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SUMMONS.

The State of New Jersey to Murray, Griffith & Messler, Inc.:

(Seal)

You are summoned to answer the annexed complaint of Benjamin Cohan, in an action at law in the Circuit Court of Mercer County. And take notice that unless you file your answer to said complaint with the Clerk of the Mercer County Circuit 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, A. Dayton Oliphant, Judge of the Circuit Court at Trenton, this fifteenth day of March, A. D. 1928.

Charles P. Hutchinson,
Clerk.

Alex. Budson,
Attorney.

COMPLAINT.

MERCER COUNTY CIRCUIT COURT.

BENJAMIN COHAN,
Plaintiff,
v.
MURRAY, GRIFFITH & MESSLER, INC., a corp.,
Defendant.

Action at Law.
Complaint.

Plaintiff, Benjamin Cohan, residing in the City of Trenton, in the County of Mercer and State of New Jersey, says:

1. At the time herein stated the defendant was and still is a corporation of the State of New Jersey, and are the owners of and are in possession of a certain dry goods and notions business commonly known as Murray, Griffith & Messler, Inc., and located at 112-114 Academy Street, Trenton, New Jersey.

2. On the third day of January, 1928, plaintiff entered the said premises for the purpose of purchasing merchandise from the defendant.

3. On the date aforesaid Robert Messler, one of the directors of the said company, and one of the persons actively in charge of the aforesaid business

for the aforesaid corporation, conducted the plaintiff to a certain elevator or lift in the rear of their aforesaid business establishment.

4. The premises were then inadequately lighted throughout and particularly was there a complete absence of light in the rear of the aforesaid business establishment and in the vicinity of the said elevator.

5. The said Robert Messler, agent for the said corporation, and actively in charge of the said business, then endeavored to properly light the aforesaid premises, but for reasons unknown to the plaintiff he was unable to do so.

6. Thereafter the said Robert Messler, acting for and in behalf of the said corporation, negligently, carelessly and without regard to the safety of the plaintiff, invited the plaintiff to step into what he purported to be an elevator, by lifting the door leading into the elevator and motioning to the plaintiff to step therein.

7. Relying upon the aforesaid invitation, the plaintiff proceeded to step into the aforesaid elevator and so precipitated and fell into the bottom of the shaft of the aforesaid elevator.

8. Due to the aforesaid negligence and carelessness of the aforesaid Robert Messler, as agent and manager of the aforesaid corporation, plaintiff suffered bodily injuries, contusions in and about the head and body, and in and about the legs, back and spine so that he has suffered and still is suffering from nervous shock resulting from the violence of

the injuries, which nervous shock has produced lack of sleep, headache and dizziness and other injuries of a technical nature which the plaintiff is unable to explain.

9. Plaintiff was confined to the hospital for a long period of time and is still unable to pursue his daily avocation.

10. Plaintiff was compelled to expend large sums of money for hospital expenses and medical treatment, and will be compelled to expend large sums of money for medical treatment for a long time.

11. Plaintiff is still unable to resume his occupation as a merchant tailor and cleaner and presser.

Plaintiff demands as damages the sum of $25,000 together with costs of suit to be taxed.

ALEX. BUDSON,
Attorney for Plaintiff.

[ENDORSED.]

To the Within Named Defendant:

In case the within writ of summons and complaint are served upon you personally, or personally upon your president or other head officer or agent in charge of your principal office in this State, or personally upon any of your officers or directors or your registered or authorized agent, then take notice that if you intend to make a defense to this action, you must file an affidavit of merits within

ten days from the date of the service hereof upon you, and that unless you file such affidavit, judgment by default will be entered against you at the end of said ten days; and that, in case you file said affidavit, unless you file an answer within twenty days from the date of such service hereof upon you, judgment by default will in such case be entered against you at the end of said twenty days.

ALEX. BUDSON,
Attorney for Plaintiff.

ANSWER.

(Filed April 5, 1928.)

MERCER COUNTY CIRCUIT COURT.

BENJAMIN COHAN, *Plaintiff,* v. MURRAY, GRIFFITH & MESSLER, INC., a corp., *Defendant.*	Action at Law. Answer.

Defendant, a New Jersey corporation having its principal office in the City of Trenton, County of Mercer and State of New Jersey, says that:

1. Paragraphs 1 and 2 are admitted.

2. Paragraphs 3, 4, 5, 6, 7, 8, 9, 10 and 11 are denied and the defendant denies that plaintiff is entitled to damages from it in the sum mentioned in the complaint, or any other sum.

First Separate Defense.

Plaintiff was not invited to go upon the elevator of the defendant, which was near the rear of the defendant's store, or to go into that part of the defendant's store where said elevator was situated, at the time of said alleged accident, and the defendant did not know that the plaintiff was then in that part of the store, and the plaintiff became a trespasser when he entered that portion of said store premises, and therefore cannot recover damages from the defendant in this action.

Second Separate Defense.

Plaintiff failed to exercise reasonable care for his safety at the time of said accident in that he knew or should have known that what he did would result in injury to him, and in that he failed to exercise reasonable care to discover whether or not the place into which he walked was a safe place, and in other respects, and his negligence contributed to the injuries received by him.

Edward L. Katzenbach,
Attorney for Defendant.

REPLY.

MERCER COUNTY CIRCUIT COURT.

BENJAMIN COHAN, *Plaintiff*, v. MURRAY, GRIFFITH & MESSLER, INC., a corp., *Defendant*.	Action at Law. Reply.

Plaintiff replying to the answer of the defendant says that:

1. He denies the allegations contained in the first separate defense in the above entitled cause.

2. He denies the allegations contained in the second separate defense in the above entitled cause.

ALEX. BUDSON,
Attorney for Plaintiff.

TESTIMONY.

MERCER COUNTY CIRCUIT COURT.

No. 16, January Term, 1929.

BENJAMIN COHAN, *Plaintiff*,
v.
MURRAY, GRIFFITH & MESSLER, INC., a corporation, *Defendant*.
Action at Law.

Transcript of shorthand notes of testimony, etc., taken in the above entitled cause on the trial thereof before HON. A. DAYTON OLIPHANT, Circuit Court Judge, and a jury, at the Court House, Trenton, New Jersey, on Tuesday, January 22, 1929.

APPEARANCES:

HARRY HEHER and ALEXANDER BUDSON, for the plaintiff.

GEORGE GILDEA (EDWARD L. KATZENBACH), for the defendant.

(Jury impaneled and sworn.)

(Mr. Budson opened for the plaintiff.)

(Mr. Gildea opened for the defendant.)

BENJAMIN COHAN, the plaintiff, sworn.

Direct examination.

By Mr. Budson:

Q. Mr. Cohan, what is your full name?
A. Benjamin H. Cohan.
Q. Where do you live?
A. No. 9 West End Avenue.
Q. Are you married?
A. Yes, sir.
Q. Have you children?
A. Yes, sir.
Q. How many?
A. Two.
Q. How long have you lived in Trenton?
A. Ten years.
Q. Are you in business?
A. Yes, sir.
Q. What kind of business?
A. Tailor business; cleaning, pressing, repairing, and I also make new clothes, and I did do gents' furnishing up until about last July, then I gave it up.
Q. How long have you been at that address, 9 West End Avenue?
A. All the time I have been here, only one year I was away from here.
Q. You recall January 3, 1928?
A. I do, sir.

Q. Where were you bound for around 5.15 or 5.30?

A. I left the house around 5.15 or around 5.20 with my wife to go over to Murray, Griffith & Messler to get some underwear.

Q. Had you been in the habit of dealing with Murray, Griffith & Messler?

A. Yes, sir.

Q. You had been there before?

A. Yes, sir.

Q. You knew Mr. Messler?

A. Yes, sir.

Q. And did you get a lot of credit in that store?

A. Well, I had some credit there, yes.

Q. Did you go there?

A. Yes, sir. I came to the door and Mr. Messler was in the office talking to another ——

Q. Did your wife go in with you?

A. My wife sat in the car in front of the store, on the opposite side. I came to the door and Mr. Messler was talking to a man in the office, in the show window, and Mr. Messler saw me and motioned to me and he came over and let me in and asked me to wait until he got through with the man he was talking to, and he got through and the man went out and he asked what I wanted and I told him I wanted some woolen underwear and he asked what price and I told him I wanted somewhere around two and a quarter wholesale, and Mr. Messler says, "Now, let us go and see if we can get some lights."

Q. What was the condition of the premises when you went in?

A. One light was in the office, in the window, and one light like this here (Illustrating), along the store, almost the full length of the store, and over one of the desks was a light.

Q. Shaded?

A. Shaded.

Q. How big is that ground floor, do you know?

A. I could not say. It is much longer than this. I could not say how long it is.

Q. It is almost twice as long as this, isn't it?

A. I would not say. It is a very deep store.

Q. Were there any other lights outside of those two lights that you could see?

A. No.

Q. On any of the upper floors?

A. No, sir.

Q. Nor in the basement?

A. No.

Q. What happened?

A. Mr. Messler says, "Let us go down to the basement first and see if we can get any lights." We went down to the basement.

Q. How?

A. By lighting matches, Mr. Messler and I walked down to the basement.

Q. Who lit the matches?

A. I did. Mr. Messler asked if I had matches, and by the help of the matches we got down to the basement.

Q. Who went down first?

A. He did, and I followed and struck matches and went to the basement, and on the wall is a lot of fuses there which Mr. Messler went over and turned; Mr. Messler went over and turned the fuses to see if we could get lights.

Q. What were you doing then?

A. Lighting matches; and while he was trying to get the lights with the fuses and he couldn't get none he said, "I guess we will find it."

Q. Find what?

A. "We will find the underwear. You strike matches and we will go up and get it anyway." And we walked up to the first floor and Mr. Messler opened the elevator shaft. I was striking matches and we took the elevator to the third floor and I was lighting matches for Mr. Messler to find the underwear, and finally he got the underwear, and I say, "Mr. Messler, how much are these underwear?" And Mr. Messler says, "They are about twenty-five dollars a dozen." I says, "That is about two dollars and eight cents apiece." He says, "Yes." Then I told Mr. Messler ——

Q. You were satisfied with that?

A. Yes, sir. I told him I wanted the forty-eight size. Then I says to Mr. Messler, "I would like to have some gloves." And Mr. Messler says, "The gloves are on the second floor." We walked from the third floor to the second floor and we got the gloves there.

Q. How did you walk from the third to the second floor?

A. By striking matches.

Q. There were no lights there either?

A. No, sir.

By the Court:

Q. How did you get from the basement to the third floor?

A. On the elevator.

Q. From the basement?

A. No; we walked from the basement to the first floor and then took the elevator to the third floor.

By Mr. Budson:

Q. Is there any light on the elevator?

A. No, sir.

Q. You mean you went up in total darkness?
A. Yes, sir.
Q. The elevator was not lighted in any way?
A. No.
Q. Just by the light of the matches?
A. Yes.
Q. When you got to the second floor were there any lights?
A. No, sir.
Q. How did you find the gloves?
A. I was striking matches. Mr. Messler knew where the stock was and he went over there and he found the gloves I wanted.
Q. Who went first?
A. Mr. Messler.
Q. He preceded you down the aisle?
A. Yes; and I was striking matches as we walked down.
Q. And you came to the stock of gloves?
A. Yes, sir. Mr. Messler got the gloves and picked up the stuff and said, "Let us go down to the first floor." Then by striking matches we walked down the steps to the first floor and on the first floor Mr. Messler went over to one of those desks to wrap the stuff up, and while he was wrapping the stuff up I said, "Mr. Messler, you had some stockings here, eight or eight dollars and a half a dozen." And he said, "Yes; they are on the first table near the door. Go and look at them." And I went to the first table near the door and looked at the stockings and in the meantime Mr. Messler looked up the bill for the merchandise, and he hollered out to me while I was at the table—he says, "Cohan, these underwear are two dollars and seventy-five cents apiece, but if you want to take the smaller size, the forty-six, it will cost you two and a quarter."

Q. What did he say they were, two dollars and seventy-five cents?

A. That was the extra size.

Q. Extra large?

A. Yes, sir.

Q. In other words, he made a mistake in the dark in picking out the size?

A. No, he did not. He picked out the right size. I asked for the forty-eight and he picked out the right size, only that he made a mistake in the price. Instead of being twenty-five dollars a dozen, which makes two dollars and eight cents apiece, they were two dollars and seventy-five cents apiece, and the smaller size would be two dollars and twenty-five cents apiece. He made a mistake in price. And I said, "Would it be too much trouble for you to get me the forty-six?" And he said, "No. All right," he says, "Let us go."

Q. "Let us go ——" where?

A. When I came over to him he says, "We better go down and see if we can get lights," and by striking matches Mr. Messler went to where the fuses were.

Q. Going toward the rear of the store, how did Mr. Messler proceed in the dark?

A. Mr. Messler went ahead and I followed him.

Q. How?

A. By striking the matches going from the first floor to the basement.

Q. You struck the matches for him as you looked for the fuses or switches?

A. Yes. There were no switches there, just fuses; at least, I did not see any switches there.

Q. What happened then?

A. Then Mr. Messler said, "Let us go up. We will find it." So we started to walk up, Mr. Messler

walking ahead, and I followed him striking matches; that is, from the basement to the first floor; and when we got on the first floor Mr. Messler walked over to the elevator.

Q. How far was the elevator from the basement?

A. About fifteen ——

Q. Show us approximately the space in this courtroom.

The Court: What do you mean?

Mr. Budson: The steps leading down to the basement, from the elevator shaft.

The Witness: I guess it is farther than from that window over to the door. (Indicating.)

Q. To where the Judge sits?

A. Yes.

Mr. Budson: The witness says approximately eighteen feet.

The Court: You better see if counsel for the defendant agrees to that.

Mr. Gildea: Twenty-five feet.

Mr. Budson: All right.

Q. Now, as you landed on the first floor again from the basement the second time did Mr. Messler say anything to you?

A. Yes. "Let us go up."

Q. "Let us go up to the third floor"?

A. "Let us go up to the third floor." And we

went to the elevator and I was still striking matches until we got up on the first floor, and Mr. Messler says, "Let us go up." And I walked over and Mr. Messler had lifted up the gate.

Q. You got to the elevator shaft, did you?

A. Yes, sir.

Q. And he did what?

A. Mr. Messler lifted up the gate.

Q. What were you doing at the time he was lifting up the gate?

A. I was standing there.

Q. Did you strike any matches at that particular moment?

A. No.

Q. As he lifted the gate, then what?

A. I stepped in.

Q. Where was he standing? Assume this is the entrance to the gate.

A. On the side.

Q. Show where he was standing.

A. This is the elevator shaft and Mr. Messler was on this side. He picked up the gate and stepped over on this side. (Indicating.)

The Court: On the left-hand side facing the elevator?

The Witness: Yes.

Q. And as he stepped over, what did you do?

A. As he stepped over I came over on this side and I stepped right in.

Q. Do you remember what happened after that?

A. No, sir.

Q. Did Mr. Messler say anything to you from the second he had lifted the gate, from the time you

made your first step had he said anything to you? As he was lifting the gate and you were standing right near to him did he say anything to you, "Look out," or any other outcry?

A. No; there was not a word spoken.

Q. Did he say anything to you as you made the step forward?

The Court: He said there was not a word spoken.

A. There was not a word spoken.

Q. Do you remember what happened to you after you were precipitated into the elevator shaft?

A. No, sir.

Q. When was the next you knew anything about it?

A. When I was in the hospital I seen people around me.

Q. What hospital was that in?

A. Mercer Hospital.

Q. What sensation did you have when you first came to? What did you find was the matter with you?

A. I could not move.

Q. What part of your body was affected?

A. My head, my back and my left leg.

Q. Couldn't you move your leg at all?

A. No, sir.

Q. How long did you remain in that position on your back in the hospital?

A. Two weeks.

Q. That you were not able to move at all?

A. Yes.

Q. And for two weeks you were stretched out?

A. Stretched out.

Q. How long was it before you recovered sufficiently to be able to move your body?

A. Oh, it was a long time.

Q. I mean, while you were in the hospital, how long before you could move it?

A. While I was in the hospital I could not move my leg until probably the fourth week.

Q. Did you have any sensation of pain in that leg?

A. At first I did not, none at all; I did not feel it.

Q. How do you know that?

A. The doctor was sticking pins in it and I did not feel it; and then the doctor put lighted matches, putting them to my toes and I did not feel it at all.

Q. How long did that keep up?

A. About four weeks. It was the fourth week when I started to get feeling, and then I started to get pain.

Q. How long did you remain at the hospital?

A. Four weeks.

Q. Who was treating you at the hospital?

A. Doctor Scammell.

Q. Doctor Frank G. Scammell?

A. I guess that is the name.

Q. And what interne?

A. Doctor Raginsky.

Q. Do you know whether he is interne still at the hospital?

A. I do not know.

Q. You tried to get him here?

A. Yes.

Q. And you found he had left the institution and went to New York?

A. He is in New York somewhere.

Q. Who else treated you?

A. Doctor Berman came there several times a week. He is my family physician.

Q. He came how often?

A. Several times a week. I do not remember exactly the exact times, but it was every other day or so.

Q. You remained there how long?

A. Four weeks.

Q. After that where did you go?

A. They took me home.

Q. When you came out of the hospital could you move about?

A. On two crutches.

Q. And you remained in that condition, using the two crutches, for how long a period?

A. For about eight months.

Q. Could you do any labor?

A. I could sit down and sew but I could not get up and attend to cutting or pressing or to go after clothes or make deliveries. The only thing I could do was sit down and sew. I could not use the machine. I could sew by hand.

Q. As a result of that what did you have to do?

A. I had a man to do my work.

Q. What is his name?

A. Charles Pascoe.

Q. Is he any relation of yours?

A. Yes, sir.

Q. What relation?

A. Brother-in-law.

Q. When did he come to your place of business?

A. The first day after the accident, January 4th.

Q. How long did he remain there?

A. He worked steady for me until the Saturday before Labor Day, and since then he worked off and on. When there was pressing to be done he would come for half a day and sometimes for a day.

Q. And he took care of the ——

A. Yes, and he is still doing it now.

Q. How much did you pay him a week?

A. Thirty-five dollars a week.

Q. What do you pay him now?

A. It is according to what time; he makes sometimes twenty or fifteen or twenty-five dollars, according to the time he makes.

Q. What became of your gents' furnishing business?

A. I could not attend to it; I had to give it up. I could not go out and do buying and I could not attend to it.

Q. What seems to be the trouble with you?

A. I have pains if I use my leg; I get pain in it and I cannot step on it.

Q. Is it different from your other leg in any way?

A. Well, it is always swollen at the ankle. At nights I don't sleep; the pain is severe.

Q. Did you see any physician besides Doctor Berman?

A. Yes, Doctor Koplan and Doctor Reddan and Doctor Ernest.

Q. You went to Doctor Ernest at the request of the defendant, Murray, Griffith & Messler, did you?

A. Yes, sir.

Q. And Doctor Ernest examined you?

A. Yes. He took X-rays.

Q. Did he prescribe for you?

A. Not at that time he didn't; no.

Q. Did you see him subsequent to that time?

A. I did.

Q. What did he do?

A. I went to see Doctor Scammell and Doctor Scammell advised me to go and see Doctor Ernest. I went to see Doctor Ernest and he treated me.

Q. What did he treat you for?

A. My leg.

Q. Is that the thing that bothered you most at that time?

A. Yes, sir. I was there on a Thursday, April 19th, and he treated my leg on Thursday and asked me to come back Monday, that he would treat my back, and when he got through with me he asked me for five dollars and I told him I did not have it and when I came back the second time he told me I would have to pay him cash because that was the only way he does business, and I did not have the money, and I said, "Doctor, I will pay you as soon as I get better and start to work. At present I cannot pay you; I haven't got the money ——"

Mr. Gildea: I object to this.

The Court: Yes.

Q. Did you see any other physician besides Doctor Ernest or have an X-ray taken of your leg?

A. Yes.

Q. Who was that?

A. Doctor Davison.

Q. Did he take an X-ray?

A. He did.

Q. When was that?

A. On the twenty-fourth day of October.

Q. And you also saw Doctor Koplan?

A. Yes.

Q. And Doctor Reddan?

A. Yes, sir.

Q. How do you feel now?

A. Well, I don't feel very good. It is my leg and my back. I get pains occasionally in the head.

Q. To what extent does this interfere with your work in the operating of your tailoring establishment?

A. Well, I cannot attend to my work at all, only to sit down and sew. To be a tailor you have to get about on your feet and do pressing and use the machine, and you have got to get the stuff and deliver it and you have got to stand up to a person to measure him or fit him, and you have got to be on your feet most of the time.

Q. How does your business this year compare with last year?

A. I have done very little business this year. If you don't go after it you don't get it.

Q. Why?

A. Because competition is so great here that if you do not go after it somebody else gets it.

Q. Why don't you go after it?

A. I cannot use my leg.

The Court: Could you hire somebody?

The Witness: I could hire somebody, but still they could not do what I could do. People know me and if I go there it is all right. The people that I catered to have known me for years, and if I send somebody they do not know it would not do me any good. I could hire a man to do the work but he could not attend to the business the same as I would.

Q. About how much has your income been reduced this year as compared with last year?

Mr. Gildea: Objected to.

The Court: On what ground?

Mr. Gildea: On the ground, in the first place, that the witness must keep books, and I think the books are the best evidence of the income from his busi-

ness. The law requires him to keep books, and the presumption is that he does.

The Court: The objection will be sustained at this time.

Q. Did you keep books?
A. No, sir.
Q. What system did you have of knowing your income?
A. I had a cash register and every dollar and every cent that came in was rung up. Then Saturday I would see what the cash register reads and at the same time I would also see what I would pay out. That is the only way I could tell.
Q. Well, you do know that you did not make any money this year?

Mr. Gildea: Objected to as leading.

The Court: Objection sustained.

Q. By this system of keeping your accounts through the cash register could you tell me approximately how much your income is reduced this year?

Mr. Gildea: I object upon the ground that it appears there is a written record kept, whether by cash register slips or whatever it is and if it is a written record that record is the best evidence and should be produced.

The Court: Objection sustained.

Q. You did not keep those slips that come out from the cash register?
A. No.

Q. Do you know how much you approximately earned in 1927?

Mr. Gildea: Objected to on the same ground. It appears the witness kept a record.

Mr. Budson: He may not have the record, but at the same time he knows what he made. He is not obliged to keep books.

Mr. Gildea: I think under the Federal Income Tax Law any man in business is obliged to keep books.

The Court: I do not know that we are controlled by the Federal Income Tax Law.

Mr. Gildea: If that is the law of the land the presumption is that he did keep books.

The Court: I do not know that it is the law of the land.

Mr. Budson: Assuming he is a mechanic who earns thirty-six hundred dollars a year and don't keep books, do you mean to tell me he is precluded from testifying to that because he does not keep books?

Mr. Gildea: My objection, if your Honor please, is that the witness testified that he kept a record of his business by means of cash register slips.

The Court: Which slips he has not now.

Mr. Gildea: He was asked by counsel if he kept the slips.

Mr. Budson: And his answer was "No."

By the Court:

Q. Are those slips in existence now, Mr. Cohan?
A. No, your Honor.
Q. What did you do with them?
A. They have been destroyed.
Q. When?
A. Oh, last year some time. I had them in a box and while I was laid up I do not know what became of them. You know how children are. They get around and play with things. I did not find them.
Q. Did you make an effort to find them?
A. Yes, sir; I did. I had them in boxes on one of the shelves and they disappeared. The children will pull out those slips, you know.
Q. When was the last you saw them?
A. I have not seen them since before the accident. I did not really bother to attend to anything until lately I thought perhaps I would need them and I started to look for them and I could not find them.

The Court: The question will be allowed and an exception noted.

Mr. Gildea: May I ask the witness a question?

The Court: Yes.

By Mr. Gildea:

Q. Did you have a bank account?
A. Yes, sir.
Q. Did you have a check book?
A. Yes, sir.

Q. Did you pay all your bills by check?

A. Not all.

Q. Most of them?

A. Well, I mostly paid them cash. I would sometimes go to places where they would not accept a check because they don't know me.

Q. Did you keep on your check book a record of the receipts and disbursements of cash?

A. No; just what was withdrawn.

Mr. Gildea: That is all.

By Mr. Budson:

Q. Approximately how much net income did you have in the year, 1927?

Mr. Gildea: I object to that as calling for a conclusion. I think if anything is to be given it ought to be the receipts and disbursements and we can draw the conclusion as to what the net is.

The Court: The receipts and disbursements.

Mr. Budson: I will withdraw that question then because I do not want to deliberately put my client in the position where he would testify to something he does not know because he did not keep a record.

The Court: He testified that he did keep records and that he kept records by his cash register, of his income each week. Now he knows what his income was and he knows what his outgo was.

Mr. Budson: But he would be compelled to testify from memory as to his approximate net income. He

certainly cannot give me his gross receipts and disbursements.

The Court: Why not?

Mr. Budson: Because it would be from memory.

The Court: That is what you are asking for anyway. The question is withdrawn.

Q. Mr. Cohan, can you tell this jury, for the year, 1927, if you had figured it for that year, the approximate business that you did for that year, the gross business?

A. Yes.

Q. Approximately how much business did you do?

A. Around six thousand dollars.

Mr. Gildea: One moment. I think the witness means he put it down on paper.

Mr. Budson: He testified he did not put it down on paper, and has no books.

The Court: You are asking if he figured it up. Did he do that on paper, or how?

Q. Did you do that on paper, or how?

A. Yes, on a piece of paper, just for myself, to see what I did. I did not note it in a book or anything.

Q. And that was your total business?

A. Yes, sir.

Q. How much did you say the amount was?

Mr. Gildea: We ought to know whether the paper is in existence or not.

Q. Is that paper in existence?
A. No, sir. I had it with those slips in that box.

The Court: Ask the question.

Q. How much was that amount?

Mr. Gildea: What year was this?

Mr. Budson: For the year, 1927.

A. It was over six thousand; sixty-four hundred or sixty-six hundred; something like that.
Q. What about your expenses, the cost of merchandise, and so on?
A. I figured a net profit of about ——

Mr. Gildea: I object.

Q. Tell us about how much your expenses were, the cost of material and the cost of doing the business.
A. Over two thousand dollars.

The Court: How much over?

The Witness: Around twenty-five or twenty-six hundred.

Q. You took in around sixty-four to sixty-six hundred with an expense of twenty-five or twenty-six hundred?
A. Yes, sir.
Q. Before this accident occurred did you have anything the matter with you? Had you been sick or suffered from anything?

A. No, sir.
Q. Did you ever have an accident before this?
A. No, sir.
Q. Were you ever confined to a hospital?
A. No, sir.
Q. Did you ever have any operation?
A. No, sir.
Q. Did you enjoy good health?
A. I did, yes, sir.
Q. Have you ever had any of these aches and pains you are having now at any time before this accident?
A. No, sir.
Q. About how soon after the accident did these aches and pains develop?
A. About two weeks after that I started to feel pains all over.
Q. Did Mr. Messler ever come to see you at the hospital?
A. Yes, sir.
Q. Did you have any conversation with him?
A. Yes, sir.
Q. Will you tell the Court and jury what the conversation was?

Mr. Gildea: Objected to as incompetent, irrelevant and immaterial.

The Court: Objection sustained.

Mr. Budson: What is the ground of the objection?

The Court: It is irrelevant—conversations, unless they were about the accident. The question is too broad, I think.

Q. Did you have any talk with Mr. Messler at the hospital about the accident?

A. Yes, sir.

Q. What was that conversation?

Mr. Gildea: Objected to on the ground that so far as the evidence goes there is nothing to show that Mr. Messler had authority to bind the defendant corporation by admissions.

Mr. Heher: Isn't it a partnership?

Mr. Gildea: They are sued as a corporation.

The Court: Objection sustained.

Mr. Budson: All right. Cross-examine.

Cross-examination.

By Mr. Gildea:

Q. Did you file an income tax return for 1927?

A. No, sir.

Q. You did not?

A. No, sir.

Q. Was it dark in this store?

A. Yes, sir.

Q. How dark was it back near the elevator?

A. Very dark; very dark.

Q. So dark that you could not see?

A. Well, near the elevator it was so dark that you could not see.

Q. You could not see anything near the elevator?

A. No.

Q. Then how could you see where Mr. Messler was?

A. I was right near him.

Q. It was so dark that you could not see anything, yet you could see Mr. Messler; is that right?

A. Yes, sir.

Q. Do you want us to understand that is your statement?

A. You could not see any smaller articles but you could see a man and you could see the tables around there.

Q. Then it was not completely dark, was it?

A. Oh, it was dark.

Q. Well, there must have been some light there for you to see the tables.

A. Only the light that I was making by matches.

Q. Were you striking matches then?

A. Not at that minute I wasn't.

Q. Did you strike matches as you approached the elevator the second time?

A. Until we got to the elevator, as I was going up the steps from the basement I was striking matches, and Mr. Messler said, "Let us go up ——"

Q. I did not ask you that. How far were you from the elevator when you struck your last match?

A. I must have been half way. There is a office, coming up from the basement on the left-hand side, and until I got to the end of the office there I remember striking the last match. I cannot tell how far I was.

Q. Had you ever been in this place before?

A. Yes, sir.

Q. How many times?

A. Quite a few times.

Q. You had never been up in the elevator before, had you?

A. Yes, sir.

Q. More than once?

A. That I do not remember.

Q. But you had been up in the elevator before?

A. I had.

Q. Who operated the elevator when you went up the first time?

A. Mr. Messler.

Q. How did he do it?

A. I don't know; I did not notice that.

Q. What kind of an elevator was it?

A. Well, it looks to me like an old style elevator. It is not like the up-to-date elevators.

Q. It is an old style elevator that you can operate yourself by pulling a rope.

A. I could not say. I did not notice how it was run or the way he ran it.

Q. But you know it was an old style elevator?

A. Yes, sir.

Q. And you knew that when you got on and went up Mr. Messler operated it and took you up?

A. Yes, sir.

Q. Was there anybody else around there besides Mr. Messler?

A. At that time, no, sir.

Q. You two were the only ones in the store?

A. Yes, sir.

Q. And you got out of the elevator on the third floor and walked down to the second floor?

A. Yes, sir.

Q. And walked down to the first floor?

A. Yes, sir.

Q. You left the elevator on the third floor?

A. I think so; I am not sure.

Q. Well, you know you did, don't you?

A. We got out on the third floor. Now, whether the elevator stayed there or went down again, I did not know that.

Q. How would it go down again?

A. I have seen an elevator go down when they are sent down.

Q. An old fashioned elevator like this?

A. I do not know whether it was an old fashioned elevator, but I have seen other elevators being sent down.

Q. You never saw this one being sent down, did you?

A. No, sir.

Q. And you got out of the elevator on the third floor?

A. Yes, sir.

Q. And you did not go back to the elevator again?

A. Not at that time.

Q. You walked down the rest of the way?

A. Yes, sir.

Q. How many times did you say you had been up in this elevator before?

A. I could not say. I know I have been up on it.

Q. Were there any electric lights on anywhere in the building except on the first floor?

A. No, sir.

Q. None at all?

A. None only on the first floor in the office, where the desks are.

Q. How many lights were there on on the first floor?

A. I think two; one in the window in the office and one over the desk.

Q. Did I understand you to say on direct examination that you went down cellar twice?

A. Yes, sir.

Q. You went down the first time and could not find out how to turn the lights on, is that right?

A. Yes, sir.

Q. And then after you discovered that the underwear which Mr. Messler had brought down was not

the underwear that you wanted, then you say you went down cellar again?

A. Yes, sir.

Q. What did you go down for the second time?

A. To try to get lights.

Q. That is what you tried to do the first time, wasn't it?

A. Yes, sir.

Q. You say there were no switches there?

A. I did not see any switches. I saw a lot of fuses on the wall. Mr. Messler was trying to turn the fuses.

Q. Did he turn them?

A. He turned them with his fingers, but he did not get any lights.

Q. There were no switches there at all?

A. I didn't see any. I don't say there wasn't.

Q. Did you see Mr. Messler close any switches there to make contact?

A. No, sir.

Q. Not any?

A. Just some of the fuses.

Q. What kind of a gate did the elevator have on the first floor?

A. (Indicating.) It is a gate about that high.

Q. How does it operate?

A. You push it up and down.

Q. Do you push it up and hold it up?

A. No.

Q. It stays up?

A. I think it does.

Q. You saw Mr. Messler push the gate up?

A. Yes, sir.

Q. It was light enough for you to see that, was it?

A. Well, I was right near it.

Q. You say it was light enough for you to see it?

A. Yes, sir.

Q. You say Mr. Messler pushed the gate up and stepped to the left?

A. Yes, sir.

Q. With his back to you?

A. No; facing me.

Q. And you walked in?

A. Yes.

Q. Did you see Mr. Messler do anything else?

A. I could not see any more after that.

Q. Did he lift the gate up high enough to clear your head or did you have to stoop?

A. No; I did not have to stoop.

Q. Did you have your hat on?

A. Yes, sir.

Q. As soon as Mr. Messler lifted the gate up you walked right in?

A. Yes, sir.

Q. And he was standing right there at the left? There was a light on the second floor of the store, wasn't there, when you selected the gloves?

A. No, sir.

Q. You are sure about that?

A. Positive.

Q. What light did you say you used in selecting the gloves?

A. A match. I did not select them at all. Mr. Messler brought them over to me and I was lighting it and I said that would be all right.

Q. You held matches then while Mr. Messler found gloves the right size; you are sure about that?

A. Yes. I only wanted a couple pair of gloves.

Q. You say there were no electric lights as far as you remember on the second floor?

A. As far as I remember, yes.

Q. How far was the light that was nearest to the elevator from the elevator?

A. It was about in the middle of the store in a gate over a desk.

Q. Was the elevator at the extreme rear of the store?

A. In that part of the store it was, yes.

Q. On which side as you entered the store from the front?

A. The left side of the store.

Q. When you go in from the front the elevator is to the rear?

A. To the rear on the left side of the store. There is another room in back of the store.

Q. There was a light in there, wasn't there?

A. No, sir.

Q. There was no light in there?

A. No, sir.

Q. When Mr. Messler lifted this gate up you did not look to see whether the elevator was there or not, did you?

A. I could not see; it was too dark there; in the shaft it was too dark.

Q. You had some matches, didn't you?

A. I did not strike them then.

Q. You had some, did you?

A. Yes, sir.

Q. You had been striking them every where else but you did not strike any then?

A. No, sir.

Q. And you could not see whether the elevator was there or not?

A. No, sir.

Q. And you walked in this dark hole without knowing whether the elevator was there or not?

A. I was sure the elevator was there.

Q. How could it be there when it was left on the third floor?

A. I don't know. I thought it was brought down.

Q. Who would bring it down? You and Mr. Messler were the only ones in the store, weren't you?

A. Yes, sir.

Q. Who would bring it down?

A. Mr. Messler may have brought it down.

Q. How could he when he was there with you?

A. I don't know. He was there with me.

Q. You knew that elevator was left at the third floor?

A. Yes, sir.

Q. Then you walked in this place on the first floor in the dark?

A. Yes, sir.

Q. Without seeing where you were going?

A. Yes, sir.

Q. You knew the elevator had been left on the third floor?

A. Yes, but I thought it was there then.

Q. How could it get there?

A. I thought Mr. Messler brought it down.

Q. How could he?

A. I don't know. If I had known the elevator was not there I would not have walked in.

Q. You did not think whether it was there or not, did you?

A. I thought the gate was open, and Mr. Messler said, "Let's go up."

Q. Now, you know Mr. Messler reached in to get the rope to bring the elevator down?

A. I did not know that. I knew when the gate goes up the elevator is there if it is open.

Q. Well, it was not there that time.

A. No.

Q. Then you were wrong.

A. Yes. I know the elevator shaft would not be open unless the elevator is there.

By the Court:

Q. You know that is not right, Mr. Cohan. You are apparently misconstruing your own thoughts.

A. I have been on elevators and I notice when they get to a floor they stop and open the doors and get out, and if it is not on a level with the floor they cannot open the door.

Q. You mean by that the elevators in modern buildings?

A. I don't know then. I don't go so much on elevators or know anything different. I thought the gate of the elevator shaft would not open unless the elevator was there.

By Mr. Gildea:

Q. Mr. Messler opened it, didn't he?

A. Yes, sir.

Q. He reached down and lifted the gate up, didn't he?

A. Yes, sir.

Q. You have never seen an elevator that had a gate open by a man reaching down and lifting it up or lifting up a door which would not open unless the elevator was there, have you?

A. I have not taken notice.

Q. These elevators you are talking about are the elevators that have doors that will not open unless the elevator is there.

A. I thought they were all alike.

Q. Do you mean to say that you think an elevator in a warehouse of a wholesale concern like this

was the same as the elevator in a modern business building?

A. I do not mean to say anything. I do not know the difference.

Q. Then you did not know anything about this elevator, did you?

A. No.

Q. Except you did know you left it at the third floor and got out there?

A. Yes; we got out there and walked down but I did not know the elevator shaft would open up if the elevator was not there.

Q. But you did not know the door could not be opened?

A. Yes, sir.

Q. All you knew was that you got out of the elevator on the third floor and walked down?

A. Yes, sir.

Q. And when you walked over to this elevator the moment Mr. Messler lifted the gate up you walked in and fell down cellar?

A. Yes, sir.

Dr. Frank G. Scammell, sworn for the plaintiff.

Direct examination.

By Mr. Heher:

Q. You are a practicing physician, Doctor?

A. Yes, sir.

Q. You have been for how many years?

A. Thirty years this June.

Q. Do you know the plaintiff?

A. Yes.

Q. Did you treat him sometime during the year, 1928?

A. I did, sir.

Q. Where?

A. At Mercer Hospital.

Q. Where he was confined?

A. Yes, sir.

Q. You were sent there at whose request, or whose direction, rather?

A. I think I was asked to go in and see this case by Doctor Berman, and then I think I was requested to continue on with the treatment of him by the Murray, Griffith & Messler Company.

Q. In treating Mr. Cohan you were acting for the defendant, Murray, Griffith & Messler, a corporation?

A. Well, I suppose I was. I rendered a bill to them.

Q. And you were paid by them?

A. No, sir.

Q. You expect payment from them?

A. Undoubtedly.

Q. What date did you examine Mr. Cohan the first time?

A. January fourth.

Q. 1928?

A. Yes.

Q. What condition did you find him in?

A. I found him in excellent physical condition with the exception that he had some pains in his head and the back of his neck and in his left leg within the area from the knee to the ankle.

Q. He complained of those pains to you, I suppose?

A. Yes.

Q. And your diagnosis of his condition convinced you that he did suffer from those pains?

A. I was quite well convinced that he was having considerable disturbance from that, yes.

Q. He was confined to Mercer Hospital for how long a period of time?

A. I think about twenty-seven days or something like that.

Q. During that time you saw him about how many times?

A. I saw him every day.

Q. And did you observe that he was still suffering from these pains?

A. No, not continuously. During the early part of his disturbance he was having these pains. The pains in his head discontinued shortly after his treatment in the hospital, but the pain in his left leg continued for quite some definite time, and he still had some pain, that is, he complained of some pain in his left leg at the time he was leaving the hospital.

Q. Were you convinced from your examination of him that this complaint was based upon facts?

A. Well, I was not so sure about that at the time of his discontinuance at the hospital, because I suggested that I could not find any reason for him to have pain in his leg. I suggested that he go to someone else and see if they could find out the reason for it.

Q. To what did you ascribe the pain that you knew that he suffered from when he first went to the hospital?

A. I was pretty sure that his pains were due to the result of his fall.

Q. And the result of that fall was what upon the body, to cause this pain?

A. Well, he had swelling in his leg.

Q. And that was due to what?

A. That was due to his injury, in his fall.

Q. What we want to know is the specific thing from which he suffered as a result of that accident.

A. Well, there were no bruises there which you could see; there was no definite area of injury from his external appearance and I thought this was due to the fact that he had his clothing on and did not get the same amount of injury. But I judged and I thought it was due to the injury to his joint from the fall—to the knee joint.

Q. Did you make any examination to discover what that specific injury was?

A. I made an examination of him every time that I saw him.

Q. Would bruises cause these pains?

A. They could, yes.

Q. But you saw no external evidence of bruises?

A. No, sir.

Q. Then the pain must have come from some other injury to the joint?

A. It was not in my opinion due to any other injury to the joint. I think it was due to the injury to the joint. Just what exactly was the disturbance in the joint I could not say.

Q. I suppose, not having said anything about it, you did not take any X-rays?

A. It was taken, yes, sir.

Q. But you did not take it?

A. Oh, no. I do not know anything about X-ray.

Q. You did not examine any photographs that were taken?

A. I did but I did not know very much about them, and the report on them was that there was no ——

Q. Well, of course, that is hearsay. I want to know what your determination was, if any, as a result of the examination of the photographs. You did not come to any determination?

A. No, sir. I am not skilled in the use of X-ray photographs.

Q. And not being skilled in the use of X-ray photographs you would not want to say from an examination of them what the cause of the injury was?

A. No.

Q. Did you examine this man again after he left the hospital on January 27, 1928?

A. I examined him at his home, yes.

Q. When?

A. I have no record of the exact date of his examination, but I think he was home perhaps three or four weeks; I am not so sure.

Q. You examined him but once after he left the hospital?

A. That is the only time that I examined him, but he sent for me as a result of some communication that he had with reference to his going to another man to be examined. He asked me about it and I told him I thought it was an excellent idea and that if that man could find out what was causing the disturbance which he thought he had it was perfectly agreeable to me and I would be only too glad to know if any other determination could be made.

Q. At this time did you make an examination?

A. Yes, sir.

Q. What was the nature of it?

A. I had him lie down, if I remember rightly I think I had him take off his clothing from his waist down and examined his left leg.

Q. At that time you took no photographs?

A. Oh, no.

Q. And examined no photographs taken by anyone else?

A. No.

Q. Did he complain of pain at that time?

A. He was not complaining of so much pain at that time, if I remember rightly, except he said his leg was very weak and that he could not walk without the aid of a cane or a crutch; that he had tried and it had been rather difficult for him to do it and he was afraid his leg might give away and he would fall.

Q. He complained then of a weakness in the joint?

A. Weakness of the leg, yes.

Q. Did he complain of stiffness of the joint?

A. No, sir.

Q. Was it swollen at the time?

A. No, sir.

Q. Did your examination disclose a strained condition of the joint?

A. It did not; no, sir.

Q. Your examination then was confined solely to an inspection of the externals of the joint?

A. Yes; to a visual examination.

Mr. Heher: Cross-examine.

Mr. Gildea: No questions.

Dr. R. Winthrop Davison, sworn for the plaintiff.

Direct examination.

By Mr. Heher:

Q. Doctor, you are a practicing physician?

A. I am not practicing. I am just a specialist in X-ray work, Roentgenologist.

Q. You are a graduate physician?
A. Yes, sir.
Q. I suppose you have practiced?
A. Yes, sir.
Q. But in recent years you have devoted your time to the use of the X-ray machine?
A. Yes, sir.
Q. Did you ever see the plaintiff before?
A. I think so, yes.
Q. And did you take X-ray pictures of any part of his anatomy?
A. I took two plates, X-rays of the left knee.
Q. (Indicating.) Are these the plates?
A. Those are the plates that were taken; yes, sir.
Q. When were these photographs taken?
A. These were taken October 24, 1928.
Q. Did you take any photographs except those?
A. That is the only two that I have a record of.
Q. What do they disclose, Doctor?
A. There was no evidence of fracture in either plate, but there were several spurs sent out, which was an indication of an arthritis involving the left knee joint.
Q. Will you describe what an arthritis condition is so the jury will know.
A. Well, there are several little spurs which indicate there has been a little irritation there of some type and there has been a shortening up of the edge of the tibia, which is an indication of an arthritic condition.
Q. Any inflammation?
A. Well, that type of arthritis I expect has an inflammatory condition.
Q. You say there was evidence of irritation. What sort of irritation?
A. I could not tell you that.
Q. Due to an injury?

A. I could not tell you that.

Q. You could not determine?

A. No.

Q. It may have been due to an injury?

A. I could not tell you that.

Q. What is the effect of this condition upon the use of the limb?

A. Well, he probably would have a little pain connected with it; perhaps a little swelling of the joint.

Q. Any other result?

A. I do not think so.

Q. Would it affect the strength of the leg any?

A. Well, you might get an atrophic change from disuse.

Cross-examination.

Mr. Heher: Cross-examine.

By Mr. Gildea:

Q. Doctor, what is the common cause of arthritis?

A. Well, there is quite a question. There does not seem to be anyone who knows what the cause is in the medical profession at present.

Q. It is usually caused by infection, isn't it?

A. Some physicians seem to think it is infection, and there was an old theory about it but no one seems to know what it is.

Q. Ordinarily it is caused by poisoning, from diseased tonsils or bad teeth?

A. A theory is that it comes from the absorption of some infection in the body, especially an osteo-arthritis. As far as an acute arthritis is concerned. I do not think anybody knows.

Q. Could you tell from the pictures whether or not this was a condition of long standing?

A. Well, it is not an acute condition, because in an acute condition you would not get little spurs shooting out from the joint. It must have been some condition of long standing, of longer standing than acute.

Mr. Gildea: That is all.

Mr. Heher: I offer these photographs.

The Court: They may be marked.

(Two X-ray photographs offered in evidence are marked respectively Exhibit P1 and Exhibit P2.)

Dr. Jacob J. Berman, sworn for the plaintiff.

Direct examination.

By Mr. Heher:

Q. Doctor, you are a practicing physician?
A. Yes, sir.
Q. And you have been how many years?
A. Nine years this September.
Q. Practicing during that time in Trenton?
A. The entire time.
Q. You are a general practitioner?
A. Yes, sir.
Q. Do you know Mr. Cohan, the plaintiff?
A. Yes, sir.
Q. Did you treat him for some physical injury in the year, 1928?
A. I did.

Q. When did you first see him?

A. On the third of January.

Q. At Mercer Hospital?

A. At Mercer Hospital.

Q. Did you make an examination of him at that time?

A. I did.

Q. What did your examination disclose?

A. I found some concussion, generally weak, general shock and a paralysis of the left leg.

Q. Due to what, to your knowledge?

A. At that time, apparently, to an injury.

Q. Was there any indication that this condition was due in part to disease?

A. I could not see any at that time.

Q. What were the manifestations of an injury or a physical condition due to injury?

A. General shock, pains and partial paralysis, shooting pains in coordination with the shock. That is enough, in itself.

Q. Now, the shock, did that leave any condition that existed for any period of time or did it clear up quickly?

A. It cleared up quickly.

Q. Now, the pains that Mr. Cohan complained of you say were in the left leg?

A. The left leg and back.

Q. What part of the leg?

A. He referred to pain of the left knee and thigh.

Q. Did you find any external evidence of injury to the leg?

A. There were some painful points on pressure although there were no cuts.

Q. No swelling?

A. Apparently no swelling at that time.

Q. Was there any external evidence of injury to the back?

A. None except the severe pain.

Q. How long did you treat Mr. Cohan?

A. Well, I saw him at intervals at the hospital and I have seen him lately, at intervals of once or twice a week at the beginning and lengthening with time.

Q. You have treated him at intervals until the present time?

A. Yes, sir.

Q. You were his family physician?

A. Yes, sir.

Q. Did you ever treat him for any condition prior to the time you saw him in the Mercer Hospital?

A. General complaints.

Q. Did you ever treat him for any injury to the leg or back?

A. No, sir.

Q. Did your treatment or examination of Mr. Cohan prior to January 3, 1928 enable you to determine whether he was suffering from any other condition that might result in this condition found after January 3, 1928?

A. No, sir.

Q. Will you describe what the nature of the injury was? Its effect upon Mr. Cohan physically, his present condition and the probabilities for the future.

A. Well, as I find them at present it seems to be limited to that left knee, limited because of pain. And upon looking deeper into that I had an X-ray taken which showed an arthritis. It is a question as to the exact amount of time to clean that up.

Q. Have you examined the X-ray photographs?

A. I have got a report on it. I am not an X-ray man.

Q. They are marked Exhibit P1 and Exhibit P2. Will you examine those, Doctor? They show what?

A. I cannot tell you anything from the pictures.

Q. You are sufficiently expert in the use of them?

A. No, sir.

Q. How did you discover that he was suffering from a condition known as arthritis?

A. Well, having him under treatment, the pain was constantly there and with a general treatment that we were putting him under and having the X-ray that showed the deeper aspects which we were unable to determine by external manipulation.

Q. To what do you ascribe this arthritis?

A. Well, continuing on from the first time that I saw him there was left but ——

Q. My question was, what was the cause of this condition of arthritis, in your judgment?

A. In my judgment it is a continuation of the injury.

Q. Do you mean that it was due to the injury in your judgment?

A. Yes, in this particular case.

Q. Is that opinion based upon your examination of Mr. Cohan and treatments?

A. And following the case up as I have seen him from the beginning; yes, sir.

Q. Is your opinion that the arthritis from which he suffers was the result of the accident due to your knowledge of his physical condition prior to the accident?

A. No; his physicial condition also is brought into that answer.

Q. It was a factor in enabling you to reach this determination?

A. Yes, sir.

Q. Is there any question in your mind about the cause of this condition of arthritis?

A. Not in this case, no, sir.

Q. There is then no question in your mind that it was due to this injury?

A. Yes, sir.

Q. Wholly due to the injury?

A. Yes, sir.

Q. What has been the effect of this condition of arthritis upon Mr. Cohan? To what extent has it impaired the functions of the knee and the leg?

A. Well, complete, free, active use of that extremity.

Q. To what extent has it impaired the functioning of the leg? Has it impaired the strength of it?

A. Yes, sir.

Q. To what degree?

A. That he is unable to walk without some support.

Q. You mean that he is required to use crutches?

A. Yes, or at least a cane, or some support.

Q. And has that been the condition ever since the accident?

A. Yes, sir.

Q. Has it improved any?

A. Some improvement.

Q. There is a gradual improvement?

A. Yes, sir.

Q. In what other respect has it impaired the function of the use of the leg, if any?

A. Well, you get some atrophy of the strength of the muscles, which is natural with anything that has been in disuse completely.

Q. Atrophy is what?

A. Atrophy is the disintegration.

Q. That is permanent, isn't it?

A. No.

Q. It is not?

A. No.

Q. What, in your judgment, will be the condition in the future of Mr. Cohan's leg?

A. My outlook is that he will get around and be totally all right.

Q. You do not believe then that there is any permanent injury?

A. As to a permanent injury, I do not venture to say that, and as to the length of time it would take to get completely around I am also unable to say.

Q. You mean at the present time you are not able to determine whether or not there is a likelihood of a permanent injury?

A. No, sir.

Q. It is possible that it may entirely clear up?

A. Yes, sir.

Q. And equally possible that it may not?

A. Yes.

Q. Only time would determine that?

A. Time would determine it.

Q. When do you think that could be determined?

A. It is impossible to say. It is a matter of watching it.

Q. How long do you think he will suffer this impairment in the functioning of the leg?

A. That is very indefinite. I could say a year but it may go on to two.

Q. We understand that you don't know definitely.

A. I would say about another eight to twelve months.

Q. Do you mean that in that period of time he would be required to use support in the leg?

A. Most of the time.

Q. Whether a crutch or cane?

A. Yes, sir.

Q. And it may take two years?

A. It is a possibility.

Q. Can it be determined in less time than a year from now whether or not the injury will be permanent in any respect?

A. It can, depending on the improvement gotten.

Q. How often have you treated him?

A. I have seen him about every second or third day at the hospital and since the hospital it varied at the beginning from two to three days a week and then once a week and then at intervals once in ten days.

Q. Now, during that time, from the time of the accident until the present time, has Mr. Cohan's condition been such that he could not perform the duties of his employment as a tailor, standing on his leg, pressing clothes and so on.

A. If it required the use of that leg I would say he could not, if it required any great use of that leg.

Q. You said that when you found Mr. Cohan in the hospital that that leg was paralyzed?

A. Yes, sir.

Q. To what extent was it paralyzed?

A. Loss of sensation, use, activity.

Q. How did you determine there was a loss of sensation?

A. Sticking the leg with a pin and there was no reaction; tapping the leg.

Q. Anything else?

A., I tried his reflexes for a reaction of the muscles.

Q. For how long a period of time did you find there was a loss of sensation?

A. That did not persist very long; that came back very quickly.

Q. In what period of time?

A. I would say within three or four days; maybe within the first week.

Q. And that paralysis of the leg was due to what?

A. Well, apparently it was due to some pressure which I judged was a concussion.

Q. A concussion of the brain?

A. He had both, of the brain and the spine, and it could have been done ——

Q. This paralysis was not the result of a condition of arthritis?

A. No.

Q. It was due directly to the injury?

A. Yes, sir.

Q. Did all the manifestations of paralysis clear up within three or four days or a week?

A. Yes, sir.

Q. How often have you seen him since he left the hospital?

A. As I say, from the beginning, two or three times a week, then once a week and then once or in ten days at intervals as I felt he required to be seen.

Q. What is your bill for services at the present time?

A. I figured out just a rough bill of two hundred and fifty dollars, judging the patient.

Mr. Heher: Cross-examine.

Cross-examination.

By Mr. Gildea:

Q. How many times did you see the patient, Mr. Cohan, altogether?

A. Do you want the exact figures?

Q. If you have them, yes.

A. I do not have them here.

Q. You don't have them with you?

A. No, sir.

Q. Have you any idea how many times?

A. If you want a rough estimate I could say approximately fifty times; fifty or sixty times.

Q. Do you charge all your patients five dollars a visit?

A. It is not the actual visit; it is what I do.

Q. What do you ordinarily charge a visit?

A. To the house, two dollars, and one dollar in the office.

Q. When did you conceive the idea of charging this man five dollars a treatment?

A. His treatment was different. Some treatments we require fifteen or twenty dollars for.

Q. What did you do for this man?

A. My treatment was electrical treatment, baking it, general massaging.

Q. Did you do that yourself?

A. Yes; and also I had a baker which I permitted him to have at his house, which he used quite some time.

Q. How many of those treatments did you give him?

A. At the beginning, every day; then two or three times a week and once a week and once in ten days. But the baking was done every day, in fact, two or three times a day.

Q. How many times did you, yourself, give him treatments?

A. I would say about thirty treatments in the office.

Q. Did you ever examine Mr. Cohan's tonsils?

A. I did examine them generally.

Q. What do you mean by "generally."?

A. A general examination over the ear, nose and throat and heart and lungs and abdomen.

Q. Did you look at his tonsils?

A. Yes, sir.

Q. What about the tonsils?

A. I have never found them diseased at any time.

Q. When did you last examine his tonsils to see whether or not they were diseased?

A. Well, I have examined them—I would not say I have examined them in the last six months.

Q. When did you first find out he had arthritis?

A. In October. This X-ray reading is that it was in October.

Q. And until that time you did not know, of course, that he had such a condition?

A. Well, the treatment was on that basis.

Q. I asked you when you found out that he had arthritis and you said in October.

A. I think the X-ray reading of arthritis was in October.

Q. Then did you examine his tonsils immediately?

A. Well, there was a time he came in with a report. He came in one day to my office asking about his visits and the history of the case which was that he was an injured man and we reasoned his condition was due to these tonsils. I did examine him then at that time and my report to him was that I did not see any condition in his tonsils to warrant that condition.

Q. There was nothing about his tonsils that required removing them?

A. That is the way it appeared to me.

Q. You say he did tell you that some other doctor had told him that he ought to have his tonsils out?

A. Yes, sir.

Q. Did he tell you who that doctor was?

A. Yes.

Q. Who was it?

A. Doctor Ernest.

Q. And you disagreed with Doctor Ernest?
A. I did.
Q. You found nothing wrong with his tonsils?
A. No, sir.
Q. You know, as a matter of fact, don't you, that arthritis usually comes from diseased tonsils or infected teeth?
A. That is one cause of it.
Q. It usually does, doesn't it?
A. That is one cause of it.

The Court: Answer the question.

The Witness: It might come from diseased tonsils.

Q. Isn't that the most common cause?
A. Well, with some focal infection at times.
Q. Isn't it true that all arthritis comes from some focal infection?
A. I would not say that; no, sir.
Q. Did you have your patient's teeth X-rayed?
A. No, sir.
Q. It is true, isn't it, Doctor, that seventy-five per cent of all arthritis comes from focal infection?
A. I cannot give any figures.
Q. You would not dispute that, would you?
A. I don't know.
Q. Isn't it true that traumatic arthritis resulting from an accident lasts only a short time?
A. I would not say. I have seen cases of a long nature.
Q. But ordinarily where the arthritis is prolonged it results either wholly or partly from focal infection, doesn't it?
A. No, sir.
Q. Hasn't that been your experience?

A. No, sir.
Q. It has not been?
A. No, sir.

Re-direct examination.

By Mr. Heher:

Q. Traumatic arthritis is due to injury?
A. Yes, sir.
Q. To injury caused by an external force?
A. Yes, sir.
Q. The medical term for that is "trauma"?
A. Yes, sir.

Mr. Heher: That is all.

Dr. Martin W. Reddan, sworn for the plaintiff.

Direct examination.

By Mr. Heher:

Q. Doctor, you are a practicing physician?
A. Yes, sir.
Q. And you have been for how many years?
A. Since 1900.
Q. Do you know Mr. Cohan, the plaintiff? Did you examine him at any time?
A. I saw him once in the office before coming here.
Q. When or approximately when did that examination occur?
A. On the first of November, 1928.

Q. In what condition did you find him at the time?

A. (Referring to paper.) His complaint at that time was that he had pain in the lower part of the back, the left knee and left ankle, and limited motion of the left ankle. He stated that on January 3, 1928 about 5:45 P. M., he fell through an elevator shaft from the first floor to the basement; he was immediately unconscious after the accident and became conscious about 3 A. M. He claimed dizzy spells.

Q. What did your examination of Mr. Cohan at that time disclose?

A. A loss of fifty per cent of the flexion and twenty-five per cent loss of extension, with pain on motion of the left knee. In that left knee there was no limitation of motion and motion caused pain in knee joint. There was pain on pressure over the second, third and fourth lumbar vertebrae with limitation of motion on forward and backward bending of the lumbar vertebrae. That is the spine. May I speak about having been shown the X-ray at that time?

Q. Are these the X-ray pictures, P1 and P2?

A. I have a note here, "X-ray of left knee, taken October 24, 1928, shows an arthritis." I do not just understand that loss of fifty per cent flexion and twenty-five per cent loss of extension with pain on motion. I do not know what that refers to, because I say immediately afterwards there was no limitation of motion of left knee. It seems involved. One contradicts the other. "Motion caused pain in knee joint." The X-ray here shows a spur on the front part of the shin bone. It shows a deposit over the upper part of the knee cap, the working surface of the joint, which is a little bit hazy, not clear cut and not sharply defined.

Q. Is that a mechanical defect in the photograph or due to some physical condition?

A. I do not think it is a mechanical defect. I think it is a reproduction of the condition in the joint. (Indicating.) This picture shows a spur on the inner surface of the large bone of the thigh, the thigh bone, the femur; it shows the same slight haziness in the joint surface.

Q. What does that haziness signify?

A. It shows a deposit of probably lime salts.

Q. Has that any relation to arthritis?

A. Yes; you find it a hundred per cent present practically if the disease has progressed far enough to produce that.

Q. That is a well defined symptom of arthritis, that haziness?

A. Yes, sir.

Q. What do these photographs signify so far as the condition of Mr. Cohan was at the time that they were taken?

A. Well, it shows an arthritis in a joint, the left knee joint.

Q. To what extent would that condition as disclosed by the photograph interfere with the functioning of the joint?

A. The photographs only show the deposit of lime salt. It would not give a true indication of it because involved in that joint would be the muscles and the nerves and blood vessels, all that the picture does not show, the entire condition. It only shows the condition of the bone and the lime salts that are deposited there as a result of the inflammation or irritation.

Q. Now, to determine the cause of a condition of arthritis is it necessary to know the history of the case?

A. It is an aid, yes.

Q. You have already stated that you have knowledge of the injury he sustained in January, 1928, when he fell in the pit of an elevator shaft?

A. Yes, sir.

Q. There has been testimony from his physician that prior to that he complained of no aches or pains in that region of the body where the arthritis condition now appears. Knowing those facts what, in your judgment, was the probable cause of that condition of arthritis?

A. I would say it was due to the injury.

Q. Solely due to the injury?

A. If it was not pre-existing and developed immediately afterward or shortly afterward I would say it was solely due to the injury.

Q. That is a condition known in medicine as a traumatic arthritis?

A. Yes, sir.

Q. Due to an injury?

A. Yes, sir.

Q. To what extent do you believe that condition interferes with the functioning or use of the leg of Mr. Cohan?

A. I would think it would interfere with that portion of the leg which shows haziness in the joint itself, and further than that would be the interference with the tendons and muscles and possibly some nerve injury and possibly some circulatory interference.

Q. That results ordinarily in limitation of the motion of the joints, does it not?

A. Yes, sir.

Q. In this case to what extent is the motion of the joint interfered with or limited?

A. Unfortunately I do not know what my notes mean here, about fifty per cent flexion and twenty-five per cent loss of extension, because I contradict

it, and I do not know whether that referred to the limitation of the motion of the back or to the knee, although my recollection is it referred to the knee.

Q. Would an examination during the noon recess clear that matter up, Doctor?

A. Yes.

Q. Can we discuss now the injury to the back or would you prefer to withhold discussion of that until you make this examination?

A. I can give you my findings at that time, that there is pain on pressure on the second, third and fourth lumbar vertebrae. They are the large vertebrae at the lower end of the spine. With limitation of bending forward and limitation of bending backward, and production of pain on trying to perform these motions.

Q. Is there anything to indicate the probable cause of that injury?

A. Except it might be due to the accident.

Q. Knowing that he suffered this accident in January and that prior thereto he had suffered no difficulty in that region of the body, what in your judgment was the cause of the injury to the back?

A. I presume the fall.

Q. What was the extent of the injury to the back, Doctor?

A. Well, at that time there was limitation of motion and pain which would prevent a quick and active bending or use of the spine.

Q. Does the confusion in your notes extend to that, the motion or limitation of motion in the back?

A. I doubt if he had that much limitation in his back.

Q. Then you would like to examine the back too in order to be certain about it?

A. Yes.

Mr. Heher: Does the Court adjourn at twelve thirty?

The Court: Yes. I was hoping to conclude with the doctors.

The Witness: I can determine it right here quickly.

The Court: I thought if I could finish with all the doctors by one o'clock that we would go on until one o'clock.

Mr. Heher: Then I will call Dr. Koplin now.

Dr. Nathan Koplin, sworn for the plaintiff.

Direct examination.

By Mr. Heher:

Q. Doctor, you are also a practicing physician?
A. Yes, sir.
Q. And you have practised how many years?
A. Twenty years.
Q. In Trenton?
A. Yes, sir.
Q. Do you know Mr. Cohan, the plaintiff?
A. I do.
Q. Did you examine him for injuries sustained sometime in January, 1928?
A. I did.
Q. When did you first examine him?
A. On September 17, 1928, and November 1st,

1928. On November 1st I examined him with Dr. Reddan.

Q. What did your examination of Mr. Cohan disclose his physical condition to be?

A. Mr. Cohan gave me a history of being injured on the third of January and taken to Mercer Hospital and remaining there for four weeks. His chief complaint when he came to see me on both occasions was pain in the back and left ankle and also over the second, third and fourth lumbar vertebrae. On examination I found that he had a swelling of his left knee and there was a difference in the measurements of both knees of about an inch and a quarter; and I also examined him this morning to verify that and I found the same condition.

Q. Do you mean by that the one joint is an inch and a quarter larger than the other in circumference?

A. Yes, sir.

Q. And that condiion continues to the present time?

A. Yes, sir. He has a limited motion in that left knee and he has a loss of fifty per cent of flexion. That is the bending of the knee. And twenty-five per cent of extension, that is, trying to extend his leg, and when he tries to do that he apparently has some pain. And he also has some limited motion of his back, trying to back forward or backward, and the X-ray shows now that—I do not understand the X-ray photograph myself—it shows an arthritis of the left knee.

Q. What in your judgment was the cause of that arthritis in the left knee?

A. The injury.

Q. An injury such as he suffered in January, 1928?

A. Yes, sir.

Q. That opinion is based upon what factors?

A. On the history and examination.

Q. The fact that prior to the injury he had no similar condition?

A. Yes, sir.

Q. And the knee was injured?

A. Yes, sir.

Q. And the condition that you found after it was sustained?

A. Yes, sir.

Q. Is that what is known as a traumatic arthritis?

A. Yes, sir.

Q. To what extent does this interfere now with the functioning of the leg?

A. Well, he cannot stand on it any length of time without some pain, and it interferes with his walking. He has to have some support to enable him to walk.

Q. Is it necessary to have some support?

A. Some support, a cane or crutch.

Q. To what extent does it impair the weakness of the leg?

A. Long standing on it would weaken the leg.

Q. During the past year has this condition been such that in your judgment this man could not pursue his employment, which required him to stand, pressing clothes and so on?

A. Yes, sir.

Q. You do not think he could do that work?

A. No, sir.

Q. Do you think he could do it now?

A. I don't think so.

Q. Do you think he is likely to be able to do that work in the near future?

A. Not in the near future, no.

Q. What period of time do you think will be required to bring about a return to a physical condi-

tion that will enable him to pursue the employment or that phase of his employment?

A. I would say at least a year.

Q. Do you believe there is a likelihood of a permanent injury?

Mr. Gildea: Objected to.

The Court: Yes.

Q. The probability?

A. I do not think it is permanent.

Q. You don't think so?

A. No, sir.

Q. What is the minimum period in your judgment necessary to heal these injuries?

A. Well, from the history of this particular case, with the treatment that he had and that he has not gotten any improvement as yet, I think it will take quite some time.

Q. Well, the minimum period of time?

The Court: He said within a year.

Q. I want to know whether—what you think as to the time required for treatment to return the leg to its normal functioning?

A. I should say at least a year.

Q. It may take longer?

A. Yes, it may.

Q. How much longer?

A. I could not say.

Q. What sort of treatment would be required in order to heal this injury?

A. Rest and not too much standing on his leg; massage, baking.

Q. What will the expense of the treatment be?

A. I could not tell you. It depends on the physician.

Q. You cannot approximate it?

A. No.

Q. Doctor, how many treatments do you think would be required in a period of a year?

A. I should say possibly he should at least have three bakings a week, every other day.

Q. What is the average charge for that?

A. I don't know. I do not do that kind of work and I do not know.

Q. You don't do that work?

A. No, sir.

Q. Now, this injury to the vertebrae, what in your judgment was the cause of that?

A. The injury.

Q. That is the injury suffered in January, 1928?

A. Yes, sir.

Q. Did he still suffer from that condition in November, when you examined him the last time?

A. Yes, sir.

Q. To what extent?

A. To the extent of bending forward or backward and with pressure of your fingers over those three vertebrae, and the pain and limitation of motion.

Q. What is the sensation caused in that condition? What is the specific cause of that condition?

A. In this particular case I think it is due to the injury.

Q. Is that what you describe as arthritis?

A. I do not think he has an arthritis there.

Q. Well, then, what is the condition that is the result of the injury?

A. He might have a slight arthritis, but I could not say without an X-ray.

Q. You think that will clear up?

A. Yes, sir.

Q. You do not think there will be any permanency to that injury?

A. No, sir.

Q. How long do you think it will take to clear that up?

A. I think it will clear up possibly sooner than the knee.

Q. Will that require treatments?

A. Yes, sir.

Q. How many treatments in a period of a year from now?

A. I think the same kind of treatment could be given in association with the other.

Q. Three times a week?

A. Yes, sir.

Q. Is there any other injury that Mr. Cohan is suffering from as a result of that accident?

A. No, sir; not that I know of.

Mr. Heher: Cross-examine.

Mr. Gildea: No questions.

Dr. Martin W. Reddan, recalled for the plaintiff.

Direct examination.

By Mr. Heher:

Q. Doctor, you have just made an examination of the plaintiff?

A. Yes, sir.

Q. Will you state what the result of that was?

A. There is still soreness and limitation of the movements of the backbone. I believe now that my

notes must have referred to the amount of motion that he had in his backbone because that is still quite limited and that fifty per cent bending forward and a lesser amount backward probably referred to his spinal column.

Q. Is that the extent of the limitation of the motion in the back at the present time?

A. There is a little greater motion in the backward bending now than there was at that time. The bending forward is about the same.

Q. What, in your judgment, is the cause of that condition of the back?

A. If it occurred after the injury I would say it is due to the injury.

Q. Is that a condition of arthritis too?

A. Yes, sir.

Q. The same condition then that exists in the joint?

A. In the absence of an X-ray—inflammation in any joint is an arthritis. Now that might be due to the bone itself or it might be due to the muscles or tendons entering into the joints. An X-ray would help to clear that point up.

Q. Do you think that will return to normal functioning, the back?

A. I think with proper treatment it will come back nearly a hundred per cent—possibly a little twinge occasionally, but not interfering.

Q. Do you think there is any probability of a permanent injury to the back?

A. Possibly a trace to some extent after any injury. I doubt if any joint ever becomes one hundred per cent after it is injured. There may be anywhere from one hundred per cent before to one hundred per cent disability, but there is always some residual disability from a joint injury.

Q. What are the probabilities in this case?

A. I think he will have a functioning back and be able to do his work with probably but little discomfort, maybe at times. It may entirely clear up, but I rather doubt it. I think there will be some slight continuing disability in the back.

Q. What about the leg?

A. In the leg there does not seem so much limitation of motion today. It is slightly swollen. I did not measure it, having no tape. When you put your hand on the joint there is a little creaking sound similar to that you produce when you bend a piece of sole leather; you can feel it rather than hear it.

Q. Doctor Koplin has testified that knee is an inch and a quarter larger than the other. What does that signify?

A. From looking at it today I would think it is fully that if not more, and it means a continuing inflammation and disability in that joint.

Q. To what extent, Doctor, is the functioning of this leg interfered with at the present time? Is the strength impaired?

A. I saw his gait going out of the court room and it seems to me that there is a slight flail-like motion to that joint and he had to get a sort of swinging motion to his foot as he walked along.

Q. In your judgment is he at the present time able to perform the duties which would require a tailor to stand to press clothes and so forth?

A. I would think not.

Q. When do you think that he will be able to do that work? What are the probabilities?

A. I would hate to be bound down to an opinion because it is such an indefinite thing. It may vary from one to one hundred per cent disability, depending on the particular patient. One man may come out of it in a few months and another man may be more or less permanently disabled.

Q. What percentage of disability do you think exists now?

A. For standing at a pressing table I would think seventy-five per cent.

Q. Do you think there may be a complete recovery of function?

A. There may be, yes.

Q. Within what period of time do you think that may result, if it does result?

A. In view of the bony deposits that show in the X-rays now I would think it would be many, many months. It might even go into years.

Q. Do you mean for more than one or two years, that it might take more than one or two years?

A. Yes, sir.

Q. Before he would be ——

A. Before he would be fully recovered. He would be improved over his present condition.

Q. When do you think he is likely to recover to the extent that he can resume the employment which requires him to stand on his feet?

A. For an eight-hour day?

Q. I presume so.

A. I would say for an eight-hour day certainly not within a year.

Q. Will he require medical treatment in that time?

A. He should have an application of heat in various electrical forms, and massage.

Q. How many times will he require that treatment?

A. Depending on his resistance to the treatment. I would say two or three times a week at present.

Q. What is the cost of that treatment?

A. I do not know.

Q. That treatment can be given by whom?

A. I generally refer them to the Rehabilitation Clinic, on West State Street.

Q. It must be given under medical supervision?

A. Yes.

Q. Only a physician can give it?

A. He will direct the treatment. He may have a technician who does the actual work, but he directs it.

Mr. Heher: That is all.

The Court: Is Dr. Ernest your witness?

Mr. Budson: No; but we will consent to having him put on.

Mr. Gildea: We will not call Dr. Ernest now, your Honor, and perhaps not at all.

(At 12:45 o'clock in the afternoon a recess was taken until 1:45 o'clock in the afternoon.)

Mrs. Fannie Cohan, sworn for the plaintiff.

Direct examination.

By Mr. Budson:

Q. You are the wife of Benjamin Cohan, the plaintiff in this case?

A. I am.

Q. And you are at present living with him and your children?

A. Yes, sir.

The Court: How many children have you, Mrs. Cohan?

The Witness: Two.

Q. How old are your children?
A. I have a little girl who is going to be eleven and a boy of eight.
Q. Were you with your husband on January 3, 1928?
A. Yes, I was.
Q. When he went to the establishment of Murray, Griffith & Messler?
A. I was.
Q. When he went inside where did you remain?
A. I was sitting outside, in the car.
Q. When you drove up to the place of business of Murray, Griffith & Messler what did you observe as to the condition of their place with respect to it being lighted up, or was it not?
A. I did not take particular notice of that.
Q. Did you notice Mr. Cohan leaving the machine?
A. I saw Mr. Cohan go inside after Mr. Messler opened the door for him.
Q. You saw Mr. Messler open the door for him?
A. Yes, sir.
Q. How long did you remain out there?
A. I could not hardly say the exact time; I really do not know.
Q. Well, approximately?
A. It might have been between twenty minutes and a half hour.
Q. Did your husband come back from the establishment?
A. No, he did not.
Q. What was the next thing you observed?

A. I was sitting there for a while. It was kind of cold and I was wondering what was keeping Mr. Cohan so long in there, and I noticed Mr. Messler came over to the door, by the window like, and he looked out like that and I noticed him open the door and call to somebody, but I did not pay any attention, I did not think anything of it, when I saw the ambulance, the patrol, draw up and there were two officers with a stretcher getting out, and that struck me very funny; I could not imagine what happened but I knew something must have happened and I rushed across immediately and I do not know exactly whether I reached the door before the officers or not. I was excited and I knocked at the door and Mr. Messler says, "You can't come in." And I said, "Did anything happen? I am Mrs. Cohan. Where is Mr. Cohan?" And they left me in and I remember running with the officers and I was excited, I suppose, and I remember the officers saying, "Now if you are going to get excited like this you are not going to do us any good. We have an injured man here." I said, " I won't get excited. Take me to him." And I went to him. I think I was the first one to reach Mr. Cohan. I ran down the steps—I could not tell you what I did until I reached him.

Q. Where did you find him?

A. In the elevator shaft, right against the side of the elevator. (Illustrating.) This is the position he was in. The way he was sitting it seemed to me one leg was under him. His hat was off and he was moaning. I imagine he was coming to.

Q. Did you talk to him?

A. I did.

Q. Did he come to?

A. He was moaning and crying and carrying on. He was moaning most of the time at the elevator

shaft. Then I remember that the officers had an awful time getting him out. He was quite heavy. And then they brought the elevator down and sat him on the elevator with Mr. Cohan's head on my lap and I was sitting right down on the floor of the elevator and they brought us up-stairs; and of course the officers asked me what hospital would I prefer taking him to and I said the Mercer Hospital and I went along.

Q. How long did he remain at the hospital?

A. He remained there four weeks.

Q. After that where was he taken to?

A. Taken home.

Q. During those four weeks what became of his business?

A. Well, of course, we did not do very much at the time, and the little work we did get in we had a man there.

Q. Who was it?

A. Mr. Pascoe.

Q. And he did the work for you?

A. Yes, sir.

Q. Since Mr. Cohan came back from the hospital has he been able to attend to his duties?

A. The first few months, of course, he was not able to hardly get around. I had to wait on him all the time, and we have an apartment up-stairs and I was with him only when somebody came in the store. We have a bell and I had to run those steps, which was rather hard on me, to try to do two things at once.

Q. Was he able to attend to his duties as he formerly did?

A. No, sir, he was not.

Q. Approximately how long a time in months has he been away altogether from the business without doing any work in the place?

A. Well, up until about August.

Q. The first of August or the latter part of August?

A. The beginning of August.

Q. That is when he first began to get around and help out?

A. He done very little. He could sit and sew.

Q. Could he press the same as he used to?

A. No, sir.

Q. How long was this man in there working, Mr. Pascoe?

A. He has been up to the week of Labor Day, the Saturday before.

Q. From when?

A. From right the next day after the accident.

Q. Until the Saturday before Labor Day?

A. Yes, sir.

Q. Do you know how much he paid him a week?

A. Thirty-five dollars.

Q. Does he come in yet?

A. He does.

Q. But he does not come in steady, is that right?

A. Yes, sir.

Q. Just occasionally as you call him in?

A. Yes, sir.

Q. About how often is that?

A. Well, sometimes if he has any pressing to do that is very hard for Mr. Cohan to stand up and press and Mr. Pascoe does most of his pressing.

Mr. Budson: Cross-examine.

Mr. Gildea: No questions.

BENJAMIN COHAN, the plaintiff, recalled.

Direct examination.

By Mr. Budson:

Q. What was your income for the year 1928 from your business?

Mr. Gildea: That is objected to, if the Court please, on the same ground that I objected to the same question with respect to 1927, that if there is testimony it ought to be the receipts and disbursements and to permit us to make the subtraction.

The Court: Yes. He may give his receipts and disbursements.

Q. Do you have a record of your approximate receipts and disbursements for that year?
A. No, sir.
Q. You haven't?
A. No, sir.

Mr. Gildea: Then I make the further objection that the testimony should only cover the time during which he was there and knew what his receipts and disbursements were. If he was in the hospital he could not know from his own knowledge.

The Court: It may cover the time that he was there and knows of his own knowledge.

Q. Do you know what your approximate receipts and disbursements were from the time that you came back from the hospital until the present time?

A. I don't know. The only thing I can tell is by the amount of money since the time of the accident up to date, that I am away behind. I don't know what I made ——

The Court: No.

Mr. Gildea: I move to strike out the answer.

The Court: Strike it out.

Mr. Budson: That is all.

Mr. Gildea: No questions.

Mr. Budson: With the exception of one question from Dr. Reddan, who is on his way down here, if your Honor will permit us to call him when he arrives, we will rest.

The Court: Is that the question I suggested to counsel that one of the jurors asked the Court about?

Mr. Heher: Yes.

Mr. Gildea: May I know what it was, your Honor?

The Court: Yes. One of the jurors asked if the testimony the doctors gave meant that the bone was splintered.

Mr. Gildea: I think we could agree to the answer to that, couldn't we, without bringing Dr. Reddan back?

Mr. Heher: We do not pretend there was a splinter.

Mr. Gildea: And neither do I.

Mr. Budson: I think we can agree to the fact that it was not splintered.

Mr. Gildea: Yes. You will not have to call Dr. Reddan.

Mr. Budson: No.

Mr. Gildea: Then you rest?

Mr. Budson: Yes.

ROBERT A. MESSLER, sworn for the defendant.

Mr. Budson: Your Honor, Dr. Reddan just came in. I think it would be better to have it explained by the doctor.

The Court: Very well.

Dr. Martin W. Reddan, recalled for the plaintiff.

Direct examination.

By Mr. Heher:

Q. Doctor, the question has been asked whether or not there was any splintering of the bone?

A. None that I could see or determine in any way.

Q. This arthritis does not involve any splintering of the bone?

A. Not necessarily.

Q. Will you just explain what this condition due to arthritis is?

A. It is an inflammation of the parts entering into the joint. It may be the bones; it may be the cartilage covering the end of the bones; it may be the ligaments which bind the joints together; it may be the nerves or blood vessels or muscles entering into the formation of the joint; they are all necessary to constitute the joint; any part may be diseased or they all may be diseased in an arthritis.

Q. But it does not involve any splintering of the bone?

A. Not necessarily but there may be arthritis with splintering, but they are not necessary to each other.

The Court: There is no evidence of splintering here?

The Witness: No, sir.

Mr. Heher: That is all.

Mr. Gildea: No cross-examination.

ROBERT A. MESSLER, resumes the stand for the defendant.

Direct examination.

By Mr. Gildea:

Q. Mr. Messler, where do you live?
A. East State Street.
Q. Trenton?
A. Yes, sir.
Q. How long have you lived there?
A. About fifty-six years.
Q. On the third of January of last year, somewhere between 5:30 and 5:45 P. M., where were you?
A. In the front office at 212-214 East State Street in my place of business.
Q. The place of business of what concern?
A. Murray, Griffith & Messler, Inc.

Mr. Heher: You said East State Street.

The Witness: I beg pardon. I mean Academy Street.

Q. Do you know Mr. Benjamin Cohan, the plaintiff in this case?
A. I do.
Q. Did you see him on January 3, 1928, sometime shortly after 5:30?
A. I did.
Q. Where was he when you first saw him?
A. He was outside of the door of the store.
Q. Did he come in the store?
A. I had a friend from Hightstown staying and

talking with me after we closed the store. The men had all gone away and put out all the lights except the light we leave in the packing room and a light we left in front. And I got up and let him out the front way and he came to the door and he wanted to come in and I said, "We are closed. There is nobody here." He said he wanted to get a box of underwear and I said, "I will take your order and send it up in the morning." "Well, I promised to deliver it tonight." I said, "There is nobody here. I don't wait on anybody very much, but I will take the order and see that you get it in the morning." Well, he rather insisted on getting it so we walked back and went down-stairs and turned on the lights down-stairs that light up the basement, the first floor and second floor.

The Court: You say you turned on the lights in the basement, first and second floors?

The Witness: In the basement, first and second floors. That means that to make a light you have to go to the jet and turn it and it will put the light ready to be put on at any part.

Q. Do you mean each individual light had a circuit of its own?

A. Yes. Then we came up-stairs and went up in the elevator to the third floor. The electric lights on the second floor were the same kind of a fuse turned on the lights on the third and fourth floor, but we did not stop there. We went on up to the third floor and we walked down to where the underwear was placed in the building and he lit a match to see the size that he wanted. I got them and I came back and on the way back to the back of the store where the elevator was he says, "I want some

gloves." I said, "We will have to go down on the next floor." We came down on the next floor and got his two dozen gloves.

The Court: Did you strike a light?

The Witness: We had plenty of light for walking. We could get any light we wanted by simply turning it on. Then while I was getting the gloves —we came on down-stairs, turned out the lights and I went to look up the extra size that he got, size 48, that cost extra money and he says, "Where are the ladies' hose?" I said, "What price?" He said, "The eight-dollar goods." I said, "You will find them up on the front table." That is on the first floor. I was in the office at the stenographer's desk, and we had a light there and I looked that up and he was up at the table looking at the hose and I said, "Mr. Cohan that will cost you four dollars extra." He said, "Well, I will take the next size, which won't cost extra." I said, "I don't want to go back again. You give me the order and I will send it up tomorrow." Well, he insisted on getting the goods and I walked from where I was standing to the elevator and raised the gate and I was about reaching over the gate to catch the cable and draw it down and I heard this thump in the basement. I did not know where he was. I did not know that he was back of me and I did not hear of him at all since I left there to go up-stairs and ——

Q. Where was he when you left the place and told him the difference in price?

A. He was at the front table.

Q. How far were you from him?

A. About ten paces from the elevator.

Q. Then you heard a thump, and what did you do then?

A. I called down to him and he made no answer and I went down-stairs and tried to arouse him but he just groaned, and I came up-stairs and called the police ambulance and waited for them to come, and when they got there they put him on a stretcher and took him out.

Q. Mr. Cohan testified that after he had discovered that he wanted some other underwear because of the price of the underwear you had brought down that you then said to him, "Let us go up." Did you say that to him?

A. No, sir.

Q. Did you know he was following you?

A. I did not.

Q. Did you invite him to go up with you a second time?

A. I did not.

Q. How does the elevator operate, Mr. Messler?

A. It is an Otis elevator we use for bringing down our packages and taking up our packages and for also taking up and down our customers and getting out our orders. It has these gates that are protected; that is, you cannot leave the elevator up-stairs unless the gate is shut down-stairs or at each floor. The Otis people had been there and had just finished checking up the elevators and they were in perfect order.

Q. You can raise the gate and pull the cable if the elevator is not there?

A. You have to do that.

Q. If the elevator is not at the floor where you want to take it, then to get the elevator you must raise the gate and pull the cable?

A. Yes, sir.

Q. That cable runs on which side of the elevator as you face the elevator?

A. To the left.

Q. How wide is the door or opening through which you walk to get upon the elevator?

A. The elevator is about seven feet wide, and I suppose it is about five or six feet deep.

Q. How wide is the gate that you have to lift?

A. Almost the same width as the elevator.

Q. Mr. Cohan also testified that after he discovered that he did not want the underwear that you had brought down-stairs that you went down into the cellar again to do something to the lights or the fuses. How many times did Mr. Cohan go into the cellar with you until he fell in?

A. Only once.

Q. And that was before you had gone up-stairs at all?

A. Yes, sir.

Q. How many lights were there on the first floor of the store at the time that you started to get the elevator for your second trip up?

A. Four lights.

Q. Where were they?

A. One is always in the packing room when they close up, for the watchman.

Q. Where is the packing room?

A. It is three flights of steps up to the packing room, the packing room is right there. These three steps are alongside of the elevator. This light was within eight or ten feet of the elevator.

Q. Was this packing room enclosed?

A. No; it is always open; it is a big open space.

Q. Was there any wall between this light and the elevator?

A. No, sir.

Q. What kind of a light was it?

A. It is quite a high power electric light.

The Court: Did the rays shine into the elevators?

The Witness: No; they shine to the back of the elevator. There is a partition up on the side of the elevator to keep that light out of that part. It would show out in the store but not directly in front of the elevator.

Q. Now there were three other lights you stated. Where were the others?

A. The other light was ten paces away, at the stenographer's desk in the middle of the floor and right over it and it is a very bright light.

Q. Did that have a green shade on?

A. It has a white shade.

Q. Nothing to throw the light down; not the kind of a light that you sometimes see over a desk, with a green shade?

A. No covered shade.

Q. Where were the other two lights?

A. One in my office in front and one on the front of the store in front, that we keep there always for the night watchman.

Q. How long had you known Mr. Cohan?

A. Oh, I think four or five years; maybe more.

Q. Had you ever seen him around the store before that?

A. Very often; yes.

Q. Do you know of your own knowledge whether or not he had ever gone up in that elevator before? Had you ever gone up with him, as you recall?

A. I could not say that. He would have to go up to be waited on.

Q. That is if he wanted to buy things you did not keep on the first floor?

A. We have five floors and people go around and see the goods as they want them.

Q. When you started back to get the size of underwear that Mr. Cohan decided he wanted, you were on your way to which floor?

A. To the third floor.

Q. Did you know how the underwear on the third floor was arranged with respect to sizes?

A. Yes; I am very familiar with all that.

Q. Did you need a light to go up and make the change?

A. No.

Q. You were able to do it in the darkness?

A. Yes.

Q. How long has that store been the place of business of Murray, Griffith & Messler?

A. Between thirty and forty years.

Q. Have you been connected with the company all that time?

A. I am connected with the company fifty-four years.

Q. Which way does the elevator face, Mr. Messler?

A. It faces south; it faces to the street.

Q. Toward Academy Street?

A. Yes.

By the Court:

Q. Well, did the rays of this light over the stenographer's desk shine into the elevator?

A. Yes.

Q. You say that light was on?

A. Yes, sir.

Q. How far is that light from the elevator opening?

A. About ten paces or thirty feet.

Mr. Gildea: Cross-examine.

Cross-examination.

By Mr. Heher:

Q. Mr. Messler, you say that if Mr. Cohan or any other patron of your store decided to buy merchandise on one of the other floors he would have to take the elevator?

A. They can walk I suppose.

Q. Patrons very often use the stairs, don't they?

A. Very often, but if they want goods on more than one floor it is usual to take the elevator.

Q. You mean that the elevator is operated by one of your employees for the benefit of those patrons who may want to go to an upper floor for the purpose of buying goods?

A. It is generally a salesman who goes with the patron and operates the elevator. We have no special operator.

Q. Yes, and it is operated by one of your employees?

A. Yes, sir.

Q. This property is on which side of Academy Street, north or south?

A. North.

The Court: It is next to the Public Library, is it not?

The Witness: Yes, sir.

Q. How far north does it extend? The entrance is on the north side of Academy Street, and how far back does the building go?

A. It goes about eighty feet to the packing room from the front of the building.

Q. I understood you to say that the packing room is not a separate compartment; that it was merely a part of this floor used for the purpose of packing, without any partition. Is that so?

A. Not altogether that. A very large opening takes you from the main front store into the packing room. There is part of a partition on either side.

Q. Then the packing room is partitioned, it is a separate room?

A. Not a separate room in the sense of the way you use it.

Q. But it is partitioned from the rest of the floor?

A. Side partitions, yes.

Q. Has it a door?

A. It has two doors.

Q. How wide was this first floor?

A. About forty feet.

Q. And how deep was the packing room?

A. The packing room is made in two parts divided off with a back partition and altogether about thirty feet.

Q. Then the entire depth of the first floor was about one hundred and ten feet?

A. The whole of the complete building was about one hundred and ten feet.

Q. And the width about forty?

A. About that.

Q. Is it a uniform width all the way back?

A. Yes, sir.

Q. Were these two doors leading into the packing room closed at the time Mr. Cohan was there?

A. No, sir.

Q. They were open?

A. Yes.

Q. How far from the front of the building is the elevator?

A. Possibly thirty-five feet.

Q. Is it on the east or west side of the building?

A. I beg pardon. I did not mean thirty-five feet. It was about sixty-five feet.

Q. Then it is about fifteen feet approximately from the packing room?

A. It is right up against the packing room.

Q. Oh, it was against the packing room?

A. On one side.

Q. How deep was the elevator shaft?

A. Ten feet from the first floor.

Q. Then it would be—the opening into the elevator shaft would be about seventy feet from the front of the store, wouldn't it?

A. Something like that.

Q. You say that the elevator shaft adjoins the packing room, that it is ten feet deep, and the packing room is eighty feet from the front?

A. The elevator is not ten feet deep. I think I testified six or seven feet deep.

Q. Then I misunderstood you. And the rear of the elevator shaft adjoins the packing room on which side, the east or west side?

A. The west.

Q. And you say the elevator opening is on the south side of the shaft toward Academy Street?

A. Facing Academy Street.

Q. That would be on the south side of the shaft?

A. Yes, sir.

Q. Now, when Mr. Cohan arrived how many lights were burning on the first floor?

A. Four.

Q. One in the packing room?

A. One in the packing room.

Q. And where were the other three?

A. One in the front office and one over the desk of the stenographer.

Q. Just where was the stenographer's desk located?

A. On the east side of the building about ten or fifteen paces away from the front.

Q. How many feet from the front?

A. About thirty-five to forty feet.

Q. And was the stenographer's desk close to the easterly wall of the building?

A. No; it faced the aisle. The back of the stenographer is against the window.

Q. Where was the aisle?

A. The main aisle, from the front of the store straight back.

Q. Was it in the center of the ——

A. No; it was on the east side.

Q. How far from the easterly wall of the building?

A. Ten or twelve feet.

Q. How wide was it?

A. Four or five feet.

Q. And the stenographer's desk was between that aisle and the easterly wall of the building?

A. Yes, sir.

Q. Close to the easterly wall?

A. No. You have to get in the aisle to go in front of the stenographer's desk and the open space up against her back and the wall.

Q. Do you mean that the desk was alongside of the aisle?

A. Yes. A railing shuts off and encloses the desks in the office all the way down on that side of the building.

Q. Well, the railing is used to partition the aisle, isn't it?

A. Yes.

Q. And the desk was against the railing?

A. Yes, sir.

Q. Where was the light with reference to the desk?

A. Right over it.

Q. How far above it?

A. I suppose ten or twelve feet. It was a good high ceiling.

Q. It was a high ceiling light?

A. No; it came down.

Q. A drop light?

A. A drop light.

Q. Was the bulb itself very far above the desk?

A. Not over three feet.

Q. It was a flat-top desk?

A. Yes, sir.

Q. And the bulb was three or four feet above the desk?

A. Yes, sir.

Q. It was a drop light used by the stenographer who used that desk?

A. Yes, sir.

Q. So that it is the ordinary electric light?

A. No; it was a bright light; I cannot tell you the power.

Q. Well, was it just an ordinary electric light bulb?

A. No; it was more than ordinary on account of the light that was needed.

Q. Did it have a shade?

A. It had a half white shade over it.

Q. And that shade was used to throw the rays down on the desk, wasn't it?

A. That was the principal reason.

Q. So that this light, whatever its brilliancy, the shade threw the rays down on the desk; they were not diffused throughout the room?

A. Somewhat, yes.

Q. The purpose of the light was not to illuminate the room but to throw light down on the desk for the benefit of the stenographer who might use it?

A. Principally. We have two or three of those lights there.

Q. You do not mean at this desk?

A. Right along together. There are several desks along there.

Q. But at this time only one was lit?

A. That is all.

Q. Now that desk you say was thirty-five or forty feet from the Academy Street entrance?

A. Yes, sir.

Q. That would mean that it would be about the same distance from the elevator shaft, wouldn't it, on a direct line?

A. Not quite. I paced it off and found it was ten paces from the elevator to this light and ten paces from this light to the front table where he stood.

Q. The packing room was eighty feet from the front of the building; the elevator shaft was six or seven feet deep; so that the front of the elevator shaft would be seventy-three or seventy-four feet from the front of the building? Now this desk was thirty-five or forty feet from the front of the building, on the other side of the room. I think you said that the desk was about thirty-five or forty feet from the front of the building, is that correct?

A. Yes, but that was not where he was standing. He was standing at the table. It was nearly in the middle of the store, excluding the depth of the elevator shaft.

Q. Well, this desk you said, was about thirty-five

or forty feet from the front of the building. Is that approximately correct?

A. That is correct if you want the front of the building.

Q. Yes.

A. The front of the building takes in the big windows, which is part of the building, and it is part of the office also.

Q. When you gave the distance of the packing room from the front of the building as eighty feet you had the same point in mind, hadn't you, at the front?

A. Yes, that it was eighty feet.

Q. Now you say there was a light in the office?

A. Yes, sir.

Q. That would be immediately to the front of the building?

A. Yes, sir.

Q. Where was the fourth light?

A. On the other side of the store at some place, near the other window.

Q. That is in the front?

A. Yes, sir.

Q. Was your office on the east or the west side of the building?

A. On the east side.

Q. This light you now speak of, was it on the west side?

A. Yes, sir.

Q. Right in the front?

A. Yes, sir.

Q. Now when Mr. Cohan said that he wanted some merchandise you learned that this merchandise which he desired was on the third floor?

A. Yes, sir.

Q. And there were no lights lit on that floor?

You went down in the basement for the purpose of turning the switch?

A. Yes.

Q. The turning of that switch would not give light on the third floor. You would still have to go to the third floor and pull the cord for each individual light?

A. Yes, but the fuses in the basement lights up the second floor, the first floor and the basement. The fuses on the second floor light up the third floor and the fourth floor.

Q. Then when you went into the basement you turned the fuses that would light what part of the building?

A. The first, second and basement.

Q. And then the lights on the third floor are controlled by fuses on the second?

A. Yes, sir.

Q. When you went down into the basement you went there for the purpose of turning which switches?

A. All of the switches that are in the fuse box.

Q. The basement, first and second floors?

A. Yes. I thought that the second and third floor was on. When we got up there we found the light was not on, that those fuses were not turned.

Q. You did not go to the second floor until after you had been to the basement?

A. Well, I did not stop at the second floor.

Q. When you went to the basement and turned on the switches or fuses you had not yet been to the second floor?

A. No.

Q. So that you went to the basement for the purpose of using the control switches for the basement, first and second floors?

A. I went there to put all of them on, for both

the third and the fourth floor, and I found afterwards that the fuses on the basement floor do not turn on the second or third floor.

Q. Do you mean you did not know that until that time?

A. I did not know that they had turned them off there at night. They turn them off at night and put them on in the morning. They do that on account of fire and electricity.

Q. Then when you went to the basement that was for the purpose of throwing on the lights on the third and fourth floor as well as the other floors?

A. On all the floors.

Q. Did you have any difficulty in getting the switches or fuses that controlled those lights?

A. No.

Q. Now, Mr. Cohan went down into the basement with you?

A. Yes.

Q. Did you ask him to go?

A. I cannot recall.

Q. You won't say that you did not?

A. I cannot recall.

Q. Did you ask him to follow you along and use matches to light the way?

A. Up on the third floor, to get the size.

Q. But not when you went to the basement?

A. No.

Q. Did he use matches to light the way when he went to the basement with you?

A. No.

Q. And you knew as you went down into the basement that he was behind you?

A. Yes, sir.

Q. After you had gone to the basement you went where?

A. We came up and went to the elevator and up to the third floor.

Q. You went from the basement to the first floor and took the elevator from the first floor?

A. Yes, sir.

Q. Now, when you had gone down into the cellar and used these switches did they throw any additional light on the first floor?

A. Not until you go to the jet and turn them on.

Q. Did you turn any additional light on the first floor?

A. No; we did not need them.

Q. Then at that time only the four lights on the first floor were lit?

A. That is all.

Q. You knew that Mr. Cohan was following you to the elevator shaft at that time?

A. The first time.

Q. And the elevator was then at the first floor.

A. Yes.

Q. Did you raise the door for the purpose of reaching the cable?

A. Yes, sir.

Q. That is a protection door, isn't it?

A. Yes, sir.

Q. And that is a door that automatically closes when the elevator is not at that particular floor?

A. Yes, I suppose you would call it that.

Q. When you raise this door for the purpose of entering the elevator when it is at that particular floor, do you close the door or lower it before you start the elevator, or does the door automatically close as the elevator goes up or down?

A. The door closes itself.

Q. As the elevator moves?

A. Yes, sir.

Q. Then it is automatic?

A. Yes, sir.

Q. Was there any light in the elevator shaft itself on this occasion?

A. No, sir.

Q. Was there any light in the elevator?

A. No, sir.

Q. I do not mean when it was lighted but I mean is there any bulb that will give light?

A. No.

Q. Then there isn't any way of getting light in the elevator cage itself?

A. Except from the store.

Q. How high is this door, this elevator door that you say automatically closes as the elevator moves?

A. About my height; in the neighborhood of six feet.

Q. Does that close the entire opening from the floor to the top?

A. No. It closes a space about six feet high on the sides and closes all of the front of the elevator.

Q. And there is an open space around it?

A. Yes, sir.

The Court: Is it a solid door?

The Witness: No; a slat door.

Q. You say that the door is about six feet high?

A. The slat door is about six feet high.

Q. And above that is the opening?

A. An open space, yes.

Q. You can reach the elevator control above that door, can you?

A. We do not have to. There is an opening there on the side where we reach the cable.

Q. An opening on the side of the door?

A. In the slats.

Q. Then you can reach the cable without raising the door?

A. Yes, you can do that.

Q. So that it is not necessary to move the door at all to reach the cable to start the elevator?

A. We always have used it that way.

Q. I suppose that has been the practise, but the fact is that it is not necessary to move the door at all to reach the cable in order to move the elevator?

A. No; it is not necessary.

Q. There is an opening in the door for that purpose?

A. Yes.

Q. Now you went up to the third floor and you found that the lights were not functioning on the second and third floors?

A. Well, I found they were not functioning on the third floor.

Q. Then you picked out the merchandise that Mr. Cohan wanted by the use of matches?

A. Yes, sir.

Q. And you walked down?

A. Walked down to the second floor.

Q. Would it have been possible for you on the third floor, after you had stepped from the elevator cage, to send that elevator down to the first floor by using the cable?

A. I could have sent it down. I do not know just where it would have stopped.

Q. You could have started the cable and sent it down and when it got down there stopped it, couldn't you?

A. If I thought it was the right place, yes.

Q. In other words, you could control the movement of that elevator when you were not in the cage itself?

A. Yes.

Q. Now, you decided to walk down with this merchandise, and when you got to the first floor Mr. Cohan discovered that it was not the size that he wanted, or that it was not the price that he wanted?

A. Mr. Cohan when he came in only wanted one thing, when he went in, and I went and got that, and then he said he would like to have some gloves, and I said, "They are on the second floor. We will walk down there." We came down on the second floor and I turned on the lights and gave him the gloves and then we came down to the first floor.

Q. And then it was he discovered something that caused you to go back to the third floor?

A. He wanted to know then about some hosiery and I sent him to where the hosiery was when I told him the price on the extra-size underwear and he said, "I will get it lower than four dollars." And I said, "We won't go back. Give me the order and I will send it up tomorrow." And he stated that he must have it that night, and at that time he was at the hose desk and I was at the desk of the stenographer, in the middle of the room and I went and opened the gate and started to pull down the elevator and I had not heard where he was or if he was coming; I did not know anything about it except when he fell through the opening.

Q. Where were you talking about going to the third floor again, how far from the elevator shaft were you standing?

A. Ten paces.

Q. In what direction, toward the front or rear?

A. I was in the middle of the room practically.

Q. How far from the stairway?

A. About eight paces or nine paces.

Q. When you say you were ten paces do you mean about thirty feet?

A. Yes, sir.

Q. So that when you had this conversation you were about thirty feet from the elevator shaft?

A. Yes, sir.

Q. And you decided again to go to the third floor?

A. Yes.

Q. And you walked toward the elevator shaft?

A. Yes, sir.

Q. You did not hear Mr. Cohan walking behind you?

A. I did not.

Q. You did not look around to see whether or not he was behind you?

A. I cannot say that I did; I do not know.

Q. Up to that point as you moved about that building Mr. Cohan was behind you all the time?

A. No. He was up in front of the building.

Q. Well, he followed you to the basement, to the elevator and up to the third floor; he lighted matches up there and followed to the second floor to get the gloves and you and he walked to the first floor and stood there talking, about thirty feet from the elevator shaft?

A. He was not talking right by me; he was up front.

The Court: He said Mr. Cohan was up front and he was in the middle of the store and the conversation was had between them at that distance.

Q. How far apart were you when this conversation occurred?

A. About thirty feet.

Q. Do you mean that when you came down from the first floor Mr. Cohan was thirty feet from you when he said he wanted some merchandise?

A. We were together when he wanted to know where the ladies' hose was and I said it was on the

front table, and I was looking for the price on the extra-size underwear, and when I told him the price would be four dollars extra he said, "Oh, well, I will have to take a size smaller."

Q. When you turned to go to the elevator shaft for the purpose of going again to the third floor do you know how far away from you he was?

A. I did not see him at all.

Q. What?

A. I do not know where he was. There was no need of his going with me. I knew where to go to get it and I went off to get it.

Q. Do you mean that when you turned to the elevator shaft you did not know where he was then?

A. I did not know, no. I supposed he was up by the hosiery but I did not know.

Q. And you walked leisurely to the elevator shaft?

A. Yes, sir.

Q. You had raised the door?

A. I raised the gate.

Q. And then you were reaching for the cable?

A. Yes, sir.

Q. You did not hear him walking toward the elevator shaft before he fell?

A. I did not.

Q. There was no one else in that room?

A. I did not hear him.

Q. There was no noise?

A. No.

Q. Mr. Cohan was a heavy man, wasn't he?

A. Yes, sir.

Q. He was not unusually light of step?

A. No.

Q. Anyone near by would hear him walking?

A. I do not know whether he had rubber heels or anything about it.

Q. Was your hearing good at the time?

A. Yes, sir.

Q. You did not hear any noise did you until he tumbled into the elevator shaft?

A. I did not.

Q. Now at that time it was not necessary to raise the door to move the elevator?

A. I thought it was, yes.

Q. You were simply doing what you thought was necessary, but as a matter of fact it was not necessary. You could have moved that elevator or brought it down from the third to the first floor without moving that door at all?

A. The elevator gate could have been in the same position, whether I reached over the top or whether I reached under the opening.

Q. I understood you to say that there was an opening in the gate itself, to the side?

A. Yes, sir.

Q. Through which you could put your hand to reach the cable and move the elevator.

A. The elevator gate had to be moved before you could get on the elevator.

Q. Yes, but I mean that it was not necessary to move the gate in order to bring the elevator down from the third to the first floor?

A. You could have done it both ways.

Q. You could have done it that way, and then when the elevator came down to the first floor you could have raised the gate and entered it?

A. Yes, sir.

Q. When you started from the first to the third floor on the elevator the first time did you know that the lights were not lighted on the third floor?

A. I did not.

Q. You learned that when?

A. When I tried to get a light after I got up there.

Q. Now the second time you went up did you know the lights were not functioning?

A. Yes.

Q. And it was then that Mr. Cohan assisted you by the use of amtches?

A. Not the second time.

Mr. Heher: That is all.

Re-direct examination.

By Mr. Gildea:

Q. Mr. Messler, to bring the elevator down to the first floor without raising the gate where would you have had to put your arm to take hold of the cable or rope?

A. Over the slat of the gate or over the partition that runs across it which is possibly six or eight inches lower than the top of the slats.

Q. Is it as convenient to do it that way as it is the way you did it, by raising the gate and reaching around?

A. No, it is not. It is easier to reach over the gate and bring it down.

Q. What is the customary way of doing it?

A. I have always done it for a number of years that way.

Q. By raising the gate?

A. By raising the gate, yes, reaching for the ——

Mr. Heher: If the Court please, I do not think that is binding upon the plaintiff, the customary way the defendant had of operating that elevator.

The Court: It has been answered on both cross and re-direct examination. I do not see that it is particularly material, anyway.

Mr. Gildea: That is all.

Re-cross examination.

By Mr. Heher:

Q. Aren't there a number of shelves on the first floor of that building, shelves that reach nearly to the ceiling or to the ceiling, that extended throughout that floor?

A. That is on the west side of the building, reaching from the front to the back, about eighty feet, where we keep the hosiery, and that was filled with hosiery boxes.

Q. Don't those shelves extend through the floor from the front to the back on the west side of the building?

A. From this window back to where the elevator is, that is one solid row of shelves.

Q. Back to where the elevator is?

A. Yes, sir.

Q. So that between the elevator opening and the stenographer's desk where you say this light was there were a number of shelves?

A. No; they are all tables.

Q. Tables?

A. Yes, sir.

Q. And on those tables was piled merchandise?

A. Only about a foot high.

Q. How high were the tables?

A. Ordinary tables, about like that (indicating); it may have been higher but not much.

Q. Your tables may have been?
A. Not much.
Q. How much?
A. Four or five inches.
Q. Half a foot approximately?
A. Yes, sir.
Q. And on top of them was merchandise that was a foot high?
A. Yes.
Q. And those tables extended all the way from the front to the elevator shaft?
A. With space enough to work around there.
Q. And they were between the elevator shaft opening and the stenographer's desk where the light was on the first floor?
A. Well, I cannot say that exactly. (Illustrating). That desk was here, but these tables did not run all the way back to the elevator. There was a space there to get in and out of the elevator, to handle packages in and out of the elevator.
Q. In these passageways?
A. Yes, sir.
Q. But there were tables there?
A. I think all the way back.
Q. How did the height of the stenographer's desk compare with the tables on which the merchandise was placed?

Mr. Gildea: The desk or the light?

Mr. Heher: The stenographer's desk.

Q. How did the height of the stenographer's desk compare with the height of the tables upon which you had placed the merchandise?
A. Maybe one foot higher than the stenographer's desk, with the goods on the tables.

Q. Then you mean that the tables and the desk would be about the same height?
A. Yes, about.

Mr. Heher: That is all.

Mr. Gildea: That is all. We rest.

BENJAMIN COHAN, the plaintiff, recalled in rebuttal.

Direct examination.

By Mr. Heher:

Q. Mr. Cohan, when you entered the first floor of the defendant's establishment on Academy Street did you observe any light at a stenographer's desk on the east side of the building?
A. Yes.
Q. Where was that desk located with reference to the elevator shaft?
A. Well, it was half way of the building, about.
Q. The desk was half way back from the front?
A. Yes, sir.
Q. How far away from the elevator shaft was it?
A. Halfway of the building.

The Court: About halfway between the front of the building and the elevator?

The Witness: Yes, sir.

Q. Did the rays from this lamp over the stenographer's desk shine into the elevator shaft?

A. It could not —— It did not, because here (Indicating) is the office with the desks and there is an aisle, like this, in between the desks and the railing, and here runs shelves and tables with goods, and that closed the entire view of the elevator; it closes the entire view of this light.

Q. How many shelves were there at that point?

A. They cross the store like this, tables, one after another, starting at the front as you enter and all the way to the elevator shaft is a space left to get on and off the elevator.

Q. Do those tables run sidewise or lengthwise?

A. Sidewise.

Q. How far apart are the shelves?

The Court: Do you mean tables or shelves?

Q. Speaking of the shelves, do they run lengthwise or sidewise?

A. Across the store.

The Court: Are you speaking of the shelves or tables?

The Witness: The tables.

Q. I am speaking about the shelves.

A. The shelves are up against the walls.

Q. When you say "shelves" do you mean tables?

A. Yes, across the store; they are tables and they are pretty high.

Q. How high were they?

A. Well, if you will stand on that side of one of those tables and I stand on the other side you would not see me.

Q. Do you mean the table itself or the table with the merchandise on?

A. With the merchandise on.

Q. How far apart were those aisles or tables?

A. I could not say; probably enough room for a person to go between them.

Q. How far above the stenographer's desk was this electric light?

A. I don't remember. It was quite a lot over the desk, but I could not say how far.

Q. When you came down from the third to the second floor you got some gloves?

A. Yes.

Q. And you and Mr. Messler went to the first floor?

A. Yes, sir.

Q. All the while you were close together?

A. Yes, sir.

Q. Where were you with reference to Mr. Messler?

A. Behind him.

Q. How far behind him?

A. Right near.

Q. When you got down to the first floor you got into a conversation about merchandise and decided you would go to the third floor again?

A. Yes, sir.

Q. Where was that conversation?

A. I was near that desk where the light was and Mr. Messler was wrapping up the bundle for me and making out the bill and in the meantime I asked for the ladies' hose and he told me the first table near the window was where I could see that eight-dollar hose and I went over to look at that, and in the meantime Mr. Messler told me they were two dol-

lars and seventy-five cents apiece instead of twenty-five dollars a dozen.

Q. Where were you then, how far from the desk?

A. I figure it would be about twenty-five feet.

Q. What happened after that?

A. Mr. Messler told me, "Why don't you take the forty-six, and that will cost you two dollars and a quarter apiece instead of two seventy-five." I said, "All right. Will it be not too much trouble for you to get those?" And he said, "No, not at all. Come on; let us go up and get them."

Q. Where?

A. Up on the third floor.

Q. What happened then?

A. I followed him.

Q. How far from him did you walk.

A. Right in back of him.

Q. Did you wear rubber heels?

A. He waited for me.

Q. Did you wear rubber heels?

A. Yes, I always have rubber heels.

Mr. Heher: That is all.

Cross-examination.

By Mr. Gildea:

Q. Then you went right to the elevator?

A. No; we went down to the basement.

Q. Do you mean you went to the basement twice?

A. Yes, sir.

Re-direct examination.

By Mr. Heher:

Q. And then you came up from the basement and went to the elevator?
A. Yes, sir.
Q. How far behind Mr. Messler were you?
A. I followed him right up.
Q. Did you light the way for Mr. Messler?
A. Yes, sir.

Mr. Heher: That is all.

The Court: Do both sides rest?

Mr. Gildea: We rest.

Mr. Heher: We rest.

(Court and counsel retired to chambers.)

Mr. Gildea: I move for the direction of a verdict in favor of the defendant upon the ground that there is no evidence of negligence on the part of the defendant, and upon the ground that it appears from the testimony that the plaintiff was clearly guilty of contributory negligence.

(After argument.)

The Court: The motion will be denied.

Mr. Gildea: I pray an exception.

The Court: Note an exception.

(Mr. Gildea summed up for the defendant.)

(Mr. Heher summed up for the plaintiff.)

CHARGE OF THE COURT

OLIPHANT, J.:

Ladies and gentlemen of the jury: This is a suit by Benjamin Cohan, as plaintiff, against Murray, Griffith & Messler, Incorporated, a corporation, as defendant, for injuries which the plaintiff alleges he sustained by reason of falling down an elevator shaft on the premises of the defendant on January 3, 1928.

The plaintiff alleges that he went to the store of the defendant for the purpose of buying some goods; that he was invited to go into the premises and further that he went into an elevator which has been described in the testimony, into the shaft, the elevator not being there, and that he fell to the bottom of the shaft and sustained various injuries which have been related to you.

The defendant denies that there was any negligence on the part of the defendant and says that the plaintiff was not invited to go up on the elevator at the time in question and that he, therefore, was a trespasser in that part of the premises. The defendant further contends that the plaintiff was guilty of what is known in the law as contributory negligence and therefore the defendant should not answer to the plaintiff in damages.

The mere happening of the accident, unfortunate though it may have been, does not entitle the plaintiff to damages at the hands of the defendant. The plaintiff must prove his case by a fair preponderance of the evidence, and you have probably heard me say before that by the use of the word "preponderance" is not meant, necessarily, the greater num-

ber of witnesses on the one side than on the other, but rather the weight of the evidence, rather than the quantity.

The plaintiff charges that the defendant, acting through its agent, Mr. Messler, was guilty of negligence and that his injuries were caused by the negligence of the defendant. Negligence is the failure to use reasonable care. Reasonable care is defined as that which a reasonably prudent person would or would not have done under exactly the same circumstances. Before you can find the defendant liable you must find that it was guilty of negligence and that its negligence was the proximate cause of the accident. If you find from all the facts and circumstances in this case that the defendant was not negligent, or if it was negligent that that negligence was not the proximate cause of the accident, then your verdict will be in favor of the defendant and against the plaintiff, that of no cause of action.

In considering the question as to whether or not the defendant, acting through its agent, was negligent, you will want to know what duty the defendant owed to the plaintiff in a case of this nature. The law of this State is that an owner of property who by invitation express or implied induces persons to come upon his premises is under a duty to exercise ordinary care to render the premises reasonably safe for such purpose, or at least to abstain from any act that will make the entry upon or use of the premises dangerous. Now, granting that it appears that the plaintiff's entry, that is, the original entry upon the premises was by invitation of the owner, the question may also arise whether at the time the injury was received the plaintiff was in that part of the premises into which he was in-

vited to enter. The owner's liability for the condition of the premises is only co-extensive with his invitation. A person on private grounds or private property by invitation of the owner going of his own volition into other parts of the premises exceeds the bounds of his invitation and if he does not thereby become a trespasser, goes out of his way to create a risk for himself and, of course, if that is the situation, the duty that the owner owes is that of refraining from wilfully or wantonly injuring the plaintiff. In that connection it is perfectly proper for you to consider the fact as to their using the elevator at a previous occasion to the time at which the plaintiff was injured.

If you find that the defendant was guilty of negligence and that that negligence was the proximate cause of the accident, then, under the pleadings of this case, you must examine the conduct of the plaintiff, and if you should find from all the facts and circumstances of the case that the plaintiff was guilty of negligence which in any degree contributed to the proximate cause of the accident your verdict would be against the plaintiff and in favor of the defendant, that of no cause of action, because in this State we do not deal in degrees of negligence.

After considering all the facts and circumstances, if you find that the defendant was guilty of negligence and that that negligence was the proximate cause of the accident, and that the plaintiff was not guilty of any negligence which contributed in any degree to the proximate cause of the accident, then your verdict would be in favor of the plaintiff and against the defendant and you would proceed to assess damages. If you reach that point, the plaintiff is entitled to recover a reasonably fair amount of money for the injuries he sustained as the natural

and proximate result of this accident. That would include any pain and suffering which the plaintiff has undergone as the natural and proximate result of this accident, if he has undergone any such pain and suffering; it would also include any pain and suffering which he may undergo in the future as the natural and proximate result of this accident, if from the testimony you reach the conclusion that he will undergo any pain and suffering in the future; it would also include any expense which he has undergone as the natural and proximate result of this accident in an endeavor to effect a cure; and it would also include any expense which he will undergo in the future as the natural and proximate result of this accident in an endeavor to effect a cure; it would also include any diminution in income which he has sustained as the natural and proximate result of this accident, if there has been any. The testimony, as I remember it, was that his income the year before was about $6400 and his expense was about $2500. There is no direct testimony as to what his income and expenses have been since the accident, that I recollect. There is testimony that there has been a doctor's bill, I think, of $250; and there is further testimony of the employment of a helper, at the sum of $35 per week up until about September first of last year, and of part-time employment of that helper since that time.

Those are the elements of damage, if you reach that point. You are the sole judges of the facts in this case; you are not to be guided necessarily by what counsel have said with regard to the facts or by what the Court has said with regard thereto, but are to take your own recollection of what those facts are as they have been related to you by the various witnesses. You are also the sole judges of the

credit to be given the testimony which the various witnesses have adduced before you. I do not remember whether I covered it or not: In the elements of damage, loss of earning power would also be an element, if there is any loss of earning power.

You may take the exhibits and retire.

Mr. Gildea: I except to that part of your Honor's charge in which you said, "If you find that the defendant was negligent and the plaintiff was not guilty of contributory negligence and that the defendant's negligence was the proximate cause of the accident, then the plaintiff would be entitled to recover damages," upon the ground that it omits the possibility that the plaintiff might have exceeded his invitation, when the duty owed him was not to wilfully injure him.

The Court: Note an exception.

RULE TO SHOW CAUSE.
MERCER COUNTY CIRCUIT COURT.

BENJAMIN COHAN,
Plaintiff,

v.

MURRAY, GRIFFITH & MESSLER, Inc.,
Defendant.

Action at Law.
Rule to Show Cause.

Upon application made within six days after the rendering of the verdict herein:

It is on this 13th day of February, 1929, on motion of Edward L. Katzenbach, attorney for the defendant, ordered that the plaintiff show cause before this Court on Saturday, the 23rd day of February, 1929, why the verdict in this case should not be set aside and a new trial granted.

And it is further ordered that the said defendant be permitted to reserve all exceptions taken at the trial, and that this rule shall not preclude the taking of an appeal by said defendant.

A. DAYTON OLIPHANT,
Judge.

[ENDORSED.]

Service of the within rule to show cause is hereby acknowledged this 15th day of February, 1929.

ALEX. BUDSON,
Attorney for Plaintiff.

ORDER DISMISSING RULE TO SHOW CAUSE.

MERCER COUNTY CIRCUIT COURT.

BENJAMIN COHAN, *Plaintiff,* v. MURRAY, GRIFFITH & MESSLER, Inc., a corp., *Defendant.*	Action at Law. Order Dismissing Rule to Show Cause.

A rule to show cause having been entered in this cause on the 13th day of February, 1929, and this cause having been argued by Edward L. Katzenbach, attorney for the defendant, and Alexander Budson, attorney for the plaintiff, and the Court having considered the same and finding no cause for making the rule absolute:

It is thereupon, on this twentieth day of March, 1929, on motion of Alexander Budson, ordered that the said rule to show cause be, and the same is hereby dismissed with costs, and the judgment is hereby confirmed.

A. DAYTON OLIPHANT,
Judge.

NOTICE OF APPEAL.

MERCER COUNTY CIRCUIT COURT.

BENJAMIN COHAN, *Plaintiff,* v. MURRAY, GRIFFITH & MESSLER, Inc., *Defendant.*	Action at Law. Notice of Appeal.

To Alexander Budson, Esq., Attorney for the Plaintiff:

Take notice that the defendant appeals to the Court of Errors and Appeals of New Jersey from the whole of the judgment entered in this cause in favor of the plaintiff upon the following grounds:

1. The Court erred in denying the defendant's motion for the direction of a verdict in its favor.

2. The Court erred in charging the jury as follows:

"After considering all the facts and circumstances, if you find that the defendant was guilty of negligence and that that negligence was the proximate cause of the accident, and that the plaintiff was not guilty of any negligence which contributed

in any degree to the proximate cause of the accident, then your verdict would be in favor of the plaintiff and against the defendant and you would proceed to assess damages."

EDWARD L. KATZENBACH,
Attorney for Defendant.

[ENDORSED.]

Service of the within notice of appeal is hereby acknowledged this 16th day of April, 1929.

ALEX. BUDSON,
Attorney for Plaintiff.

New Jersey Court of Errors and Appeals

BENJAMIN COHAN,
Plaintiff-Appellee,

vs.

MURRAY, GRIFFITH & MESSLER, INC.,
Defendant-Appellant.

ACTION AT LAW
ON APPEAL

APPELLANT'S BRIEF

This action was instituted in the Mercer County Circuit Court by Benjamin Cohan to recover damages for injuries resulting from a fall down an elevator shaft from the first floor to the basement of the defendant's premises. The trial resulted in a verdict of $7000.00.

There are two grounds of appeal. The first is that the Court should have directed a verdict in favor of the defendant, and the second is that the Court erred in one particular in charging the jury.

THERE WAS NO EVIDENCE TENDING TO PROVE THE NEGLIGENCE ALLEGED IN THE COMPLAINT.

It is alleged in the complaint that the plaintiff, who had gone to the defendant's wholesale place of business on January 3, 1928, to purchase some merchandise, was injured because of the following negligence:

> "6. Thereafter the said Robert Messler, acting for and in behalf of the said corporation, negligently, carelessly and without regard to the safety of the plaintiff, invited the plaintiff to step into what he purported to be an elevator, *by lifting the door leading into the elevator and motioning to the plaintiff to step therein.*
>
> "7. *Relying upon the aforesaid invitation,* the plaintiff proceeded to step into the aforesaid elevator and so precipitated and fell into the bottom of the shaft of the aforesaid elevator." (p. 3.)

The only persons in the defendant's store at the time of the accident (the regular hour for closing having passed—p. 82) were Mr. Robert Messler and the plaintiff. The testimony of no other witnesses as to what occurred in the store, or the conditions existing at the time of the accident, was offered. The plaintiff sought to sustain the allegations of his complaint by testifying as follows:

After he entered the defendant's store, he and Mr. Messler went to the basement to try to turn on the lights on the third floor, where certain articles which the plaintiff desired to purchase were kept (p. 11). They came up from the basement to the first floor and there took the elevator to the third floor, where the plaintiff struck matches, as the lights had not been turned on by the effort to do so in the basement

(p. 12). Then the plaintiff decided that he wanted some gloves and he and Mr. Messler walked from the third floor to the second floor, procured the gloves, and then walked down to the first floor (p. 13). On the first floor the price of the underwear was ascertained and the plaintiff decided he would rather have underwear a size smaller, which would be cheaper. He then said that Mr. Messler suggested that they go down to the basement again and make another effort to turn the lights on (p. 14). Then Cohan said they came up to the first floor again to take the elevator (p. 14). Plaintiff testified at this point as follows:

> Q. Now, as you landed on the first floor again from the basement the second time, did Mr. Messler say anything to you?
>
> A. Yes. "Let us go up."
>
> Q. "Let us go up to the third floor?"
>
> A. "Let us go up to the third floor." And we went to the elevator and I was still striking matches until we got up on the first floor, and Mr. Messler says, "Let us go up," and I walked over and Mr. Messler had lifted up the gate.
>
> Q. You got to the elevator shaft, did you?
>
> A. Yes, sir.
>
> Q. And he did what?
>
> A. Mr. Messler lifted up the gate.
>
> Q. What were you doing at the time he was lifting up the gate?
>
> A. I was standing there.
>
> Q. Did you strike any matches at that particular moment?
>
> A. No.
>
> Q. As he lifted the gate, then what?
>
> A. I stepped in.
>
> Q. Where was he standing? Assume this is the entrance to the gate.

A. On the side.
Q. Show where he was standing.
A. This is the elevator shaft and Mr. Messler was on this side. He picked up the gate and stepped over on this side. (Indicating the left hand side facing the elevator.)

Mr. Messler's testimony was to the effect that after going to the third floor in the elevator and walking down to the second floor, and then to the first floor, Mr. Cohan asked about some ladies' hosiery which Mr. Messler said was on the first floor near the front of the store (p. 83). Messler was in the middle of the store at a desk when he told Cohan the price of the underwear which had been obtained on the third floor, and then Cohan said he would rather have the cheaper underwear. Mr. Messler started from the middle of the store to go to the rear and take the elevator up to the third floor and change the underwear when Mr. Cohan was standing in the front of the store near the ladies' hosiery (p. 83). He did not know Mr. Cohan had followed him to the elevator the second time until he heard a "thump" in the elevator shaft (pp. 83, 84). He denied that he had asked Mr. Cohan to go up stairs the second time or suggested that he go up (p. 84). (Cohan admitted that he wore rubber heels—p. 110.) Mr. Messler also said that only one trip had been made to the basement, and that he and Mr. Cohan did not go to the basement a second time (p. 85). Messler said that when he went to the elevator the second time he raised the gate and was reaching over to catch a cable to bring the elevator down when he heard a "thump" in the basement (p. 83). The "thump" apparently was Cohan striking the bottom of the shaft.

It was contended in the defendant's answer that Cohan was not invited, either expressly or impliedly, to enter the elevator upon the occasion of Mr. Messler's proposed second trip to the third floor. The defendant's position at the trial was that it was not necessary for the plaintiff to go to the third floor a second time, as the article to be purchased had been agreed upon and did not need to be selected, the third floor at that time not being lighted, and the defendant's place of business being closed for the day. Because of these contentions, the defendant could not object to the testimony offered by the plaintiff that Mr. Messler had said just prior to the accident, "Let us go up." This testimony bore upon the question of invitation, but not upon the question of negligence raised by the complaint.

The cross-examination of Mr. Messler, as to other ways of bringing down the elevator than by raising the door (pp. 103, *et seq.*), was proper cross-examination, not as showing a ground of negligence not alleged in the complaint, but to test Mr. Messler's credibility regarding his statement that he did not open the gate for Mr. Cohan to walk in.

It certainly is not the law that a defendant can be held liable in a negligence action for negligence not alleged in the complaint, simply because of evidence which the defendant cannot object to because it is material upon some other ground. In fact, the rule is clearly established that in a negligence action the plaintiff is entitled to succeed only when he proves the negligence alleged in the complaint. The issues raised by the pleadings are the only issues thoroughly tried out and the only ones which can be submitted to the jury.

Murphy v. North Jersey St. Ry. Co., 71 N. J. L. 5.
Garibaldi v. Rubenstein, 99 N. J. L. 223.
Oaklyn v. Rulofson, 98 N. J. L. 304.
Gilliard v. Public Service Railway Co., 94 N. J. L. 288.
Duel v. Mansfield Plumbing Co., 86 N. J. L. 582.

The only negligence alleged in the complaint is that Mr. Messler committed a negligent act "by lifting the door leading into the elevator and motioning to the plaintiff to step therein." Practically the plaintiff in his complaint rested his whole case upon an allegation that after lifting the door leading to the elevator Mr. Messler motioned to the plaintiff to step in. There was absolutely no evidence to support this allegation of negligence. No motion to amend was made and no other claim of negligence was put in issue. The plaintiff, having failed to sustain the allegation on which he rested his case, the Court should have directed a verdict in favor of the defendant.

ASSUMING THE TRUTH OF ALL THE PLAINTIFF'S TESTIMONY, MESSLER WAS NOT GUILTY OF ANY NEGLIGENCE.

The elevator in the premises of the defendant had, just a few minutes before the accident, been left at the third floor by Mr. Messler and the plaintiff. As has been said above, they walked down to the second floor and then down to the first floor. There was no one in the building but the plaintiff and Mr. Messler. This is admitted by the plaintiff (p. 37).

Assuming that Mr. Messler did say to the plaintiff, immediately prior to the accident, "Let us go up," and then walked to the elevator shaft and raised the gate and reached in for the cable, *how could it be said that it was negligent of him not to anticipate that the plaintiff would forget that the elevator was at the third floor, where they had both left it a few minutes before, and would walk into the dark elevator shaft and be injured?* He knew that Mr. Cohan knew where the elevator was, and he had no reason to suppose that Cohan would forget. Certainly reasonable care would not require Messler to anticipate that Cohan would forget a fact well known to them both and walk into a place which both knew to be dangerous.

COHAN WAS GUILTY OF CONTRIBUTORY NEGLIGENCE.

It is contended that Cohan was guilty of contributory negligence because,

(1) He knew that the elevator had been left at the third floor a few minutes before the accident, and

(2) He testified that he walked into the elevator shaft without being able to see whether the elevator was there or not. (There was a light about ten paces from the elevator—p. 86. This light was turned on, but Cohan testified that it did not light up the inside of the elevator shaft because of some tables which cut off its rays—pp. 107, 108.)

It clearly appears from the testimony that when Messler and Cohan went to the third floor together they got out of the elevator there and walked down to the second floor, and then down to the first floor

(p. 33). Cohan testified that on the trip up to the third floor Mr. Messler operated the elevator, that it was an "old style" elevator, and that nobody else was in the building (p. 32). Plaintiff had been up in the elevator before, but he could not say how many times (p. 33). He did not see the elevator sent down after they left it on the third floor (p. 33).

In this connection it should be borne in mind that the defendant's place of business had closed for the day; that Mr. Messler, who had been connected with the company for fifty-four years (p. 87), was endeavoring to serve the plaintiff, notwithstanding the fact that the place of business was closed, and that only Mr. Cohan and Mr. Messler were in the premises; that Mr. Cohan knew that the regular lights were not on, and had in some parts of the premises struck matches to supply light.

Cohan knew, as well as anyone else, at the time he approached the elevator shaft the second time, that the elevator was at the third floor. He knew it as well as Mr. Messler knew it. He said that while he could see Mr. Messler raise the gate and step over to the left, he could not see into the elevator shaft, and could not see that the elevator was not there (pp. 107, 108).

It is contended that Cohan did not act with reasonable prudence in walking into an elevator shaft when he had every reason to know that the elevator was not at the floor where he walked into the shaft, and that under all the circumstances of this case he was guilty of negligence in walking into the dark elevator shaft without ascertaining whether or not it was safe for him to do so.

Certainly in a man of reasonable prudence about

to take an elevator, the fact that he could not see into the shaft would cause him to consider the safety of entering it, and if Cohan had paused for a moment he would have recalled that the elevator had been left at the third floor. Certainly there was no evidence that Messler told Cohan to step into the elevator shaft, or made any motion to him to do so, although the complaint alleged Messler had motioned to Cohan to get into the elevator. Clearly Cohan, who admittedly stepped into an elevator shaft without being able to see whether or not it was safe for him to do so, was guilty of contributory negligence.

The plaintiff's motion for a directed verdict was based upon two grounds:

> (1) That there was no evidence of negligence, and
>
> (2) That the negligence of the plaintiff was clearly shown by his own testimony (p. 111).

THE COURT ERRED IN HIS CHARGE TO THE JURY.

In the defendant's answer and at the trial, one of the defenses urged was that the plaintiff was not invited to be in the part of the premises where he was injured at the time he was injured. There was a conflict in the testimony as to what occurred just prior to the accident when the plaintiff decided that he did not want the underwear which had been brought down from the third floor. Mr. Messler said that when he was told to change the underwear Mr. Cohan was in the front part of the store and Mr. Messler, without inviting the plaintiff to accompany him, started toward the rear to the elevator to

go to the third floor and get the underwear which the plaintiff desired (p. 83). When Mr. Messler started up the second time Mr. Cohan was at a table in the front of the store (p. 83). He did not ask Cohan to go up the second time (p. 84), and did not know that Mr. Cohan was following him to the elevator (p. 83). It was not necessary for Cohan to go to the third floor the second time, as Mr. Messler's trip was merely to get the same kind of underwear of a smaller size. And, as has been said above, the store was closed for the day.

There was a question for the jury as to whether or not the plaintiff was exceeding the bounds of his invitation at the time of the accident. The Court recognized this question and charged (p. 114):

> "A person on private grounds or private property by invitation of the owner going of his own volition into other parts of the premises exceeds the bounds of his invitation, and if he does not thereby become a trespasser, goes out of his way to create a risk for himself, and, of course, if that is the situation, the duty that the owner owes is that of refraining from wilfully or wantonly injuring the plaintiff. In that connection it is perfectly proper for you to consider the fact as to their using the elevator at a previous occasion to the time at which the plaintiff was injured."

No exception to this part of the charge was taken by the plaintiff.

Subsequently, the Court charged the jury as follows:

> *"After considering all the facts and circumstances,* if you find that the defendant was guilty of negligence and that that negligence was the proximate cause of the accident, and that the plaintiff was not guilty of any negli-

> gence which contributed in any degree to the proximate cause of the accident, then your verdict would be in favor of the plaintiff and against the defendant and you would proceed to assess damages."

The defendant took exception to this part of the charge, and called the Court's attention to the fact that it excluded the possibility that the jury might find that the plaintiff had exceeded his invitation, in which event negligence would not make the defendant liable. An exception was granted, but no further charge was made upon the point (p. 116).

Under our second quotation from the charge, the jury could have found the defendant liable even though the plaintiff had exceeded his invitation, if they believed that the defendant was negligent and the plaintiff was not guilty of contributory negligence. When the Court said, "After considering all the facts and circumstances" the defendant would be liable for negligence, he referred to the facts relative to the plaintiff's invitation to various parts of the premises in question. In other words, after telling the jury that if the plaintiff became a trespasser the owner of the property had only a duty to refrain from wilful or wanton injury, he later told the jury that, after considering all the facts and circumstances, if they found the defendant negligent and the plaintiff free from negligence that the defendant was liable. These two parts of the charge are inconsistent. That part of the charge which dealt with the law respecting invitation was entirely nullified by the latter part of the charge, which made the defendant's liability depend entirely upon negligence.

It has been held repeatedly in this State that where two distinct propositions are charged, one correct

and the other erroneous, the jury cannot decide which is right, and there is, consequently, reversible error in the record.

Metropolitan Construction Co. v. Brazos, 81 N. J. L. 649.
Niebel v. Winslow, 88 N. J. L. 191.
Collins v. Cent. R. R. Co. of N. J., 90 N. J. L., 593.
State v. Lionetti, 93 N. J. L. 24.
Brown v. Public Service Ry. Co., 98 N. J. L. 747.
Cox, et al., v. Rosenvinge, et al., 135 Atl. 59.

In the case of *McLaughlin v. Damboldt,* 1 N. J. Misc. R. 510, the Court said:

> "Our theory of jury trials proceeds upon the fundamental assumption that the jury will take the law from the court, not that they shall be judges of its correctness, or that as between two conflicting statements of the law they will unerringly single out the correct one."

The present case does not come within the rule laid down in *Redhing v. Central Railroad Co.,* 68 Law 641, where it was said:

> "Although sentences in a charge may, if read apart from their connection, need some qualification to render them accurate, yet if the qualification be given in the context *so that the jury cannot reasonably be thought to have been misled by the charge taken in its entirety,* there is no error."

In the present case the jury was instructed, in the first place, that if an invitee exceeds his invitation the owner's duty is not to wilfully or wantonly injure him, and in the second place, if, after considering all the facts and circumstances of the case, they found that the defendant was negligent and the plaintiff

free from negligence, that the defendant was liable for the plaintiff's injuries. Either the jury was told that negligence was equivalent to wilful or wanton injury, or it was told not to consider the question of whether or not the plaintiff exceeded his invitation. This was misleading and injurious to the defendant.

The rule that a charge must be taken in its entirety in determining whether or not it is correct only applies where "the jury cannot reasonably be thought to have been misled." It does not apply where two inconsistent statements are made, or where one part of a charge nullifies a previous portion. The cases cited above show this to be the law.

In the case of *Costello v. Hudson & M. R. Co.*, 145 Atl. 110, the trial court in charging the jury first said that the plaintiff's negligence would bar a recovery by him, and subsequently in his charge made the question of liability depend entirely upon whether or not the defendant was negligent. In reversing the judgment the court said:

> "We think also the court misled the jury in its charge by limiting the case to the defendant's negligence after having charged that the plaintiff's negligence was likewise involved."

Substantially the same thing happened in this case when the Court, after referring to the defendant's duty in case the plaintiff exceeded his invitation, limited the case entirely to the defendant's negligence and the plaintiff's contributory negligence.

It is respectfully submitted that the judgment in this case should be reversed.

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MacCrellish & Quigley Co., Printers, Trenton, N. J.

NEW JERSEY
Court of Errors and Appeals

BENJAMIN COHAN,
Plaintiff-Appellee,
vs.
MURRAY, GRIFFITH & MESSLER, INC.,
Defendant-Appellant.

Action at Law.
On Appeal.

BRIEF FOR PLAINTIFF-APPELLEE

On January 3, 1928, at about 5:45 P. M., the plaintiff, who conducted a tailor shop in Trenton, and in connection therewith dealt in wearing apparel, called at the defendant's wholesale establishment to make a purchase of merchandise. He was invited to enter by Robert A. Messler, the defendant's agent, who agreed to supply his needs. Business had been discontinued for the day, and the building was inadequately lighted. Mr. Messler attempted, without success, through the operation of the control switch in the basement, to secure additional light, and he then directed the plaintiff to proceed with him to the elevator on the first floor. They ascended in the elevator to the third floor, where the plaintiff selected some underwear. They then proceeded to the second floor, using the stairway, where the plaintiff made an additional purchase. They descended to the first floor, again using the stairway, when it was discovered that a mistake had been made in the price

of the merchandise purchased on the third floor. The plaintiff testified that Mr. Messler again requested him to accompany him on the elevator to the third floor; that he followed Mr. Messler to the elevator shaft; that the latter raised the elevator gate, and the plaintiff, thinking that the elevator was at that floor, walked into the open gateway and fell to the bottom of the pit, as the result of which he sustained severe and permanent injuries.

The plaintiff had a verdict for $7,000. Thereafter the defendant applied for and secured a rule, with a reservation of exceptions, directing the plaintiff to show cause why the verdict should not be set aside (Case, 117). At the argument of the rule, the defendant advanced, in support of its application for a new trial, each reason now relied upon for reversal, except that the trial court erred in charging the jury. In addition, the defendant contended that the verdict was excessive. Judge Oliphant discharged the rule to show cause, whereupon this appeal was taken.

The points made by the defendant in its brief will be discussed seriatim:

POINT I

As to the Alleged Absence of Evidence Tending to Prove the Negligence Charged in the Complaint

It is here contended by the defendant that "the only negligence alleged in the complaint is that Mr. Messler committed a negligent act 'by lifting the door leading into the elevator and motioning to the plaintiff to step therein,'" while "practically, the plaintiff in his complaint rested his whole case upon an allegation that after lifting the door leading to the elevator, Mr. Messler motioned to the plaintiff to step in." It is claimed that the plaintiff "failed to sustain the allegation on which he rested his case," and that, therefore, the Court should have directed a verdict in favor of the defendant.

This contention of the defendant is entirely without substance. The evidence fully supported the allegation of the complaint. Furthermore, this point was not made at the trial, and cannot be raised here. We will first allude briefly to the evidence pertinent to this inquiry.

When the plaintiff entered the defendant's establishment and informed Mr. Messler of his mission, the latter said, "Let us go down to the basement first and see if we can get any lights." Only two electric bulbs were giving light on the first floor. One was in the office in the front of the building, while the other was a shaded light over a stenographer's desk, a short distance to the rear (Case, 9, 10, 11). The first floor had a depth of 110 feet. In the rear there was a packing room about thirty feet deep, leaving the depth of the store from the Academy Street entrance to the packing room, eighty feet. The width of the store was forty feet (Case, 89). The building extended north from Academy Street, and the elevator shaft was located on the west side of the building about seventy feet from the front. The rear of the elevator shaft joined the packing room, while the front faced Academy Street (Case, 90). The stenographer's desk, over which the light was suspended, was located on the east side of the building, about thirty-five or forty feet from the front (Case, 91). This was a drop-light suspended from the ceiling, and the shaded bulb was about three feet above the desk (Case, 92). The rays of this light did not reach the elevator shaft. The shade concentrated the rays on the desk, and in addition, the floor space between the desk and the elevator shaft contained tables upon which merchandise had been placed, which obstructed the passage of all light rays to the elevator shaft (Case, 108).

In compliance with Mr. Messler's request, the plaintiff followed him to the basement, and at his suggestion, the plaintiff used lighted matches to guide their footsteps (Case, 11). Mr. Messler was unable to control the building lights through the basement switch, and he again requested the plaintiff to use matches to guide their

steps to the first floor. They ascended the stairs to the first floor, the plaintiff behind Mr. Messler, and journeyed to the elevator. Mr. Messler opened the elevator door. The plaintiff followed him into the cage and they ascended to the third floor. With the aid of the light given by the matches, they found the underwear, and the plaintiff selected what he needed. They descended the stairs to the second floor, where the plaintiff purchased gloves. There were no lights on this floor, and they were again required to use matches (Case, 12, 13). They then descended the stairs to the first floor, and at Mr. Messler's suggestion, the plaintiff walked to the front of the store to inspect the merchandise stored there. While he was so engaged, Mr. Messler called to him the price of the underwear which the plaintiff had selected on the third floor (Case, 13), and it was then discovered that a mistake in price had been made. The plaintiff asked for another size. In requesting Mr. Messler to procure him another size, the plaintiff asked, "Would it be too much trouble for you to get me the forty-six?" Mr. Messler replied, "No. All right; let us go." When the plaintiff walked over to him, Mr. Messler said, "We better go down and see if we can get lights," and, again using matches, they went to the basement. Mr. Messler again found himself unable to control the light through the switches, and he said to the plaintiff, "Let us go up. We will find it." They walked up the stairs, the plaintiff behind Mr. Messler, and when they reached the first floor, Mr. Messler said, "Let us go up to the third floor." (Case, 14, 15). With the plaintiff behind him, Mr. Messler walked to the elevator, lifted the gate, stepped to the left side, all the while facing the plaintiff, and the latter walked into the gateway and fell into the pit (Case, 15, 16, 35). No warning was given to the plaintiff (Case, 17). Mr. Messler conceded this. He said he did not know the plaintiff was near him at the time (Case, 83). Furthermore, he admitted he did not know where the plaintiff was when he opened the elevator gate (Case, 100).

He did not know whether he looked around to see if the plaintiff was behind him when he started for the elevator shaft (Case, 101, 102). The plaintiff was a heavy man physically, and was not light of step, and Mr. Messler's hearing was good (Case, 102, 103).

It was very dark in the vicinity of the elevator shaft (Case, 30). The elevator itself contained no light or lighting facilities (Case, 12, 98).

The defendant's contention apparently is that there was a variance between the allegation and the proof, in that the complaint alleged that "after lifting the door leading to the elevator, Mr. Messler *motioned* to the plaintiff to step in," and that the evidence failed to sustain such allegation. This criticism is hypercritical, indeed. The complaint, in effect, alleged that the plaintiff was invited to enter the elevator, and the evidence sustained the allegation.

This point of variance was made for the first time on the hearing of the rule to show cause. The plaintiff's testimony early disclosed this so-called variance, but neither then nor at any other time during the course of the trial did the defendant move to suppress this testimony upon the ground that it made a case materially variant from that set forth in the complaint, nor did the defendant make any other motion to bring to the attention of the Court this alleged variance, which undoubtedly was the subject of amendment during the course of the trial. The defendant did not move for a nonsuit at the close of the plaintiff's case. The motion to direct a verdict at the close of the whole case was grounded upon the claims that there was "no evidence of negligence on the part of the defendant," and that the plaintiff was guilty of contributory negligence (Case, 111). No request to charge was presented by the defendant, nor was any exception raising this question taken to the charge.

We quote the cases applying the principles here applicable.

(1)

What Constitutes a Variance

Where a variance exists, it must, to be fatal, be prejudicial to the defendant in meeting the plaintiff's case. It must be such a departure in point of proof from the allegations of the complaint that the defendant was misled to his injury.

In *P. J. Carlin Const. Co.*, v. *Guerini Stone Co.*, 241 Fed. 545, the Circuit Court of Appeals held that where the complaint alleged that requisitions for payments were in accordance with the contract, evidence that the parties had agreed upon a different basis of payment, and that the requisitions corresponded therewith, was not admissible.

The judgment in this case was reversed by the United States Supreme Court.

Guerini Stone Co. v. *P. J. Carlin Const. Co.*, 248 U. S. 334, 39 S. Ct. 102, 63 L. Ed. 275.

In discussing the particular phase of that case pertinent to this inquiry, Mr. Justice Pitney said:

> "It was held that since the complaint alleged that plaintiff's demands for payments were made in accordance with the contract, evidence to show the agreement made on February 2, about unit prices was not admissible without an amendment of the complaint setting up a modification of the contract.
>
> "This view cannot be upheld. * * * Were there doubt about this, we should deem it proper that the complaint be amended, or treated as if amended, even in the Appellate Court, rather than that the judgment should be reversed for so unimportant a variance, not in the least prejudicial to defendant."

Where an action was based upon a contract to sink a tubular well for $2.75 a foot, and the case was tried and submitted upon that theory, but the complaint con-

tained an unnecesary allegation that the services were reasonably worth $2.75 a foot, testimony by plaintiff that his services were reasonably worth that sum did not amount to a shifting of position.

Snyder v. *Crescent Milling Co.,* 111 Minn. 234, 126 N. W. 822.

In *Jordan* v. *Reed,* 77 N. J. L. 584, at 590, Judge Green, speaking for this Court, said:

> "Variance, or discrepancy, between a material averment in pleading and the evidence adduced in support of it was, in early times, of vital importance. Since the enactment of the provisions now embodied in the Practice Act (Pamph. L. 1903, p. 571, Sec. 125), variance has with us been of less consequence. Nevertheless, today, it is sound law and sound reason that there must be no variance *to the prejudice of the adverse party* between the case declared upon and the case proven, and that a recovery must be *secundum allegata et probata. Hallock* v. *Commercial Insurance Co.,* 2 Dutcher 268, 274; *Bristow* v. *Wright, supra; Martinex* v. *Runkle,* 28 Vroom 111, 117, 122."

In holding that the defendant was prejudiced to his injury in being denied an opportunity to plead non-joinder in abatement, Judge Green said further:

> "On the other hand, it would not be consistent with justice now to amend the declaration so as to make it conform to the proofs. To use the language of Mr. Justice Dixon, in *Excelsior Electric Co.* v. *Sweet,* 30 Id. 441, 443, so to do would be 'to support a verdict which may have been rendered upon a matter which the parties *have not fairly litigated.*'
>
> "Such cases as *Price* v. *New Jersey Railroad and Transportation Co.,* 2 Id. 229, 231, 234, and *Redstrake* v. *Cumberland Insurance Co.,* 15 Id. 294, 296, would not justify an amendment."

Where a complaint alleges an agreement as to advertising upon a line rate, and the evidence shows a change from the line rate to an inch rate, at the request of defendants and for their convenience, the variance is immaterial.

Newell v. *National Advertising Co.,* 39 Colo. 295, 89 Pac. 792.

Only substantial and material variances between the pleadings and the proof will be regarded.

Mutual Fire Ins. Co. v. *Ritter,* 113 Md. 163, 77 Atl. 388.

If the variance between a particular and the evidence offered under it is such as would naturally mislead the party, the evidence ought to be rejected; otherwise, the party objecting ought to satisfy the Court by affidavit that he has been misled by the particular.

Bunting ads. Allen, 18 N. J. L. 299;
Stothoff v. *Dunham,* 19 N. J. L. 181.

In *Hallock* v. *Insurance Co.,* 26 N. J. L. 268, at 274, it was held:

> "As to the variance, there is no proof, nor even any allegation, that the defendants were misled by them to their prejudice, and they must consequently, under the forty-third section of the Act of 1855 (*Nix. Dig.* 641) be deemed to be immaterial."

It is the question which the parties hoped and intended to try, not the question at issue upon the record, which determines the real matter in controversy.

Miller v. *Railroad Co.,* 76 N. J. L. 282;
Hoboken v. *Gear,* 27 N. J. L. 273.

(2)

Assuming a material variance, the defendant is not entitled to a reversal of the judgment.

Timely objection to a variance must be made at the trial, and a failure to do so is fatal to the party asserting the discrepancy. Such defects can be obviated by amend-

ment, and a party cannot remain mute at the trial, take his chances on the verdict, and if unfavorable, assert that a variance nullifies the verdict and judgment.

A

The point of variance was not raised by an appropriate motion at the trial, and the defendant is now precluded from advancing it in support of its demand for a reversal of the judgment.

Early in the trial the alleged variance was disclosed to the defendant, but it made no motion with respect thereto, and evidently, judging from its course of conduct thereafter, it was not surprised. It is obvious that the defendant was not deceived, and suffered no embarrassment in meeting the case made by the plaintiff's proofs. The variance, if any, was therefore not prejudicial to the defendant, but even so, its subsequent conduct precludes it from relief now. The failure of a party, during the trial, to raise a question which could be obviated by an amendment, is fatal.

In *Hanrahan* v. *Metropolitan Life Ins. Co.*, 72 N. J. L. 504, a verdict had been directed for the defendant for breach of warranty. Mr. Justice Swayze, speaking for this Court, said:

> "The first question which arises is one of pleading. The plea avers a warranty that the assured had not been under the care of a physician within fifteen years. The warranty was that he had not been attended by a physician. Whether the plea sets forth the warranty with sufficient accuracy is a question we do not find necessary to determine. *The printed record does not disclose that this objection was made at the trial.*"

An objection of variance cannot be first raised on appeal.

Atlantic Coast Line R. Co. v. *Williams*, 284 Fed. 262;

Walker v. *Russell*, 240 Mass. 386, 134 N. E., 388;

Kennedy v. *City of Chicago,* 195 Ill. App. 58;

Twin City Fire Ins. Co. v. *Stockmen's Nat. Bank,* 261 Fed. 470;

Moskow v. *Burke,* 152 N. E. 321 (Mass.).

Where the cause is tried on issues not formally made in the pleadings, the parties may not shift their ground in the Appellate Court.

Lackland v. *Turner,* 207 Ala. 73, 91 So. 877.

Where the case was not tried with the rights of the parties restricted by the declaration, no question of pleading is open on report to the Supreme Judicial Court.

Walker Bros. Co. v. *Cox,* 238 Mass. 211, 130 N. E. 219.

Where plaintiff's testimony on issue not raised by the pleadings was admitted without objection, the variance is not available to defendant on appeal, since defendant's failure to object deprived plaintiff of the benefit of an amendment, which would have been asked and granted, if objection had been seasonably made.

Penna. R. Co. v. *Burgerson,* 296 Fed. 311.

A case will not be reviewed on a theory different from that on which it was tried below.

Phillips v. *Borough of Longport,* 90 N. J. L. 212, 100 Atl. 192;

Gridley v. *Wood,* 206 Ill. App. 505;

Stewart v. *Sulger,* 161 N. Y. S. 489;

Lorenz v. *Bull Dog Auto Ins. Asso.,* 277 S. W. 596 (Mo. App.).

Where the record shows that plaintiff's counsel questioned jurors on contributory negligence, it was held to disclose that the case was tried on the theory that contributory negligence was a proper issue.

Hoffman v. *Southern Pacific Co.,* 258 Pac. 397, (Cal. App.).

B

Assuming error at the trial, it was harmless.

To avail the defendant on appeal, the error must have been prejudicial. In the case *sub judice,* it is manifest that the defendant was not the victim of harmful error. No claim of surprise or inability to meet the case made by the plaintiff, because of the alleged variance, was made at the trial, nor could such claim be made with any degree of plausibility.

There is no showing that the substantial rights of the defendant have been injuriously affected, and the judgment should therefore be affirmed.

2 Supp. Comp. Stat. 2819, Sec. 163-303.

No judgment should be reversed in a Court of Error when it is clear that the error could not have prejudiced, and did not prejudice, the rights of the party against whom the ruling was made.

Lancaster v. *Collins,* 115 U. S. 222, 29 L. Ed. 373;

Carlisle Packing Co. v. *Sandanger,* 259 U. S. 225, 66 L. Ed. 927;

Passaic Valley Sewerage Com'rs v. *Holbrook, Cabot & Rollins Corp.,* 6 Fed. (2d) 721.

C

The power of amendment exists at all stages of the proceedings, in the Appellate Court on strict error, as well as in the lower court.

The statutes of New Jersey confer on the Courts a broad power of amendment, after as well as before verdict.

3 Comp. Stat. 4091;

1 Comp. Stat. 41.

A motion for amendment may be heard at any time, and at almost any stage of the cause.

Den, Hoover v. *Franklin,* 5 N. J. L. 850;

Reed v. *Barker,* 30 N. J. L. 379;

Joslin v. *Car Spring Co.,* 36 N. J. L. 146.

Amendments in matters of form that have not affected the fair trial and determination of the real question in controversy may be allowed in the Court of Review.

Holt v. *Trust Co.*, 76 N. J. L. 585, 21 L. R. A. (N. S.) 691.

If the real question in controversy between the parties to an action appears to have been fully and fairly tried and correctly settled, the Court of Errors will not reverse for an objection which may be avoided by an amendment of the pleadings, but in such case will exercise the power of amendment.

Ware v. *Insurance Co.*, 45 N. J. L. 177;

Electric Company v. *Sweet*, 57 N. J. L. 224;

Milk Company v. *Brandenburgh*, 40 N. J. L. 111;

Willis v. *Shinn*, 42 N. J. L. 138.

Where the original complaint rested on the theory that defendant had furnished an unsafe and improper crane, and the case proceeded to trial on double theory, failure of duty to supply proper crane, and negligence of railroad in handling it, and evidence of negligent operation came in without objection of defendant, it was a case in which the pleadings, if necessary, should be moulded to conform to issue actually tried.

Eannetta v. Delaware, L. & W. R. Co., 129 Atl. 232.

See, also, *Guerini Stone Co.* v. *P. J. Carlin Const. Co.*, 248 U. S. 334, 39 S. Ct. 102, 63 L. Ed. 275;

Price v. *N. J. R. R. & Trans. Co.*, 31 N. J. L. 229;

Willis v. *Fernald*, 33 N. J. L. 206;

Hanrahan v. *Metropolitan Life Ins. Co.*, 72 N. J. L. 504.

POINT II

The Evidence Established the Defendant's Negligence

The proofs fully supported the allegation of defendant's negligence. We have already referred, under Point I, to some of the evidence bearing upon this question. The plaintiff was admittedly the defendant's invitee. The store premises were practically unlighted. Mr. Messler requested the plaintiff's assistance in reaching the control switches in the basement, and to the latter was assigned the task of furnishing such light as matches would give to guide their steps through the building. Thereafter the plaintiff followed Mr. Messler closely as the latter moved about the building, furnishing such light as matches would give to guide them. Concededly, Mr. Messler invited the plaintiff to enter the elevator and ascend to the third floor. Upon their return to the first floor, it was learned that a mistake had been made in the price of the underwear selected on the third floor. While up to this point there was no substantial variance in the testimony of the plaintiff and Mr. Messler, they diverge in the recital of the events immediately preceding the plaintiff's fall into the elevator pit.

The plaintiff said that when he was informed by Mr. Messler of the mistake in the price of the merchandise, he expressed a wish for another size, and asked Mr. Messler whether it would be "too much trouble" to procure the desired size. The latter replied, "No. All right; let us go," and suggested that they return to the basement to make another effort to secure the needed light to move about the building and inspect the merchandise. They returned to the basement, the plaintiff guiding the way with the lighted matches, as he had on the previous journey, and Mr. Messler again found that his efforts were in vain. He then said to the plaintiff, "Let us go up. We will find it," and proceeded up the

stairs to the first floor, with the plaintiff to his rear (Case, 14). When they reached the first floor, Mr. Messler said, "Let us go up to the third floor," and continued walking to the elevator with the plaintiff following him (Case, 14, 15). Without any warning of danger, he raised the safety gate, stepped to the left of the opening, and the plaintiff stepped through the gateway, and fell into the pit. When Mr. Messler raised the gate and stepped to the left, he was facing plaintiff. The gate was raised high enough to allow the plaintiff to walk in without stooping (Case, 35).

Mr. Messler denied that they went to the basement a second time. He said that when they returned to the first floor, after selecting the underwear on the third, he directed the plaintiff to a table containing merchandise in the front of the store. While the plaintiff was engaged in inspecting this merchandise, Mr. Messler called the price of the underwear to him, and the plaintiff then asked for another size. Mr. Messler then testified (Case, 83):

"Well, he insisted on getting the goods and I walked from where I was standing to the elevator and raised the gate and I was about reaching over the gate to catch the cable and draw it down and I heard this thump in the basement. I did not know where he was. I did not know that he was back of me and I did not hear of him at all since I left there to go upstairs and—"

Mr. Messler admitted that the plaintiff accompanied him to the basement, although he could not recall whether he had asked him to do so (Case, 96). While there he did not make an effort to secure additional light for the first floor, *although he could have procured such light if he had desired. He said it was not needed.* Apparently, the witness's visit to the basement was to procure light for the upper floors. He knew that the plaintiff followed him from the basement to the elevator on the first floor. The witness was, of course, referring to the time when they ascended to the third floor on the elevator (Case, 97).

The safety gate to the elevator shaft automatically drops when the elevator moves from the floor (Case, 97). The gate was six feet high, and contained an opening through which the arm could be extended for the purpose of reaching the cable and moving the elevator (Case, 98, 103). In this manner, Mr. Messler could have brought the elevator down to the first floor without moving the safety gate. Had he been ordinarily prudent, he would have brought the elevator down without raising the gate, and thus the injury to the plaintiff would have been avoided.

On cross-examination Mr. Messler again gave his version of the events immediately preceding plaintiff's fall. He said (Case, 100):

"And he stated that he must have it that night, and at that time he was at the hose desk and I was at the desk of the stenographer, in the middle of the room and I went and opened the gate and started to pull down the elevator and *I had not heard where he was or if he was coming;* I did not know anything about it except when he fell through the opening."

When asked if, when he started for the elevator, he looked around to see whether the plaintiff was behind him, he said, *"I cannot say that I did; I do not know."* (Case, 101).

He testified further on this point (Case, 102):

"Q. When you turned to go to the elevator shaft for the purpose of going again to the third floor do you know how far away from you he was?

A. *I did not see him at all.*

Q. What?

A. *I do not know where he was. There was no need of his going with me. I knew where to go to get it and I went off to get it.*

Q. Do you mean that when you turned to the elevator shaft you did not know where he was then?

A. *I did not know, no. I supposed he was up by the hosiery but I did not know.*

Q. And you walked leisurely to the elevator shaft?
A. Yes, sir.
Q. You had raised the door?
A. I raised the gate.
Q. And then you were reaching for the cable?
A. Yes, sir.
Q. You did not hear him walking toward the elevator shaft before he fell?
A. I did not.
Q. There was no one else in that room?
A. I did not hear him.
Q. There was no noise?
A. No.
Q. Mr. Cohan was a heavy man, wasn't he?
A. Yes, sir.
Q. He was not unusually light of step?
A. No."

We respectfully submit that no argument is needed to demonstrate the fallacy of defendant's contention that this evidence does not establish the defendant's negligence.

From the time the plaintiff entered the building, he closely followed Mr. Messler as the latter moved about. Concededly, he entered the elevator and ascended to the third floor at the invitation of Mr. Messler. The plaintiff's testimony establishes that he approached the elevator a second time at Mr. Messler's invitation. The raising of the gate was clearly a negligent act. It was an unnecessary thing to do. This was a safety gate to close and guard the shaft doorway, and it had an opening through which the elevator could be moved without raising the gate. Even though Mr. Messler did not extend an expressed invitation to plaintiff to ascend again to the third floor, his conduct in raising the gate constituted negligence. In the exercise of ordinary prudence, he should have ascertained whether the plaintiff, his invitee, was nearby when the gate was raised, and proper warning should have been given that the raising of the gate created a place of great danger.

It is therefore respectfully submitted that the evidence clearly established the defendant's negligence, as alleged in the complaint.

POINT III

As to the Alleged Contributory Negligence of Plaintiff

The defendant contends that the plaintiff was guilty of contributory negligence, because (1) he knew that the elevator had been left at the third floor a few minutes before the accident, and (2) he walked into the elevator shaft without being able to see whether the elevator was there or not.

As to the first reason, it is obvious that if the plaintiff knew the elevator was not at the first floor, he would not have walked into the shaft when Mr. Messler raised the gate. The plaintiff assumed, and reasonably so, that when Mr. Messler raised the gate and stepped to the left side of the gateway, all the while facing the plaintiff, that the elevator was at that floor and that he was invited to enter, especially when Mr. Messler had a moment previously requested the plaintiff to ascend with him to the third floor. It must be borne in mind that a very little while before, at Mr. Messler's request, the plaintiff accompanied him on the elevator to the third floor.

The plaintiff did not know the type of the elevator, nor the method of its operation (Case, 32). He had seen the movement of elevators controlled from the outside of the shaft (Case, 33). Because of the darkness he could not determine from observation whether the cage was at the first floor when the gate was raised, although he "was sure the elevator was there;" he "thought it was brought down" (Case, 36, 37). He further testified (Case, 37, 38, 39):

"Q. You knew the elevator had been left on the third floor?

A. Yes, but I thought it was there then.

Q. How could it get there?

A. I thought Mr. Messler brought it down.

Q. How could he?

A. I don't know. If I had known the elevator was not there I would not have walked in.

Q. You did not think whether it was there or not, did you?

A. I thought the gate was open, and Mr. Messler said, 'Let's go up.'

Q. Now, you know Mr. Messler reached in to get the rope to bring the elevator down?

A. I did not know that. I knew when the gate goes up the elevator is there if it is open.

Q. Well, it was not there that time?

A. No.

Q. Then you were wrong?

A. Yes, I know the elevator shaft would not be open unless the elevator is there.

By the Court:

Q. You know that is not right, Mr. Cohan. You are apparently misconstruing your own thoughts.

A. I have been on elevators and I notice when they get to a floor they stop and open the doors and get out, and if it is not on a level with the floor they cannot open the door.

Q. You mean by that the elevators in modern buildings?

A. I don't know then. I don't go so much on elevators or know anything different. I thought the gate of the elevator shaft would not open unless the elevator was there.

By Mr. Gildea:

Q. Mr. Messler opened it, didn't he?

A. Yes, sir.

Q. He reached down and lifted the gate up, didn't he?

A. Yes, sir.

Q. You have never seen an elevator that had a gate open by a man reaching down and lifting it up or lifting

up a door which would not open unless the elevator was there, have you?

A. I have not taken notice.

Q. These elevators you are talking about are the elevators that have doors that will not open unless the elevator is there?

A. I thought they were all alike.

Q. Do you mean to say that you think an elevator in a warehouse of a wholesale concern like this was the same as the elevator in a modern business building?

A. I do not mean to say anything. I do not know the difference.

Q. Then you did not know anything about this elevator, did you?

A. No.

Q. Except you did know you left it at the third floor and got out there?

A. Yes; we got out there and walked down, but I did not know the elevator shaft would open up if the elevator was not there."

Mr. Messler testified that this was a safety gate; that it automatically dropped when the elevator moved from the floor; that the elevator could be operated from any floor, without raising the door, by extending the arm through the gate to the operating cable (Case, 97, 98, 99, 103). He admitted that from the outside of the shaft on the third floor, he could move the elevator down to the first floor (Case, 99).

This was a protection gate, and it did not serve that purpose when it was raised to reach the cable for the purpose of bringing the car from another floor. This was a dangerous and unnecessary departure from an essential rule of safety. The plaintiff was justified in assuming that Mr. Messler would not do the unusual, unnecessary and dangerous thing, in the operation of the elevator. It was his right to assume that the raising of this gate was indicative of the presence of the elevator at that floor.

It cannot be said that in stepping into a dark elevator shaft the plaintiff was guilty of negligence. In doing so, he was acting on the invitation of Mr. Messler, and he was justified in assuming that the latter would not invite him into a place of danger.

It cannot be said, as a matter of law, that a reasonably prudent person would not have acted as the plaintiff did. In its most favorable aspect to the defendant, the question was one for the jury, and it was submitted to them under proper instructions to which no exception was taken.

POINT IV

As to Alleged Error in Charge by the Court

The defendant contends that the trial Court erred in charging the jury as follows (Case, 114):

"After considering all the facts and circumstances, if you find that the defendant was guilty of negligence and that that negligence was the proximate cause of the accident, and that the plaintiff was not guilty of any negligence which contributed in any degree to the proximate cause of the accident, then your verdict would be in favor of the plaintiff and against the defendant and you would proceed to assess damages."

Counsel for the defendant excepted to this part of the charge, assigning as the reason that "it omits the possibility that the plaintiff might have exceeded his invitation, when the duty owed him was not to wilfully injure him" (Case, 116).

It is contended in the brief that the error lies in this, that "the jury could have found the defendant liable even though the plaintiff had exceeded his invitation, if they believed that the defendant was negligent and the plaintiff was not guilty of contributory negligence;" that there was an inconsistency between this and other instructions in the charge, and that, therefore, the jury was misled as to the injury of the defendant. The contention of the defendant seems to be that by the state-

ment to which exception was taken, the jury was told, in effect, that if the defendant was negligent and the plaintiff free from negligence, the latter should recover even though he had exceeded his invitation. This is not so.

A reading of the entire charge on this phase of the case discloses that the criticism of the defendant is without merit. The charge follows (Case, 113, 114):

"In considering the question as to whether or not the defendant, acting through its agent, *was negligent, you will want to know what duty the defendant owed to the plaintiff in a case of this nature.* The law of this State is that an owner of property who by *invitation express or implied induces persons to come upon his premises is under a duty to exercise ordinary care to render the premises reasonably safe for such purpose,* or at least to abstain from any act that will make the entry upon or use of the premises dangerous. Now, granting that it appears that the plaintiff's entry, that is, the original entry upon the premises was by invitation of the owner, the question may also arise whether at the time the injury was received the plaintiff was in that part of the premises into which he was invited to enter. *The owner's liability for the condition of the premises is only co-extensive with his invitation.* A person on private grounds or private property by invitation of the owner *going of his own volition into other parts of the premises exceeds the bounds of his invitation and if he does not thereby become a trespasser, goes out of his way to create a risk for himself and, of course, if that is the situation, the duty that the owner owes is that of refraining from wilfully or wantonly injuring the plaintiff.* In that connection it is perfectly proper for you to consider the fact as to their using the elevator at a previous occasion to the time at which the plaintiff was injured.

"If you find that the defendant was guilty of negligence and that that negligence was the proximate cause of the accident, then, under the pleadings of this case,

you must examine the conduct of the plaintiff, and if you should find from all the facts and circumstances of the case that the plaintiff was guilty of negligence which in any degree contributed to the proximate cause of the accident your verdict would be against the plaintiff and in favor of the defendant, that of no cause of action, because in this State we do not deal in degrees of negligence."

Then follows the portion of the charge now assigned as error.

It will thus be seen that the Court defined negligence as a breach of a duty owing by the defendant to the plaintiff. This duty was carefully defined as the *exercise of ordinary care* to render the premises reasonably safe. The jury were told that the duty did not arise unless there was an invitation to enter the premises, express or implied. The court also carefully instructed the jury that even though the original entry upon the premises was by invitation of the owner, the question would arise as to whether at the time the injury was received, the plaintiff was still the invitee of the land-owner; that the owner's liability for the condition of the premises was *only co-extensive with his invitation; and* that if the plaintiff *exceeded the bounds of his invitation,* the duty of the land-owner was to refrain from *wilful or wanton acts.*

The Court thus made it clear that negligence on the part of the defendant could only be predicated upon the breach of a duty, which would not arise unless, at the time of the injury, the plaintiff was still the invitee of the defendant and had not become a mere licensee or trespasser.

The entire charge must be examined, and if the principle of law applicable is accurately stated, there is no error.

In *McLaughlin* v. *Damboldt,* 100 N. J. L. 127, 125 Atl., 314, the Supreme Court reversed a judgment for the plaintiff upon the ground that one paragraph of the charge, when severed from the context, instructed the

jury that it could not find the plaintiff guilty of contributory negligence, unless the defendant was free from negligence, and that was not the law.

This Court reversed the judgment of the Supreme Court, and in an opinion by Mr. Justice Black said:

"The paragraph criticized, when considered in reference to the context, is an accurate statement of the law. But if the paragraph of the charge criticized, considered apart from its context, is susceptible to such meaning, it is then difficult for us to see how it harmed the defendant. The utmost that can be said is that such paragraph *is not a complete statement of the law.* It certainly *is not a contradictory statement from the other portions of the charge* * * *. It falls within that other well-recognized rule, that the whole charge must be looked at. *Sullivan* v. *North Hudson R. R. Co.,* 51 N. J. L. 542, 18 Atl. 689; *Veader* v. *Veader,* 89 N. J. L., 728, 99 Atl. 309; *Brown* v. *Spence,* 79 N. J. L., 452, 75 Atl. 154; *Kargman* v. *Carlo,* 85 N. J. L., 633, 90 Atl. 292; *Shoeffler* v. *Phillipsburg Horse Car R. R. Co.,* 90 N. J. L. 235, 100 Atl. 199. And when so regarded, if it was right, there is no error. The instruction is to be construed as a whole, and the legal rule, which was declared, thus extracted. *State* v. *Sage,* 99 N. J. L., 229, 122 Atl. 827; *State* v. *Banusik,* 84 N. J. L., 640, 64 Atl. 994."

In *Glaseman* v. *Erie R. R. Co.,* 130 Atl. 445 (N. J. Sup.), the jury in an action to recover damages for personal injuries had been instructed that exculpation was for the defendant. The Supreme Court said:

> "Moreover, instructing the jury that exculpation was for the defendant, it was manifest that the jury could not reasonably have interpreted the instruction as meaning more than that negligence might be found in the absence of exculpation."

In *Coll* v. *Lehigh Valley R. R. C.,* 130 Atl. 225, Aff. 132 Atl. 922, 102 N. J. L., 713, the Supreme Court said:

> "But apart from this practice rule, we think no harmful error was committed. The point of the present objection seems to be that when the judge spoke of the 'inspection part of the alleged negligence,' the jury must have understood him to confine contributory negligence to lack of inspection alone, excluding failure to repair, and so on. But reading the instruction in full, it is plain that he was drawing a distinction between liability under the general act and under the Safety Appliance Act, and that while it was a verbal inaccuracy to speak of 'inspection part,' the jury could not have been misled into drawing the fine distinction now suggested by counsel."

In *Singer* v. *Home Ins. Co.,* 135 Atl. 274 (N. J. Sup.), the Supreme Court said:

> "The first reason for the rule is that the Court charged that a warranty of title made a good faith, does not of itself deprive the insured of his rights under the policy, even if he was not the unqualified owner. This was charged in reference to false swearing in representation of ownership made in proof of loss. The Court elsewhere properly charged on the sole and unconditional ownership clause of the policy, and the matter was also adequately covered in the defendant's seventh request which was fully charged."

In *Nolan* v. *Public Ry. Co.,* 132 Atl. 237 (N. J. Sup.), the trial Court charged that if the jury found the defendant negligent and the plaintiff free of negligence, they must return a verdict in favor of the plaintiff. It was contended that the Court omitted a material factor, viz: that the negligence of the defendant must have been the proximate cause of the injury. The Supreme Court, in answering this contention, said:

> "But the excerpt recited is only a portion of the instruction upon the subject of negligence on

> the part of the defendant and contributory negligence on the part of the plaintiff; the Court having already told the jury that, in order to recover, the plaintiff must show that there was negligence on the part of the defendant causing the accident, and also that she herself, at the same time, was free from any contributory negligence, and that these two elements were necessary to the plaintiff's case. That instruction is to be read as a whole, and, when so read, is accurate, so far as the criticism directed against it is concerned."

In *Fuller* v. *State Cafeteria,* 130 Atl. 4 (N. J. Sup.), the Supreme Court held that when the trial Court told the jury they must consider which side had convinced them by the greater weight of the evidence and render a verdict accordingly, *it must be taken in connection with what he had already said as to the burden imposed by the law upon the plaintiff.* It was held there was no such manifest injury to the defendant as is contemplated by the statute.

In *Lenz* v. *Public Service Ry. Co.,* 98 N. J. L., 849 (C. E. A.), 121 Atl. 741, this Court said:

> "The inquiry should be whether the jury would have been misled to the injury of the defendant by the language of the Court, and in this case we think it clear, in view of the context, that they could not have been misled by the charge as an entirety. *Brown* v. *Spence,* 79 N. J. L., 452, 75 Atl. 154; *Crosby* v. *Wells,* 73 N. J. L., 811, 67 Atl. 295."

A charge is not to be taken piecemeal, but as a whole.

> *Republic of France* v. *Lehigh Valley R. Co.,* 96 N. J. L. 25, 114 Atl. 242.

It is improper to take an isolated portion of a Court's charge, and from such portion, base an argument. The charge must on every point be considered as a whole.

> *Anthony* v. *Public Transit Co.,* 130 Atl. 895 (N. J. Sup.);

U. S. Agency v. *Metropolitan Lumber Co.*, 137 Atl. 432.

In *Helstowski* v. *Greenberg*, 126 Atl. 615, Aff. 130 Atl. 918, 101 N. J. L., 560, the Supreme Court held that an expression in the trial Court's charge was not objectionable in view of the language preceding such expression.

In *Mulligan* v. *Losi*, 139 Atl. 387, the Supreme Court said:

> "Next, it is argued that the Court erred in charging the law of negligence, because it failed to state expressly that the negligence of the defendant, if it was shown, must have been the natural and proximate cause of the collision. We think there is nothing in this contention. The whole charge was based *upon the necessary implication* that the plaintiff could not recover unless the negligence of the defendant, if it was shown to exist, was the sole and proximate cause of the collision."

Criticism aimed at a detached portion of the charge relating to contributory negligence is not error, particularly when read in connection with the whole charge on that subject. A charge must be construed in its entirety.

M. Reichman & Son, Inc. v. *Public Service Co.*, 6. Misc. R. 636, 142 Atl. 431.

See, also, *Harper* v. *City of East Orange*, 143 Atl. 435 (C. E. A.).

In *J. D. Loiseaux Lumber Co.* v. *O'Reilly*, 141 Atl. 763, Chancellor Walker, in applying this principle, said:

> "In *Redhing* v. *Central R. R. Co.*, 68 N. J. L., 641, 54 Atl. 431, this Court held that although sentences in a charge may, if read apart from their connection, need some qualification to render them accurate, yet, if the qualification be given in the context, so that the jury cannot reasonably be thought to have been misled by the charge taken in its entirety, there is no error.

See, also, *Brown* v. *Spence*, 79 N. J. L., 452, 75 Atl. 154; *State* v. *Timmerari*, 96 N. J. L., 442, 445, 115 Atl. 394 * * *.

"The defendant-appellant has selected a mere excerpt from the charge; but the whole charge taken and considered all together rightly instructed the jury on this issue of the case."

The portion of the charge excepted to was not intended to completely state the law applicable to the case *sub-judici*. It was the concluding statement of the applicable principles, and in instructing the jury that if the defendant was guilty of negligence a verdict should be returned for the plaintiff providing the plaintiff was not also at fault, the Court manifestly had in mind negligence as he had previously defined it, a violation of duty growing out of the presence of the plaintiff upon the premises by invitation of the owner, and the jury undoubtedly understood it in that sense. The charge as a whole amply protected the defendant. If the excerpt in question did not fully state the applicable rule, it could not have injuriously affected the substantial rights of the defendant.

Furthermore, the evidence did not present any controversy as to the plaintiff's status. He was upon the premises of the defendant by invitation at the time he sustained the injuries. Concededly, it was the defendant's duty to use reasonable care to guard the plaintiff against injury at the time he fell into the elevator shaft, and this without regard to whether he was expressly invited to accompany Mr. Messler again to the third floor.

It is respectfully submitted that the rule to show cause should be discharged.

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