand,—

Q Yes? A —but I never noticed talked to me radiator was loose; I don't hear no reference radiator no one. 20

Q I see; you don't understand English very well, do you? A Me? I don't understand good English, no.

Q So, if anybody asked you about hair cutting or a shave, something like that, you would understand it,— A Yes—

Q —but if Russell Moore had talked to you about the radiator, you think perhaps you did not understand it? Is that it? A I don't remember if he talked to me on the radiator. 30

Q All right; you don't remember if he talked to you about the radiator lately? A Lots of people speak to me different way, I can't understand all of them; just to please the people, I say yes.

Q Why was it that just a few days ago you talked to Russell Moore about whether he was going to be a witness here? A Yes. 40

Q You say you asked him whether he was going to be a witness? A Yes, sir.

Q And he told you whether he was going to be a witness? Was that right? A Yes.

Q You didn't think Russell Moore saw this accident, did you? A Yes, sir; I asked him. He didn't see the accident, Your Honor.

Q You asked him whether he saw the accident? A Yes.

10 Q Well, how many people did you go to and ask whether they had seen the accident? Anybody besides Russell Moore? A No.

Q You didn't think that Russell Moore was going to swear to a conversation that he had with you, did you? A No, I didn't think so.

Q What? A I didn't understand what you say.

20 Q I understood that you were asking Russell Moore a while ago whether he was going to be a witness in this case; that is right, isn't it? A Yes.

Q I understood that you were asking Russell Moore a while ago whether he was going to be a witness in this case; that is right, isn't it? A Yes.

Q Didn't you think then that Russell Moore was going to swear to the conversation he had with you about this radiator? A I don't understand very well.

30 Q Did you say that you went to Russell Moore and you asked him why he was going to be a witness in this case? That is true, isn't it? A Yes, I asked him if he is a witness.

Q You asked him if he is a witness. What did you think he was going to testify about? A Well, because my lawyer told me some questions, was some man told me something about screws loose on the radiator, I see on the street. I say to him, why you say screws was loose?

40 Q Did you tell your lawyer that this witness was going to testify to any such thing as that? Did you tell him that? A After, yes, after when I

speak with Mr. Russell—(What's-his-name?)—
Moore.

Q Let's get this right. The reason why you asked this man, Russell Moore, if he was going to be a witness in this case, was because your lawyer told you— A Yes.

Q —that he was going to swear that he had had a talk with you? Is that right? A He had talk with me, yes.

Q So you went to see him, because your lawyer sent you to him; is that right? A No, he just told me. 10

Q Did you think that Russell Moore was going to be a witness, aside from what your lawyer told you? A Yes.

Q How did you know it? A I don't know—lawyer told me.

Q Was that the only information you had about it? A I don't understand all of these questions.

Q Well, all right. A I don't understand all of these questions, that is all. 20

Q Huh? A I can't speak English good.

MR. COULT: All right, I think that is all.

PHILEMON BRODT, sworn.

DIRECT EXAMINATION BY MR. KAYS:

Q Mr. Brodt, what is your business? A Barber. 30

Q Where do you work? A 222 Spring street.

Q Is that for Paul Monevasis? A Yes.

Q How long have you worked for him? A Two years and a half, since the 8th day of November, 1925—1926.

Q Do you remember an accident (that) happened there in November, 1926, where a woman was injured? A I do.

Q She is the plaintiff in this case? A (No 40

audible response).

Q Who was in the shop at the time of this accident? A There was one customer besides the lady that was waiting, Mr. Ratti. He was in my chair I was working on Mr. Ratti.

Q Do you know the radiator that was suspended along the wall at that time in the barber shop? Do you know the radiator that extended along the wall at that time in the barber shop? A Radiator?

10

Q Yes. A Yes, sir.

Q Do you remember where it was located? A Certainly do; it was before my eyes all of the while. We worked quite near-by.

Q Where was it? A The radiator was along the right hand side of the wall as you come in the store; it was eight feet long, seven sections.

20

Q Seven sections. How wide? A About twenty inches high, I imagine,—from twenty to twenty-two inches high.

30

Q Now, where did the pipe come into this radiator, from what wall? A As you come in the store, the wall was run this way; radiator was against this wall; when you got back to the corner, there was an off-set went that way, and the flat wall starts again. The radiator runs for eight foot, to this wall that runs that way, and the pipe comes through this way, about two feet from the corner, pipe comes through this way, didn't come through the wall that that radiator hung on, as you have heard. Radiator hung on this wall and the pipe come through this wall that runs that way.

Q Do you know Russell Moore? A I do.

Q Did you ever see him in the shop? A I have

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Q Do you remember seeing him there about a week before the accident? A I don't know whether it was the week before, but I see him in the shop from the time that I went to work there. I see him maybe that time or between that time and the —when the accident happened.

Q Did you ever hear him tell Paul Monevavis about the radiator being loose? A I never did.

Q Did you ever hear anybody tell Paul that the radiator was loose? A Tell Paul that?

Q Yes. A I never did.

Q Did you look at that radiator to see whether the screws were in it, or not? A Well, in your leisure times, when you walk around the shop, you look at most everything. I have looked at the radiator. I see that the radiator was hanging again the wall board, and I have looked at it and wondered whether that radiator was really safe again that wall, being that it is screwed again wall board, and I have looked at the radiator, not particularly to see whether it was safe up again the wall, because I think the same morning I was setting under it, looking at the newspaper, because I set under it every day, and I, if I had thought that that radiator would fall on me, I wouldn't set under it.

10

Q Did you notice a day or two before this accident whether all of the screws were in the hooks?

20

A I suppose they were in; I never saw that that was any out. I didn't notice that they were all in, or not, for I supposed that the radiator was all right.

Q Did you see the radiator after it fell? A I certainly did: I helped the lady from under it after it pinned her down on the floor. It was all I could do to lift it off enough to get her out from under it.

Q Do you remember how many hooks there were? A There was an iron casting bracket underneath the radiator that the radiator rested on—I think it was a sort of a bracket—and the screws were in the bracket—and the screws had to pass through this iron bracket, through the wall, to the studding. I noticed the time after it dropped, that just the tips of the screws was in the studding, and the screws were an inch and a half in length. I think they were seven screws to hold that to the wood, and they was an inch and

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a half long about.

Q How many brackets were there? A I think there was maybe two or three brackets; how many I don't know sure; it might have been more. I think there was two to three brackets, seven screws.

Q How far were those brackets from the radiator? From the end of the radiator, I mean.

10 A I think one bracket was toward the wall from one corner, and the other was out toward one end, and I think there was one out toward the middle, up near the top, to hold it again the wall, something like that; I can't just give exactly how it was.

CROSS-EXAMINATION BY MR. DOWNING:

20 Q Now, Mr. Brodt, how far from where the two walls come together did the pipe come through the end walls? A Well, the extreme corner of the off-set, I imagine, was two foot and a half or three feet,—let's see, the shop is nine feet and a half wide, I think,—I imagine from two to three feet from this corner to the off-set,—this corner runs back that way—and the pipe comes through here, I imagine, about six inches from the corner.

Q About six inches from the right hand wall?

A Yes, to hold the coupling there right again the end of the radiator.

30 Q That wall through which the pipe came was about three feet wide? A What do you mean? Do you mean this extension toward the corner?

Q From the wall between the tea room and the barber shop to the outside edge of the wall that runs at right angles to it was how far?

40 A The radiator was again this wall, between the tea room and the barber shop, and back at the corner where the partition goes like that, I think about six inches, like this is the corner, the pipe comes through there from the tea room.

Q How far was that to the corner where it was cut off? A How far from there right out to the corner where it was cut off?

Q Yes. A Oh, couple of feet.

Q Couple of feet? A Couple of feet, about three feet, from the corner to the radiator; there was about half a foot from the coupling to go in there from the radiator itself.

Q That wall was cut off after you came there?
A Before I came, it was cut off before.

Q Cut off before you came? A Yes.

10

Q Do you remember the condition before it was cut off? Had you ever been in there before that time? A I have been in there a few times.

Q Was it near the radiator that it was cut off, or away from it? A Away about two or three feet, yes.

Q About two or three feet away from the radiator? A Yes.

MR. DOWNING: That is all.

20

CROSS-EXAMINATION BY MR. COULT:

Q You were familiar with the interior of this store before the change was made in that corner, were you? A Not particularly, no.

Q Well, you know the place that was cut off was part of the foundation of the old Hood house, don't you? A Before it happened?

30

Q The part that was taken off was part of the foundation of the old Hood house? A The part that was cut off was, I think, one corner of the old original building; it stuck out from the—when the building was built against the corner.

Q In other words, the old Hood house had a corner that run on the line of the front of that house into the front of your barber shop?

A The barber shop was built against it.

Q When they concluded to have more room in

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the barber shop, and they cut the corner off of this building, what they took out was the foundation of the old Hood house, wasn't it? A Not particularly the foundation; it didn't go to the foundation; it was this corner, part of the studing, whatever you may call it, that reached from the floor up.

Q Whether I am precise in saying the foundation, or not, it was a portion of the corner of that house which supported the weight of the building? A Yes.

Q They cut that back for about two feet and a half from the corner, didn't they? A Right across the corner.

Q About two feet, is that right—two and a half feet? A Something like that, yes.

Q And the water—and the steam pipe that ran from the radiator ran into the old Hood house, didn't it? A It come from, I imagine, from the cellar in the Hood house.

Q There isn't any doubt that it ran through the same wall that was cut away? A It looks to me like wall board.

Q Now, regardless of that, without regard to what it looks like to you, the pipe that goes into the furnace, or the heater, comes through the same wall that the cut off; that is right, isn't it? A I imagine, a part of that wall, yes.

Q Well, call it a part of the wall, but it went into the wall of the old Hood house? A I don't think it is the original wall of the old Hood house, because I think it is wall board now, and the old Hood house would have been a stronger thing than wall board.

Q Putting it in another way, the steam pipe that goes to the furnace, goes through a portion of that wall of the Hood building? A It goes through the partition, but there has been a tea room at the present time in there, and I think they run that partition a little different from the

old building.

Q Just one thing I want to ask you, Mr. Brodt, and I wish you would answer my question. Now, listen to me. If you don't understand what I am asking you, tell me, won't you? Does this pipe run through the old Hood building, or not?

A I can't say that. I can't say that was the old Hood building, but I don't think it was.

Q Does it run through one of the walls of the corner which comes into the barber shop, or which originally came into the barber shop? A Yes. 10

Q All right; that is good enough. Now, you had no particular concern with this radiator, had you?

A Not particularly; no, sir.

Q It didn't provide any heat for your barber shop, did it? A It didn't; we used two oil stoves—either two oil stoves or a gas stove and an oil stove—to furnish heat.

Q So you never had anything to do at all to it except look at it? A And to dust it off. 20

Q Who dusted it? A The boss sometimes, and I did sometimes.

Q You say that from time to time you looked at the screws in the bracket underneath this radiator to see if they were all in; is that right? A No, not particularly,—just as you happened to once in a while see the radiator and the screws, not particularly, for any particular purpose.

Q Didn't you say—I understood you to say on direct examination that before the accident you frequently wondered whether or not this radiator was secure, since it was fastened by screws into what appeared to be wall board? A Yes, it entered my mind that the radiator would really be safe on the wall board, but I never gave it a thought that it would fall down, but, as I say, I sat under it myself. 30

Q After it came down, you noticed that there were, as you say, six or seven screws? A There were from seven to eight screws, something like that. 40

Q May have been seven? A Well, I think, seven or eight; I don't know.

Q How many brackets? How many holes were there for screws under the radiator. How many holes to a bracket? A There was, I think, three brackets—either two or three brackets, two or three holes in a bracket,—two or three holes to one bracket.

10 Q If there were two or three brackets and two or three screws in each bracket, there might be as few as four or as many as nine; is that right? A From seven to nine; I don't think there was nine. I think it was seven we picked up off the floor.

Q Seven? A I think it was.

Q If it was seven screws, and three holes to a bracket, where were the other two screws? A If there was only one screw in one bracket, that would make seven; three in the other two, one in the tight one.

20 Q Were there two out of the tight one? A There might have been.

Q What do you think about it? A I think there was, possibly.

Q You had never seen that in your inspection of this radiator, had you? A Not particularly, no, sir; I didn't notice that.

Q So, as a matter of fact, there were two screws out, weren't there? Weren't there? A I am not positive; I couldn't say sure.

30 Q When you went back there, and picked up what was left, you say you found seven screws for nine holes; is that right? A I think it was seven screws picked up.

Q Well, and naturally there were nine holes for the screws, if there were three brackets? A I don't know.

Q In other words, you couldn't put seven screws in either two or three brackets and have an even number in each? A Sure not.

40 Q So there was a screw loose somewhere, wasn't

there? A I guess there was.

Q In all of your examinations of this bracket—these brackets—and the radiator, you never knew that there were any screws out of them until after the accident had happened, did you? A No.

Q So your inspection wasn't of such a character as to advise you of just how many screws there really were in them, was it? A No, I never made any particular inspection.

Q You wouldn't make any particular inspection to see how many screws there were in the brackets or whether they were there or not, would you? A No. 10

Q There wouldn't be any reason for your doing it, would there? A No, I wouldn't think so.

Q After the accident, you found that these screws—the seven of them—were only long enough to go through the wall board and just the tips of them catch into the studding; is that right? A Yes. 20

Q Now, then, you say there were seven sections of pipe? A Seven blocks.

Q Seven blocks; now, will you say that each one of those blocks weighed about fifty pounds, each one of those units? A They mightn't weigh quite that much.

Q Would you say forty-five pounds? A From forty to fifty, I would imagine.

Q Between forty and fifty? A Yes.

Q So that the total weight, according to you, would be from 280 to 350 pounds? A I am not much of a judge of iron, but I would imagine from 250 to 400 pounds. 30

Q All right. Each one of those seven screws, if that weight was evenly divided, was holding up the weight of a whole section of that radiator, wasn't it? A Yes, they had to.

Q Seven sections, seven screws,—forty-five to fifty pounds on each screw? A Yes, sir.

Q And they were only long enough barely to 40

touch into the studding; is that right? A Inch and a half long.

MR. COULT: I think that is all.

REDIRECT EXAMINATION BY MR. KAYS:

10 Q Mr. Brodt, you think they were only long enough to just reach the studding. Do you know how far the studding was back of that wall board?

A No, I didn't measure the distance, but I noticed on a couple of screws, just the tips, little wood hung on like splinters, like wood on the tips of the screws.

Q Well, whether the screw went two inches into the wood, or not, that might happen, mightn't it?

A That is so, but you must figure the thickness of the iron bracket and the thickness of the wall board; there wasn't much left.

20 Q Do you know what became of those brackets after the accident? A Well, Mr. Abruzzo took them out; he said he was going to take them down to the lawyer's.

Q Does that look anything like one of them? A It looks like one of them, about two I guess in there.

Q Ever see the screw before? A Well, I don't know that was this particular screw, but it was a screw just like it; that looks like the enamel.

30 Q All right. Now, that would go quite a ways into the studding? A Yes, but you have got wall board to go through there yet.

Q Do you know how thick the wall board is? A Wall board, I would imagine, is three-quarters of an inch thick anyway.

Q You do not know? A I don't know; I should imagine it would be three quarters of an inch—from a half to three quarters.

40 Q How many screws did you say there were? A I think there was seven. There might have been more. I might have not seen them all.

MR. KAYS: That is all.

MR. DOWNING: That is all.

JOHN JENSEN, sworn.

DIRECT EXAMINATION BY MR. KAYS:

Q What is your business? A Plumber.

Q How long have you been in that business? 10

A Eight years.

Q Where? A Newton, all around.

Q You still live in Newton? A Yes, sir.

Q You lived here at the time that Miss Nilssen was hurt in the barber shop? A Yes, sir; I did.

Q Did you see the radiator that fell from the wall that day? A I see, before the fall; I didn't see it fall down.

Q You didn't see it the time it fell. A No.

Q Did you see it on the floor after it fell? 20

A No.

Q Do you know when you saw it before it fell?

A I seen that radiator on that wall; the radiator was hung up on the wall, on the right hand side, coming inside, from the door, seven section, cast iron radiator, what we call for a wall radiator.

THE COURT: That is all. That is all he asked you,—if you saw it before it fell; you say you did,— 30

THE WITNESS: Yes.

THE COURT: That is the answer.

Q How was it hung? A It hung on some brackets—radiator brackets—about two or three screws into them, I guess.

Q Do you know whether the hooks were under the radiator or in the middle of the section, 40

or how? A Underneath the radiator.

Q All of them underneath the radiator?

A I wouldn't say they was all underneath the radiator; there might be one in the center, but I noticed a couple of—or three underneath.

Q Do you know whether there were any in the middle? A I don't know, that radiator I fixed that on the other side of the wall after it fell down, I know that; that radiator was on the other side, and I put bolts through to hold it tight.

10

MR. KAYS: That is all.

THE COURT: Any cross, Mr. Downing?

MR. DOWNING: No questions.

CROSS-EXAMINATION BY MR. COULT:

20

Q Did you say that you fixed another radiator after this one fell down? A Yes, sir.

Q Where was that? A Why, the lady in the Three Trees Tea Room called me up, asked me to come down.

THE COURT: No, he didn't ask you that. He asked you where the radiator was that you fixed.

30

A In the tea room, next door,—

THE COURT: That is the answer, in the tea room.

A —right next side.

Q Was the radiator affixed along, on this same wall, only on the other side of it? A Yes, sir.

40

Q And who sent you down there? A I am in business for myself; I had the telephone call from the lady in the tea room and I went down,

MR. COULT: I guess that is all.

CROSS-EXAMINATION BY MR. DOWNING:

Q The radiator of the lady, the Three Tree side, was tight against the wall? A Yes, sir.

Q It wasn't loose? A No, it was all right, but I put some bolts in; she said, to be sure that wont come down too, which is what I did, and I got paid for it.

10

MR. DOWNING: That is all.

MR. KAYS: If the court please, I have another witness here that will testify with regards to the plaintiff's mental condition,—dementia praecox. Mr. Downing wants to make another motion, and if that motion is denied, I have got to put that witness in, with his defense, so that we will save time.

20

THE COURT: I haven't any objection.

MR. COULT: On whose defense?

MR. KAYS: With Mr. Downing, on his defense.

MR. COULT: Mr. Downing is going to put in his defense before he makes a motion, I assume.

30

THE COURT: Yes, and I understand that he wishes to reserve one more witness until after Mr. Downing gets through. Is that right, Judge?

MR. KAYS: Yes.

THE COURT: I have no objection to that.

(DEFENDANT MONEVASIS RESTS.)

40

DEFENDANTS ABRUZZO'S CASE

JOSEPH ABRUZZO, recalled in his own behalf.

DIRECT EXAMINATION BY MR. DOWNING:

Q Mr. Abruzzo, you are the owner of the premises where Paul Monevasis has a barber shop? A I was the owners at one time.

10 Q You were, in November, 1926? A 1926? It was right after—

Q At the time of this accident, you were the owner of the building? A Yes, at that time, I was the owner, yes.

Q Did or did not your agreement with Mr. Monevasis provide for the making of repairs? A No, we agree with him that all inside work he has got to do himself; painting, outside, everything where is work outside, I have got to fix that up.

20 Q How much rent did he pay you when he first rented the place from you? A \$48.00.

THE COURT: No, no; when he first came.

A When he first come, I think it was forty-five—

A VOICE: Forty—

A —or forty, or forty.

30 Q Did you make any alterations in the room for him? A I made that corner alteration.

Q That was the one alteration you made? A I don't make any alteration at all; he painted the store himself.

Q Did you do anything to the wall inside? A That is all, only the corner.

Q Only the corner? A That is all.

Q What did you do to the corner? A Took out a piece of the corner to make little more room.

40 Q How much of the corner did you cut off, if

you know? A I don't know, about two feet.

Q About two feet? A About two feet, yes.

Q Was that cutting off done anywheres near the wall on which this radiator was hung? A No, I don't think it has got anything to do. Mr. Kellam, who done it, is here; he can tell you all of that.

Q Who built this building for you? A Mr. Houghton.

Q Did he have a contract to do all of the work?

A Yes, to do all of the work, and I give it to him, because I was satisfied for him to do it, because he was a very good contractor, so I thought everything was all right. 10

MR. DOWNING: Cross-examine.

CROSS-EXAMINATION BY MR. KAYS:

Q Do you know what the building was to be used for when you first rented it to Paul? A When I rented to Paul, what for? 20

Q Do you know what it was to be used for? A For barbershop; yes, I know that.

Q Did you have any written lease with him?

A We had lease between him and I, you know, private lease.

Q Was it in writing? A Writing between him and I.

Q It was in writing? A You know, writing for one year, private lease, paper we made, him and I, made myself and himself. 30

Q Did you and Paul sign a paper, sign a lease?

A At that time?

Q Yes. A Private paper together, it was paper between him and I, nothing before judge or before lawyer.

THE COURT: They saved the lawyer's fees by making it themselves, he means, Judge Kays

THE WITNESS: He was coming in for one year.

THE COURT: Did you put it in writing?

THE WITNESS: You know, that he sign piece of paper.

10 THE COURT: That is in writing, if he signed a piece of paper.

THE WITNESS: All right.

Q Where is it? A I don't know if he got it.

Q You haven't got it, have you? A No, I haven't got it.

Q You don't remember what was in it? A I remember that I put one year; I move away the house, maybe the writing we throw away maybe the writing.

20

MR. KAYS: That is all.

REDIRECT EXAMINATION BY MR. DOWNING:

Q That written lease, that writing that you signed, that was made after the accident, wasn't it?

A We have got another lease now from after the accident.

30 Q But did you have one in writing before the accident? A That is what I say, private paper, you know, private paper.

Q That is all? A Between him—

MR. DOWNING: That is all.

CROSS-EXAMINATION BY MR. COULT:

Q You say you made another lease after the accident? A Yes, he has got another lease.

40

Q I thought you said you didn't own the premises. A Three months after.

Q Three months after you sold it? A When, after he went in, he got new lease, right after this accident. Q You made another lease with him just before you sold the property, did you? A No, I made lease between him and I private,—

Q Yes? A —then after accident happened, he made new lease with new landlord; that is what I mean.

10

Q With the new landlord? A With the new landlord, yes.

Q Who is that? Your brother-in-law? A No, not my brother-in-law at all; I never saw that man at all; he live in Brooklyn, he is a real estate man.

MR. COULT: That is all.

RE-CROSS-EXAMINATION BY MR. KAYS:

Q I show you a writing, dated November 15, 1926, signed "J. Abruzzo"; is that the writing you refer to? A Yes, that is the one, my signature.

20

Q Is that the one you mean? A Yes.

Q This was just before the accident? A Oh, yes.

MR. KAYS: Do you want to see this? (Exhibiting to counsel.)

Q I show you three braces, each having two screw holes in them, and ask you if you have ever seen these before. A Yes, I did.

30

Q Where did they come out of? A They come from where the radiator fell.

Q They are the braces and screws that were used to hold that radiator to the wall? A Yes.

Q Where did you get them? A From the store—from the radiator there, from the floor.

Q You picked them up from the floor? A 40

Picked them up from the floor.

MR. KAYS: I offer the braces and screws in evidence.

THE COURT: Let them be received.

(DESIGNATED AS DEFENDANT'S EXHIBIT D-1, not marked.)

10 Q Did you pick up all of the screws that you found on the floor? A Yes, I got telephone and I went right there, and I picked them—Paul gave them to me, too.

Q That is all of the braces and all of the screws that you found there, was it? A I think, if I can remember rightly,—I don't know, there is more than two years ago ago,—I don't recall, two years, long time, you know, but I recognize the screws and the braces, what was there.

20 Q There were screws in each one of these when you picked them up, or were the screws on the floor? A Some was on the floor there; them screws Paul give to me. I wasn't right there when the thing happened, you know. Next day I went there, Paul give me them screws,—the barber, his working man,—give me all of these screws after, and some was on the floor yet.

30 THE COURT: Is that all?

MR. DOWNING: That is all.

RE-CROSS-EXAMINATION BY MR. COULT:

Q So that there were holes for six screws and only five screws to go in them; is that right? A It was all of the screws there. Every time I used to go in there and I used to set there under
40 that radiator myself, too.

Q There is five there, isn't there?

MR. KAYS: I took the other screw out.

MR. COULT: Where did this come from?

MR. KAYS: Out of my pocket.

Q Look at that screw. Is that one of the screws that you picked off of the floor? A Sure, you can see— 10

Q I mean the other one, the one with no plaster on it; I say, is that one of the screws that you picked off of the floor? A Listen, counsellor.

Q All right. A This screw was belong there because was painted the same as this.

Q I understand that, but I am talking about the other one. A I don't know about this.

Q Don't look like the other, does it? A I don't know.

Q Kindly look at it, will you? A I couldn't tell you. 20

Q Look at it, and tell me if you think it is one of those that you picked up? A I couldn't tell you.

Q You cannot tell? A No.

Q Look at these other five; there is no doubt about them, is there? A If it isn't, it is identical as near as can be to the others.

Q Just wait a minute. See those five? No doubt about those with the paster in there (indicating), is there? A Well— 30

Q See that plaster in there? What have you to say about that now? A Yes; I don't know, I couldn't tell you, if those screws belong there or not belong there, I couldn't tell.

Q Was there one screw that was broken? A That was broken? I don't know. That is same there.

Q Will you say that is one of the screws you 40

picked up? A I didn't pick up no screws at all; barber give them to me when I went there; I wasn't there when the thing happened. How can I pick up screws?

THE COURT: Anything more?

THE WITNESS: If you give me permit, I would like to say something.

10

Q Here is something I found in the package that contained these. Do you recognize that broken screw? A It looks the same, but I don't know if that screw belong there or not.

Q Let's see; we have got six whole screws and one half screw, that is six and a half out of six holes. Where did the half screw come from? Do you know?

20

MR. KAYS: That is mine; I picked that up.

MR. COULT: Did you want me to think that was one of the screws that was in this thing, or not?

MR. KAYS: Yes, the barber brought it up to me. It had nothing to do with that evidence there, however.

30

THE COURT: Is that all?

MR. COULT: I do not know of anything at all more that I care to ask.

MR. KAYS: Put it in evidence, if you wish to.

THE WITNESS: May I say a few words?

40

THE COURT: No, no, no.

MR. COULT: That is all.

CHARLES H. WATKINS, sworn.

DIRECT EXAMINATION BY MR. DOWNING:

Q Mr. Watkins, you are a plumber in the town of Newton. A Yes, sir.

Q As such, did you do any work for William I. Houghton on the Abruzzo property in Spring street? A Yes, sir. 10

Q When the barber shop addition was put to that building? What work did you do? A Plumbing and heating both.

Q What did that include? The hanging of the radiator. A Yes, sir.

Q Did you hang this radiator in question? A Yes, sir.

Q Explain to the court and jury how it was hung. A Hung on brackets, just the same as you see here, and placed on the wall. 20

Q How did the radiator rest, on the hook part of the bracket? A There is three pairs,—three on the top, three on the bottom.

Q Three on the bottom, three on top? A Yes, sir; one there, then one on top, in the middle and at the end.

Q So that all of the brackets aren't here? A No, sir; they are not.

Q Was that radiator hung in accordance with the approved methods for such work? A Yes, sir. 30

Q Did you put the screws in that radiator yourself? A Yes, sir; I did so.

Q Do you know whether those screws went into the studding? A Yes, sir; I do.

Q Did they? A Yes, sir; I wouldn't do otherwise.

Q You say the hooks that were at the top of that radiator, were they hooked into one of the 40

loops of the radiator? A Yes, sir: there is a little ridge on the top of the center of the radiator where that catches into.

Q When the radiator is hung on that, when the radiator is against the wall, could you see all of those screws in those hooks? A Not the height that radiator was, I don't think you could.

Q Well, was there any of them covered by the piping or coils? A If there would be any interference, it would be the sections of the radiator.

Q Well, did it interfere with the view of these screws that were in the hooks to hold them up?

A Well, it might, the lower ones, but not the top ones.

Q Will you say, in your opinion, you could not see the top because it was too high? A Yes.

CROSS-EXAMINATION BY MR. KAYS:

20 Q When was this radiator put up? A May the 21st, 1925 or '6, I think it was,—the year it was done I ain't sure,—'25 because it was a year ago it was built.

THE COURT: The accident happened the fall of 1926.

A Well, it was '25, May the 21st, 1925.

Q Did you make any change in the radiator after it was first installed? A No, sir.

Q Did you ever go in that barber shop? A Yes, sir; quite often.

Q How soon before were you in it, before the time of the accident? A From about two weeks—a week or two weeks.

Q Did you ever notice the condition of the radiator? A Not particularly; no, sir, any more than I would naturally commonly see it when I went in, that is all; paid no attention any more than my eyes could see it, that is all.

Q Did you ever notice whether it was tight against the wall?

MR. COULT: I object to that as leading.

A No, sir.

THE COURT: Well, I will allow it. He has answered it.

Q Do you know whether any alterations were made in the building after you installed this? A 10
Not until after the accident.

CROSS-EXAMINATION BY MR. COULT:

Q Mr. Watkins, you are familiar with the construction of that store, aren't you? A Yes, sir.

Q You knew the old Hood building, didn't you, pretty well? A Yes, sir.

Q And the foundation of the Hood building, or the corner of the Hood building, comes right into that store? A Yes, sir; three feet about. 20

Q About three feet in? A Yes, and then went back the length of about twelve or fifteen feet.

Q And the radiator was between that jog and the front door? A Yes, sir.

Q On the right hand side; then there is a pipe from the radiator that runs right through the old building? A Yes, sir.

Q Into the Hood cellar; isn't that right? A 30
Yes, sir.

Q Now, if the corner support of that Hood building was taken out to the extent of about two feet, if the corner of that building was caused to settle, and the pipe from the radiator went in through the wall, that would be likely to put a strain on the screws and on the radiator, wouldn't it? A Certainly would,—weight of the building on the 2x4 through there.

Q And it wouldn't take very much of a strain 40

to start them over, would it? A No, sir.

MR. COULT: I think that is all.

CLINTON W. KELLAM, sworn.

DIRECT EXAMINATION BY MR. DOWNING:

10 Q Mr. Kellam, you are a contractor and builder of the town of Newton? A Yes, sir.

Q How long have you been a builder? A In Newton?

Q Any where? A Forty years.

Q How long? A Forty years.

Q Do you know the Joseph Abruzzo property on Spring Street? A I do.

Q Did you ever do any work there? A I did a little.

20 Q When did you do the last work there? A The last and only work I done was in the fall of '26, I think.

Q In the fall of '26? A Yes, sir.

Q Do you know whether it was October or November? A Why, around September, I should imagine; I don't remember exactly.

30 Q What did you do? A Why, I took out part of the corner post of the main building which projected in the barber shop about two feet to give the barber a little more room, cut the corner about the heighth of headroom, say, or a little higher than headroom.

Q By doing that, did you weaken the building? A No, sir.

Q Now, what effect, if any, would the removal of that corner have on the radiator that hung on the wall between the barber shop and the tea room? A Nothing whatever.

Q Would the taking out of that corner cause the building to settle? A No, sir.

40 Q Would there or would there not be any

strain? A Beg pardon?

Q Would there or would there not be any additional strain put on the radiator by reason of the work which you did there? A There would not.

Q How far does the pipe that connected to the radiator in question, how far is that from the wall between the tea room and the barber shop? A I don't know; I didn't pay any attention to it.

Q How close did you come to the pipe in your operations? A No, sir.

Q How close did you come to it? A I didn't see it. 10

THE COURT: Did you do the work yourself?

THE WITNESS: I superintended it.

THE COURT: You were there personally?

THE WITNESS: Yes, sir, due to the fact that I had to take care of it,—I didn't want to do it, but this man wanted me to do it, and I went there and engineered it, and done the job for him. 20

Q This work that you did, was it on the side of the wall that is at right angles to the wall on which the radiator hangs? A Yes, sir; it was the corner of the main building. The main building had a basement, and the barber shop floor was about two feet below the main floor of the house, so that we had to take out the corner post of the old fashioned construction, cut the corner post, and then we cut out the girts that come up to the post, took out the two girts on the corner, and took it out right down to the foundation, even with the floor of the barber shop, and then closed it up, and bracing it. 30

Q Was there any steam pipe there where you did your work? A No, sir; not where we cut. 40

Q Anywheres near your work, where you were working? A I didn't notice it; I don't know.

MR. COULT: I object to his leading the witness.

THE COURT: He said he didn't notice it, didn't see it.

10 MR. DOWNING: Cross-examine.

CROSS-EXAMINATION BY MR. KAYS:

Q You say you took part of the post out?

A Part of it; yes, sir.

Q What did you put in place of it to support the building? A The old foundation was a stone foundation; this is the wall, this is Spring street. The girt that carries the second floor of
20 the main building runs through here studded up solid under that girt to the floor, same way here, so all of that support rested on those studs, on the sills toward the back, from this corner, cut across the corner.

Q I suppose you did quite a lot of hammering and pounding around there? A Very little.

Q What? A Very little hammering and pounding.

Q You had to knock the studding out, didn't
30 you? A No, after we got the under support out, sawed out, the studding came out, that is all, no pounding, no jacking up.

Q You didn't have to jack it up? A No, sir.

MR. KAYS: Very well.

CROSS-EXAMINATION BY MR. COULT:

Q That radiator has a pipe that goes into the
40 wall of the Hood house. You can assume that.

Just assume that for a minute. If the wall—

MR. COULT: I will withdraw the whole question.

Q Assuming that there was a pipe from the radiator that went into the old wall of the Hood house, if the Hood house did settle, then the pull on that pipe would be likely to bring the radiator down, wouldn't it? A No, sir.

Q And why not? A It is supported, with its weight, on the frame of the building; it will pull through the plaster, perhaps, or down through the plaster on the frame work. 10

Q I know, but I am assuming this, that if the pipe that goes from the radiator, goes through that foundation wall, and that foundation settles, wouldn't the strain on that pipe be likely to dislodge the radiator? A I would not think so.

Q Why not? A Because the radiator is on the wall; it is part of that wall. 20

Q Do you mean to say that if there was a downward pull on the pipe that is attached to the radiator, that it wouldn't tend to put more strain on the hooks that held it? A It wouldn't be apt to fall; it would be apt to spring maybe.

Q I see, that pipe has got to spring; if it wouldn't, the strain would come on the radiator, wouldn't it? A I don't know; I didn't see the pipe; I don't know where the pipe went. 30

Q Of course, you haven't had much experinece in the plumbing business, have you? A Some.

Q Some? A I have seen a lot of it, never did it, though.

Q You knew where that radiator was, which was on the side wall, didn't you? You knew that? A I believe it was; I never paid no particular attention to this thing.

Q Do you know whether it hung very close like this or out this way? A I don't know any- 40

thing about it.

Q I don't know anything about it either. Now, if you did the work of removing the post from the corner of that building, and did it properly, the building ought not to settle, ought it? A Do what?

Q If you took the corner post, or part of the corner post out from under the Hood building, and you did your work properly, carefully, that building ought not to settle, should it? A No, sir.

Q I didn't do the manual work; I did the head work.

Q In other words, you had men there to do that work? A Yes, sir; I stayed there to engineer it.

Q You mean to say that on this little barber shop job, you gave your attention— A I did; yes, sir.

Q —all of the time? A I didn't, every minute, but I was there until the crisis was over.

Q Why were you so anxious to be there personally until the crisis was over? A Because I wanted it done right.

Q What was there about it? Was there anything likely to happen? A Why, might have knocked the corner post out of the building, building might have started to fall down.

Q Was that what you meant by the "crisis"? A Crisis, yes. It required knowledge, headwork, to superintend that work, to see that they didn't take out too much of that, and to see that they didn't cut out the post that was unnecessary to cut out.

Q It was such a delicate operation that if you had not been there at the crisis, something would have happened and the corner post come out, and the building might have come down? A Building might have come down? I am not saying just that.

Q Why did you say that Hood building might have started to fall down for? A You might have it start something in the wall.

Q So we will take it as a fact, that you say the job was such a job that you had to be there until the crisis was over, if it had not been done properly, the corner post would come down and the building might have come down; is that all you say? A I guess that is all. Is that all?

MR. COULT: That is all.

10

REDIRECT EXAMINATION BY MR. DOWNING:

Q Mr. Kellam, have you seen that building since the repairs were made? A Beg pardon.

Q Have you seen that building since your job was done? Were you in there today? A I went there to see how the building was like, to see if it was settled any there.

20

Q Was there anything to indicate any settlement in that corner? A There wasn't anything to indicate any settlement in that corner, that I could see.

RECROSS-EXAMINATION BY MR. KAYS:

Q Do you know whether the corner that was removed was afterwards covered up with plaster board, or some such substance? A That building was part plaster, new part was plaster board.

30

Q Well, was the inside of the corner of the Hood building, which stuck out into the barber shop, covered with plaster board, after it was cut off? A Yes.

Q That was covered with plaster board, was it? A Yes,

MR. KAYS: That is all.

40

REDIRECT EXAMINATION BY MR. DOWNING:

Q Do you know how thick the plaster board was in the wall between the tea room and the barber shop? A How thick?

Q Yes. A Why, the plaster board was three-eighths of an inch thick, and the *studding*, I suppose, about four inches, three and three-quarters.

10 THE COURT: No plaster board is three-quarters of an inch thick, is it?

THE WITNESS: No, sir; I haven't seen it, if there is any.

THE COURT: I haven't either.

20 THE WITNESS: Some plaster board is half an inch; this was sheet rock, that is three-eighths of an inch.

MR. DOWNING: That is all.

DAVID TRUAX, sworn.

DIRECT EXAMINATION BY MR. DOWNING:

Q Mr. Truax, where do you live? A Beemerville.

30 Q Do you know Hulda Nilssen? A Yes, sir.

Q Do you know her parents? A Yes, sir.

Q How long have you known Hulda Nilssen?

A Well, I don't know as I could tell you that exactly—fifteen years, anyway, possibly.

Q How far do you live from the Nilssen's, Mr. Truax? A About two miles, I guess.

Q Do you know who does the work there?

A No, sir; I don't.

40 Q Do you know whether or not Hulda Nilssen did any work there prior to November, 1926?

A I don't know; I couldn't tell you as to that.

THE COURT: What was that?

THE WITNESS: I couldn't tell as to that,
so—

THE COURT: Say it so we can understand.

THE WITNESS: I have got a cold in my
throat. 10

Q Do you know anything about her mental
condition prior to that? A No, sir.

Q Do you know whether she has ever had any
difficulty with her parents? A Not to my
knowledge.

(NO CROSS-EXAMINATION)

LAWRENCE M. COLLINS, M. D., sworn. 20

DIRECT EXAMINATION BY MR. DOWNING:

Q Dr. Collins, you are a practicing physician
of the State of New Jersey? A I am.

Q Where are you practicing your profession?

A I am the senior resident physician at the Mor-
ris Plains Hospital, Greystone Park.

Q How long have you been there? A Twelve 30
years.

Q Do you know Hulda Nilssen? A I do.

Q Was she ever a patient at Morris Plains Hos-
pital during your term of service? A She was.

Q When? A On two different occasions.
First was from in October 1921 until July 1922;
and the second admission was from September of
1923 to November of the same year.

Q Was she discharged at that time? A She
was. 40

Q Discharged as cured from her ailment, or not? A She was not; she was discharged as improved.

Q What is her ailment? A She was suffering from a form of mental disease, known as dementia praecox—paranoiac.

Q Do patients recover from that? A They do not.

Q Just what does dementia praecox mean? A Dementia praecox is a classification of a mental disease which generally starts in childhood, in the younger years, starting with behavior disorders, temper tantrums, anti-social tendencies, perhaps with formation of delusions and hallucinations, going on through, may go on for their whole life, with those particular behavior disorders.

Q Did this patient have any particular delusions when she was in the hospital? A The ones I recall were particularly against her family.

Q Against her family? A Her father and mother and sister.

Q What form did they take? A She believed, as I recall now, that her brother-in-law was trying to influence her parents in regard to a will, and that the sister became antagonistic toward her; also that a neighbor had influenced her father, that the neighbor had wanted her to marry his son, and that she believed that the father had been influenced by this neighbor. We also had a long history in regard to the patient in which she had had behavior disorders, going out into the—

MR. COULT: Now, I object, if the court please.

Q Do you have your record of the hospital with you, doctor? A I have.

Q What does it show?

MR. COULT: Objected to.

THE COURT: Objection sustained.

MR. COULT: On the ground it is not binding on us.

MR. DOWNING: I offer the record.

MR. COULT: The record is not competent, if the court please. 10

THE COURT: No.

Q Do you have a record of her treatment in the hospital? A I have.

Q Does that record show the eccentricities that she exhibited?

MR. COULT: I object to that, because the record speaks for itself, and it is not evidential. 20

THE COURT: Yes, the doctor is speaking from his own observation. You do not need the record anyway to show you what his observation was, what the treatment was, when she came and when she left.

Q What would you say as to her willingness to work or not to work, doctor? A She was very indolent at the hospital. 30

Q Would she or wouldn't she do any housework? A She would not.

Q Is this disease from which she is suffering likely to progress? A It is a chronic disease, from the beginning to the end.

MR. DOWNING: Cross-examine.

MR. KAYS: No questions.

CROSS-EXAMINATION BY MR. COULT:

Q Then, in your opinion, she is worse now than she was in 1923 when you let her out?

A I haven't seen the patient.

Q You say it is a progressive disease. A It isn't necessarily progressive; they may adapt themselves.

10

THE COURT: I do not think he said progressive; he said chronic.

THE WITNESS: Chronic, I said.

Q Did you ever see the patient? A I examined her constantly.

Q Did you have anything to do with discharging her? A I did not; of course, I had to state the situation, when the staff refused to discharge her.

20

Q I know, but she was discharged altogether in 1923, wasn't she? A On an order of the court.

Q You had nothing to do with that? A I had nothing; no, sir.

MR. COULT: I think that is all.

30

FREDERICK T. COMPTON, sworn.

DIRECT EXAMINATION BY MR. DOWNING:

Q Mr. Compton where do you live? A I live Wantage township.

Q Do you know Hulda Nilssen? A Yes, sir.

Q Did you ever act in any official capacity for her? A Why, at the time they wanted her to come from the sanitarium down there, the rains asylum, Judge Shay, he appointed me guardian

40

over her and sent me down there.

MR. COULT: I suppose the best evidence of this is the record of the appointment of a guardian in this case, if there was one appointed.

MR. DOWNING: I will introduce the record.

MR. COULT: All right.

10

Q Did she ever stay at your home? A Yes, sir.

Q How long? A For about a month.

Q Did you have any trouble with her while she was there at your home?

MR. COULT: I object to that as not being competent.

20

THE COURT: What is the competency of it?

MR. DOWNING: To show that this woman would not work, unable to work.

THE COURT: On that theory, perhaps it is competent, if it were before she was injured.

MR. DOWNING: Before she was injured, yes.

30

THE COURT: You may answer. Did you have any trouble with her?

MR. COULT: I object—

A She would never do any work at all for us.

THE COURT: Just a moment.

40

MR. COULT: Trouble relating to work, I suppose?

THE COURT: Since the guardianship, before the accident.

MR. DOWNING: Trouble that he had with her, to get her to work.

10 THE COURT: I will allow it.

A (Continuing) No, she never did any work at our place.

Q Never did any work at your place? A No, sir.

Q Do you know whether she had any difficulty with her parents about working?

MR. COULT: I object.

20

THE COURT: If you know, of your own knowledge.

MR. DOWNING: Yes.

MR. COULT: "Do you know whether or not she ever had any difficulty?" I think, is entirely too broad.

30

THE COURT: About the work.

MR. DOWNING: I had that in my question.

THE COURT: Of your own knowledge, not what somebody else told you.

A No, I couldn't say, from my own knowledge,—

THE COURT: Doesn't know.

40

A —not what happened up there.

Q Do you know whether or not she has ever worked for her parents? A Well, she wasn't working there at the time she was down at the asylum, I am sure.

THE COURT: No, that was quite evident.

THE WITNESS: Yes.

Q Where did she go from your home? A Why, her sister come there and got her and brought her here to Newton, or took her down to the city; I don't know just where she was taken here. 10

Q Do you know how long it was before she came back to the farm? A I have an idea that she was away for about a year.

MR. COULT: I object to that.

THE COURT: Why do you have that idea? 20

THE WITNESS: Because I didn't see her up around the farm.

THE COURT: But you did see her at the farm after that; is that right?

THE WITNESS: Later on, about a year after that. 30

Q Did you ever see her do any work at the farm after she came back? A Well, I have been up there; I have seen her do a little housework, something like that; but I cannot say that I ever noticed her at all outdoors, see her doing any work, I could not say that I ever had.

Q Have you been there when you have seen other people working around the place? A Oh, yes; Mr. Nilssen always had someone to help him 40

out, like a man or a tenant, something of that kind.

MR. DOWNING: Cross-examine.

MR. KAYS: No questions.

CROSS-EXAMINATION BY MR. COULT:

10 Q Was she being paid by you while she was at your house? A Her sister agreed to pay us for her board.

Q Oh, they were paying you to take care of her; is that right? A Her sister agreed to pay her board there.

Q She was supposed to be resting, was she, while she was— A How is that?

20 Q Well, if you have in mind the fact that you were being paid for her board while she was there, is there anything surprising in the fact that she wouldn't do any work at your house? A We didn't ask her to do anything; we didn't care whether she did anything or not.

Q She wasn't supposed to work, was she? A Well, a young woman might help a little, sometimes

Q Even when she was at your place and you were receiving pay for her board? A Well, we wasn't getting very rich, however, on it.

30 Q As a matter of fact, while she was there, she didn't do anything? A She didn't do anything at all.

Q Wasn't she supposed to be recuperating when she was at your place? A If she felt that way.

Q There wasn't any reason why she shouldn't take it easy, if she wanted to? A I guess not.

40 Q As far as working on her father's farm was concerned, while she lived with her father and her mother, you don't undertake to say that she didn't do any work up there, do you? A I have been around there quite a lot, and as I say, I have never seen her out working around the farm at heavy

work, like we heard told on the stand she was doing.

Q You never happened to see her doing that?

A No, sir; I have not.

Q How many times have you been up there?

A I have been up there many many times.

Q How many? A Probably a **hundred** times.

Q At the times you were up there, she didn't do any work? A Not heavy work, housework, a little.

Q She wasn't doing a man's work, you say?

A No, she wasn't doing a man's work.

Q You don't know whether she did any milking or not? A I couldn't say; I never seen her milk a cow.

Q Then you don't know, do you? A I couldn't say; I never seen her milk a cow.

Q She might have milked cows and you not know it? A She might have; I couldn't say.

Q You won't say she didn't do the cooking? A I have seen her helping around the kitchen a little.

Q You have seen her helping around the kitchen a little; is that all? A I have seen her helping around the kitchen a little, setting the table, washing dishes, setting the table, something like that.

Q Who was she helping? A Helping her sister when she was over there, Bertha, or her mother, something of that kind, but she was never a good worker alone with it herself, like her mother was.

Q Did you ever see anybody else working on that place who was there steady?

THE COURT: Any other woman.

A Any other woman?

Q Yes. A Why, her sister, Bertha, would be up there for a month, two months, at a time.

Q She was married, had her husband here in Newton, wasn't she? A I don't care, she wasn't living with her husband when she was up there on

the farm working.

Q At that time? A Yes.

Q I want you to give me the name of one woman who was regularly and steadily doing housework besides this girl? A Who was there regularly?

Q Regularly and steadily, year in and year out.

A I couldn't tell them all. I have seen, first one sister there, Sister Em; then I have seen Bertha there, and then I have seen these women around there; they were all taking part in doing the work.

Q Well, except for the fact that certain of these sisters did come to the home—to the house at times,—except for them, this plaintiff in this case, did all of the housework that was done on that farm, didn't she? A No, I wouldn't say so.

Q Well, who else did it? A Well, there was enough around there to help her all of the while.

Q Who were they? A Well, I told you; there was two sisters there, first one and then the other, most of the time. Mr. Nilssen had his brother, he and his wife was there, lived in part of the house with them for a long time, I don't know how long.

Q I am asking you to try to tell us, if you will be good enough, excluding the sisters who came there from time to time, exclusive of them,—was there anybody else besides them? A Her mother was there.

Q All right; how old was her mother? A I told you, she was an old lady, but she was a good worker.

Q I see. A Yes, sir.

Q So you think that the mother did most of the work? A I have been there lots of times when I thought the mother done her share.

MR. COULT: That is all.

REDIRECT EXAMINATION BY MR. DOWNING:

Q I didn't ask you when Miss Nilssen was with you. When was it she lived with you? A It was just after we brought her out of the asylum—

Q Was that in October? A —for about a month.

Q In October or November, 1923? A I think it was in October or November, somewheres along there, at that time; it was in the fall of the year; I think it was along there sometime. 10

Q Then it was about a year from that time that she came back to the farm? A Yes, her sister came there and got her away from my place, took her away; and a year from that she was back up the farm with her people.

MR. DOWNING: That is all.

RE-CROSS-EXAMINATION BY MR. COULT:

Q You have had a little trouble with these folks, haven't you? A None at all. 20

Q Isn't there a little matter of an unpaid ——— bill? A None at all, no, sir; I just didn't think they had paid me for all I had done for them.

Q Isn't it a fact that you, after this young lady went away, claimed that there was more money coming to you than you were paid? A Well, I didn't think we was paid up in full for all we did for them. 30

Q You feel that they haven't paid but a part of it? A Not all of it, but I have forgotten it, however; I have lost lots of money that way.

Q You haven't any feeling or interest in this case one way or the other, have you? A Not only from the standpoint of right and truth.

Q You are testifying here about this girl's refusal to work and her indolence and so on, simply because you want to see justice and right and 40

truth prevail, isn't that so? A I tell you, I have no hard feeling on either side at all; I am here to tell the truth as near as I can.

MR. COULT: All right, that is all.

(EVENING RECESS.)

May 7, 1929; 10:00 A. M.

10

MRS. MARY BUCHLOST, sworn.

DIRECT EXAMINATION BY MR. DOWNING:

Q Mrs. Buchlost, you are a nurse? A Yes, sir.

Q Were you employed at the Linn Memorial Hospital while Hulda Nilssen was there? A Yes, sir.

20 Q What position did you occupy at the Linn Hospital at that time? A As night nurse.

Q As night nurse did you have charge of Miss Nilssen as one of your patients? A Yes, sir.

Q What was her condition while she was in the hospital? A Why, she seemed to suffer a lot of pain.

Q What have you to say as to whether or not she was a troublesome patient? A Not particularly.

30 Q Not particularly? A No.

Q Did she have any mental difficulty while she was there?

MR. COULT: I object to that.

A Not to my knowledge.

MR. COULT: Just a moment.

40 MR. DOWNING: She answered, "Not to my knowledge."

MR. COULT: Then I will withdraw the objection.

Q How long was she at the hospital? A I do not just remember.

MR. DOWNING: That is all.

CROSS-EXAMINATION BY MR. COULT:

Q Just one question. While she was there, she was administered opiates? A Not to my knowledge. 10

Q Sedatives? A Not to my knowledge.

MR. COULT: I see; all right.

MISS NORA I. BACH, sworn.

DIRECT EXAMINATION BY MR. DOWNING: 20

Q Did you occupy an official position at the Linn Memorial Hospital while Hulda Nilssen was a patient there? A Yes, superintendent.

Q Superintendent? And as such superintendent, did you have charge of Miss Nilssen, with other patients? A Yes.

Q What have you to say as to whether or not Miss Nilssen was a troublesome patient? A Well, not very troublesome; she was nervous at times. 30

Q Did you or did you not have difficulty in keeping her in bed? A She did get out one time.

Q Do you know whether or not she ever threw water at the nurses? A Yes.

MR. COULT: That is leading.

THE COURT: Well, she has answered; I 40

will allow it to stand.

Q How many occasions? A One time.

Q Is that the same time she got out of bed?

A After she got out of bed.

Q And while she was— A No, she was in bed at the time she threw the water.

10 THE COURT: It was just after they got her back into bed, is that it?

THE WITNESS: Oh, about three hours after she was back in bed.

THE COURT: All right.

Q Do you know whether or not the hospital authorities insisted upon her removal?

20 MR. COULT: Object to that.

MR. DOWNING: I am asking her if she knows.

THE COURT: Yes, I will allow it.

A No, they did not.

MR. DOWNING: Cross-examine.

30 CROSS-EXAMINATION BY MR. COULT:

Q Have you had any other patients up in that hospital during your experience that had broken backs? A No, not—

Q This lady suffered a good deal of pain, didn't she? A Yes, at times.

Q Do you know whether she was administered opiates? A Yes, she had sedatives for her nerves.

40 Q How frequently? A Well, not very often,

just when she was nervous.

Q She suffered considerable pain all of the time, didn't she? A Yes.

Q You have had experience with other people who have suffered pain? A Yes.

Q Constant suffering of pain is likely to wear out a patient's nerves, isn't it? A Sure.

Q And they get excitable sometimes? A Yes.

Q No unusual thing for people to try to get out of bed? A No, they get nervous and try to get out of bed. 10

MR. COULT: Yes; that is all.

MRS. ANNA FORSTER ABRUZZO, sworn.

DIRECT EXAMINATION BY MR. DOWNING:

Q Mrs. Abruzzo, you are a defendant in this case. A I am. 20

Q And the wife of Joseph Abruzzo. A Yes.

Q You were one of the owners of the barber shop occupied by Paul Monevavis on November 22, 1926? A Yes.

Q Prior to that time, had you ever employed William I. Houghton to look over the premises with the purpose of having one of the corners cut off the room? A No.

Q You had a talk with him about it? A No.

Q Just describe to the court and jury the appearance of that room prior to the cutting off of the corner of the wall. A Before it was cut off. 30

Q Yes. A Well, as you went in,—I wouldn't—I can't show just how many feet it was in the wall straight, and then it come this way, I should say, about three feet out, and then back again.

Q There was an off-set there then? A There was an off-set there, I should say, I couldn't tell just how many feet in from the doorway was the off-set, come this way about three feet that way. 40

Q Where was the pipe that was fastened to the radiator coming through that rear wall? A Well, I didn't look at that time just where it came through. I only remember that the radiator was on the right side and connected in the rear on the the place that went across this way.

Q And how close to the right hand wall? A Well, I should say, about a half a foot or so or a foot; was about that much, I would think (indicating).

10 Q Do you know how that pipe comes up from the furnace to that point? A No, I don't; I never looked at it so close.

Q The alteration that was made in the interior of the building, did or did you not receive any increased rental for that? A We did get increased rental.

20 Q At whose suggestion was that alteration made? A Well, Mr. Monevasis asked us to do that. At first, we didn't care to do it, and he pleaded with us. He says that that would be so much more space about his—to get around, because it interfered with his getting around properly, so finally I called Mr. Kellam and asked him if it could be done.

Q Was that corner cut off all of the way from the floor to the ceiling, or part way? A Not all of the way up, just part way.

30 MR. DOWNING: Cross-examine.

CROSS-EXAMINATION BY MR. KAYS:

Q When were you in the barber shop the last time before the accident? A Why, before the accident?

Q Yes. A I should say it was in August, if I remember, when my girl had her hair cut.

40 Q Now, do you know of any lease that was made after this corner was cut off? A After the

corner was cut off?

Q Yes. A Why, when he asked us to have that corner cut off—

Q Do you know? A —at the same time he asked us to give him a paper and I drew up the paper and Mr. Abruzzo signed one and Mr. Monevasis signed one at that time.

Q I show you a paper writing, signed J. Abruzzo; is that the paper you refer to? A Yes, this is my writing; I have written two,—one I gave to Mr. Monevasis, signed by my husband, and one we had signed by Mr. Monevasis. 10

Q I see. A He just wanted to be sure that we wont make him move out before the time of the year.

Q This was the time it was made, on November 15th? A Yes, and he asked me to date it ahead, until December 1.

MR. COULT: These conversations are not binding on us. 20

MR. KAYS: No.

THE COURT: No.

MR. KAYS: That is all.

MR. COULT: No questions.

JOSEPH ABRUZZO, recalled. 30

DIRECT EXAMINATION BY MR. DOWNING:

Q Did you ever have a conversation with William I. Houghton, in which you asked him to look at that barber shop for the purpose of figuring on cutting off the corner of the wall? A Never.

MR. DOWNING: Cross-examine. 40

THE COURT: Any questions, Judge?

MR. KAYS: No, I have asked Mr. Abruzzo about this signature.

THE COURT: Any questions, Mr. Dolan?

MR. DOLAN: No questions.

CLINTON W. KELLAM, recalled.

10

DIRECT EXAMINATION BY MR. DOWNING:

Q Mr. Kellam, after the adjournment of court last evening, did you have an opportunity to view the barber shop occupied by Paul Monevasis?
A I did.

Q Did you examine it as to whether or not there had been any settlement after the making of the alterations that you made there? A I did.

20 Q What did you find? A No settlement whatever; just as I left it.

Q Are there or are there not any indications of settlement, like any cracks in the wall or otherwise? A Nothing whatever.

Q Did you examine the pipe to which the radiator had been fastened? A I saw it had been disconnected in the basement of the old house.

30 Q Did you examine where that pipe went?
A I saw where it held on, yes, sir.

Q Could you tell from your examination whether the pipe had lead out vertically or horizontally from the boiler? A It went up to within about six inches of the partition of the old part, went up through the floor of the old part and through a partition of the old part into the barber shop, about, I should say, three feet of an upright pipe, and the hole where it went through the plaster was perhaps half an inch larger than the
40 pipe that went through it.

Q That hole is still in the plaster? A Yes, sir.

Q Where is it located with reference to the right hand wall of the shop, as you enter the shop? A Beg pardon?

Q Where is this hole located with reference to the right hand wall of that shop? A Why, it is about half way between the front door and the off-set of the other building.

Q With reference to the right hand wall, how far is it located to the left of the right hand wall of that shop—right hand wall, looking toward the rear of the property? A The radiator isn't there now, but I should judge about three feet, I guess, of the place where it had been hung. 10

Q The hole through which the pipe came, how far is that from the right hand wall? A Right close to the wall, it shows on the opening right on the wall.

Q That is where the radiator was fastened to the pipe? A Beg pardon. 20

Q That is where the radiator was fastened to the pipe? A Yes, sir.

MR. DOWNING: Cross-examine.

CROSS-EXAMINATION BY MR. COULT:

Q When did you make this examination?
A About six o'clock last night. 30

Q And the interior of this barber shop is sealed, isn't it, now? A Sealed with sheet rock.

Q And the radiator is gone, isn't it? A Yes, sir; it isn't there now.

Q Yes, and the pipe that connected the radiator is gone? A Yes.

Q How much pipe is there on the other side of this wall, in the Hood building? A Oh, I should say, from the furnace up to the elbow where it was disconnected is about ten or twelve 40

feet, maybe more.

Q How far is it from the elbow to where it was disconnected, to the place where it formerly went through the wall? A It is about six inches from the wall and a *riser* of about, I should say, three or four feet; then another elbow, and goes through the wall into the barber shop.

Q Did you find the elbows and pipe? A No, sir; I didn't look for them.

10 Q Did you look for them? A I did not look for them.

Q Did it occur to you that they might be useful in determining whether or not that wall had settled? A I don't know anything about that at all.

20 Q How did you determine whether there had been any settlement in that wall, or not? A I examined it, went down in the cellar with a flash light, examined the wall and the wall above; went into the tea room, on the joining where the corner had been cut out, and I examined the paper to see if I could find any settlement, and the man that ran the tea room was with me, and he said, "No, sir"—

Q No, no— A I asked him if he saw any indication; he said, "no."

Q You asked him if he saw any? A I said, "Can you see whether there is any settlement here?" He said, "No."

30 Q I see. You were not quite sure about it yourself when you asked him, were you? A I beg pardon?

Q You were not very sure until you asked him, were you? A I was sure; yes, sir.

Q What did you ask him for, if you were sure? A Well, natural question to ask.

Q You were judging just by your eyes alone? A By my what?

Q You were judging just by your eyes alone?

40 A By my eyes; yes, sir.

Q Did you take any measurement to find out?

A No, sir.

Q It would be quite possible for that wall to have settled and you not be able to discover it by an eye examination, wouldn't it? A No, sir.

Q You think if the whole corner of the building had settled, you could be able to discover it by simply looking at it, do you? A I do.

Q Buildings do settle sometimes, don't they?

A Sir?

Q Buildings do settle sometimes, don't they?

10

A Yes, sir.

Q Taking out the corner part of that building, with part of the foundation, would be the sort of an operation that would be likely to cause the building to settle, wouldn't it? A No, sir; not if properly done.

Q You are the man that did the work, aren't you? A I am.

Q You are responsible for it? A Yes, sir.

20

Q You think you did it properly? A I do.

Q Did you have in mind the fact of your responsibility for this job when you examined it last night to see if there had been any subsidence?

A Last night.

Q Yes. A No, sir; simply to confirm what I said yesterday.

Q That is, it didn't make any difference to you whether you *done* the job or somebody else?

A No, sir.

30

Q You just gave it a fair examination, decided it hadn't subsided; isn't that so? A No, sir; nothing whatever.

Q Eh? A No, sir, nothing whatever.

MR. COULT: That is all.

MR. KAYS: I think I would like to offer this lease, this writing.

40

MR. COULT: No objection.

THE COURT: Let it be marked.

(MARKED DEFENDANT MONEVASIS EXHIBIT
D-2 IN EVIDENCE)

PHILEMON BRODT, recalled by Deft. Abruzzo.

10 DIRECT EXAMINATION BY MR. DOWNING:

Q Mr. Brodt, you are still employed by Paul Monevasis? A I am.

Q Have you noticed whether or not there has been any settlement of the building by reason of the alterations that were made?

MR. COULT: I object to that. That would require an expert.

20

THE COURT: It depends on how much settlement.

MR. COULT: He says, by reason of the alterations that were made; that would leave it for this witness to determine whether any settlement had been due to the alterations or some other cause.

30

THE COURT: Yes. I think all he can say is whether there is any settlement. I will sustain the objection.

Q Have you noticed any settlement of the building since the making of the alterations? A No settlement whatever, no cracks of any kind.

Q Have you followed out the steam pipe that was connected with the radiator? A It leads into the tea room; from the tea room into the cellar to
40 the furnace.

Q Going from the tea room to the cellar, was it in a horizontal or vertical position? A I have not examined it—

Q Does it go up or down? A Goes down.

Q Have you followed it out from the point where it enters the cellar to the boiler? A No, I haven't examined that part of it. I noticed it goes down by looking through the hole; where it is connected to the radiator it goes down.

THE COURT: What is the difference between going down and coming up? 10

THE WITNESS: One is up, the other is down

THE COURT: Both the same, isn't it? If it goes down it also comes up, doesn't it?

THE WITNESS: Certainly.

THE COURT: He asked you whether it came down or went up. 20

THE WITNESS: It goes down.

THE COURT: It does both?

THE WITNESS: It does both.

THE COURT: It comes up from the furnace. 30

THE WITNESS: It comes up from the furnace.

THE COURT: That is what I thought.

Q You were in the barber shop at the time this radiator fell. A I certainly was.

Q At the time that the radiator fell, did it become disconnected from the steam pipe? 40

MR. COULT: I think we have been all over that with this witness.

THE COURT: I think so. I think he said it did not. I have just the notation that it was this witness that assisted in lifting the radiator from the plaintiff, and at that time was still attached at the end where the pipes went, as I recall his testimony. If there is any doubt
10 about it, you might ask him.

Q What part of the radiator was on the floor?

A The part that left the wall, the part from the far end where the attachment was at the wall, that swung around in the back and dropped to the floor; the end at the wall was still attached, and at the other end, it swung possibly five feet, making like a circle like to the floor, in a "V" shape, like that.

Q So that the only part of the radiator that struck the floor was the part nearest the door, from
20 the barber shop door? A Nearest the door, not the part farthest back, which was still attached to the wall; it was the other end of the radiator that struck the floor.

Q Did the full weight of the radiator rest on this Miss Nilssen?

MR. COULT: I object to that.

30 THE COURT: Objection sustained.

Q Where was Miss Nilssen when she was knocked down, as you have described? A She was this way, partly fast, I think, under the end of the radiator, but the radiator didn't come directly down on her. It swung when it got loose; it had to swing, because the other end was fast, it swung around, the other end like that.

Q Did the radiator—any part of the radiator
40 lie flat on the floor or was it in an upright position?

A Upright position, just the corner rested on the floor.

MR. DOWNING: Cross-examine.

CROSS-EXAMINATION BY MR. KAYS:

Q Which corner was it, the top or the bottom of the radiator, rested on the floor? A Bottom corner; it couldn't have been the top, or it would have been turned upside down. 10

MR. KAYS: That is all.

CROSS-EXAMINATION BY MR. COULT:

Q Are you the man who went with Mr. Kellam to make the examination yesterday at six o'clock?

A I wasn't with him when he made the examination; I met him when he came out.

Q Well, was he alone? A He was alone. 20

Q So you are the only man who was with him, if anybody was? A I wasn't with him; I met him as he came out.

Q Mr. Kellam asked you if you saw any signs of settlement there? A He didn't ask me that question.

Q Did you hear him ask anybody else that question? A No.

Q And he was alone all of the time he was there, was he? A I wasn't there; I met him as he came out. 30

Q Yes, nobody with him? A He was alone.

Q Now, you have never had any experience in building, I suppose, have you? A Who? Me?

Q You are not experienced in building? A Well, I have built a house or two.

Q As a carpenter? A No.

Q As how? A I had it done.

Q Oh, you mean you hired other people to do 40

it? A Yes, and I supervised it myself.

Q Ever do any mason work yourself? A Never.

Q Ever do any heavy carpenter work? A Never.

Q Never had any experience in determining whether foundations were settled or otherwise, have you? A Only from what I could use my own judgment on, if I would see it.

10 Q Yes, just like the rest of us. A Yes.

Q Who are not builders? A Yes.

Q The inside of this barber shop is sealed? A Sealed.

Q With board? A With wall board.

Q You formed your judgment about whether or not there has been any subsidence of that corner there by what you could see on the inside of the barber shop; is that true? A That is true.

20 Q So far as you know, that whole corner could have settled and the whole barber shop could have settled without your being able to observe it; is that right? A It would naturally leave a little crack in the wall.

Q So that because you imagine it would leave a crack in the wall, it would have settled; if there weren't any cracks there, it hadn't settled? A No cracks in the wall.

Q That is the only thing you would base your opinion on? A That is all.

30 Q Just because there is no cracks in the wall board? A That is all.

Q And the wall board is how thick? A I imagine, about half an inch; I don't know just the thickness.

Q Because that wall board hasn't a crack, you could give us your conclusion that the corner of the main Hood building has not gone down; is that right? A That is right.

40 MR. COULT: That is all.

REDIRECT EXAMINATION BY MR. DOWNING:

Q That is right, I suppose, between the floor and the top part of the plaster board, at the point where the alterations were made? A No crack whatsoever.

MR. DOWNING: I desire to offer in evidence the record of the admittance of Hulda Nilssen to the Morris Plains Asylum; order of insanity filed September 15, 1923; another order of insanity filed November 7, 1921. 10

THE COURT: Any objection, gentlemen?

MR. COULT: I won't object to that.

THE COURT: Let them be received.

(RECEIVED AS DEFENDANTS ABRUZ- 20
ZOS' EXHIBIT D-3; NOT MARKED.)

MR. DOWNING: Our case; we rest.

MR. KAYS: We rest.

(DEFENDANTS REST.)

THE COURT: Any rebuttal? 30

MR. DOLAN: No.

(PLAINTIFF RESTS.)

DEFENDANTS ABRUZZOS' MOTION FOR DIRECTION OF A VERDICT.

10 MR. DOWNING: If the court please, I, at this time, make a motion for direction of verdict as to the Defendants Abruzzo, on the ground that the landlord is not liable for any injuries sustained by reason of the condition of the demised premises. There are only two instances in which that rule is changed, and that is, in the one instance, of where there is a common ownership or where there is an ownership of common stairways and halls, and the other where the owner gratuitously performs some service or he makes some repairs to the premises. In this case, we have the original letting at the price of \$40.00 per month. We then have another letting at the price of \$48.00 per month, after the alterations were made. No repairs were made by the landlord to any part of the premises that affected in any way the position of the radiator that fell and caused the accident. The testimony is that there was an alteration made to a wall through which the steam pipe entered but that nothing had been done to the steam pipe or to the radiator, and that the alterations had been made in a wall that was not adjacent to that radiator or adjacent to the pipe to which the radiator was fastened. Those repairs were not gratuitously made by the landlord but were made for a consideration. In other words, the landlord did not go in of his own violation to make any alterations to the building, but the tenant requested the alterations made, and said, in effect, "If you will make the alterations, I will pay you an additional compensation of \$8.00 per month." That takes it out of the classification of gratuitous repairs. And where the tenant agrees

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to pay, and does pay for the repairs that are made, there is still no liability on the part of the landlord. There arises, then, a contract between the tenant and the landlord, wherein the landlord is presumed to have done the work in a proper manner for the benefit of the tenant. This suit is a suit brought against the owner of these premises for a breach of duty arising out of a contract with the tenant. The plaintiff in this suit has no contractual relationship with the landlord. She was not an invitee and was not on the premises with his permission or by his invitation, either express or implied; and no breach of duty that occurred between the landlord, on the part of the landlord, by reason of his having let the premises to the tenant, can be assigned as a ground for a cause of action by a third party who is not a party to the contract. 10

In addition to that, we have the lease that was introduced into evidence by the defendant Monevasis, which bears date *November 15, 1926*, and is admittedly after the repairs were made, so that the tenant in this case accepted these premises as he found them, and there is no duty on the part of the landlord, express or implied, no contract that the premises were fit for the use for which they were leased, and there is no duty on the part of the landlord to tell the tenant whether or not the premises were in a condition fit for use. 20 30

(Citing *Barthelmess v. Bergamo*, 135 Atl. 794, and *Riley v. Feldman*, 138 Atl. 307, and *Siggins v. McGill*, 72 Law, 263.)

Under all of the cases that I have cited here, it appears to me that the plaintiff in this case is in a situation similar to the plaintiffs in the other cases that I have cited, and that there is nothing in this case that would impose a duty 40

upon this landlord to pay damages to the tenant for any injuries that might have resulted by reason of the ruinous condition of the premises or by reason of the premises being out of repair, and if he is not liable to the tenant, he is not liable to the tenant's customers or guests. In addition to the law in the matter with reference to the making of gratuitous repairs, we have the lease that was made, after the repairs were made, a lease bearing date November 15th, 1926, which was a new letting and under which the tenant took the premises from the landlord and took them, under the law, in the condition in which he found them, and leaving the landlord in the position of having no duty imposed upon him to the tenant or to the tenant's customers or guests for any injuries that occur by reason of the premises being out of repair at the time of the letting.

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THE COURT: The difficulty with your argument, as I comprehend it, is that the cases that you cite are distinguishable from the case at bar in this essential particular, that in all of the cases that you rely upon the repairs were not, in fact, made by the landlord. There was a promise on the part of the landlord to make them, which promise was not fulfilled, and injury followed in the mantel piece case and in the case of of the rotten porch boards; in both of those cases the landlord agreed to make repairs and did not make them, whereas, in the case at bar, the repairs were made, the alteration was made, which is tantamount to repairs; and in the opinion of the court the landlord was under a duty, under those circumstances, to make the alteration in a proper manner, and if, in doing so, he was guilty of an act of negligence, there was a right of action that would accrue with respect to any person thus injured, I think that brings it out of

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the theory of the **retained** demised premises, in the tenant cases, where the landlord retains control of the stairway, and the same rule would apply as applies there. I do not think that the language of Justice Minturn there in the Riley case is susceptible of the construction that you put upon it with respect to gratuitous repairs. What is meant there, as I take it, that it is gratuitous, not in the sense that it was done free, but it is gratuitous in the sense that it is an alteration which he was not under a duty to make; and when he assumes to do it, I do not think it makes a bit of difference whether he did it and got paid for it or whether he did it and got additional rent, but the distinction, I take it, from the language, the legal effect of it, I think is, rather, that the defendant undertook a duty which he had not been under before, and having undertaken to do something which he was under no legal duty to do, or contractual duty to do, he is answerable for the way in which he did it, which he gratuitously undertook to do,—gratuitously, in that sense. x x x I think that the cases that you cite are not analagous to the case at bar. I think there is a wide difference between them. I have, of course, no disposition to quarrel with the long line of decisions which you have cited and which settle the law very conclusively, but I do not think they apply to this situation. That is my ruling, at any rate.

MR. DOWNING: Assuming that Your Honor is correct in that, we have the suitation of the new letting, the new lease, of November 15th.

THE COURT: I do not think that explains the situation.

MR. DOWNING: The repairs were made

prior to November 15, 1926, and the new lease was entered into on November 15, 1926, and the tenant took the premises then,—

THE COURT: Yes.

10 MR. DOWNING: —as he found them, and we were then under no obligation to go in and and repair those premises or to do anything else with them.

THE COURT: If it had been a new barber, it might have; but it was the same old tenant.

MR. DOWNING: That wouldn't make any difference.

20 THE COURT: I think that does make a difference.

MR. COULT: Your Honor, that wouldn't wipe out the significance of the landlord's authority which he had already had.

30 THE COURT: It doesn't seem so to me. If so, it would be the thing for the landlord to do every time he makes repairs, to make out a new lease. x x x There may be some merit on that point. I do not think there is, however. I will deny your motion and grant you an exception.

MR. DOWNING: I ask an exception.

THE COURT: Now, Judge Kays, do you want to introduce another witness with respect to the medical damages?

40 MR. KAYS: No.

THE COURT: Very well.

Thereupon, the court charged the jury as follows:

LADIES AND GENTLEMEN OF THE JURY:

On the 22nd of November, 1926, Hulda Nilssen went into the barber shop of Paul Monevasis to have her hair bobbed, and while waiting to be attended to, a radiator that was suspended or hung on the wall came loose at one end, fell and struck her, injuring her, and so she has brought a suit for damages which she says she sustained by reason of the radiator striking her, which, she says, was due to negligence, and so she brings a suit against the barber, Paul Monevasis, and also against Joseph Abruzzo and Anna Forster Abruzzo, the owners or the then owners of the property where this accident occurred, charging that both the tenant and the landlord was guilty of an act of negligence which was the proximate cause of her having received her injuries.

Now, that raises a question of fact, and all questions of fact must be decided by the jury; and you are, therefore, called upon to decide this question of fact. It is the duty of the court to decide questions of law, but it is your duty to decide questions of fact. There have been several motions made in this suit, during its progress, with respect to questions of law, which have been decided by the court. You have nothing to do with those matters, and you must take into consideration nothing with respect to what has been said in connection with those motions. It has been the theory of the attorneys for the owners of this property that in the law there was no case made out against the owner. The court has denied those motions, because it has a different notion of the law in that regard.

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You will take as a correct statement of the law what the court will explain the law to be to you during the course of the charge. It was because the court felt that there was a question of fact in this case that the case is submitted to you for your determination, and not because there was simply a question of law for the court to decide.

10 Now, there is some dispute in this case on some of the facts. It is not disputed that on the day in question this plaintiff was in the barber shop and was hurt. She says that the nature of her hurts, the main injury, was an injury to her back bone, which has been described by the physicians in detail, which has left a permanent disability, so that she will always suffer from the injury that has been described, so that her ability to do the things that she was able to do before she was hurt are curtailed and limited; that she is able to do but a small proportion of the things that she was
20 able to do before by reason of this permanent disability. So she asks that she be compensated in such sum as you think she should be paid for the disability that she may have because of this injury, for the pain and suffering which she has had and may have in the future, and, in addition to those items, the amount that she has been obliged to expend in order to effect a cure or an amelioration of her condition.

30 She says, in that connection, that it was necessary for her to be transported to the hospital and to New York to be fitted for a brace, and that the cost of that transportation was \$143.00; that the cost of a brace that was necessary was \$48.00 plus some postage, which brought it to about \$50.00; that the expense at the hospital was \$399.00, and that the doctor's bill was \$135.00. That is as I recall them, and those items of expense that were testified to amount to a total of something like \$737.00.

40 Negligence, in the law, is never presumed but

must always be proven. The happening of an accident is not enough. There must be proof of negligence, and the law casts upon the plaintiff the burden of proving, by the clear weight of the testimony, that what she contends happened, that there was negligence, and, furthermore, that it was negligence of both of the defendants or one of them, in order that she should recover against both of them or one of them, as the case may be.

You are the sole judges of the weight that is to be given to the testimony. You are the sole judges of where the testimony does, in fact, predominate. "Her contention is that there was negligence on the part of the owners of this building in that they undertook to do something in connection with these premises which was not done in a proper manner; that the workmen that they engaged to do the work did not do the work in a proper manner; that they did it as reasonably prudent persons would not have done it; and that the proximate cause of the falling of this radiator within a few weeks from the time that they negligently performed that work, was their having done this work in a way that reasonably prudent persons would not have done it, and if that be so, of course, the owners of the building would be responsible for the negligence of their servants, who would be the persons who did the work in this case, on this alteration work."

Now, the law is well settled that a landlord is not responsible for repairs, unless there is an obligation to make repairs. Ordinarily, a landlord need not make repairs, but here the landlord did undertake something that he did not need to do. He undertook a duty which was not incumbent upon him. "The law further says that when a landlord does do something that he was not called upon to do, when he does make repairs, then he is under an obligation to the people that may lawfully be upon those premises, to do those repairs

as a reasonably prudent person would do them," so that no one should suffer injury because of the repairs or alterations not having been done as a reasonably prudent person would do them.

10 So that "if you find here, as a matter of fact, that the proximate cause of this radiator falling was the negligent alteration of this building, as has been claimed by the plaintiff, then, of course, your verdict will be against the owners of this building, or the people that were then the owners, the Abruzzos." If you are not so satisfied from the testimony here, then, of course, your verdict as to the owners of the building will be no cause for action.

20 The situation with respect to the other defendant, Paul Monevasis, the tenant, is that it is charged that he also failed in a duty that he owed this plaintiff, and that duty was to use reasonable care to keep the premises in a safe condition, that he should have discovered the condition of that radiator and should have taken such means as a reasonably prudent person would have taken to prevent it falling; that a reasonably prudent person would have discovered that that radiator was in a dangerous condition, and that he failed in that duty, in that he did not so discover, that he did not act as a reasonably prudent person would act in the inspection of the contents or appliances of the premises in which he was a tenant.

30 Now, he says that is not true. He says, as a matter of fact, he did no act of negligence. He says that he dusted that radiator. He says that his employee did the same thing, and that there was nothing about its appearance that indicated that there was any danger. He says that a reasonably prudent person could have done nothing more than he did, and that is the test that you must apply to his actions.

40 Did he act as a reasonably prudent person would have acted under the circumstances, or did

he not? If he did, he cannot be held responsible, and your judgment should be, as to him, no cause for action. If, on the other hand, he did not act as a reasonably prudent person should have acted, then your verdict must be against him.

Now, the testimony in that respect, other than his own testimony, is that of his employee, that the screws were tight within a day or two of this occurrence, and that an inspection by both of them so disclosed. The only testimony to the contrary is the testimony of the witness who says that during the preceding week, I think it was, when he was in the barber shop, he saw that the radiator was out of place on that wall or a little bit from the wall, and in looking up under it, as he sat there, he discovered the screws to be pulling out; that they were loose apparently, and that he expressly called the attention of the barber to that fact, and the barber denies that. Now, of course, he must have an actual knowledge in order to be responsible for the dangerous condition of the radiator, or he should have constructive notice, that is to say, he should have discovered it had he used the precaution that a reasonably prudent person should have used.

Now, I am requested by the attorney for Mr. Monevasis to instruct you in certain respects, and I will now read his requests, even though I may have already, more or less, covered his points. I charge you as follows:

1. If the injuries sustained by plaintiff were due to the faulty or defective construction of the building or installation of the radiator, and the defendant, Paul Monevasis, used ordinary care in maintaining that part of the building under his control, the defendant, Monevasis, is not liable in this action.

2. The said defendant, Monevasis, would not be liable under such circumstances set forth in this case, if the accident was entirely due to a latent

defect in the construction or repair of the building or the hanging or placing of the radiator, if the jury believes that no notice of the same was had by this defendant, Monevasis.

I add to that, "and also that he had not only no notice but that he had no constructive knowledge," that is, that he did not have any expressed notice, that is, by having it called to his attention, or that he had by his negligence failed to discover it.

10 3. Where injuries to a third person are due to the faulty or defective construction of the premises or because of a continuing nuisance thereon, the landlord is liable for such injuries and the tenant would not be, in the absence of notice of such defects to him.

20 4. The tenant of premises is alone liable for a nuisance resulting from his own acts or negligence in the use of the premises, but for a nuisance resulting from the structure of the building the owner is liable.

5. The rule that makes a landlord liable for injuries sustained by an invitee of the tenant on account of the nuisance at the time of the letting where the letting is of a public or semi-public purpose a landlord is liable.

30 6. In this case the landlord was under no contract to supply the tenant with heat and the radiator which existed in the premises was not used by the tenant. It was not incumbent upon the tenant nor had he a right to remove the radiator, nor was it the duty of the tenant to examine the building or the radiator for latent defects which existed at the time or the letting, which was on November 15, 1926, and if the tenant exercised ordinary care in the use of the premises the tenant would not be liable.

40 That is, the last letting was on that date; the original letting was prior to that time. I do not know that it develops just how long. I think a year, perhaps, but I am not sure about that.

7. The law imposes upon an ordinary tenant the duty of keeping the demised premises in repair and of returning them to his landlord at the end of his term in approximately the same condition in which he received them. That being so, it follows, as a necessary result, that a lessee is under no obligation to a third person to tear down a structure upon the demised premises, which, in the state in which it was at the commencement of the term, constituted a nuisance.

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8. The law does not impose upon anyone the duty of performing an act for the benefit of one person which would necessarily subject him to liability at the hands of another. In those cases in which the nuisance exists at the time of the creation of the estate and the lessee does nothing except to maintain the demised premises in the condition in which he received them, the person who suffers from the nuisance must look to the landlord, and not to the tenant, for redress. If the jury believes that the premises were in the same condition at the time of the accident as they were at the time of the letting, which was November 15, 1926, the tenant would not be liable in this case.

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Now, then, the owners say that there was no negligence on their part, or on the part of anyone acting for them; that the cutting out of the corner, the alteration of the premises as was described, was done in a proper manner; that there was no negligence whatever about that, and that that had nothing to do with the accident; that that radiator was not disturbed, that where this alteration took place was not at that precise point, and that that had nothing to do with the accident.

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The tenant says that there was nothing that he did that was an act of negligence; that there was no act of omission on his part that was an act of negligence; that he acted as a reasonably prudent person would act under the circumstances.

Therefore, say they, that she should not recover. 40

And they say one thing more. They say, irrespective of that, there was what the law says is contributory negligence on the part of this plaintiff. At least one of the attorneys in summation makes that comment, and I note that these pleadings say that for both of them, and so the contention of both defendants is that this plaintiff cannot recover, irrespective of who may be negligent, because she herself was guilty of an act of negligence. They say
10 that she was warned of this danger, and her act of negligence was in not getting away from the place of danger when she was so warned, and that her failure to leave the place of danger when she was warned was an act of negligence on her part which contributed in some way to the accident.

Now, if you find from the facts that she, by any act of hers, was guilty of an act of negligence, that is to say, an act which a reasonably prudent person would not have committed, and that act contributed
20 ed in some way to the accident, then she cannot recover against anyone. She cannot profit by her own wrong.

The testimony on that point is that there was a crackling or a snapping—I have forgotten just what it was. She herself says that she heard it two minutes before the accident. She says that she supposed it was steam. The theory of the defense in that it was not steam, that there was no live steam there, that there was not heat in that radiator, that the
30 radiator was not used, and that it was the beginning of the accident, that it was the noise that preceded the falling of this radiator, the snapping of some of the parts or what-not, and that that was a warning which she should have heeded. Now, that is another question of fact for you to determine. Was she guilty of an act of negligence that contributed to the accident?

If you find no negligence, or if you should find contributory negligence, as I have just described it
40 to you, your verdict in this case must be no cause

for action as against all of the defendants. If, on the other hand, you find there was negligence and no act of contributory negligence, then there will be a verdict in favor of the plaintiff and against the defendant, and as to which defendant it shall be against depends on how you decide the question of fact as to whose negligence was the proximate cause of the accident. Was it the negligence of the owners of the building only? In that event your verdict will be against them only and no cause for action as against the tenant. Was the negligence that of the tenant only? In that event, the verdict will be against the tenant and no cause for action as to the owners.

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If your verdict is that they were both guilty of an act of negligence, although it be a different act of negligence on the part of each, then your verdict will be against both the owners and the tenant, no matter whether you find that one was guilty of a greater act of negligence than the other, or not. The law does not separate the degree of negligence, but if they were both negligent, then your verdict will be against all of them, in a lumpsum, because, in that event, they are jointly liable, and you will not separate the amount that each is to pay.

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You will decide the case, I repeat, from the testimony as it has been adduced before you, as you weigh it. It is entitled to the weight that you give it. You have in mind the interest in this suit that the witnesses have with respect to the testimony that they have given and the weight that it is to receive. You must take into consideration, also, the likelihood of the testimony being true. You will take into consideration your own knowledge of the laws of physics, if that will help you. You take into the jury room with you your common sense, and apply all of these rules to the testimony and thus find the facts, find the truth, separate the truth from the untruth, and render your verdict accordingly, and render your verdict according to testimony as you

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understand it, as you remember it, not as I may have reviewed it. If I have made any errors in reference to the testimony, you will please disregard any such errors and depend, rather, on your own recollection of what the testimony was.

EXCEPTIONS TO CHARGE BY DEFENDANTS
ABRUZZO

10 MR. DOWNING: I except to that part of the court's charge in which it was stated that if the work done by the landlord in this case was negligently done, the landlord is responsible; also to that part of the charge which states that when the landlord makes repairs, he becomes liable if the repairs are negligently made; also to that part of the charge which states, if you find that the proximate cause of the radiator falling was the negligent alteration to the building, your verdict must be against the landlord. I also want to take exception to the charge by the court of all of the requests to charge, as charged on behalf of the Defendant Monevasis.

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At —— P. M., the jury returned to the court room, and the court thereupon further charged the jury as follows:

30 LADIES AND GENTLEMEN OF THE JURY:

I have been advised that you have been unable to agree. Under our system of the administration of the law in this country by jury, there can be no verdict unless the verdict be the unanimous verdict of all twelve of the jury, and it is my duty to keep you in deliberation, within reason, of course, until such time as you might agree.

40 Now, if it is impossible for you to agree, if your differences are irreconcilable, then, of course, it is

my duty to discharge you; and that means that it will be necessary to take the time of counsel and of the court and the money from the county to try it over again; and that is what we do, of course, as a matter of necessity, when there can be no verdict rendered.

But the court is reluctant to,—and that is why I have not excused you sooner,—the court is reluctant to excuse you because the court cannot understand why you cannot come to an agreement.

You have not asked me for any further instructions, and, therefore, there is nothing for me to do except to keep you deliberating on this case until you can agree or until I am satisfied that you cannot agree. I have not been satisfied yet that you cannot agree. If there is anything that the court can do to help, the court is at your disposal. If there is anything that the court has not made clear with respect to the law, I will, of course, answer any questions that you may properly ask me,—that is, any questions that you may ask me with respect to the law.

It does not seem to me that there should be any question with respect to the law. I think I made it clear to you in my charge. If I did not, I will be very glad to restate it to you. The whole question is a question of fact. Under the charge of the court, under the law, your duty is plain and it is clear, to render your verdict according to your oaths and in accordance with the law as I have charged it to you.

You will please retire again. You are having some refreshments, and if you want more, the court will see that you are provided. The court will be in Newton for another hour or two. Please re-deliberate. Reconcile your differences, if you can. If you cannot, of course, I will discharge you, but I am not willing to do so yet. I regret that you have been kept so long without food, but you are now provided with food and you may have such further

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food as you need, and the court will be available, if you need further instructions to assist you in the performance of your duty as jurors.

You will again retire.

(THE JURY RETIRED)

EXHIBIT D-2

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Newton, New Jersey.

November 15, 1926.

Received from Mr. Paul Monévasis 96 dollars for security for one year contract on the present store money to be returned after one year, December 1, 1927.

Also I give him privilege to rent any of the other two stores if the present party should move out.

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Months rent to be 48 dollars.

J. Abruzzo.

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NEW JERSEY SUPREME COURT
SUSSEX COUNTY

HULDA NILSSEN,	}	Action at Law.
Plaintiff,		
—vs—	}	P O S T E A.
JOSEPH ABRUZZO and		
ANNA FORESTER		
ABRUZZO and PAUL		
MONEVASIS,		
Defendants.		10

This case was tried before Judge Newton H. Porter with a jury at the Sussex Circuit on May 6, 1929 and May 7, 1929.

The jury rendered a general verdict against the defendants, Joseph Abruzzo and Anna Forster Abruzzo, and in favor of the plaintiff, Hulda Nilsson, for Nine Thousand Five Hundred Dollars; and a general verdict of no cause for action in favor of the defendant, Paul Monevasis, and against the plaintiff, Hulda Nilsson. 20

NEWTON H. PORTER,
Judge.

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New Jersey Court of Errors and Appeals

HULDA NILSSON,
Plaintiff-Respondent,

vs.

JOSEPH ABRUZZO and ANNA
FORSTER ABRUZZO,
Defendants-Appellants.

*Action
at Law.*

*On Appeal
from New
Jersey
Supreme
Court.*

BRIEF OF PLAINTIFF-RESPONDENT.

The above action was brought by Hulda Nilsson, plaintiff-respondent, hereinafter called the plaintiff, against Joseph Abruzzo and Anna Forster Abruzzo, defendants-appellants, hereinafter called the defendants, and Paul Monevasis. The trial resulted in a verdict in favor of the plaintiff against the defendants and in favor of Monevasis against the plaintiff.

Plaintiffs sued for damages to compensate her for injuries which she sustained on November 22, 1926, when an iron steam radiator weighing about 250 pounds came loose from the wall of a barber shop and fell on the plaintiff, who was sitting beneath it, inflicting serious personal injuries upon her. The defendants were the owners of the building in which the barber shop was located; Paul Monevasis was the tenant in possession. The plaintiff was a customer in the shop and at the time of the accident was sitting in a chair awaiting her turn to have her hair bobbed. The plaintiff's right to recover against the owners of the building was based upon proof that about a month or a month and a half before the radiator fell, the defendants had caused certain alterations or changes to be

made in the structure of the supporting walls of the building, which had resulted in a settling or subsidence in that part of the wall through which passed an iron pipe leading to the radiator; the pull or strain on this pipe had caused the radiator to tear loose from the wall where it was suspended. The plaintiff asserted that the alterations that were made constituted poor construction and were calculated to produce a subsidence in the wall of the building and that common prudence and foresight ought to have demonstrated that the work could not have been done in the manner in which it was done without producing the result which ensued.

To make clear exactly what occurred, it is necessary to give this court a brief description of the premises. The barber shop was an addition to an older building which has been called in the testimony the "Hood" property. A corner of the Hood house extended into the barber shop for about three feet running back 12 or 15 feet towards the rear; between that jog and the front door of the barber shop and on the right-hand side of the barber shop as one enters it was the wall of the addition upon which the radiator was suspended; the pipe from the radiator ran along this new wall into and through the corner of the Hood building to the heater in the cellar of the Hood building. The alterations in the barber shop consisted in cutting off the corner of the jog in the barber shop. This necessitated the removal of the main supporting timbers of the corner of the Hood house, which was a delicate and dangerous operation and one which the defendants had previously been advised by a competent contractor was poor construction. It was established by the plaintiff that the withdrawal of the sup-

port at the corner of the Hood house would cause a settlement in the wall carrying the iron pipe, which in turn would put a strain or pull upon the radiator and would cause it to loosen from its support and be likely to fall.

DEFENDANTS' POINTS 1, 2 and 3.

Under the above points the defendants argue the Court erred in the following respects:

1. Refusal to direct a non-suit on the opening.
2. Refusal to direct a non-suit at the close of the plaintiff's case.
3. Refusal to direct a verdict at the close of the whole case.

These points are based upon grounds of appeal Nos. 1, 2 and 3 (S. C. p. 3) and are argued separately and at length in defendants' brief, pages 4 to 26. Two general propositions are stated in the argument which it appear require answering:

(a) That the plaintiff in opening to the jury and in the submission of proof went outside the allegations of negligence contained in the complaint;

(b) That there was no evidence of negligence to be submitted to the jury.

It is conceded that a reading of the complaint (S. C., pp. 9, 10, 11) leaves something to be desired so far as particularity and certainty are concerned, in the setting up of a cause of action against the defendants Abruzzo. In fact, the only statement of a cause of action against these defendants appears in paragraph 7 of the

complaint (S. C., p. 10, l. 13) which reads as follows:

“7. Because of their (the defendants’) negligence a large iron wall radiator affixed to and a part of the premises became loose and without warning fell on the plaintiff.”

Upon a motion to strike out, now tantamount to a special demurrer, the complaint would have been bad for uncertainty. The complaint, however, would have been good on general demurrer and sets forth a cause of action.

In *Savage v. Public Service Rwy. Co.*, 95 N. J. L. 432; 113 Atl. 252, Chief Justice Gummere, speaking for the Court of Errors and Appeals, after discussing *Central Railroad Co. ads. Van Horn*, 38 N. J. L. 133; *Breese v. Trenton Horse R. R. Co.*, 52 N. J. L. 250; *Race v. Easton & Amboy R. R. Co.*, 62 N. J. L. 536; *Ferguson v. Western Union Telegraph Co.*, 64 N. J. L. 222; *Minnuci v. Phila. & Reading R. R. Co.*, 68 N. J. L. 432; said as follows:

“The opinions referred to are those of the Supreme Court; but the soundness of the judicial declarations has never been challenged, so far as we are aware, and they meet with our approval. It is hardly necessary to add that they are dispositive of the present appeal; for they establish the principle that an averment in a declaration that the plaintiff’s injuries resulted directly from the negligence of an employe of the defendant, without any specification of what constituted the negligence, or what employe was guilty of it, discloses the existence of a cause of action against the defendant, and will therefore be sustained as against a general demurrer.”

No particulars were demanded of the plaintiff and in their absence our system of pleading would permit the proof of any act of negligence

proximately causing the fall of the radiator and the consequent injuries alleged in the complaint. Even if there were force in the defendants' claim that the proof submitted was broader in scope than the allegations of the complaint, it cannot avail them anything to protest on appeal when no objection was made to the complaint or to the admission of evidence under the complaint, before, during, or at the conclusion of the trial.

The defendants' brief maintains (p. 4, l. 27) that a motion for a non-suit was made on the ground that the opening of the plaintiff went outside of the facts alleged in the complaint. This is a mis-statement of fact. The opening of the plaintiff was not transcribed but the grounds of the motion and the ensuing colloquy (S. C., pp. 26, 27, 28) show that no criticism of the opening was made on the ground that it went outside the pleadings. We quote what was said at length:

“Before opening on behalf of the defendants Abruzzo, the following motion was made:

Mr. Downing: If the Court please, on behalf of the defendants Joseph Abruzzo and Anna Forster Abruzzo, I desire to make a motion for a non-suit, on the opening of the plaintiff, on the ground that his opening discloses no cause of action against the defendants Abruzzo. I think that the law was wrongfully stated to the jury as to the liability of the landlord of leased premises. (Citing various cases in support of the motion.) We submit that, under the law, no case has been stated against the defendants Abruzzo, who are landlords in this case, and that, therefore, our motion for a non-suit should be granted.

The Court: (After argument.) The cases you cite, that this is a contractual matter, I do not think that is sound; I do not think it

is applicable to this situation. This is not a contract suit; it is a negligence suit.

Mr. Downing: It is a suit for a breach of duty arising out of a contract between landlord and tenant.

Mr. Coult: No.

The Court: Yes, but there is a duty, that is the charge, when the landlord repairs, not only to the tenant but to the tenant's guests, I have no doubt about that.

Mr. Downing: The allegation is not that there were repairs made to this part of the building or to this radiator, but that there were repairs made to some other part of the building.

Mr. Coult: I think that we are going to connect it up to the radiator.

The Court: Of course, if he does not show that the repairs were made to the radiator—

Mr. Coult: I do not know that I am going to show repairs to the radiator, but I am going to show that there were repairs made, changes in the building—

The Court: That caused the radiator to fall?

Mr. Coult: Yes. In other words, I am going to show that by faulty construction or repairs, there is a connection between that and the falling of the radiator.

The Court: I will deny the motion.

Mr. Downing: I ask an exception.

The Court: You may have an exception.

There is in the whole case not a single objection to the admission of evidence founded upon a departure from the pleadings, nor was there at any time any allegation of surprise. In fact, the pleadings and their contents were not mentioned at all during the whole trial. Defendants now for the first time urge that this judgment should be reversed because of an infirmity in a complaint, which was really one of form and

not of substance and which could have been cured by amendment in the trial court and which may be ^{so} secured in this court.

In *Van Houten v. Van Houten*, 89 N. J. L. 301; 98 Atl. 251 (Court of Errors and Appeals 1916) it was said:

“The power of amendment extends to this court and where the issue has been fairly tried and no injury has been done to the party complaining, it is incumbent upon this court in the interest of justice to exercise the power.” Citing *American Life Ins. Co. v. Day*, 39 N. J. L. 89.

In *Klie v. Hollenstein*, 98 N. J. L. 473; 120 Atl. 16, this Court held:

“Where, as here, the real question in controversy has been fully and fairly tried, though not specifically pleaded and the complaining party has not been surprised or injured, the reviewing court has power to amend the pleadings in order to support the judgment and we will exercise that power.” Citing *Levenson Wrecking Co. v. Gatti-MacQuaide Co.*, 93 N. J. L. 184.

Kapherr v. Schmidt, 98 N. J. L. 803; 121 Atl. 617, was a malpractice case. In affirming a judgment for the plaintiff, Justice Minturn said:

“It is insisted for reversal that a verdict should have been directed for the defendant, because of the absence of proven negligence upon the part of defendant. At the trial the issue was rather narrowed to an inquiry as to whether the infection of the hand was due to defendant’s negligence or to other causes not related to the treatment. The case was tried almost entirely upon that theory, and no objection was taken by defendant to that course of procedure. In such a situation, where parties, without objection, try and submit the question at issue upon a theory apparently satisfactory to themselves, and suffer the case to go to the jury upon

the legal theory thus adopted, such course of procedure becomes the law of the case, and it is too late, upon appeal, for either party for the first time to question the legal propriety of the course thus pursued. In any event, to sustain a verdict otherwise regular, an amendment will be ordered here, if necessary to conform the allegations to the proof. *Levenson Co. v. Gatti-MacQuade*, 93 N. J. L. 185; 107 Atl. 277; *Giardini v. Director General*, 93 N. J. L. 138; 107 Atl. 437."

In *Eannetta v. Delaware, L. & W. R. R. Co.*, 3 Misc. 834; 129 Atl. 232, the Supreme Court on rule to show cause dealt with a judgment which was alleged to have been erroneous, among other things, because "The complaint was insufficient to constitute a cause of action against the defendant." After noting the fact that the issue had been submitted to the jury without objection or exception, the Supreme Court said:

"In other words, we think counsel cannot permit an issue to be raised, presented to the jury in evidence, submitted to the jury by the trial judge, all without objection, and then on a rule for a new trial complain that the pleadings were insufficient to sustain the verdict. *Consensus tollit enorem.*" (*errorem?*)

In *Waring, et als. v. Jobs, et al.*, 104 N. J. L. 158; 138 Atl. 889, this Court said:

"The defendants contend that there is a variance between the proof and the allegation. This is true, but only in immaterial matters, which do not affect the vital point in controversy, and it is well settled that when the real question in dispute has been fairly tried, and the ends of justice will be promoted, the declaration will be amended here in order to support the judgment below."

On December 19, 1913, an opinion of the Supreme Court was filed by Mr. Justice Kalisch in the case of *James Mason v. Public Service Electric Co.* This opinion was not reported but expresses our view of the present case so clearly and succinctly that we cannot forebear to quote from it as follows:

“The first point made is that there is a variation between the allegations in the declaration and the proof. No such claim was made at the trial. No testimony offered and introduced by the plaintiff was objected to on any such ground. If the proof did vary from the allegations in the declaration and it further appeared that the issues which arose at the trial were fought out and without any objection by the parties, as it does appear in this case, then if there was any proof on part of the plaintiff showing a cause of action, tried out by the parties, though not strictly within the allegations of the pleadings, the verdict will not be disturbed on the ground that there is a variance.”

We respectfully submit that the complaint set forth a cause of action against these defendants in paragraph 7 which we have quoted above; and if that paragraph was not a sufficient allegation of a cause of action against these defendants, then they cannot now for the first time raise an objection to the pleadings, having fought the case out fully, and having without objection, tried an issue which they understood and which their witnesses were ready to meet without surprise.

THERE WAS EVIDENCE OF NEGLIGENCE.

That the radiator fell injuring the plaintiff is undisputed; that it was attached to the wall of the barber shop hanging on hooks held by screws and that the screws tore out causing the

radiator to fall, is also undisputed. There was evidence that one of the screws broke (S. C., p. 142). It is also undisputed that the defendants by their agent Clinton W. Kellam, removed the corner of the old Hood building. If there was proof of facts creating a reasonable inference that the alterations in the wall made by the defendants caused the fall of the radiator, then there was evidence of negligence for the jury.

Paul Monevasis, one of the defendants, called by the plaintiff testified that he had rented the store from Abruzzo and that about a month before the accident, the landlords had cut part of the corner in the store (S. C., p. 85, l. 20). The main pipe from the radiator went through the corner: "About two feet away from the corner, there, the main pipe that was there main pipe was right to the corner but two feet was the connection of the main pipe to the radiator" (S. C., p. 86, l. 5). The corner had been cut out to give the tenant more room (S. C., p. 87, l. 10); Mr. Abruzzo had done the work and had employed a Mr. Kellam, the contractor and had paid him (S. C., p. 87, ll. 10-20). On cross examination this witness said that the corner that was cut off was about two feet from the radiator but that the steam pipe which leads to the radiator comes out in the wall close to the corner that was cut off (S. C., p. 87, l. 40; p. 88, l. 15).

Defendant Abruzzo, called for the plaintiff, testified that at the time of the accident he owned the Hood building (S. C., p. 93, l. 5); that he had built a store on an empty lot; then he built another store on the extension in the front of the house; this extension was the barber shop and the corner of the old Hood building extended into the barber shop and that was the

corner which this defendant had cut off (S. C., p. 93, ll. 15-30). This witness further testified that the pipe which leads to the radiator came from the Hood building and that the corner which was cut away was the front of the old Hood building (S. C., p. 94, ll. 35-40).

William I. Houghton, a witness produced by the plaintiff, testified he was a general contractor and that he had a large experience in building structures in Newton and the vicinity and in other localities; that Mr. Abruzzo had called him to look at some work that he wanted done in the barber shop on Spring street (S. C., p. 99, l. 20); this was about three or four months before the work had been done by Mr. Kellam (S. C., p. 99, l. 25); Mr. Abruzzo pointed out what he wanted done and this witness told him that it was poor construction and that he wouldn't do it (S. C., p. 99, l. 40; p. 100, l. 1); that the probable result of cutting off about two feet on that corner would be to weaken the wall (S. C., p. 102, l. 3); and that it would weaken the partition and cause a settlement there, probably (S. C., p. 102, l. 25). This witness also testified that the probable effect of removing the corner of the Hood building would be to cause a settlement in the wall and loosen the screws of the radiator (S. C., p. 103, ll. 20-30). He testified also that he could not remember where the pipe from the radiator went through the wall; that if it went into the Hood building without going into the tea room it would have gone through the corner which was removed (S. C., p. 104, ll. 30-35). He had previously said on cross examination that if the pipe came through the corner that was taken off, then the result which he said would happen probably happened (S. C., p. 104, l. 20).

Charles H. Watkins, produced by the defendants, testified that he had installed the radiator when the barber shop addition was put in the building in May, 1925; he described the manner in which the radiator was hung and said that it had remained in apparently good condition until about two weeks before the accident. On cross examination this witness testified as follows (S. C., p. 145):

Q Mr. Watkins, you are familiar with the construction of that store, aren't you? A Yes, sir.

Q You knew the old Hood building, didn't you, pretty well? A Yes, sir.

Q And the foundation of the Hood building, or the corner of the Hood building, comes right into that store? A Yes, sir; three feet about.

Q About three feet in? A Yes, and then went back the length of about twelve or fifteen feet.

Q And the radiator was between that jog and the front door? A Yes, sir.

Q On the right-hand side; then there is a pipe from the radiator that runs right through the old building? A Yes, sir.

Q Into the Hood cellar; isn't that right? A Yes, sir.

Q Now, if the corner support of that Hood building was taken out to the extent of about two feet, if the corner of that building was caused to settle, and the pipe from the radiator went in through the wall, that would be likely to put a strain on the screws and on the radiator, wouldn't it? A Certainly would—weight of the building on the 2 x 4 through there.

Q And it wouldn't take very much of a strain to start them over, would it? A No, sir.

Clinton W. Kellam, produced by the defendants, testified that around September, 1926, he took out part of the corner post of the main

building which projected in the barber shop about two feet to give the barber a little more room, and cut the corner about the height of head room or a little higher than head room; that removing this corner post would not cause the building to settle and that there would be no additional strain put on the radiator (S. C., p. 146, l. 25; p. 147, l. 5); that he didn't know how close he came to the pipe of the radiator in the operation; that he did not see it (S. C., p. 147, l. 10). This witness testified that the main building had a basement and the barber shop floor was about two feet below the main floor of the house so that he had to take out the corner post of the old-fashioned construction, cut the corner post, and then cut out the girts that come up to the post; took it out right down to the foundation even with the floor of the barber shop and then closed it up and braced it (S. C., p. 147, ll. 25-35). This witness denied that the settling of the foundation wall would be likely to dislodge the radiator; said it wouldn't be apt to fall; it would be apt to spring maybe (S. C., p. 149, l. 25). He testified that he personally supervised the work; that he was there every minute until the "crisis" was over (S. C., p. 150, l. 20). Asked: "What was there about it; was there anything likely to happen?" he answered, "Why, might have knocked the corner post out of the building, building might have started to fall down."

And again (S. C., p. 150, l. 25; p. 151, ll. 1-10):

Q Was that what you meant by the "crisis?" A Crisis, yes. It required knowledge, headwork, to superintend that work, to see that they didn't take out too much of that, and to see that they didn't cut out the post that was unnecessary to cut out.

Q It was such a delicate operation that if you had not been there at the crisis, something would have happened and the corner post come out, and the building might have come down? A Building might have come down? I am not saying just that.

Q Why did you say that Hood building might have started to fall down for? A You might have it start something in the wall.

Q So we will take it as a fact, that you say the job was such a job that you had to be there until the crisis was over, if it had not been done properly, the corner post would come down and the building might have come down; is that all you say? A I guess that is all. Is that all?

This witness was recalled on the following day of the trial (S. C., p. 170) and testified that on the previous evening he had made an examination of the premises; described the location of the pipe in the old wall of the house; stated he had found no evidences of settlement. It appeared, however, that at the time of this examination the radiator had been removed; the pipes had been taken out; the barber shop had been sealed with sheet rock; that this witness had based his conclusion upon what he was able to see in the cellar of the Hood house with flashlight (S. C., p. 172, l. 15). He also testified that the man from the tea room was with him and that witness had asked him if he saw any indication of settlement and the man from the tea room had said "No" (S. C., p. 172, l. 25). He said he asked this question of the man in the tea room not because he wasn't sure of himself, but just because it was a natural question. He said the taking out of the corner of the house would not cause it to settle if the work had been properly done; that he was the man who had done the work and was

responsible for it and he thought he had done it properly (S. C., p. 173, ll. 20, 32).

Philimon Brodt, being recalled, said he had made an examination of the premises over night and saw no cracks of any kind and no settlement (S. C., p. 174, l. 35). This witness, on cross examination, said he had not been with Mr. Kellam when he made his examination and Mr. Kellam had not asked him what his findings were; he only met Mr. Kellam coming out of the building; he did not hear Mr. Kellam ask any questions of anybody (S. C., p. 177, l. 15). Witness testified on cross examination that he looked nowhere in the building except in the barber shop; that the inside of the barber shop was sealed with wall board; that he based his opinion solely upon the fact that there were no cracks in the wall boards which he said were about one-half inch thick (S. C., p. 178, ll. 10, 40).

We submit that from the foregoing testimony the jury were justified in coming to the conclusion that they came to—that is of exonerating the tenant in whose control and possession the radiator was at the time it fell and in fastening the responsibility upon the owners of the building. There was evidence that what the defendants attempted was a dangerous construction which probably resulted in the weakening of the outside wall of the Hood property; that this would cause a settlement which would put a strain on the pipe and cause the radiator to fall. The defendants themselves proved that the radiator had been properly attached to the building and that it was in good condition a week or so before the accident. Something made it fall. From the proof in the case there seems to be only one inference tenable, which is that Mr. Kellam, in spite of his protestations, was not

efficient in the "crisis" which he described and while he did not bring the Hood building down completely, he must in some manner have caused sufficient strain upon the radiator pipe to cause the radiator to fall and this plaintiff to be injured.

Defendants argue that they cannot be held responsible in this case even if they negligently caused the injuries, because after alterations were made and before the injuries were sustained by the plaintiff, they had terminated their lease with Monevasis and had entered into a new one upon different terms. This new letting it is claimed, works a sort of absolution in favor of the defendants, releasing them from all claims caused by any negligence, antedating the new contract, which might proximately work injury to persons lawfully on the premises after the new letting went into effect. We cannot fathom this theory except that it appears to be based upon the assumption that we are claiming rights under the lease and must necessarily cease to have the benefits of such rights because the lease has been terminated. This theory was urged on both motions for non-suit and on the motion for direction of verdict.

We submit that the relationship of landlord and tenant existing between these defendants and Monevasis is not a necessary element in our case. If the defendants had owned the Hood building and had had no interest whatever in the barber shop, they would, of course, still be liable to persons lawfully in the barber shop, if by dangerous weakening of the walls of the Hood building they had caused damage to a customer in the barber shop. It is true that a landlord is under no obligation to make alterations or repairs, but if he undertakes to make them,

gratuitously or otherwise, he assumes to use reasonable care and is responsible if he fails to do so. *LaBrasca v. Hinchman*, 81 N. J. L. 367; 79 Atl. 885; *Broame v. N. J. Conference Camp Meeting Assn.*, 83 N. J. L. 621; 83 Atl. 901; *Charney v. Cohen*, 94 N. J. L. 381; 110 Atl. 698.

DEFENDANTS' POINTS 4, 5 and 6.

The above points are argued together with Point 7, beginning on page 26 of the brief, and are based upon grounds of appeal numbers 4, 5 and 6. Under the foregoing grounds of appeal the defendants criticise certain portions of the charge of the Court which give to the jury the question of the landlord's responsibility providing they found it established by the greater weight of the evidence that the work of repair and alteration of the building was negligently performed and that the negligence was the proximate cause of the plaintiff's injuries.

The defendants' contention with regard to these portions of the charge are repetitions of the argument under the first three points in the brief, namely, that there was no responsibility in the defendants in this case even if there was negligence. To this claim we can only repeat what we have already said in answer to the Defendants' Points 1, 2 and 3.

DEFENDANTS' POINT 7.

The above point is made by the defendants under ground of appeal 7 (S. C., p. 4, l. 32) which reads as follows:

"7. Because the Court erroneously charged the jury certain requests to charge on the part of the defendant Monevasis, and enlarged upon the same as follows":

Then follow eight requests handed up by the defendant, Monevasis, together with certain comments which the trial court in his charge made upon some of them. The exception which forms the basis of the above ground for reversal appears on S. C., page 194, l. 22, as follows:

“I also want to take exception to the charge by the Court of all of the requests to charge, as charged, on behalf of the defendant Monevasis.”

It is to be noted that no specific error in any of the requests was pointed out to the judge and that the exception taken was a single exception intended to embrace all of the requests as charged by the Court. In other words, the defendants took a general exception to everything that was charged by the Court beginning on page 189, l. 25 and concluding at page 191, l. 25. This exception, therefore, as taken embraced at least eight separate propositions of law, no one of which was specifically charged to be erroneous or otherwise criticised at the time when the exception was taken. A general exception, such as this, can be effective only when every one of the requests excepted to is demonstrated to have been wholly erroneous. Should any one of the requests prove to be sound in law, or any single proposition stated as a part of any one of the requests prove to be unexceptionable, then the defendants can take nothing by this general exception.

In *Thibodeau v. Hamley, et al.*, 95 N. J. L. 180; 112 Atl. 320, Justice Kalisch, for this Court, dealt with a case in which a single exception taken to a portion of the charge which embraced two distinct propositions of law, as follows:

“The legal rule governing such an exception is well and vigorously stated by Chief

Justice Beasley, in *Noyes v. State*, 41 N. J. L. at page 429, as follows:

'No rule regulating the trial of causes is more valuable or more settled than the requirement that an exception to the judicial charge, to be legal, must be explicit. If the exception embraces several legal propositions, and any one of them be unexceptional, the objection fails. Counsel must put his finger on the erroneous proposition, and thus point the mind of the judge to it; if he challenges any part of the charge in bulk, assigning no reason for such challenge, and a bill is allowed on the point, the risk of any legal ingredient being found in such bulk is that of the party so excepting. The cases, including several of the decisions of our own courts, are conclusive with respect to this doctrine.'

See *Packard v. Bergen Neck Ry. Co.*, 54 N. J. L., where the cases on this point are collected by *Magie, J.*, at page 556, 25 Atl. 506. Other cases dealing with the subject are *Cliver v. State*, 45 N. J. L. 46, 48; *Gardner v. State*, 55 N. J. L. 18, 25; 26 Atl. 30; *State v. Contarino*, 92 N. J. L. 382, 385; 105 Atl. 197."

In *Paramount Upholstering Works, Inc. v. David, et al.*, 7 Misc. 179; 144 Atl. 628, the plaintiff requested the Court to charge three propositions of law, two of which were sound and the other vicious. To the Court's refusal, the plaintiff prayed and was granted an exception. A portion of the opinion reads as follows:

"As has been observed, the exception taken was a general one, to the denial of the court of the requests, and of course, if one of the requests is bad, the exception fails. In *Thibodeau v. Hamley*, 95 N. J. L. 180; 112 Atl. 320 (Court of Errors and Appeals), the headnote reads: 'If an exception to the judicial charge embraces several legal propositions, and any of them are exceptional, the objection fails. Counsel must put his finger

on the erroneous proposition and thus point the mind of the judge to it; if he challenges any part of the charge in bulk, assigning no reason for such challenge, and a bill is allowed on the point, the risk of any legal ingredient being found in such bulk is that of the party so excepting.'

This being true, the converse would follow if several requests are handed to the trial judge, some of which are good and some of which are faulty, an exception which does not point out the faulty one is fatal. See *Gardner v. State*, 55 N. J. L. 18, headnote 6; 26 Atl. 30; *State v. Contarino*, 92 N. J. L. 382, 105 A. 197. Court of Errors and Appeals."

In the present case it is not necessary to examine more than the first two requests complained of, together with the modification of the second request by the trial judge. Both of these requests are sound and neither one of them is attacked in the brief of the defendants except by the unsupported charge that they are not correct statements of the law (Defendants' brief, p. 27, l. 20).

We urge also that these requests were made on behalf of the co-defendant Monevasis and in general pointed out to the jury what determinations of fact would be required by them in order to exonerate Monevasis. If the judgment in favor of Monevasis was the product of error by the trial court, the defendants cannot complain of any such error on this appeal since they are not harmed by the failure of the plaintiff to recover a judgment against their co-defendant. *Newman v. Fowler*, 37 N. J. L. 89; *Public Service Rwy. Co. v. Matteuci*, 6 Adv. Rep. 1545; 143 Atl. 221; *Faggioni v. Weiss*, 1 Misc. 330; *Fitzgerald v. Gore*, 7 Misc. 910.

DEFENDANTS' POINT 8.

Under the above point the defendants urge that the verdict of \$9,500 is excessive. One of the latest expressions of this court regarding attempts to attack the quantum of damages on appeal is contained in *Ratz v. Hillside Bus Owners' Assn.*, 103 N. J. L. 502; 135 Atl. 884. In the opinion this Court said:

“That this court has no jurisdiction to reverse a judgment because the verdict is not supported by the weight of the evidence, or that the damages are excessive, has been decided over and over again. In fact, so often has it been decided that the courts latterly, in adjudicating the question, rather deem it a work of supererogation to cite authorities to support the position.”

It is submitted that the judgment under review should be affirmed.

Respectfully submitted,

DOLAN & DOLAN,
Attorneys for Plaintiff.

JOSEPH COULT,
Of Counsel.

See

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C

NEW JERSEY COURT of ERRORS and APPEALS

HULDA NILSSON,

Plaintiff-Appellee,

—vs—^{Respondent}

JOSEPH ABRUZZO and

ANNA FORSTER

ABRUZZO,

Defendants-Appellants

Action at Law.

On Appeal from New
Jersey Supreme Court.

B R I E F

10

This is an appeal on the part of Joseph Abruzzo and Anna Forster Abruzzo from a judgment entered on a verdict rendered May 7th, 1929 in the Sussex County Circuit of the New Jersey Supreme Court at the suit of Hulda Nilsson, plaintiff against Joseph Abruzzo, Anna Forster Abruzzo and Paul Monevasis.

The jury rendered a general verdict against the defendants, Joseph Abruzzo and Anna Forster Abruzzo, in favor of the plaintiff, Hulda Nilsson, for \$9,500 and a general verdict of no cause of action, in favor of the defendant, Paul Monevasis, and against the plaintiff, Hulda Nilsson. The part of the judgment appealed from is only that part entered against the defendants, Abruzzo.

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The facts on which the cause was submitted to the jury are briefly as follows:

That sometime during the month of October or November, 1925, Joseph Abruzzo and Anna Forster Abruzzo leased to Paul Monevasis a store room on Spring Street, Newton, New Jersey, and that the said Monevasis conducted a barber shop on the premises. Monevasis continued in the possession of the premises under his agreement with the Abruzzos until November 15th, 1926.

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Just prior to November 15th, 1926 or about the middle of October of that year, the defendant, Monevasis, requested the defendants, Abruzzo, his

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Note: Whenever the word "Plaintiff-Appellee" appears it should read "Plaintiff-Respondent"

landlords, to make certain changes in the building in the store room or barber shop that was operated by him. This request was granted and the defendants, Abruzzo, employed Clinton W. Kellam to do the work and the work was done by Mr. Kellam, who was an experienced builder and contractor.

10 The changes were made in a wall near the rear of the rented premises. As one enters the barber shop there is a wall on the right on which was hung a steam radiator weighing about two hundred and fifty pounds with a pipe leading from this radiator to the furnace in the basement which pipe came from the basement through another wall built at right angles to the wall on which the radiator hung and it was the corner of this last mentioned wall, about two feet away from where the steam pipe entered the wall, that was cut off so as to enlarge the room.

20 The plaintiff contended that the repairs or alterations to the wall were negligently made by the landlords and that therefore, the landlords were liable to the tenant and all who entered the premises at the invitation of the tenant for any damages that resulted from the negligent doing of the repairs or alterations.

30 It appears, however, that on November 15th, 1926 Joseph Abruzzo and Anna Forster Abruzzo rented the same premises to Paul Monevasis, the same tenant, for a period of one year at an increased rental of \$8.00 per month, making a total rent paid by the tenant of \$48.00 per month and it developed in the plaintiff's case that the plaintiff lawfully entered the barber shop on the morning of November 22nd, 1926 and seated herself to await her turn to be served and chose a seat directly under the wall radiator and after she had sat there a few minutes, the radiator fell from the wall and struck the plaintiff with great force
40 resulting in injury to her.

The complaint fails to allege the negligent making of repairs by the landlord and states that by reason of the nature of the business conducted therein that defendant owed the plaintiff the duty to maintain the premises in a safe condition and with due regard to the health and welfare of the plaintiff and totally disregarding the said duty the defendants allowed the premises to become in an unsafe condition and in a state of disrepair and were negligent in that they failed to maintain the premises in a safe condition and with due regard to the health and welfare of the plaintiff and that because of this negligence, a large iron wall radiator affixed to and a part of the premises became loose and without warning fell on the plaintiff. 10

In the opening on the part of the plaintiff counsel for plaintiff stated that the defendants, Abruzzo, had negligently made repairs to the premises, although there is nothing in the complaint to appraise the defendants that such was the claim of the plaintiff. 20

The defendants contend that the plaintiff should not have been permitted to go outside of the case stated in the complaint in her opening and that the matters set forth in the complaint, which should have been the only matters presented to the jury in the opening, do not constitute a cause of action against the landlord or the defendants, Abruzzo, in this matter. 30

The defendant further contends that at the close of the plaintiff's case there was no testimony by which the case could have been submitted to the jury on the theory that any facts had been brought out which would show liability on the part of the defendants to the plaintiff but that on the other hand, all acts shown to have been done by the defendants raised a presumption of law that there was no liability on the part of the defendants, Abruzzo, for damages resulting to the plaintiff. 40

10 It is the further contention of the defendants, Abruzzo, that the memorandum dated November 15th, 1926 (Exhibit D-2 page 196 state of the case) operated as a new lease with the same tenant before the term under which he was holding had expired and therefore, there was a surrender of the old lease by operation of law and a taking by the tenant of the premises in the condition in which he found them and leaving the landlord in the position of having no duty imposed upon him to the tenant or to the tenant's customers or guests for any injuries that occurred by reason of the premises being out of repair at the time of the letting in the absence of any agreement on the part of the landlord to make repairs and in the absence of showing any latent defects known to the landlord and undisclosed to the tenant.

20 L A W

POINT ONE

The first contention of the defendants-appellants is that the court was in error when it refused to grant the motion of these defendants-appellants for a non-suit made on the opening of the case on the part of the plaintiff-appellee.

30 This motion was made on the ground that the opening taken with the complaint disclosed no cause of action and that in the opening the plaintiff went outside of the facts alleged in the complaint. The complaint (Page 9 state of the case) alleges in effect that Joseph Abruzzo and Anna Forster Abruzzo were the owners of the building in which the accident happened and that they had leased a portion of the building to the co-defendant, Paul Monevasis, and that Monevasis conducted and operated a public barber shop in that portion of the premises rented by him and that
40 the plaintiff lawfully entered the public barber

shop on the morning on which the accident happened and that by reason of the nature of the business conducted therein, the defendants owed the plaintiff the duty to maintain the premises in a safe condition and with due regard to the health and welfare of the plaintiff and that totally disregarding the alleged duty the defendants allowed the premises to become in an unsafe condition and in a state of disrepair and were negligent in that they failed to maintain the premises in a safe condition and with due regard to the health and welfare of the plaintiff and because of that negligence a large iron wall radiator which was affixed to and a part of the premises became loose and fell on the plaintiff and that the radiator had been placed in the said public barber shop for the comfort and convenience of the defendants and the customers attracted to the barber shop and that by reason of the radiator having fallen on her, the plaintiff was seriously injured and suffered other damages. 10

Three questions arise with reference to the opening on the part of the plaintiff and on the above state of facts:

First, is it permissible for the plaintiff in his opening to raise questions of fact which are not within the issue raised by the pleadings?

Second, do the averments or allegations in the complaint set forth a cause of action against these defendants-appellants? 30

Third, are the particular facts stated in the complaint sufficient to raise the alleged duty and if they do not, can the duty be established by other facts not stated?

FIRST—Plaintiff's counsel in his opening stated that it was proposed to prove that the defendants, Abruzzo, were the owners of a certain building and that prior to November 22nd, 1926, had rented the same or a portion of it to the defendant, 40

Monevasis, and that the defendant, Monevasis, conducted a public barber shop on the premises and that on the morning of November 22nd, 1926, the plaintiff lawfully entered the barber shop and seated herself to await her turn to be served and while sitting there the radiator, under which she had seated herself, fell and injured her and that the plaintiff would show that the landlords who are the defendants-appallants, had negligently made repairs to the premises.

10 It is our contention that the allegations in the complaint will not support the allegations made in the opening as to the negligent making of repairs by the landlord and that, therefor, it was improper for the plaintiff's counsel to go outside of the allegations in the complaint on the opening.

To support our contention that the plaintiff was not entitled to submit to the jury in the opening statement or in the proof any facts not alleged in the complaint, we cite the case of JORDAN v. REED, 77 N. J. Law, p. 584, in which the Court of Errors and Appeals held that a motion for a non-suit on the opening of a case to the court and jury is not usual, but is permissible if the statement of counsel, by its omissions or admissions renders it clearly evident either that no case can be made out or that a recovery is precluded and that when a declaration sets up a contract growing out of commercial paper and entered in-
 20 to by the defendant alone, proof of a contract of a different nature entered into by the defendant and others will not sustain the declaration, for thereby the defendant would be denied an opportunity to plead the non-joinder in abatement.

30 We also cite the case of GILLARD v. PUBLIC SERVICE RAILWAY COMPANY, 94 N. J. Law, p. 288 where Chief Justice Gummere at p. 291 says, "It is a cardinal rule for the guidance of trial courts that only those questions which are within
 40 the issues raised by the pleadings should be sub-

mitted to the Jury and that a failure to observe this rule is legal error."

SECOND.—We contend that the complaint sets forth no cause of action against the defendants-appellants because from the allegations of the complaint it can only be inferred that the plaintiff seeks to hold these defendants-appellants on the theory that the owner of premises shall make repairs because of the premises being in a dangerous condition, when, as a matter of fact, there is no implied duty on the part of the owner of premises that he shall make repairs because of the premises being in a dangerous condition. The complaint simply alleges the relation of landlord and tenant between these defendants-appellants and the defendant, Monevasis, and that the building was in an unsafe condition, in a state of disrepair and that by reason of these facts the defendant owed a duty to the plaintiff.

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Our contention is that no duty arose on the part of these defendants-appellants from the facts stated in the complaint.

In the case of NAUMBERG v. YOUNG, 44 N. J. Law, p. 331 at p. 344, Justice Depue speaking for the Supreme Court held as follows: "The general doctrine of the law is that upon a demise there is no implied contract that the property is fit for the use for which the lessee required it whether for habitation, occupation or cultivation. There is no implied duty on the owner of a house which is in a ruinous and unsafe condition to inform a proposed tenant that it is unfit for habitation and no action will lie against him for an omission to do so in the absence of express warranty or deceit. An obligation on the part of the landlord will not be implied that he shall make substantial repairs because of the premises being in a dangerous condition. The doctrine with respect to covenants implied from the letting has been held in great

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strictness in this State. A covenant on the part of the lessee, even for title, will not arise from the relation of landlord and tenant, there must be either an express agreement to that effect or words must be used from which such an agreement can be implied." This exact language was used by Justice Dixon in the case of MULLEN v. RAIN-
EAR, 45 N. J. Law, p. 520 at p. 523 and the same principle has been followed in the following cases:

- 10 GILLVON v. REILLY, 50 N. J. Law, p. 26 at p. 27.
MURRAY v. ALBERTSON, 50 N. J. Law, p. 167 at p. 168.
MERSHON v. WILLIAMS, 63 N. J. Law, p. 398 at p. 407.
LYON v. BUERMAN, 70 N. J. Law, p. 620 at p. 622.
20 SIGGINS v. MCGILL, 72 N. J. Law, p. 263 at p. 264.
CONNELLY v. GADDIS, 31 N. J. L. Journal, p. 77 at p. 79.
ALLEN v. GREENBAUM, 41 N. J. L. Journal, p. 178 at p. 180.
BARTHELMESS v. BERGAMO, 135 Atlantic Reporter, p. 794.
LAND v. FITZGERALD, 68 N. J. Law, p. 28 at p. 29.
CLYNE v. HELMES, 61 N. J. Law, p. 359.
30 LEIBECK v. BENNIS, 4 N. J. Miscellaneous Reports, p. 422.
REILLY v. FELDMAN, 138 Atlantic Reporter, p. 307.

We feel that the above cases indicate beyond a question of doubt that a landlord is not liable to a tenant for injuries sustained by the tenant by reason of the condition of the premises. We contend that it therefore follows that a landlord would not be liable to a member of the family
40 of the tenant, his guest, his customers or others

upon the premises leased to the tenant on the theory that a landlord is not liable for injury to a tenant by reason of the condition of the premises.

In the case of *SIGGINS v. MCGILL*, the Court of Errors and Appeals speaking through Justice Pitney declared that in this state it is established as a general rule that a landlord is not liable for injuries sustained by a tenant or his family or guests by reason of ruinous condition of the premises demised there being upon the letting of a house or lands no implied contract or condition that the premises are or shall be fit and suitable for the use of the tenants. 10

In the case of *CLYNE v. HELMES*, 61 N. J. Law, p. 358 the plaintiff was a sister of the tenant living with her brother as a member of his household and acting in the capacity of housekeeper and while so employed a mantle piece on the premises fell over against the plaintiff and injured her. Plaintiff then instituted suit against the defendant, Helmes, alleging that the defendant had failed to construct the mantle piece properly and had allowed the same to remain out of repair and by reason of this negligence he was liable for any injuries sustained by the plaintiff. 20

Justice Depue reviews, in the opinion in the case of *CLYNE v. HELMES*, the law with reference to the contract between the landlord and the tenant and the duty of the landlord toward the tenant and third persons being on the property and says that a landlord who lets a house in a dangerous state is not liable to the tenants, customers or guests for accidents happening during the term for, fraud, apart, there is no law against letting a tumble-down house and the tenant's remedy is upon his contract, if any. In the same case Justice Depue speaking for the Supreme Court says, that the exemption of a landlord 30 40

from liability for injuries sustained by a tenant by reason of the ruinous condition of the demised premises where there is neither a contract nor fraud applies as well to members of the family of a tenant as to those who are on the premises by his consent.

The court also quotes from TAYLOR'S LANDLORD AND TENANT, SEVENTH EDITION, Sec. 175A as follows:

10 "The sub-tenant, servant, employee or even customer of the lessee is under the same restriction as the lessee himself because, entering under the tenants title and not by any invitation, express or implied from the owner, they assume a like risk."

In the case of LIEBECK v. BENNIS, 4 N. J. Miscellaneous Reports, p. 422, the plaintiff was an employee of a tenant occupying premises belonging to the defendant and while being employed about her duties she had occasion to go
20 to the back porch of the premises and the porch suddenly gave way causing her to fall to the walk below and resulting in injuries. The court held that this count disclosed no cause of action and this rule was concurred in by the Supreme Court which held that it is entirely settled in this state that the landlord is not bound to repair leased premises during the term unless he has contracted to do so and that this exemption of a landlord applies also to members of the family of the
30 tenant.

In the case of BARTHELMESS v. BERGAMO, 135 Atlantic Reporter, p. 794, Justice Minturn speaking for the Court of Errors and Appeals held that the relation of landlord and tenant in the absence of a continuing nuisance or an express contract imposed the duty of repairing the demised premises upon the tenant and cites the only two instances of a departure from the rule,
40 one of which was where the landlord rents a tene-

ment or apartment house to many tenants and retains control of the halls and stairs as common ways that the landlord is liable in the event of damages to occupants and others lawfully using the premises for a failure to reasonably maintain the same and the other is where the landlord gratuitously assumes the making of repairs and negligently performs the same and damage results therefrom.

There is no allegation in the complaint in the case under appeal that the landlord had gratuitously assumed the making of repairs and had negligently performed the same. 10

After citing these two departures from the fundamental rule first cited the court says "Otherwise the fundamental rule which exempts the landlord from liability in such relationship remains undisturbed."

In the case of REILLY v. FELDMAN, 138 Atlantic Reporter, p. 307, the opinion was rendered by Chief Justice Gummere and we are of the opinion that, that case is dispositive of the present case. The circumstances under the case of REILLY v. FELDMAN are briefly as follows: 20

Defendant leased his premises to a man named Mascher. The plaintiff called upon Mrs. Mascher and while in the act of leaving the house, one of the boards of the porch broke causing the visitor to fall and receive injuries. The jury awarded the plaintiff a verdict of nine hundred dollars and the defendant applied for and obtained a rule to show cause why the verdict should not be set aside and a new trial ordered. 30

Chief Justice Gummere held that the facts above recited did not impose any liability upon the defendant to compensate the plaintiff for the injuries sustained. The rule to show cause was made absolute.

THIRD—Having shown that the plaintiff could 40

not go outside of the declaration in the complaint in submitting issues to the jury and that no duty arises on the part of the owner of premises which are in a ruinous and unsafe condition that he shall make repairs to them, we proceed to the contention that the allegations of the complaint in this cause are not sufficient to sustain the allegation of the duty alleged in the complaint and if not sufficient then the complaint is bad in substance and it was error to deny a motion for a nonsuit on the opening.

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It is a rule in pleading that the plaintiff in his declaration must aver everything that is necessary to maintain his action.

RIDGWAY v. FORSYTH, 7 N. J. Law, p. 98.

Where an allegation that a duty arises is inserted in the complaint good pleading requires the allegations of the facts upon which the duty arises.

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FREEHOLDERS OF MERCER v. PENN. RAILROAD CO., 45 N. J. Law, p. 82 at p. 86.

"The decisions show that the allegation of duty in a declaration is in all cases immaterial, and ought never to be introduced, for, if the particular facts set forth raise the duty, the allegation is unnecessary, and, if they do not, it will be unavailing. *If the particular facts stated in the declaration do not raise the duty, it cannot be established by other facts not stated.* The declaration, therefore, must stand or fall by the facts stated. Negligence creates no cause of action unless it expresses or establishes some breach of duty." BREESE v. TRENTON HORSE RAIL-

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ROAD CO., 52 N. J. Law, p. 250.

Any pleading founded on a charge of legal duty, must show that duty by proper allegations of the facts out of which it arises and such a pleading will be bad in substance if the duty charged does not arise out of the facts stated. HOPPER v FREE-

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HOLDERS OF BERGEN, 52 N. J. Law, p. 313, at

p. 316.

The pleading must set out the facts from which the duty arises and is bad in substance if the duty does not result from the facts stated. *NEWARK v. STOUT*, 52 N. J. Law, p. 35 at p. 51.

In actions for negligence, facts raising a duty the breach of which is complained of, and facts showing such breach, should be averred by the pleader. *RACE v. EASTON AND AMBOY RAILROAD CO.* 62 N. J. Law, p. 536 at p. 537.

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The mere allegation that a duty exists is not sufficient. In order to show liability on the part of the defendant it is necessary for the plaintiff to set out the facts from which the alleged duty arose. *NEINABER v. BERGEN TURNPIKE CO.*, 70 N. J. Law, p. 630.

An allegation in a declaration that a duty rests upon a defendant to do a specified thing, without setting forth such facts as show the existence of a duty, is nugatory. A landlord is under no obligation to his tenant to make repairs which become necessary during the term, in the absence of any agreement on his part to do so, and no such agreement will be implied merely from the fact of the demise. Nor is he under any duty to call the attention of his tenant to any defects that come into existence during the term of the lease. *LYON v. BUERMAN*, 70 N. J. Law, p. 620 at p. 622.

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It is not enough for the pleader to allege that the duty exists. Such an allegation is not the statement of a fact but merely the pleader's averment of the legal efficacy of the facts which are set out in the declaration; and, in considering the sufficiency of the declaration, the court does not accept the conclusion drawn by the pleader but determines for itself the legal force of those facts. *MARPLES v. STANDARD OIL CO.*, 71 N. J. Law, p. 352 at p. 353. *LONG, Admx. v. JOHN STEPHENSON CO.*, 73 N. J. Law, p. 186. *MILLVILLE GAS LIGHT CO. v. SWEETEN*, 75 N. J. Law, p. 23.

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The mere allegation in words of a duty will not help the pleader unless facts are set forth from which the court may determine the existence of the duty and its breach; general statements of negligence are insufficient. *MILLER v. PATHE FRERES*, 81 N. J. Law, p. 341 at p. 343.

10 The law with reference to pleading a legal duty is also set forth in the case of *N. J. FIDELITY AND PLATE GLASS INSURANCE CO., v. LE-HIGH VALLEY RAILROAD COMPANY*, 92 N. J. Law, p. 467 at p. 471.

It is also stated in the case of *THE STATE v. JERSEY CITY*, 94 N. J. Law, p. 431 at p. 434.

20 In the case of *GAFFNEY v. ILLINGWORTH*, Essex Circuit Court, 1915, 38 N. J. Law Journal, p. 75, the court held as follows, "Looking to see what the law was under the old practice, I find that, under the old practice, and, I presume, under the new practice, this matter depends somewhat upon circumstances. In the case of *MILLER v. PATHE FRERES*, reported in 79 Atl. Rep. 1063, the Supreme Court, Mr. Justice Voorhees reading the opinion, says this: 'Where the declaration sets forth the facts which show the injury to be direct, it is sufficient to allege simply that the defendant was negligent,' and citing the case of *BREESE v. TRENTON RAILROAD CO.*, 52 N. J. Law, p. 250; 'but where negligence gives rise to an injury which is indirect, facts constituting the negligence and showing the duty and the breach thereof must be pleaded and averred.'

30 There are several cases referred to here, which I will not stop to mention now, in illustration of the rule that where the injury is indirect the facts must be stated. One of those cases was this: The declaration said that the plaintiff was a passenger on a railroad train, and that, by the negligence of the railroad company, he was thrown out of the car and hurt. The Court said that that
40 was not sufficient. There ~~was~~^{are} such an infinity of

ways in which a man might be thrown out of a car by the negligence of a railroad company, that it is incumbent on the plaintiff to say more than that—to give the circumstances. That rule, I have no doubt, would hold under the new rule of practice, for I do not understand that any change is intended by the new Practice Act in the rule requiring the plaintiff's case to be stated. The form is new; the substance, so far as I can gather the intention of the Legislature, ought to be the same.” 10

From the above cited cases and from the principle that there is no implied duty on the part of the owner of premises that he shall make repairs because of the premises being in a dangerous condition, we allege and contend that the complaint in this case is bad in substance, in that it discloses no facts from which the alleged duty arises and that it was proper under the circumstances to have granted the defendants'-appellants' motion for a non-suit. 20

In the case of *KELLY v. BERGEN COUNTY GAS CO.*, 74 N. J. Law, p. 604, the Court held that on a motion of non-suit upon the opening of counsel and upon a motion for a non-suit at the close of the plaintiff's evidence, the same question is presented, namely, whether the facts stated or proved and reasonable inferences that may be drawn therefrom disclose that the plaintiff is not entitled to submit his case to the jury because a verdict in his favor could not be maintained. 30

This was also held in the case of *JORDAN v. REED*, 77 N. J. Law, p. 584.

In the case of *SAVAGE v. PUBLIC SERVICE RAILWAY CO.*, 95 N. J. Law, p. 432, Chief Justice Gummere reading the opinion for the Court of Errors and Appeals stated, “Assuming the validity of the complaint, and the insufficiency of the probata to support it, the proper practice is to move for a non-suit either upon the plaintiff's 40

opening or when he has rested his case.”

From the case above cited the defendants-appellants followed the proper procedure when they moved for a non-suit on the plaintiff's opening and since the allegations in the complaint do not give rise to the alleged duty, the motion should have been granted.

10 The case of CAREY v. GRAY, 98 N. J. Law, p. 217, holds, by inference, that where the complaint does not set forth a good cause of action that a non-suit should be granted on the opening of counsel.

POINT TWO

20 The second contention of the defendants-appellants is that the court was in error when it refused to grant the motion of the defendants-appellants for a non-suit made at the close of the plaintiff's case.

On a motion for a non-suit at the close of the plaintiff's evidence, the question is presented whether the facts stated or proved and reasonable inferences that may be drawn therefrom, disclose that the plaintiff is not entitled to submit his case to the jury because a verdict in his favor could not be maintained.

KELLEY v. BERGEN COUNTY GAS CO., 74 N. J. Law, p. 604.

30 JORDAN v. REED, 77 N. J. Law, p. 584.

40 With this statement in view it seems that it is necessary to examine the matters testified to on the part of the plaintiff and the reasonable inferences to be drawn therefrom, bearing in mind that the burden of proof was on the plaintiff to show that this radiator fell through some negligence on the part of one or the other of the defendants in the original suit and also bearing in mind the rule that the landlord is not liable to a tenant, his guests or even his customers for injury arising by reason of

the condition of the premises.

The first witness called by the plaintiff was the plaintiff herself, Hulda Nilsson. Her whole testimony can be searched in vain for any evidence of negligence on the part of the owner of the premises. At the end of her testimony it stood out that Miss Nilsson lived about seven miles from Sussex and about two miles from Beemerville, Sussex County, on a farm and that on November 22nd, 1926, she had an accident in the barber shop operated by the defendant, Monevasis, in which a wall radiator fell on her and injured her. 10

Absolutely nothing is said as to the condition of the premises or as to who was liable for the accident and the injuries arising therefrom or as to negligence on the part of anyone.

The next witness sworn by the plaintiff was Bertha Nally, who told of her sister being brought to her house after she was injured and told of having braces made for her sister and of certain expenses that had been incurred and never a word about how the accident happened. 20

Dr. Haggerty, Dr. Cole, Dr. Morrison and Dr. Wilbur were all sworn by the plaintiff but, of course, testified only to physical injuries sustained by the plaintiff.

Mr. Louis Ratti was sworn by the plaintiff. He was in the barber shop sitting in the barber's chair when he heard a crash and a scream and looked around and saw Miss Nilsson under the radiator with one end of the radiator resting on the floor. 30

Surely there is nothing in that testimony from which it could be inferred that the falling of the radiator was due to any negligence on the part of the owner of the building.

The plaintiff then called Paul Monevasis, one of the defendants, and he was permitted to testify that he had rented the store from the Abruzzos, who are the defendants-appellants, sometime during November, 1925, and that about a month before 40

the accident happened, the Abruzzos at the request on Monevasis and in consideration of an increased rental, had enlarged the shop by cutting off a portion of a corner wall which was the wall not to which the radiator was fastened but a wall that ran at right angles thereto and that the work had been done by Mr. Kellam, a contractor and on cross-examination he stated that the corner of the wall that was cut off was a little more than two feet
10 from the point where the pipe leading from the furnace to the radiator came through the wall and that it was nowhere near the radiator and he further says, that the radiator rested on hooks that were fastened to the wall by screws and that he had made new arrangements when the corner was cut off. Beginning with November 15th, he was to pay \$8 per month more rent. His statement as to the rent is found on page 91 of the state of the case.

Joseph Abruzzo, one of the defendants-appellants,
20 was also put on the stand and all that he testified to, was that the work had been done by Mr. Kellam, paid for by Abruzzo and that Monevasis had said to him, "Mr. Abruzzo, if you do that, pay you little more money."

Certainly there is nothing in his testimony from which an inference can be drawn that the radiator fell by reason of any negligence on the part of the landlord or owner of the premises and this is so, even though we admit for the purpose of the argument that the admission of the testimony as to the repairs was correct and proper evidence under the pleadings in this case, because in the mere making
30 of alterations to one wall no inference can be drawn that the work was negligently done so that a radiator hanging on a different wall fell down. There must be some evidence that the work was negligently done and there is no effort on the part of the plaintiff to show that the cutting off of the corner was done in a negligent manner. Even Mr. Hough-
40 ton, a reliable contractor, sworn on the part of the

plaintiff, would not say that the work was negligently done and all that he could say with reference to the work was, that if the work was done as he had been asked to do it that it might cause a settlement that would loosen the screws in the radiator but even that was problematical. He further testified that the radiator in the first instance had been put in in a good workmanlike manner in the way that they are always put up, and in cross-examination he says that if the pipe leading from the radiator to the furnace was a couple of feet away from the corner that was taken off that the wall on which the radiator was hung would not be affected by any settlement in the wall through which the pipe ran. 10

There is also no evidence that there was any settling of the wall, the corner of which had been cut off.

Russell Moore testifies that about a week before the accident he called the attention of the tenant, who was the barber, Monevasis, to the fact that the screws holding the radiator were loose and there is no testimony that this knowledge on the part of the tenant was ever communicated to the landlord so that the landlord ever had an opportunity to examine the radiator as to its safety. 20

We contend that when this knowledge came to the tenant there came with it a duty to disclose the condition of the radiator to the landlord and that if he did not so disclose it, there was no liability on the part of the landlord to the tenant or to any person entering under him or by his invitation expressed or implied, for any injury arising by that defect. 30

Mr. Moore in his testimony says that when he called the defendant, Monevasis, attention to the condition of the radiator that he was informed by him that it had been in that condition for a good while. If that is true, and we have to take it as true because it is not disputed up to the time that the plaintiff closed her case, then the tenant 40

assumed liability for the condition of the radiator.

10 We contend that all the facts above set forth which we believe to be a true statement of the testimony and which the testimony as set forth in the state of the case will reveal to be a true statement, raise no question of fact from which there can be any reasonable inference that the defendants-appellants were negligent in any manner causing the happening of this accident and that on the failure of the plaintiff to prove such negligence the plaintiff is not entitled to submit her case to the jury because a verdict in her favor could not be maintained. Not only is the case of the plaintiff barren of any proof of negligence on the part of the owner of the premises but it on the other hand from the testimony of the plaintiff's witness, Monevasis, discloses that there was a new letting by a lease of November 15, 1926, by 20 which Monevasis rented the barber shop for a period of one year from November 15, 1926 at a rental of \$48. per month which lease was in full force and effect at the time of the happening of the accident and that there was, therefore, a surrender of the old lease under which the repairs and alterations to the building were made and upon that surrender becoming operative by the granting and acceptance of a new term the tenant took the premises as he found them, free from 30 any liability on the part of the landlord to the tenant or third persons entering under him whether guests, customers or otherwise for injuries sustained by reason of the condition of the premises. If the testimony of Russell Moore is to be believed and given full credence then there can be no question but that the defendant, Monevasis, had full knowledge of any defects that there might have existed in the building.

40 Our further contention is that if the court finds the testimony as to the repairs, in the face of the

fact that there is no allegation as to making repairs in the complaint, was admissible and proper testimony to go before the jury that then the repairs were not made gratuitously in the sense that they were repairs that the landlords were not obliged to make or in the sense that they were made with no consideration but that they were repairs that the landlord had contracted with the tenant to make for a valid consideration, namely, the payment of increased rent and the taking of the premises for a longer term and in this respect, we contend that there can be no recovery by the plaintiff against the owners of the premises because of the making of those repairs because one who is not a party to a contract cannot sue on it though injured because of a breach of duty arising out of it. 10

The leading case in New Jersey on this subject is *MARVIN SAFE COMPANY v. WARD*, 46 N. J. Law, p. 19, wherein Justice Depue held as follows: "The general rule of law is, that one who is not a party to a contract, cannot sue in respect of a breach of duty arising out of the contract." 20

This case was also followed in the following named cases:

FIELDERS v. NORTH JERSEY STREET RAILWAY COMPANY, 68 N. J. Law, p. 343 at p. 347.

SCHUTTE v. UNITED ELECTRIC COMPANY, 68 N. J. Law, p. 437.

STYLES v. LONG COMPANY, 70 N. J. Law, p. 301 at p. 303. 30

THOMLINGSON v. ARMOUR AND COMPANY, 75 N. J. Law, p. 748 at p. 755.

LYDECKER v. FREEHOLDERS OF PASSAIC, 91 N. J. Law, p. 622 at p. 624.

REILLY v. FELDMAN, 138 Atlantic Reporter, p. 307 at p. 308.

This case under consideration is one of two things; it is either a case of a suit by a third person injured on demised premises against the land- 40

lord by reason of some duty on the part of the landlord arising from the letting to some third person or it is a suit against the landlord for a breach of duty under a contract between the landlord and the tenant. If the plaintiff is confined to the allegations of the complaint then these defendants-appellants, the owners of the building, wherein the accident happened, were entitled to a non-suit because there are no allegations from which any duty can be inferred to arise from the landlord to the third person. If the plaintiff is allowed to go outside of the allegations in the complaint and show the making of these repairs or alterations then these defendants-appellants are entitled to a non-suit because there is nothing in the plaintiff's case from which an inference of negligence on the part of the owners of the building in the making of the alterations can be inferred and because if negligence in the making of the alterations can be inferred, the whole evidence is that they were made by the landlord under a contract for a valid consideration passing from the tenant to the landlord in which the party injured was not a party to the contract. In either event, the defendants-appellants are entitled to a non-suit because there is no duty arising from the relationship of landlord and tenant by which the landlord is bound to keep the premises safe for the tenant, members of his family, guests or customers.

In support of this contention we again refer to the case of *CLYNE v. HELMES*, 61 N. J. Law, p. 358 and to the opinion in which it is stated by the Court that even though there is a promise or contract to repair, the third person could not take advantage of the same because with respect to the third person, the contract was without consideration and that event though there was a valid contract between the landlord and his tenant an action against the landlord for injuries received by a third

person by reason of the condition of the premises could not be maintained under such a contract because one who is not a party to a contract cannot sue in respect to a breach of duty arising out of the contract.

In the case of REILLY v. FELDMAN, 138 Atlantic Reporter, p. 307, there was evidence of a contract showing that the landlord agreed to repair the step and other defective parts of the building upon consideration that the tenant would pay an increased rental. In ruling on that phase of the case, the Court held that, even if it be assumed that such a contract was valid as between the landlord and his tenant, the breach of such contract did not render the landlord liable for injuries received by a member of the tenant's family, the reason being that one who is not a party to a contract cannot sue in respect to a breach of duty arising out of it. 10

POINT THREE

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The third contention of the defendants-appellants is that the court was in error when it refused the motion of the defendants-appellants for a direction of a verdict of no cause made at the close of the case.

At the close of the case on the part of the plaintiff and both defendants there was no substantial dispute as to the facts or inferences to be drawn therefrom. Acknowledging that on such a ground as the above, the plaintiff-appellee is entitled to have the testimony considered by the court in an aspect that is favorable to the plaintiff-appellee, looked at from that or any other point of view, the case presented the following facts; the plaintiff was a customer of one, Monevasis, who conducted a barber shop in a building owned by the defendants-appellants and which had been rented to Monevasis by the defendants-appellants on November 15th, 1926. At the time of the letting there was a wall rad- 30 40

iator in the barber shop that had been properly placed there by the contractor when the building was constructed. The radiator was not used for heating purposes by the tenant. The radiator fell from the wall while the plaintiff-appellee was sitting underneath it and struck the plaintiff-appellee causing injuries to her. The defendants-appellants had no notice of any defect in the premises leased but the barber, Monevasis, did have notice that the
10 radiator was loose and knew at the time of the letting that the radiator was loose.

Prior to the making of the lease, the defendants-appellants had made repairs to a wall that ran at right angles to the wall on which the radiator hung. A pipe leading from the furnace to the radiator passed through the wall that was altered about two feet away from the corner where the alterations took place. The work of altering the wall was performed by a competent contractor. It was very
20 problematical that the repairs would affect the radiator on the adjoining wall.

The jury might have found these facts but if they did they would be compelled to assume that the work of making repairs was negligently done by the defendants-appellants or by their contractor and agent, when there is no evidence that this work was negligently done or that the falling of the radiator resulted from the making of the repairs. Then too,
30 it must be considered that any evidence as to repairs was outside of the allegations in the complaint and not proper evidence to be considered by the jury.

We again state by way of emphasis that there was no substantial dispute as to the facts or the inferences to be drawn therefrom.

At the close of the whole case there was in evidence a lease (Exhibit D-2, p. 196 state of the case) between Paul Monevasis and these defendants-appellants, dated November 15, 1926 and running for
40 one year from November 15, 1926. This lease was

made seven days before the happening of the accident complained of. Any repairs that were made to the premises were made prior to November 15, 1926 and the new lease was entered into on November 15th, 1926 and the tenant took the premises then as he found them and the landlord was then under no obligation to go in and repair those premises or to do anything else with them because this new lease operated as a surrender. A surrender may be made by act and operation of law and the acceptance by the tenant of a new lease of the same premises, during the period of the first lease, will be deemed to be a virtual surrender of the formal lease. It admits the capacity of the lessor to make such a lease, which he would not have had without a surrender of the first lease and the presumption of law is, that the lease had been surrendered, for no man would take from another a lease of a house of which he has already the legal control and agree to pay him rent for it.

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TAYLOR'S LANDLORD and TENANT, EIGHTH EDITION, p. 99.

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In legal effect when these defendants-appellants and the tenant, Monevavis, entered into this new lease during the term of the first lease there was a surrender of the first lease or at least a presumption of a surrender that could only be defeated by proof of the acts of the parties taken all together sufficient to rebut the idea of a surrender.

In the case in hand the same tenant accepted a new lease from the same landlord for a longer term at an increased rent with no protest on the part of the lessee against the right of the lessor to exact such increased rent and in fact an agreement or voluntary offer by the tenant to pay an increased rent. These acts of the parties were such that no other intention could be presumed than that there was a surrender of the first lease. The affect of a surrender was to terminate the relation of landlord and tenant and with it all obli-

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gations of the parties to that relation and upon the making of the new lease to renew the relation of landlord and tenant without regard to the terms of the former lease or any acts or things done by either party during the former term. This then left the parties to the new lease in the position of the making of a new entry by the tenant and a new delivery of possession by the landlord and it is useless to argue further the principle that is so well settled that one who enters into a lease must take the premises as they stand and cannot call upon the lessor to put them into better condition or to make any repairs on them and not being liable to the tenant the landlord, of course, would not be liable to members of the family of the tenant, his guests or his customers.

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20 The case of *WILKINSON v. PLAKET*, 5 N. J. Miscellaneous Reports, p. 853, sustains the position that there can be a surrender of a former lease by operation of law and a reletting of the premises on different terms. That is exactly what we contend happened in this case when the lease of November 15 1926 was made.

POINTS FOUR, FIVE, SIX AND SEVEN.

These points may well be argued together because they all have to do with charges that these defendants - appellants allege were erroneous charges to the jury.

30 From the statement made by the court as set forth in the fourth ground of appeal, the jury must have inferred that the law with reference to the case before them was, that if the work that had been testified to, was negligently done that then these defendants-appellants would be liable to the plaintiff when as a matter of fact there having been a new letting on November 15, 1926, after the repairs were made, there could be no responsibility on the part of the owners of the building toward the tenant or any person who
40 was lawfully on the premises under him.

The charges made as set forth in both the fifth and sixth grounds of appeal, are all premised on the proposition that there was no new letting and while the law as set forth to the jury by the court in his charge (Page 87 state of the case, line 36) is undoubtedly a proper statement of the law, it is not applicable to the cases under consideration because there is no evidence in the entire case that there were any repairs made to the premises after the making of the lease under which the tenant held the premises. The law as stated by the court on page 188, line 5 state of the case, was an erroneous statement of the law in that it is based on evidence that does not appear in the case, there being no evidence of any alterations in the building after the making of the new lease. 10

The seventh ground of appeal is based on charges made by the court upon the request of the defendant, Monevasis.

We contend that the first and second requests to charge are not correct statements of the law and that in the third, fourth and fifth requests to charge the court speaks of a continuing nuisance on the premises when there is no testimony in the case as to anything that would constitute a nuisance and no allegation in the complaint and no allegation in the answer of the defendant, Monevasis, that there ^{was} a nuisance on the property. In the sixth request to charge the court says, the landlord was under no contract to supply the tenant with heat and that the radiator was not used by the tenant. We think that this is a mis-statement of fact because the case seems to be that the heat was to be supplied through an agreement with other tenants of the landlord. 20 30

We feel that the sixth request was also erroneous in that it stated that the defendant had no right to remove the radiator and the court was also in error in stating that the tenant was excused from liability by exercising ordinary care 40

in the use of the premises without first instructing the jury that the principle of caveat emptor applied in the letting of premises.

10 In the seventh and eighth requests to charge, the court again speaks of a nuisance existing on the premises when there is no evidence whatsoever that the wall radiator was in itself a nuisance but on the other hand there was evidence that it was properly and securely fastened at the time of the erection of the building and there is also evidence that at the time of the letting it was in good condition although the witness, Russell Moore, about a week before the accident called the attention of the tenant that the radiator was loose. If his testimony is to be believed then there is no question that the tenant had knowledge of the condition of the radiator at the time of the making of the lease on November 15, 1926 and was therefore, liable to third persons for the condition of the premises.

20 In the eighth request to charge, the court treats the radiator as a nuisance existing at the time of the creation of the estate and ends with the general instruction that if the jury believes the premises were in the same condition at the time of the accident as they were at the time of the letting which was on November 15, 1926, the tenant would not be liable in this case, Thus totally disregarding the rule that a landlord is not liable for injuries sustained by a tenant or his family
30 or guests or customers by reason of ^{the} ruinous condition of the premises demised there being upon the letting no implied contract or condition that the premises are and shall be fit and suitable for the use of the tenant and nowhere throughout the charge does the court set forth this rule.

POINT EIGHT

40 We contend that if the plaintiff was entitled to

recovery at all from these defendants-appellants that the damages awarded by the jury are excessive.

The plaintiff, Hulda Nilsson, is a woman thirty nine years of age, who lived on a farm near Beemerville, New Jersey with her father and mother. She did certain work on the farm prior to the accident and since her recovery from the accident is doing work on the farm although she says that she is not able to do as much work as she was prior thereto. Even though she ~~is~~^{is} not able to work on the farm she has suffered no pecuniary loss by reason of this because prior to the accident she was not earning any money (on page 49 state of the case, line 5 inclusive) and she has not been compelled to employ any help to perform her duties. 10

The evidence as to the expenses is that she expended for transportation, braces, hospital bills and Doctor bills approximately, seven hundred and twenty five dollars. The jury awarded her nine thousand five hundred dollars, making an allowance of eight thousand seven hundred and seventy five dollars for the injuries, pain and suffering. 20

The injuries that she suffered are described by Doctor Morrison, who testifies that the woman suffered from a fracture of the base of the first lumbar vertebra and also of the spinous process of the lumbar vertebra and that he had her under treatment from November 22, until February 28, and that he had not seen her since April 19, 1928 and at that time she was able to walk around although not able to do her full duties but she is able to get around without the use of any braces. 30

Undoubtedly this woman suffered considerable pain from her injuries but her injuries have healed and she was able to get about and do some work. She was not engaged in any gainful occupation at the time of the accident and as a matter of fact she was suffering prior to the accident and at the time of the accident from a mental disease known as dementia praecox-paranoiac and the undisputed 40

testimony of the physician is that patients do not recover from that condition, that it is a mental disease generally starting in childhood, starting with behavior disorders, temper tantrums, anti-social tendencies, perhaps with formation of delusions and hallucinations, going on through the whole life and that the disease is a cronic disease and rarely cured.

10 Dr. Collins (Page 153 state of the case) described her condition when she was a patient at Morris Plains Hospital at Greystone Park and that during the time that she was in the hospital she would not work either at housework or any other kind of work so that all that can be gathered from the testimony is, that this woman prior to the accident was a mentally incompetent person who had been twice confined in an insane asylum and had been finally released on an order of the court after the appointment of a guardian for her.

20 While it is true that she probably suffered considerable pain it is also true that in her mental condition she imagined that she was more hurt than she actually was. She is able to get about and do housework and this woman never in her lifetime could have accumulated eight thousand seven hundred and seventy five dollars by her efforts because there is no testimony in the whole case of her ever having worked for wages. We therefore submit that the damages awarded by the jury are excessive.

30 In summation, we feel that we have shown that the court was in error in this case when it denied the motion of the defendants-appellants for a nonsuit on the plaintiff's opening. There can be no doubt but that the complaint fails to disclose a cause of action against these particular defendants. There can be no doubt but that the statements of plaintiff's counsel in the opening with reference to the making of repairs by the landlord should be disregarded on the making of the motion because there is nothing in the complaint itself to warrant the
40 statement that the landlord had made repairs and

that by reason of his negligent making them the premises had become unfit for use and unsafe.

There is nothing in the whole case taken from the time of the filing of the complaint through to the finish of the case from which negligence could be inferred on the part of these defendants. There is not one positive statement of negligence in the doing or in the failure to do any act. The leasing of the premises by the new lease of November 15, 1926 was of itself sufficient ground for the court to direct a verdict of no cause in favor of these defendants-appellants because there was no entry on the premises by these defendants-appellants for any purpose whatsoever from the time of the making of that lease until after the time of the happening of the accident. 10

We contend, that even though the court should find that the making of the repairs by the landlord was admissible under the pleadings, that as soon as the new lease was admitted in evidence any evidence of the making of the repairs was nugatory because none of the repairs were made after the time of the letting of the premises. Even without the new lease there is nothing in the whole case to show that the repairs testified to were made in a negligent manner. Mr. Kellam's ability to do the work was not attacked. It was not proved that there was any settling of the wall after the making of the repairs and no other fact was proved from which any person could infer that there was any negligence on the part of the landlord. Surely an inference of negligence cannot be drawn from facts that show only that a certain wall had a portion of a corner of it cut off and after this corner had been cut off a radiator on another wall running at right angles to the one that was cut off, fell down. There is absolutely no connection between the radiator and the point where the alterations were made and there absolutely could be no evidence that the repairs, although they may have been done in the most negli- 20 30 40

gent manner possible, were responsible for the falling of the radiator. The radiator was in position when the tenant rented the property and there was some testimony to show that he knew that it was not in a safe condition and there is no evidence that it was a latent defect known to the landlord and undisclosed by him to the tenant.

10 Under all of these circumstances and under all of the law applicable to the circumstances, we contend that the court should have granted defendant's motion for a non-suit on the opening or a non-suit at the close of the plaintiff's case when the facts had not changed or for a direction of the verdict in favor of the defendants at the close of the whole case because the facts had even then not changed except that the tenant had proven that he had entered into the lease of November 15, 1926 which was seven days ~~before~~ ^{before} the accident happened.

20 We most respectfully insist that the judgment entered in this case should be reversed on one of the three grounds and if not on either of those grounds that it should at least be sent back for a new trial as to damages inasmuch as the damages awarded by the jury are far in excess of the amount necessary to compensate the plaintiff for any injuries she sustained.

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