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Notice of Appeal.

(Filed March 30, 1927.)

Hudson County Circuit Court

10

To Brenner & Kresch, Esqs., Attorneys of Plaintiffs.

Sirs:

TAKE NOTICE that the defendants appeal to the New Jersey Supreme Court from the whole of the judgment entered in this cause.

Respectfully,

20

COLLINS & CORBIN,
Attorneys of Defendants.

Dated, March 25, 1927.

Service acknowledged this 26th day of March, 1927.

BRENNER & KRESCH,
Attorneys of Plaintiffs.

30

40

Grounds of Appeal.

(Filed April 25, 1927.)

NEW JERSEY SUPREME COURT.

10

MADLINE DECKER, *et al.*,
Plaintiffs-Respondents,

v.

ISADORE MILLER, *et al.*,
Defendants-Appellants.

Action at Law.

Grounds of
Appeal.

The appellants state the following grounds of appeal:

20

1. The trial judge erroneously refused to non-suit the plaintiffs and to direct a verdict in favor of the defendants when thereunto respectively moved, whereas said motions should have been granted on the following ground urged in support thereof:

a. There was no evidence of any negligence on the part of the defendants, as alleged in the complaint which was the proximate cause of the accident.

30

2. The trial judge erroneously charged the jury as follows:

The party whose negligence is the proximate cause of the injury is the party who is responsible, and that is what you have got to determine in this case, namely, first of all, of course, were the defendant owners negligent? Was the construction of this scuttle, in the manner in which it was constructed,

40

Grounds of Appeal.

negligent? If it was not, in your judgment, that ends the case and there must be a verdict of no cause of action.

You have heard it defined as to just what the Tenement House Law requires. I have not got the law to quote it exactly to you, but I may say to you that counsel has quoted it exactly. This case is predicated, as I understand it, by the plaintiffs, upon a violation of the Tenement House Law, plus a violation of the Common Law due to the negligent construction of this particular scuttle.

10

If you believe that this scuttle was constructed in violation of the provisions of the Tenement House Law, that in itself is not actionable *per se*, is not of itself sufficient to cause a recovery and to say that the defendants were negligent because of that alone. But it is one of those cases wherein if the defendants did allow to continue a scuttle which by its construction was a violation of the act in question, that is one of the facts which may be taken into consideration in determining the whole question of whether or not the defendants in this case were negligent.

20

30

Now, then, you also will take into consideration the whole construction and operation and maintenance and control of this scuttle and the skylight in question, the roof of this building in which the tenants were living, and to which they had a right to go, and determine whether or not there was a negligent operation, maintenance, control or construction thereof, by the defendants,

40

Complaint.

and whether because of that negligence this plaintiff suffered injuries and whether or not that negligence was the proximate cause of this plaintiff's injuries.

10

Respectfully,

COLLINS & CORBIN,
Attorneys of Defendants-Appellants.

Dated April 14, 1927.

Service acknowledged April 15, 1927.

BRENNER & KRESCH,
Attorneys of Plaintiffs-Respondents.

20

Complaint.

(Filed April 24, 1926.)

Plaintiffs, residing in the City of Bayonne, County of Hudson and State of New Jersey, say that,

FIRST COUNT.

30

1. On or about May 16, 1925, and prior thereto the defendants, Isadore Miller and Julius Gershanowitz were the owners, proprietors or lessees of certain lands and tenements located and designated as No. 74 Avenue C, in the said City of Bayonne, consisting of one two-story building divided into four living apartments.

40

2. The said defendants retained possession and were in charge of the halls, roof and stairways of the said building so that the same should not become dangerous to the tenants of the said building or to the public who should or might have occasion to use the said premises.

Complaint.

3. On or about the date aforesaid and prior thereto, the roof or the trap door leading to the roof of the said building became out of repair and was in a dangerous condition, of which fact the said defendants had notice and knowledge, and it thereby became and was the duty of the said defendants to keep the said roof and trap door of the said building in good and proper repair as aforesaid and not to permit it to become dangerous to the tenants or occupants thereof.

10

4. By reason of the carelessness and negligence of the said defendants in failing to keep the said trap door in good repair, the said trap door fell upon the glass skylight causing the glass to break and to fall upon the said plaintiff Madeline Decker, a tenant of one of the apartments in said building, who was then and there in the hallway of said premises, and as the result thereof, the said plaintiff was severely and permanently injured.

20

5. The negligence of the defendants Isadore Miller and Julius Gershanowitz, their agents, servants or employees consisted in this,

(a) They failed to keep the trap door in a safe and proper condition.

30

(b) That they unlawfully and negligently permitted the said trap door to become defective, thereby creating a dangerous condition in the hallway of said house.

6. By reason of the carelessness and negligence of the defendants as aforesaid, the plaintiff Madeline Decker sustained severe bruises, lacerations, wounds and other injuries to her head, shoulders and other parts of her body, such injuries or a

40

Complaint.

portion thereof being of a permanent nature, and as a result thereof, the plaintiff Madeline Decker has undergone and in the future will undergo great pain and suffering.

10 To the damage of the plaintiff Madeline Decker, \$5,000.

SECOND COUNT.

1. Plaintiff, Ernest Decker, hereby makes paragraphs 1 to 7 of the First Count a part of this Count in the same manner and to the same effect as if said paragraphs were herein specifically repeated and realleged, and further says,

2. He is the husband of the said Madeline Decker.

20 3. By reason of the negligence and carelessness of the defendants and the injuries resulting therefrom, the plaintiff Ernest Decker has been obliged to lay out and expend large sums of money for medicine and medical attention in endeavoring to cure the said Madeline Decker of the injuries sustained by her as aforesaid, and he, the said Ernest Decker has been and will be deprived of the comfort, society and services of his said wife, Madeline Decker, and has been and will be obliged
30 to hire persons to take care of the household duties while his said wife is physically incapable of performing the same.

To the damage of the plaintiff Ernest Decker, \$2,500.

LAZARUS, BRENNER & VICKERS,
Attorneys of Plaintiffs.

Answer.

(Filed May 17, 1926.)

The defendants, residing in Jersey City, Hudson County, New Jersey, say that:

FIRST DEFENSE TO FIRST COUNT.

- 1. They admit paragraph 1. 10
- 2. They deny paragraph 2.
- 3. They deny paragraph 3.
- 4. They deny paragraph 4.
- 5. They deny paragraph 5.
- 6. They deny paragraph 6.
- 7. They deny paragraph 7.

FIRST DEFENSE TO SECOND COUNT.

- 1. They repeat their answers to paragraphs 1 to 7 of the First Count. 20
- 2. They have no knowledge or information sufficient to form a belief as to paragraph 2.
- 3. They deny paragraph 3.

SECOND DEFENSE TO EACH COUNT.

The alleged accident set forth in the complaint was due to contributory negligence on the part of the plaintiff Madeline Decker in failing to exercise
30 reasonable care for her own safety.

THIRD DEFENSE TO EACH COUNT.

The alleged accident set forth in the complaint was due to contributory negligence on the part of the plaintiff Madeline Decker in failing to look or listen or otherwise inform herself of the conditions of which she complains.

Reply and Amendment to Complaint.

FOURTH DEFENSE TO EACH COUNT.

10 The right, if any, of the plaintiffs to recover against the defendants is under the Workmen's Compensation Act of the State of New Jersey, because the plaintiff Madeline Decker was employed on the said premises by the defendant as a janitress and it was her duty to keep the halls and stairs of said building in a proper condition, and her right, if any, under the Compensation Act aforesaid is exclusive of any and all other actions.

COLLINS & CORBIN,
Attorneys of Defendants.

Reply.

20 (Filed May 20, 1926.)

The plaintiffs for a reply to the defendants' answer say that,

1. They deny all the allegations contained in the paragraphs of the second, third and fourth defenses to each count.

LAZARUS, BRENNER & VICKERS,
Attorneys of Plaintiffs.

30

Amendment to Complaint.

(Filed February 26, 1927.)

To Messrs. Collins & Corbin, Attorneys of Defendants, 1 Exchange Place, Jersey City, N. J.

SIRS:

40 TAKE NOTICE that on the trial of the above-entitled matter before Honorable Frank L. Cleary, Judge of the aforesaid Court, we shall move to amend paragraph 5 of the complaint heretofore

Rule for Final Judgment.

filed in the above-entitled matter to read as follows:

5. The negligence of the defendants Isadore Miller and Julius Gershanowitz, their agents, servants or employees consisted in this, 10

(a) They failed to keep the trap door in a safe and proper condition.

(b) That they unlawfully and negligently permitted the said trap door to become defective, thereby creating a dangerous condition in the hallway of said house.

(c) That the scuttle or door leading from the hallway to the roof of said premises was not properly constructed, hung or balanced so as to be easily opened. 20

(d) That the said scuttle or door was so negligently constructed that it could not be easily opened.

BRENNER & KRESCH,
Attorneys of Plaintiffs.

Rule for Final Judgment.

(Filed March 11, 1927.) 30

This cause was tried before Judge Frank L. Cleary and a jury on March 10 and 11, 1927.

The evidence having been submitted, the jury retired and returned with their verdict in favor of the plaintiff, Madeline Decker, for Five Hundred (\$500) Dollars, and in favor of Ernest Decker for One Hundred (\$100) Dollars and against the defendants.

40 Whereupon it is ordered that judgment final be entered against the defendants, Isadore Miller and

Final Judgment.

Julius Gershanowitz, and in favor of the plaintiff, Madeline Decker, for Five Hundred (\$500) Dollars, and in favor of the plaintiff, Ernest Decker, for One Hundred (\$100) Dollars, and the plaintiff to have their costs taxed.

10

FRANK L. CLEARY,
Judge.

On motion of
BRENNER & KRESCH,
Attorneys of Plaintiffs.

Rule actually entered March 11, 1927.

Final Judgment.

(Entered March 11, 1927.)

20

HUDSON COUNTY CIRCUIT COURT.

MADELINE DECKER and ERNEST DECKER, <i>Plaintiffs,</i> v. ISADORE MILLER and JULIUS GER- SHANOWITZ, <i>Defendants.</i>	Judgment entered March 11, 1927.
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Damages	\$500.00	1st Pltf.
	100.00	2nd Pltf.
Costs	74.34	
Total	\$674.34	

Brenner & Kresch, attorneys.

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Judgment on verdict in the above entitled cause was entered in this Court on the 11th day of March

Case.

in the year of our Lord one thousand nine hundred and twenty-seven, in favor of the plaintiffs, Madeline Decker, for \$500, and Ernest Decker, for \$100, and against the defendants, Isadore Miller and Julius Gershanowitz, in a plea of action at law for the sum of Six Hundred Dollars damages and Seventy-four Dollars and thirty-four cents, costs of suit.

10

Judgment entered and signed this 11th day of March, 1927.

FRANK L. CLEARY,
Judge.

HUDSON COUNTY CIRCUIT COURT.

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MADELINE DECKER, <i>et al.,</i> <i>Plaintiffs,</i> v. ISIDORE MILLER, <i>et al.,</i> <i>Defendants.</i>

Before—Hon. FRANK L. CLEARY, J., and a jury.
Jersey City, N. J., Mar. 10, 1927.

30

APPEARANCES:

Messrs. LAZARUS, BRENNER & VICKERS (by Mr. Brenner), for the Plaintiffs.
Messrs. COLLINS & CORBIN (by Mr. Broadhurst), for the Defendants.

The Court: The question of the condition of the ladder is out of the case?

40

Mr. Brenner: Yes, it is out of the case, except as it is incidental to the lifting of the scuttle.

Madeline Vicker, direct.

The Court: How much of the case now is covered by the Tenement House Act?

Mr. Brenner: Just the scuttle situation.

(Both sides open to the jury.)

10 MADELINE DECKER, sworn.

Direct examination by Mr. Brenner:

Q. In May, 1925, were you a resident at 74 Avenue C? A. Yes.

Q. And were you a tenant in that building? A. Yes.

Q. Occupying which apartment? A. The rear apartment, second floor.

20 Q. How many apartments were there in that building? A. Four.

Q. How many were on each floor? A. Two families on each floor, a front and a rear apartment.

Q. Two families on each floor? A. Yes.

Q. So that it was occupied by four families, a two-story building? A brick or frame building? A. Frame.

30 Q. You occupied the rear apartment. Who occupied the front apartment? A. Mr. and Mrs. Bryce.

Q. Where was the door of your apartment with relation to the stairway as you came up that stairway? A. What did you say?

Q. Where was the door of your apartment? A. Oh.

Q. With relation to the stairway as you were coming up the stairway, that would be right or left? A. To the left, right at the head of the stairs.

40 Q. How close was the door of the Bryce apartment to the door of your apartment? A. About 10 feet, I should judge.

Madeline Vicker, direct.

Q. On the day that this accident happened, on May 16, 1925, were you in the hallway? A. Yes, right outside of my door in the hall.

Q. Was Mrs. Bryce also in the hallway that day? A. She was standing right outside of her doorway.

10 Q. So that each of you were in front of your own doorways, which was separated by about ten feet? A. Yes.

Q. And besides being a tenant in that building, Mrs. Decker, you also did some work in that building, did you not? A. Yes, I did.

Q. What kind of work did you do? A. Well, I had the halls to keep clean and the lights to put on in the evening.

20 Q. When would you clean the hall, what part of the day? A. In the mornings.

Q. What time would you usually finish with that work? A. Oh, it would only take an hour or so.

Q. In the early morning? A. In the early morning.

Q. You were not troubled with the lights until it was made necessary by the hall becoming darker? A. That is all.

30 Q. What time of the day did this accident occur? A. Around three-thirty.

Q. In the afternoon? A. In the afternoon.

Q. You had finished cleaning your halls and stairs long before that, hadn't you? A. Yes, Judge.

Q. And it was still a long time before it was required that you put on the lights? A. Oh, yes, I could not put them on after the accident that evening.

40 Q. I don't mean that. It had not as yet arrived

Madeline Vicker, direct.

at the time when it was sufficiently dark to put on the lights? A. No.

Q. It was in May and it did not get dark until quite late in the evening? A. Yes.

10 Q. What was your purpose and as far as you know Mrs. Bryce's purpose in being in the hallway at that particular time? A. There was a baker boy came and collected the weekly bill every Saturday afternoon.

Q. And were you paying him and Mrs. Bryce paying him? A. He came to my door and I was paying him.

Q. That had no connection with the landlord whatsoever, did it? A. No.

20 Q. You and Mrs. Bryce were simply paying your own bills? A. Yes.

Q. While you were in the act of doing that, did anyone come up the stairway? A. No.

Q. Did you see Mr. Bryce there? A. He was standing alongside of his wife when he heard the—

Q. What was the report that came at that time? A. There was a report of fire.

30 Q. Was it said where that fire was or anything? A. No, sir, we just heard the report of fire.

Q. What did Mr. Bryce do when he heard the report of fire? A. He said, "I am going to see where the fire is" and he started for the ladder to go to the roof.

Q. What kind of a ladder is there going to this roof? A. It is an iron ladder.

Q. Does it stand at an incline or does it stand up straight? A. Almost straight.

40 Q. And this ladder leads from this hallway in which you were standing? A. Yes.

Madeline Vicker, direct.

Q. And leads up to this scuttle in the roof that you have heard talked about? A. Yes.

Q. This scuttle is simply an opening in the roof with sides around and a cover over it, is it not? A. Yes.

10 Q. Is that a metal cover or wood cover? A. Metal.

Q. All metal or part metal and part wood? A. I don't really know; I know it is metal over it, the outside.

Q. He then went up the ladder, did he? A. He went up the ladder.

Q. Did you see him going up? A. I saw him going up.

20 Q. When he got to the top or almost to the top of the ladder, what did he do? A. He put his hands up, I guess, to raise this cover.

Q. And did he raise it? A. He raised it, and before I see any more there was a crash of glass and a piece of it had hit my hand.

Q. I see, did you ever talk to your landlord about this cover—did you ever talk to your landlord or either of them about the condition of this cover? A. No, I did not.

30 Q. Did you talk to anybody about it? A. No, sir. We did not know the condition of it ourselves until after this accident.

Q. As far as you were concerned you did not know its condition? A. No.

Q. Did you observe the condition of the cover after the accident had occurred, you yourself, not anybody else? A. Did I know it was like that, do you mean, Judge?

40 Q. Yes, from your own knowledge, from something that you saw. A. Well, I only saw him raise it and try to lift it over and it happened to fall

Madeline Vicker, direct.

to the skylight; that is all I know about it. I never went up on the roof myself to know anything more about it.

Q. After the glass crashed down, what happened to you? A. I was cut on the right hand, the third and fourth fingers. 10

Q. Did you remain standing or did you fall down, or what? A. Well, I kind of got, you know, sort of fainty, and the blood was pouring out of my hand, and I started to scream, "Oh, my goodness!" I was screaming.

Q. And where did you go then? A. I remained standing there, holding my hand, and Mrs. Croll, a tenant downstairs in the rear, came running up the stairs and—

Q. And what did she do for you? A. Mr. Bryce and Mrs. Bryce was there with me, all standing there. 20

Q. Then what did you do? A. Mrs. Croll went with me into the bathroom and told me to hold my hand up. She did as much as she knew to try to do for me while Mrs. Bryce ran for the doctor.

Q. What doctor did she get? A. Dr. Gould.

Q. When Dr. Gould came did he dress the injury? A. Yes, and I had to have clamps put in it also. 30

Q. Were you obliged to carry your arm in a sling or did you carry it naturally? A. No, I carried it in a sling and I had to keep it held up like that (illustrating), until the clamps were taken off.

Q. You kept your hand in the position you have indicated, flat across your chest, and over your shoulder? A. And at night I had to rest with it up on the pillow, so that there would be no blood pressure.

Q. You say it was ten days before you were able 40

Madeline Vicker, direct.

to take it from that uncomfortable position? A. Yes, until the clamps were taken off.

Q. Who removed the clamps? A. Dr. Gould.

Q. How long did you remain under the treatment of Dr. Gould? A. I think one or two visits after the clamps came out. 10

Q. What did he do for you during those visits? A. He used to rest it.

Q. How long did the hand remain dressed after the ten days you have spoken about? A. After the second visit he made, after the clamps were taken out, he told me I could leave it without a bandage, and he did not do anything—

Q. How long altogether from the day the accident occurred was it that your hand remained in a dressing? A. Two weeks. 20

Q. During that time were you able to do any work of any kind at home? A. Nothing whatsoever.

Q. Who took care of you? A. I had a woman come in to do the work.

Q. And who is the woman? A. She lives downstairs in the front apartment.

Q. Was that woman related to you? A. She was.

Q. You did not pay her anything for her services? A. Well, she required a payment and I stated to her that there was a case on and I would make arrangements with her after everything was over. 30

Q. But you never made her any definite promise of payment, I mean in a month—there was no written statement wherein she claims a certain amount for every day's work? A. No.

Q. The payment of that, of course, depends upon your generosity after this thing is over? A. Yes. 40

Madeline Vicker, direct.

Q. How long did she take care of your work for you? A. Just three weeks.

Q. Were you able at all to do any work during that time? A. Nothing whatsoever.

10 Q. You mean your hand was in such a condition during that part of the time, that you could not use it? A. The doctor ordered me not to use it.

Q. So that you were obeying his instructions? A. I was.

Q. After that three weeks' period did your hand return to the condition that it was prior to this accident? A. No, it never did since.

20 Q. What is the matter with it at the present time that you notice was not the matter prior to this accident? A. The finger seems to be crippled; it is not the same as it was.

Q. In what particular way? A. The knuckle across the top here that was cut, stays high and the other finger is crooked and it is always trembling and I seem to lose the power of the whole arm.

Q. You have noticed that since this accident occurred? A. Yes.

30 Q. And has that cured up to any extent whatsoever? A. I still have the same—it is powerless in the line of any work at all that is the least bit heavy, I cannot do.

Q. Are you doing the same work since the time this accident occurred as you were prior to the happening of the accident? A. No, sir.

Q. What work don't you do now that you did then? A. I don't do any washing whatsoever; I can't.

40 Q. Did you do your washing prior to the happening of this accident? A. Yes.

Madeline Vicker, direct.

Q. Are you now paying for the doing of that? A. I certainly am.

Q. Who is your washwoman? A. The Colonial Laundry just now, but I have changed since this accident. I had first the Leonard Laundry.

10 Q. I see, so that you now send your wash regularly to a laundry where previously you did not? A. Oh, yes, I never did before.

Q. I wish you would just step down, Mrs. Decker, so that you can show the jury the condition of your hand at the present time, just point out your two fingers. A. (Witness exhibits hand to the jury.)

Mr. Brenner: Now, just show the jury the other hand, for the purpose of comparison. Now, it was this finger. The cut came across this knuckle and in where the scar is. 20

Mr. Broadhurst: For the purpose of the record that would be the knuckle of the pinkie finger of the right hand and the top of the ring finger.

The Witness: Yes.

30 Q. Now, you indicate that pinkie in a cramped condition, and is it possible for you to straighten that out any more than you have shown to the jury? A. No, I cannot.

Q. Has that trembling of that finger remained as you have indicated to the jury ever since you have had it out of the bandage? A. It has.

Q. Has it improved any at all during the last year? A. Not so I could notice, not at all.

Q. It has been just about the same? A. Yes.

40 Q. You say that not only makes the finger impossible to use, but affects your arm, in what way? A. It seems to lose the power. It gets tired.

Madeline Vicker, direct.

Q. Your arm gets readily tired? A. Real tired. If I only try to mix a batter or anything for to cook, why, the arm is just completely tired out.

Q. You use your right hand? A. I always used my right hand before.

10 Q. Did you ever have any trouble with your hand or arm prior to the happening of this accident? A. No, sir, never.

Q. I presume that you paid Dr. Gould, did you not? A. My husband did.

Q. Do you know what he paid him from your own knowledge? A. Yes, I have the bill there.

Q. How much was that bill? A. \$20.

Q. Have you the bill—

20 Mr. Broadhurst: I do not question the reasonableness of the bill.

Q. How much are you paying for your laundry now, Mrs. Decker?

30 Mr. Broadhurst: I would like to object to that. It seems to me that that would not be the measure of damage. It is so speculative how much of that or what part of that is due to the injury and what part is not due to the injury, that it is not a proper test. That she sent it out because she was unable to do it, I do not object to that. It seems to me unless we have some medical testimony to determine whether she is or is not able to do it, however, that the cost of the laundry would be immaterial. Of course, if Judge Brenner says he intends to do that, I will pass the objection at the present time.

40 Mr. Brenner: My doctor is on his way now.

Madeline Vicker, direct.

Q. How much do you say, Mrs. Decker, that you have been paying since that time for the doing of this work? A. Well, it is according to how much wash I have had each time.

Q. I mean what is the average? A. The average is \$2.64, it mostly runs, every two weeks. 10

Q. You have given that to the laundry every two weeks from the time of the happening of this accident and are still doing the same thing? A. Yes.

Q. You say the only reason you are doing that is because you cannot do the work yourself? A. Yes.

Q. Did you ever observe whether there were any hinges on this scuttle cover? A. I don't think there was anything to hold it whatsoever, no hinges. 20

Mr. Broadhurst: I move to strike that out. The question is did you observe and she says, "I know there isn't from the way it has been raised."

The Witness: I could see there isn't anything under it.

Mr. Broadhurst: All right, she says she knows now. 30

Q. Is there anything of any kind that holds that cover in place, so that on being opened it would not fall back on the skylight? A. There is nothing holds it whatsoever.

Q. Is there anything on the skylight by way of bars, netting or anything else that acts as a protection against this scuttle cover if it is thrown back against this skylight.

Q. Did you observe any of the pieces of glass that fell down from the skylight so that you could 40

Madeline Vicker, direct.

tell us the approximate thickness of the glass? A. Well, it is about a quarter of an inch thick, regular skylight glass, about a quarter of an inch thick.

Q. And this roof, was that used by the tenants in this building for any purpose whatsoever? A. Yes. 10

Q. And for what purpose was it used? A. Well, there was a family lived downstairs in front. They went up on the roof and put an aerial up.

Q. Was there anybody else that did anything on the roof besides them? A. The owner himself, as far as I know, he had heard of leaks in the rooms.

Mr. Broadhurst: I object to what he heard.

Q. Anything that you told him would be proper. A. Oh, no. 20

Q. Did you say anything to him about leaks? A. Yes, we did.

Q. Who did? A. I did, he came to me.

Q. What did you tell him about leaks? A. I had told him that the ceilings were wet from leaks in the room, and he himself had gone up to locate the leaks where the parts were where the leaks came down.

Q. Did you observe whether or not he had any difficulty when he went up there? A. That I don't know. 30

Q. How long was it before this accident occurred that you had spoken to the landlord about the leaky condition and he himself went on the roof? A. As soon as he bought the place.

Q. How long was that before the accident? A. About two months.

Q. And did he in going to the roof go through this same scuttle that you have already mentioned? A. Yes, sir. 40

Madeline Vicker, cross.

Q. Was there any other way to get on that roof, as far as you know? A. No.

Cross examination by Mr. Broadhurst:

Q. Which one of the owners was it that you spoke to about the condition in the roof? A. Mr. Gershonowitz. 10

Q. And did you see Mr. Gershonowitz himself go up on the roof? A. Yes.

Q. Is this roof a flat roof or is it a pitched roof? In other words, is it on a pitch on the outside or is it level or nearly level with just a little pitch on the outside? A. With just a little pitch on the outside.

Q. It is up higher in the front of the house and a little lower in the back? A. Yes. 20

Q. It is not a sharp pitch like some of the houses, like that (illustrating) is it? A. Oh, no, it runs right from the front.

Q. It is practically a flat roof with a little slope towards the rear, is that what you mean? A. Yes.

Q. You say there was a radio aerial upon the roof that the family downstairs had? A. Yes.

Q. How long had that been up there, do you know? A. No, I don't know. 30

Q. How long had you lived in this house before this occurred, before you hurt your finger, how long had you lived there? A. I was living there just one year and I guess about two weeks.

Q. How long had the Bryces lived there? A. Just one month.

Q. There was nothing else then up on the roof, except the aerial, which the tenants had at all? A. Not that I know of.

Q. About how high was this ladder that you had to go up to the roof, from the floor of the hall; 40

Madeline Vicker, cross.

how high a ladder; how many steps about, would it be? A. I could not say exactly, but I think there were about seven or eight steps.

Q. Then when you would get to the top of the ladder, you would come to this scuttle, that you referred to, that Mr. Bryce pushed back, on this day? A. Yes. 10

Q. The first thing you would come to is this scuttle? A. Is this scuttle.

Q. That is a cover over the hole out of which you would go to get on the roof? A. Yes.

Q. You say that the distance from your door to Mrs. Bryce's door was about 10 feet? A. Yes.

Q. How wide is the hall up there? A. Why, I guess about, I should judge about two and a half to three feet, I could not say exactly. 20

Q. No, I understand, that is your estimate. It is two and a half or three feet wide. About how far would you indicate? Maybe that would be better. A. I should say just about this distance, between the width of the hall (indicating).

Q. That is the width of the hall as it runs from your door to Mrs. Bryce's door? A. Yes, outside of just the little way that leads to the floor going down.

Q. Yes, the turn to go downstairs. A. Yes. 30

Q. And this skylight, where is it with reference to the door, your door and Mrs. Bryce's door? A. It is right over the top of the stairway, right outside of my door.

Q. In other words, when you come up the stairway, at the top of the stairway your doorway is immediately on the left, is that the idea? A. Yes.

Q. And the skylight is right up above the landing? A. Yes.

Q. How big a skylight is it, Mrs. Decker? A. I 40

Madeline Vicker, cross.

dont' know, it is a good sized skylight; I couldn't say how big it is.

Q. Do you mean four or five—is it longer than it is wide, let us get that first? A. It is about the same all the way around.

Q. In other words, it is about a square, is it? A. Yes, it is a large skylight, though— 10

Q. Can you give us some idea of its size, is it three or four feet each way, or in distance from you to me, for example? A. I should judge it is a distance, well, about this distance and about the same the other way.

Q. That is from here to the wall? A. Yes, it seems to me.

Q. What would you estimate that to be, do you know the measurements? A. No. 20

Q. I should judge it to be four or five feet. And that skylight is the ordinary skylight that slopes sort of up to a point up to an edge? A. Yes.

Q. How far from your door is the ladder that goes up to the scuttle? A. It is right outside of the front apartment door, to the left.

Q. That is, it is right outside of Mrs. Bryce's door, is that it? A. Yes, to the left.

Q. And how far from Mrs. Bryce's door is it? A. Right outside of her door; there is a little step and it stands on this platform and goes up. 30

Q. And in feet how far would you say from her door, as far as I am to you? A. Yes, just a step.

Q. Right outside of her door on the left then? A. Yes.

Q. How far do you think the scuttle is from the nearest part of the skylight to the scuttle, do you understand what I mean? In other words, how far is the scuttle to which the ladder leads from the nearest part of the skylight? A. Well, it seems 40

Madeline Vicker, cross.

to me that there is a distance of, well, I don't know how far to say.

10 Q. Well, can you give us some idea in distance, between you and me or some object? A. This scuttle is about two or three, two feet wide by three feet long.

Q. How does the length of the scuttle run, the same way the hall does? A. Yes.

Q. I mean, is the long part of the scuttle the same as the hall? A. Yes.

Q. Now, then, can you give me some idea of how far the end of the scuttle is from the nearest end of the skylight? A. Oh, it must touch it when it is raised that way, because—

20 Q. You mean because it hit it on this occasion? A. It would have to hit it from the length of this scuttle. It is not far enough away.

Q. That is what I am trying to find out; can you tell me how far it is about, you say the length of the scuttle is about three feet; I am trying to find out how far from the end of the scuttle is the nearest edge of the skylight? A. I judge about two, two and a half feet or so.

30 Q. Do you know what part of the roof itself the skylight and the scuttle, which is say two and a half or three feet from it, are; in other words, is it about in the center of the roof, is it toward the front of the house or toward the rear of the house? A. The skylight?

Q. The scuttle and the skylight, where you come out—do you understand what I mean? A. No, I don't.

Q. That is right, if I am not clear, you tell me. Were you ever up on the roof yourself? A. No.

40 Q. Well, now, can you judge from the position of the hallway in this building and from the sky-

Madeline Vicker, cross.

light as you saw it, whether the scuttle that come out of the roof is toward the center of the roof or toward the front end of the roof or toward the rear end of the roof? A. Oh, no, it is not; it is nearer to the outside of the roof than it is to the center part. 10

Q. When you say the outside, you mean the front? A. No, the side.

Q. Nearest the side? A. Towards the alley.

Q. Can you give us some idea how far it is from the alley; in other words, is it a matter of three or four feet from the side of the alley on the roof? A. From the top of the roof, I don't know, but from the inside it just seems as though it is right near the end of the roof.

20 Q. I see, that is on the side? A. That is on the side. 20

Q. And the skylight is toward the rear of the house more than the scuttle is? A. Yes.

Q. As I understand it, at no time did you yourself actually go up on the roof? A. Never.

Q. Or open up this scuttle? A. Never, never went up the ladder.

30 Q. On the day that this accident happened did Mr. Bryce say anything other than he was going up to the roof? A. He said he was going up to see where the fire was. 30

Q. Then do I understand that you watched him as you went up or were you conversing with the baker boy? A. I was starting to pay the baker boy.

Q. But you just observed in a general way as he went up? A. Yes.

40 Q. In other words, you were not watching him particularly, but you saw him in a general way 40

Madeline Vicker, cross.

go up the ladder? A. Before I turned back to go in my doorway, why, there was a crash of glass.

10 Q. In other words, you were about completed with your transaction with the baker boy and it was just before you went back into your own apartment that you suddenly heard this crash of glass? A. Yes, it came right down in front of me.

Q. Came right down in front of your door and hit your hand? A. Yes.

Q. Were there a number of panes of glass in this skylight, in other words, was it divided with panes of glass? A. Yes, all panels.

Q. Do you know where the panel was in the skylight that broke, do you know which panel broke, did you see that? A. Yes, I did.

20 Q. Which panel was it that broke? A. It was one of the large panels, right on the corner nearest the scuttle.

Q. Relative to your work there I understand you were allowed a certain sum each month off your rent for your janitorial duties? A. Yes.

Q. How much was that you were allowed off? A. Five dollars I was allowed off.

30 Q. And the work you had to do for that you say was cleaning the halls and attending to the lights? A. Yes.

Q. Was it part of your duties to watch the premises generally to see that they were kept in order and that things went along all right? A. Well, yes, I did that; I don't know whether it all called for it, but I did it.

40 Q. In other words, you being the janitor, in addition to merely doing the manual work of scrubbing the halls and turning on the lights, you would watch over the premises while you were there to see, for example, that the children did

Madeline Vicker, cross.

not destroy them or dirty the halls or throw circulars around and all that sort of thing, didn't you? A. Yes.

10 Mr. Brenner: Just a moment, I would like to interpose an objection to that. It is not so much a question of what she may have done as it becomes a question of whether it was a part of her duties to do these things. Of course, I understood the witness to say in answer to a previous question for the same purpose that she did not know she had to do that, she had simply done it.

20 The Court: The only relevant testimony upon that point would be what her duties were under her employment.

Q. Well, did you consider it was part of your duties to overlook the premises generally so as to see that nothing went wrong with them? A. That was none of my business.

Mr. Brenner: I object.

The Court: She said it was none of her business or something like that.

30 Mr. Brenner: I withdraw the objection.

Q. But you did as a matter of fact look after the premises in addition to merely cleaning the halls and lighting the lights, did you not?

Mr. Brenner: Same objection.

40 The Court: That question would be proper if added to it was the statement as part of the duties of your employment you did look after the hall, and so forth. Unless it was part of her duties, voluntary service of that kind would not be relevant.

Mr. Broadhurst: Exception.

Madeline Vicker, cross.

Q. Can you tell me, Mrs. Decker, who made the arrangement with you to do the work of cleaning the halls and lighting the lights? A. Well, the party that was owner at first, the first owner of the house.

10 Q. He made the arrangements? A. He made the arrangements with me.

Q. And after Mr. Miller and Mr. Gershonowitz bought the house, which you say was about two months before the accident, you continued right along? A. Continued right along.

Q. Did you have any specific understanding or agreement with the previous owner as to just what were your duties there? A. They did not tell me anything outside of what I had been doing, just to continue on.

20 Q. Who was it that said that? Who was it said continue on, Mr. Miller or Mr. Gershonowitz? A. Mr. Gershonowitz always came to the house.

Q. What I am trying to find out is when you went in and started—took this duty over, what was the understanding between you and the person with whom you made the agreement as to just what your duties were? A. Just to keep the halls clean and I would receive the allowance off my rent.

30 Q. Anything else? A. And put the lights on.

Q. Anything else? A. No.

Q. Was it part of your duties to show tenants the rooms if they were empty? A. I did that, but it was not up to me—

Q. Was it part of your duties? A. No.

Q. Was it part of your duties to collect the rent? A. No.

40 Q. Was it part of your duties to see that the tenants did not dirty the halls or leave rubbish or things around? A. No.

Ernest Decker, direct.

Q. Was it part of your duties to care for the yard? A. No.

Q. Was it part of your duties to receive complaints from the tenants if the premises needed repairs? A. No.

Q. When you spoke about reporting the leak in the roof, was that something that you noticed in your own apartment? A. Yes.

Mr. Broadhurst: That is all.

ERNEST DECKER, sworn.

Direct examination by Mr. Brenner:

Q. You are the husband of Madeline Decker, who was just on this stand? A. Yes.

Q. You lived in this same apartment with her at 74 Avenue C? A. Yes.

Q. That was occupied by the four families that she has mentioned? A. Yes.

Q. Now, Mr. Decker, did you ever have occasion to go on the roof of that building or to observe others go on the roof of that building? A. No, sir, I did not have no business there.

Q. Did you ever go on the roof yourself? A. Yes.

Q. How long before this accident occurred did you go on the roof? A. Oh, I guess about three weeks before.

Q. And in going on that roof was it necessary for you to go through the scuttle that has been described? A. Yes, the scuttle.

Q. How long and how wide would you say that scuttle was? A. Well, I figured that the scuttle was about two feet by three feet long.

Q. What led up to that scuttle? A. A ladder.

Q. What was the angle of that ladder as far as

Ernest Decker, direct.

you can recall, was it straight or inclined? A. The ladder was straight up and down.

Q. You would go up that ladder to go through the opening of the scuttle? A. Yes.

10 Q. Were there sides around this roof opening where the scuttle was? A. There was an edge around it where the scuttle fit right over this edge.

Q. How high? A. Two and a half to three inches.

Q. Over this edge and around this opening in the roof there was a cover? A. Yes.

Q. That cover was made of what? A. Wood and galvanized or tin, either one, I could not tell you, over the scuttle, not inside, on the outside.

20 Q. And that was covered over with tin or galvanized iron? A. Yes.

Q. And in going through that scuttle did you lift the cover itself? A. Yes.

Q. Do you know anything regarding the weight of that cover? A. Well, I figure it weighs about 70 or 75 pounds.

Q. You have had some experience in dealing with weights, have you not? A. Yes.

Q. What is your particular business? A. Ice-

30 man. Q. Your judgment was from experience that it was between 70 and 75 pounds in weight? A. Yes.

Q. How close was the edge of the scuttle or the nearest edge of the scuttle to the nearest edge of the skylight? A. I figure about two or two and a half feet.

Q. Were there any hinges on this cover? A. No, sir.

Q. Any counterbalance of any kind? A. No, sir.

40 Q. Any protection of any kind that would prevent this scuttle from going back on the skylight? A. No.

Ernest Decker, direct.

Q. Was there any protection on the skylight to prevent it if hit by the scuttle from breaking? A. No.

Q. Did you observe anything else with regard to that scuttle as to whether or not it was easy to open, outside of the weight of it? A. No, sir. 10

Q. Why not? A. It was tight.

Q. You mean— A. You would have to push it up.

Q. You had to use force? A. Had to use force.

Q. That is, that the cover of the scuttle fitted tight around the edge of the scuttle? A. Yes.

Q. Was there anything else that made it tight, except that it fitted tight? A. That is the only thing I know, because it fits tight.

20 Q. And when you went up there was it necessary for you to use any considerable amount of force to get it up? A. I had to.

Q. Was it easy to balance yourself on that ladder while you were getting up to the roof?

Mr. Broadhurst: I object to that as immaterial. I don't see how that affects our responsibility.

A. No—

The Court: One moment. 30

Mr. Brenner: It is only for the one purpose, under the statute, not as to the ladder itself, but the statute requires that the scuttle must be so that it can be easily opened. The position of the ladder must have had something to do with whether or not it was easy to open up this scuttle from the standpoint of whether you had to balance yourself on it in any particular way. 40

Ernest Decker, direct.

The Court: In that respect, what do you say to that, Mr. Broadhurst?

Mr. Brenner: If there is going to be an objection, I will withdraw it.

10 Q. As you were going up this ladder to open up the scuttle, in opening it, would it open up towards the skylight or away from the skylight? A. Well, it goes toward the skylight.

Q. That was because of the position of the ladder in the hallway leading to the scuttle? A. Yes.

Q. Were you home at the time that Mrs. Decker was hurt? A. No, sir, I just came home.

20 Q. So that you don't know anything about what led up to her injuries? A. I don't know anything about what happened until I found my wife in bed.

Q. Was there anything on this roof that the tenants had access to? A. No.

Q. Was there an aerial up there? A. Well, there is an aerial.

Q. Who had the aerial? A. A man by the name of Minsly.

30 Q. Did you have any aerial up there? A. Well, I had my own about two months after I put mine up.

Q. But you did afterwards use it for an aerial? A. Yes.

Q. Did anybody else have an aerial up there? A. Mr. Bryce. I don't know if Mr. Bryce had one or not, but if he did or not I ain't sure.

Mr. Broadhurst: I object.

40 Q. You do know that there was at least one up there at that time? A. Yes.

Ernest Decker, cross.

Q. And was there any other entrance to this roof except through this scuttle? A. No.

Q. You were not there when the landlord went on the roof, were you? A. Yes, I was there one day when he went on the roof.

10 Q. How long was that before this accident occurred? A. Oh, think that was six or seven weeks after.

Q. I mean before, now, not after? A. About a month, I suppose, it was.

Q. Before or after? A. Before.

Q. Once you noticed him before? A. Yes.

Q. And you say it was about a month before this accident occurred? A. Yes.

20 Q. Do you know why he went on the roof at that time? A. Yes, on account of the chimney. They told him to put a new flue in the chimney so we could get a draught.

Q. So he went up to examine with that purpose in mind? A. Yes.

Cross examination by Mr. Broadhurst:

Q. Which one of the two owners was that? A. There is the man sitting right in back of you there.

30 Q. Mr. Gershonowitz? A. Yes.

Q. You say that was about a month before the accident? A. Yes.

Q. When you went up on the roof what did you go up for? A. I went up with him about this chimney.

Q. Oh, you went up with him about the same thing? A. Yes.

Q. You went up first, did you? A. No, he went up first.

40 Q. Is that the only time you were ever up on

Ernest Decker, cross.

the roof? A. No, I was up to put my own radio up there, wire up.

Q. Oh, I thought you said you did not have your radio.

10 Mr. Brenner: That was after the accident.

Q. Oh, after the accident you put your radio up. But at the time, before the accident, you went up on the roof, you went up with Mr. Gershonowitz. Mr. Gershonowitz pushed the cover aside on that occasion and you both went up through the hole? A. Yes.

Q. That hole was big enough for you to go through, was it? A. Yes.

20 Q. No glass in the skylight was broken on that occasion, was there? A. No, sir.

Q. Did you see Mr. Gershonowitz pushed the cover aside on that occasion? A. No, sir, he went up first.

Q. When you got up on the roof where was the cover lying, did you observe? A. On one side.

Q. Toward the front of the house? A. No, towards the side of the house.

30 Q. The side opposite from the skylight? A. Yes.

Q. When you went up on the roof after the accident did you then push the cover aside yourself? A. Yes.

Q. You pushed it over on the same side, did you? A. The same side where he pushed it.

Q. In other words, you would raise up on the cover and push it over, wouldn't you? A. Push it over? If I pushed it over I would push it on the skylight.

40 Q. I mean, push it up on the side opposite the skylight? A. Yes.

Ernest Decker, cross.

Q. You raised it up and after you got it up so that the edge that it fits over—I am trying to find out just how you handled it. Did you push it up until part of it got over that sill? A. Got over the sill.

Q. Yes, and then you moved it over to the side opposite to the skylight and slid it over? A. No, I did not slide it over, I told you I lifted it. 10

Q. Did you push it over? A. No. I hold onto the ladder with one hand and I pushed it up and I held the skylight and I put it over like that (illustrating).

Q. You mean you held the scuttle? A. Yes.

Q. You pushed it up, you held that ladder with one hand, you pushed the scuttle up with one hand, and then when you got it over that two inch edge, you pushed it sidewise away from the skylight? A. Yes. 20

Q. So that it slid over? A. Yes.

Q. You did not push it way up and throw it over? A. No.

Q. You say it was about 70 to 75 pounds? A. Yes.

Q. Did you ever see anybody else go up on the roof besides the time you went up after the accident and the time the owner went up? A. No, I did not. 30

Q. Is this house attached to other houses on the roof or detached; in other words, does its roof stand all by itself? A. Yes.

Q. In other words, there is no place further to go than the roof of this house? A. No.

Q. Is there a base around the skylight; in other words, how does the skylight connect with the roof; is there a base which is built up before the glass comes? A. Yes. 40

Jessie Croll, direct.

Q. About how high is that base? A. Oh, I figure about four or five inches.

Q. What is that, sort of a zinc or metal base?

A. It is zinc around it, or tin or something.

10 MRS. JESSIE CROLL, sworn.

Direct examination by Mr. Brenner:

Q. You were a resident in this property, 74 Avenue C, in which Mrs. Decker lived? A. Yes.

Q. Now, on the day that this accident happened, were you home? A. Yes.

Q. What first attracted your attention to the fact that there was an accident? A. First I heard somebody say there was a fire and I was busy at the
20 time.

Q. Please talk a little louder. A. I was busy in the back of the house and before I got out to hear about the fire I heard a crash.

Q. You heard there was a fire? A. Yes.

Q. And you started to come out of your house on account of that report? A. Yes, but I have quite a ways to come from the back of my house to get to the hall.

Q. And before you got there you heard this
30 crash? A. Yes, sir.

Q. Did you then run upstairs? A. Yes, sir.

Q. Did you observe Mrs. Decker at that time? A. Yes, I found Mrs. Decker in a fainting condition.

Q. And besides being in a fainting condition, did you notice anything concerning her hand? A. Yes, her hand,—blood was all over the top of the stairs and the broken glass, and I took and bathed her hand and gave her first aid as well as I knew
40 how.

Jessie Croll, direct.

Q. While you were doing that did anybody go for a physician? A. Mrs. Bryce went to call Dr. Gould on the phone.

Q. And did the doctor come while you were there? A. Yes, he came. I tied up Mrs. Decker's hand and went downstairs again; went as far as I knew how to render first aid, and then when the doctor came I went up again and held her hand while he dressed her. 10

Q. You are in no way related to Mrs. Decker, are you? A. No, in no way at all.

Q. Did you see her condition for some time after this accident occurred? A. Yes.

Q. Do you recall how long her hand was strapped up in the way you have heard described, across the shoulder? A. Well, I cannot be positive; it seems to me about two weeks. 20

Q. Just the approximate time, you say it was about two weeks? A. Yes.

Q. During the time that you were living there, Mrs. Croll, did you notice whether Mrs. Decker did her own work or not? A. You mean previous to the accident?

Q. Yes, previous. A. Yes, she did all the work.

Q. Did you notice whether or not she did her washing in the house or sent it out? A. No, she did it herself. 30

Q. And subsequent to the accident do you know whether or not she did her own washing? A. No, she did not do it.

Q. She only remained in that house about a month after the accident, didn't she? A. No.

Q. Was it longer than that? A. Oh, yes; the accident happened in May, 1925, and Mrs. Decker stayed until, well, she only left last December. 40

Q. During all of that time do you know whether

Isabelle Bryce, direct.

she was having her laundry done on the outside?
A. Yes, she had it done. She sent it out, because I was in that house up until November. I moved in November, and Mrs. Decker moved a month after me.

10 Q. Who did the janitor service that she did formerly? A. Well, she had to get a woman to help her do it.

Q. But after the accident did she do that work?
A. I myself helped her.

Q. You helped her with the doing of it? A. Yes.

Q. Were you paid for it or did she get the benefit of it? A. No.

Q. You just helped her out of the goodness of your heart? A. Yes, because we were neighbors.

20

Mr. Brenner: That is all.

Mr. Broadhurst: No questions.

MRS. ISABELLE BRYCE, sworn.

Direct examination by Mr. Brenner:

Q. You resided in this same house with Mrs. Decker? A. Yes.

30

Q. Your apartment was on the same floor with hers? A. Same floor front.

Q. Were you in the hallway at the same time that Mrs. Decker was this day that she was hurt?
A. Yes.

Q. You were at your doorway, were you? A. Yes.

Q. And she was at hers? A. Yes.

Q. And those two doorways are separated by about what distance? A. About ten feet, I should think.

40

Q. While you were there what was your purpose in being there, yourself and herself, as far

Isabelle Bryce, direct.

as you know? A. Well, the baker boy came; he came to my door.

Q. Did you pay him? A. Yes, I paid him and he got my order.

Q. And she paid him? A. Yes.

Q. That was the purpose of both of you being 10
in the hallway at that time? A. Yes.

Q. While you were in the act of taking care of the baker boy did your husband come upstairs? A. My husband was in the house.

Q. Was there any report that was responsible for his going up on the roof? A. Yes, the little boy said there was a fire and he said he would go upstairs.

Q. Did he say where it was? A. He did not say then. 20

Q. As soon as he said there was a fire, then Mr. Bryce went up on the roof? A. Yes.

Q. And in putting this scuttle back or the cover of the scuttle back is that when there was the crash from the skylight? A. Yes.

Q. The scuttle hit the skylight? A. The skylight.

Mr. Broadhurst: I object. I don't see how the witness could say. She could not see it. 30

Q. Did you see whether the scuttle hit the skylight? A. Why, yes, I could see right away, because it is right up above my door.

Q. And then the glass shattered down? A. Yes.

Q. And you saw what happened to Mrs. Decker?
A. Yes.

Q. Her hand was bleeding? A. Yes.

Q. And you went for the doctor? A. Yes.

Q. What doctor did you bring? A. Dr. Gould.

Q. Did you observe Mrs. Decker's condition after that? A. She got hysterical, but I don't know 40

Isabelle Bryce, cross.

after, because I was sick myself and I could not tell you after. I was under the doctor's care at the time.

10 Q. Did you observe whether or not her hand was up in a sling up there? A. Oh, yes, I observed that.

Q. Do you recall how long it was in that condition?

Mr. Broadhurst: We do not dispute what your client says, ten days or two weeks.

Q. Did you notice whether she did the same work as after this accident occurred that she did before? A. I really could not say, really.

Cross examination by Mr. Broadhurst:

20 Q. What were you doing when your husband was going up the ladder; were you watching him going up the ladder? A. No, I was watching him go up—I was finished with the baker boy, see.

Q. You watched him go up the ladder? A. Yes.

Q. Did you watch him move the scuttle off the roof? A. Yes.

Q. Did he seem to have difficulty moving it? A. Well—

30 Q. Did you observe? A. He took a little time moving it.

Q. Did you see him actually move it, as he moved it? A. Oh, yes, I could look right up.

Q. Which way did he move it, towards or away from the skylight? A. Facing the ladder, and then he moved it over the way he was facing.

Q. He moved it toward the skylight? A. Yes.

Q. Did he move it fast or slowly? A. Oh, he could not move it fast, I don't think.

40 Q. Did you actually see it strike against the sky-

James Bryce, direct.

light itself? A. Oh, no, you see, the skylight was to Mrs. Decker's door.

Q. The roof would be in the way there? A. Yes.

Q. The next thing you knew was you heard the breaking of the glass? A. I heard the crash and saw the glass drop. 10

Q. After the glass broke and the excitement died down, could you see any part of the scuttle against the skylight then? A. Oh, no.

JAMES BRYCE, sworn.

Direct examination by Mr. Brenner:

Q. I just want to get from you, when you put that scuttle up, whether the scuttle did or did not hit the skylight. A. Whether it hit the skylight or not? 20

Q. Yes. A. It certainly hit the skylight.

Q. And that is what caused the glass to break? A. Yes.

Cross examination by Mr. Broadhurst:

Q. Did I understand you were going up on the roof because there had been a report of a fire? A. Yes, that is why I went on the roof.

Q. And you were going up for the purpose of looking over and seeing whether you could see where the fire was, is that it? A. Yes. 30

Q. So that was the only purpose you had? A. That was the only purpose I had.

Q. Did you have any aerial up on the roof? A. No, I did not.

Q. Had you ever been up on the roof before this time? A. No.

Q. How long had you lived in the house before this happened? A. About two or three weeks. 40

James Bryce, cross.

Q. Just a short time? A. Yes, just newly moved in.

Q. You had not been up on the roof before? A. No.

10 Q. You were in the house when the report came there there was a fire or were you standing in the hall, or just where were you? A. I was in the house.

Q. You came out then? A. Yes, I came out after I got the report of the fire.

Q. Did you say anything to your wife or to Mrs. Decker as to where you were going? A. No.

20 Q. Do you remember seeing Mrs. Decker in the hall? A. No, I never remember the time. My wife just said to me, "There is a fire; you better go up and see."

Q. And I suppose you thought you would go right up and take a look? A. Yes, sir.

Q. You came right out of your apartment then, into the hall. You did not see Mrs. Decker; you went right up the ladder? A. Yes.

Q. Then when you got right up to the top of the ladder, what did you do? A. I raised the cover up.

30 Q. With one hand? A. I had to hold on to the ladder with one hand.

Q. And you raised the cover with the other? A. Yes.

Q. Then what did you do as you raised it? A. I could not do anything else, the thing overbalanced and went right back.

Q. That is, you raised it up and it fell right on over backwards toward the skylight? A. Yes, straight forward; it went straight forward.

40 Q. That is, as you went up the ladder the sky-

James Bryce, redirect-recross.

light would be ahead of it, would it, in the hall? A. Just right there (indicating).

Q. How does the ladder face; does the ladder run up towards Mrs. Decker's apartment; how does the ladder face as you go up it? A. It faces that way (indicating). 10

Q. Towards Mrs. Decker's apartment? A. Yes.

Q. With one hand you pushed the scuttle up and pushed it back over so that it fell over and broke the skylight which was ahead of it? A. Right ahead.

Q. How heavy do you think the scuttle is? A. Pretty heavy, any way about 70 or 80 pounds any-way.

Q. Did you have to push it hard or not? A. Well, I put some strength on to get it moved first of all. 20

Q. It moved first slowly, you say? A. Moved first of all—had to put some stress behind it.

Mr. Broadhurst: That is all.

Redirect examination by Mr. Brenner:

Q. When your wife told you, "You better look where the fire is," was it your impression the fire was in the house? A. My impression next door building and we were going to get first out. 30

Q. That was your impression in running to the roof, to see whether you were in danger? A. Yes, sir.

Recross examination by Mr. Broadhurst:

Q. How far away from the building where you lived is the building next door, how far away? A. Oh, just, about two or three feet. They are right together, anyway, maybe more than that.

Q. Are there any windows in your house that 40

John Howard Gould, direct.

face out? A. There is an alleyway runs in between.

Q. Is there any window open from your apartment into the alleyway? A. Yes, there is.

10 Q. But you did not look out that window? A. No; I was at the door; I came right to the door at the time.

Q. You went up to the roof. Well, then, you must have been in quite a hurry, is that the idea? A. No, I was in no special hurry.

Q. Well, then, you did not feel that you were in immediate danger. That is what I am trying to get at. Did you feel that you were in immediate danger that the fire was going to burn you up or did you go up to see where the fire was?

20 A. I just went up to see where the fire was, to make sure that we were all right.

Q. You did not feel that you and your family were in danger of being burned by fire? A. Oh, no, or I would have got out pretty quick.

JOHN HOWARD GOULD, sworn.

Direct examination by Mr. Brenner:

30 Q. You are a practicing physician of this State? A. Yes.

Q. And have been for how many years? A. 16.

Q. Are you connected with any hospital or other institution? A. No.

Q. What has been your preliminary training? A. I spent four years at the University of Pennsylvania, two years at the Norwegian Hospital at Brooklyn, and one year in the Foundling Hospital in New York.

40 Q. You were the family physician of Mrs. Decker? A. Yes.

John Howard Gould, direct.

Q. And you were called in on May 16th, 1925, when she sustained an injury to her hand? A. Yes.

Q. What condition, Doctor, did you find her hand in at the time you came there? A. Her hand was bleeding very freely from a cut on the back of the hand, extending over the knuckle of the last finger and the fourth finger, about two inches long the cut was, and she was, of course, very much excited. 10

Q. Was it a deep cut, Doctor? A. It was rather deep, yes.

Q. Was it necessary for you to bring the severed parts together? A. I first cleaned it out with an antiseptic and then put on three silver clamps to hold the edges together, and then a splint on the front of the hand to keep the fingers from bending and a bandage over that. 20

Q. Did you strap it up in any way that you recall, in an upward position? A. Yes, I put it up in a sling.

Q. And kept the arm or the hand? A. The hand against the head.

Q. What was the purpose of doing that, Doctor? A. That was to reduce the amount of pain, swelling and bleeding. 30

Q. Was there any pain connected with this injury? A. Oh, yes, there must have been.

Q. Any swelling? A. Some, yes.

Mr. Broadhurst: I can see the bill is reasonable.

Q. How long, Doctor, did you keep her arm in the sling? A. About five days, I should say.

Q. How long did you continue to treat her as 40

John Howard Gould, direct.

you recall it? A. I saw her last for that injury on the 28th of May.

Q. That was 12 days after the accident occurred? A. Yes.

10 Q. Her hand at the present time shows that the last finger, what is generally termed the pinkie, is bent, what is the cause of that condition? A. Well, scar tissue always tends to contract, and scar tissue—there is considerable scar tissue there and it is contracting the tissues.

Q. I see, and that is what draws that finger crooked and extends that knuckle? A. Yes, that would have some effect on that.

Q. This scar that she shows, will that ever entirely disappear? A. No.

20 Q. Will it ever get any better than it is at present time?

Mr. Broadhurst: You refer to the scar now?

Mr. Brenner: I refer to the scar.

A. It is not likely to change much either way. The scar is there and it will always be there.

30 Q. And is there any likelihood of her ever being able to extend that finger to its full extent so as to overcome that deformity? A. That is hard to tell exactly.

Q. Doctor, she also exhibited to the jury, as she was holding her hand there and said that is something she has observed since the accident occurred or since it was taken out of the bandage, that there is a quiver to that little finger. What is the cause of that? A. That might be caused by—

40 Mr. Broadhurst: I object.

John Howard Gould, direct.

Q. Not what it might be caused by, but what is the probable reason for that? A. That is probably due to the nerve endings having been severed at that point and the nerve endings caught in that scar, which is irritating those nerve endings and causing those twitchings. 10

Q. Inasmuch as that has lasted, Doctor, now, for nearly a period of two years, is there any strong likelihood that that is going to be overcome? A. It is hard to tell exactly.

Q. What is the reasonable probability, Doctor? A. Well, the condition is not likely to improve any more than it has already improved.

Q. Then is it reasonably probable that that will continue the rest of her life or is it more reasonably probable that it will discontinue at some definite time? A. I would not want to promise that it would disappear. 20

Q. What is your best record on it, that is what the jury are entitled to, as a physician, based on your experience? A. Well, I should say the probabilities are that it will continue the way it is now.

Q. For the rest of her life? A. Yes.

Q. There is another complaint that she makes that she said she did not have prior to the happening of this accident, and that is when she does any work of any kind, although it is not heavy in its nature, that her arm becomes readily very tired so that she must stop the work that she is doing, is that in any ways attributable to this injury that she now has? A. That could be due to the injury. 30

Q. Not what it could be due to, reasonable probability. A. Yes, that is reasonably probable.

Q. And why do you say that is probably due to the injury or that it has caused it? A. That 40

John Howard Gould, cross.

is also probably due to the injury to the nerve endings at that point.

Q. And that condition, Doctor, lasting as it has for almost a period of two years, what is the reasonable probability as to its continuing on or discontinuing? A. It will probably continue.

10

Q. For the rest of her life? A. Yes.

Q. She will have this arm weakness? A. Yes, I should say probably.

Cross examination by Mr. Broadhurst:

Q. Do I understand that last time you ever examined her or saw Mrs. Decker was some 12 or 13 days after the accident occurred? A. No.

20

Q. What was the last time that you ever examined her or treated her hand? That is what I want to find out. A. That was the 28th of May.

Q. And that would be some couple of weeks after the accident happened? A. Yes.

Q. But you mean you have seen her for other conditions since? A. Yes.

Q. Has she been ill otherwise, Doctor? A. Yes.

Q. What was that, Doctor? A. I don't remember the condition. Nothing very serious.

30

Q. You mean some ailment which has laid her up for a short period of time? A. Yes.

Q. How long have you treated her, Doctor, as a family physician? A. I should say eight years. I don't know exactly.

Q. You said, Doctor, that this tremor, I think you Doctors call it, don't you, of the hand—in your opinion could probably be due to some nerve endings being in the scar tissue. Now, of course, it is a fact, isn't it, Doctor, that tremor of the hand is due to a great many other causes that are in no-

40

John Howard Gould, cross.

wise connected with such lacerations as this? A. Why, yes.

Q. In other words, any nervous excitement or condition is apt to cause a tremor? A. Surely.

Q. And don't you think, Doctor, that even the excitement of being on the stand for the first time and exhibiting to the jury her hand on this occasion of her suit and all that excitement, buoyed her up after being here for several days, with reasonable probability could cause a tremor to the hand? A. Oh, yes.

10

Q. Now, Doctor, you said that it was your opinion—is there any reasonable probability that this complaint she makes of weakness in her arm could be due to the same cause, that is, the nerves being caught or involved in the scar tissue, is that right? A. Yes.

20

Q. Your opinion in that is based, of course, on the truth of her statement that there is the weakness in the arm? In other words, you assume that to be a fact, don't you? A. Well, it is not only based on that, it is based on the general opinion of the best authorities in other cases.

Q. What I mean was this, Doctor, counsel said to you, he said, "Doctor, it has been testified by Mrs Decker that she cannot use this arm so well because it gets tired or weak," and he said now, in your opinion could that be due to the injury, and you said yes. Now what I am trying to get at is, you are assuming as true, of course, that the statement that her hand does get tired and her arm does get tired is true, aren't you, you are assuming that to be a fact? A. Well, I assume that not only because she says so but because it is generally understood by the doctors that a weakness may follow such injuries.

30

40

John Howard Gould, cross.

10 Q. Is there any objective symptom, Doctor, that you observed in the case which would lead you to believe that the nerves are involved in the scar, objective symptom, not subjective but objective? A. Well, in a place like that where the nerves are really nerve endings, there is no main trunk and there is no objective sign which you could use which would prove that.

Q. Now, as I understand, Doctor, if you have an objective symptom that is a thing you can see, whereas a subjective symptom is a thing which we tell you. In other words, suppose I tell you that I have a terrible pain in my stomach and I need a prescription. You would take my word for the pain? A. That is right.

20 Q. So that these complaints of weakness and pain, and so forth, they are subjective symptoms, are they not, that you rely on your patient for the truth of to a great extent? A. Yes.

Q. Of course, I understand it follows if a man had his hand cut off and he said he was in pain, that he was in pain, but I mean in the ordinary case of a patient after recovery from convalescence and they then have a pain here or a pain there, you rely on the patient for that? A. Yes.

30 Q. Doctor, is the scar on the knuckle or on the other finger adherent to any tissue beneath do you know, from your examination? A. It must be to some—

Q. I don't want what you conclude, Doctor, but can you tell us from your examination what it is? Is it freely movable or is it adherent? A. Well, there is motion there, yes.

Q. In other words, you can move that scar over the tissue beneath? A. Yes.

40 Q. And that would indicate then that the tis-

John Howard Gould, redirect.

sues beneath were not involved in their healing or the laceration, isn't that so? A. No, there could be some scar tissue still connected below there and after two years of use those adhesions would be stretched.

10 Q. And doesn't it follow, Doctor, that if this scar does not affect the underlying tissues and is freely movable, that with use she may obtain even more of an ability to straighten the finger than she has now?

Mr. Brenner: I object.

A. I don't think so after two years.

20 Q. Isn't it a fact that where there is a nerve involvement of the fingers that the disability as the result of the nerve involvement works toward the end of the fingers and not backward toward the arm? A. No, that is not entirely correct.

Q. Is it a fact that the nerves and muscles of the arm are controlled by the brain direct so that an injury to the fingers would not go back and affect a weakness to the arm itself? A. No, that is not correct.

Redirect examination by Mr. Brenner:

30 Q. Counsel called your attention to the fact that there might be a tremor to the hand by reason of a person being nervous because of their first experience in the court room. Doctor, if the tremor was from that would there be a tremor in both hands or would it be only in the one hand? A. It would be in both hands.

40 Q. So that if one hand was steady while in the other there was a tremor, the indication would then be that it was from the injury rather than from the nervousness accompanying the trial? A. Yes.

Motion for Nonsuit.

Mr. Brenner: That is our case, if the Court please.

10 Mr. Broadhurst: I move for a non-suit on the following grounds, first, that there is no evidence of any negligence on the part of the defendant as alleged in the complaint, which was the approximate cause of the accident, of which the plaintiff complains. Second, under the evidence as appears in the case, the plaintiff was an employee, employed by the defendant, was injured by an accident arising out of and in the course of her employment, and therefore her remedy is based solely under the New Jersey Compensation Law. Those are the two grounds
20 of my motion for a non-suit.

(The jury thereupon was excused.)

(Argument thereupon ensued between Court and counsel.)

(The Court thereupon took an adjournment to Friday, March 11, 1927, at ten-thirty A. M.)

Friday, March 11, 1927.

30 10:30 A. M.

Appearances: As before.

The Court: The motion you made yesterday, Mr. Broadhurst, will be refused, and you may have an exception.

Mr. Broadhurst: Note my exception, please.

40

Anthony B. Cucinella, direct.

ANTHONY B. CUCINELLA, sworn.

Direct examination by Mr. Broadhurst:

Q. You are a practicing physician of the State of New Jersey? A. Yes.

Mr. Brenner: I admit the Doctor's qualifications. 10

Q. Did you make an examination of the plaintiff, Mrs. Decker, in this case, at my request? A. I did.

Q. When was the examination made? A. The latter part of April, 1926; I believe it was April 27, 1926.

Q. Will you tell us what she complained of and what you found on the examination? A. At the time she gave me a history that she had been struck by some glass on the right hand and arm and forearm, and she received a laceration of the right hand, that is, on the back of the right hand, and at the time that I examined her she complained of weakness in the hand, and she showed the following on examination: she had a linear scar, that is, a line on the dorsum of the right hand. 20

Q. The dorsum is what, Doctor? A. The extensor surface. 30

Q. Show us on your finger. A. In here (indicating).

Q. All right, in the back, then, of the finger? A. Yes, it ran from the knuckle of the third finger towards the fourth finger.

Q. When you say third finger, is that the one next to the fourth? A. Yes, number one, two, three, four. This is understood to be the thumb. And she also showed an injury to the fourth fin- 40

Anthony B. Cucinella, direct.

ger, that is, the small finger. She was unable to fully extend it.

Q. By that you mean cannot straighten it out?

A. Cannot straighten it out.

10 Q. What was the character of the scar on each of the fingers? A. A scar affecting the skin.

Q. Was it adherent to the tissues beneath? A. No, it was not.

Q. In your opinion did the scar involve the nerves in any way? A. Well, it involved the nerves; that is, the nerve endings on the skin; but it did not involve the controlling nerves, the nerves that control the function of the muscles of the hand.

20 Q. In your opinion based on your experience were the scars that you found there permanent in character? A. I would say they would never entirely disappear.

Q. These scars, what color were they? A. Natural color of the skin.

30 Q. Did you form any opinion as to whether the inability to straighten the small finger was permanent or not? A. At the time it was 11 months and I don't think that she will be able to fully straighten, ever fully straighten, that finger, but it does not interfere with the function of the hand. It is just an extension of this finger, would be just a little crooked, and there was a cross scar on the proximal joint.

Q. Will you show that to us, Doctor? A. I believe that was of this joint.

40 Q. Then it is the middle— A. That slightly involves the joint by a contracture which would impede the full extension of the finger; that is, she would never get it out entirely straight, but the function of the hand otherwise is normal.

Anthony B. Cucinella, cross.

Q. In your opinion as the result of this laceration to the fingers is there any disability to the arm such as weakness that she complains of or the tiring of it? A. No, anatomically or physiologically. I could not see any reason why there should be that weakness in the arm. 10

Q. Assuming, Doctor, that there was some involvement of the nerves that are down in the fingers there with the scar, in your opinion would that cause the tremor that she has or claims to have of her hand? A. No.

Q. Would that in your opinion cause any weakness to the arm? A. It is entirely independent of the enervation of the arm. The nerves that could be severed by that injury are just the sensory nerves, that is, the nerves that would allow a person to feel touch of pain and other sensations, heat and cold, but they were not nerves that enter into the motion and the control of the muscles. 20

Q. Did she complain of any other injury outside of the one to her hand? A. No, the hand and forearm.

Q. Was there a scar on the forearm, too, do you remember? A. There was just a scar about a quarter of an inch long on the radial. At the time I marked it "on the radial." That would be about here. 30

Q. The middle of the arm between the wrist and elbow? A. Yes, but that scar had disappeared.

Cross examination by Mr. Brenner:

Q. At the time that you made your examination didn't she complain about this tremor in the hand and finger? A. I don't remember that she did. 40

Anthony B. Cucinella, cross.

Q. Do you remember that she did not? A. No, I don't remember that she did not.

Q. You have no recollection either one way or the other? A. Not of that tremor, I do remember that I did not notice it, or rather it was not present at the time of my examination. 10

Q. Did you notice it in court yesterday? A. I was not in court. I came in just as Mrs. Decker was finishing her testimony.

Q. If she had that tremor and exhibited it to the jury, what do you attribute as the cause of it? A. I attribute the cause, there may be a number of causes to it. The position of the hand at the time that—

Q. I mean what do you attribute the cause— A. If you will allow me. 20

Q. Go ahead. A. I say it may be attributed to the position of the hand. The hand put in a certain position will be unsteady, because the muscles and the nerves are at a tension, while in another position—there, at present I have a tremor of my own (illustrating). That is showing the position of it. While in another position the tremors will be eliminated, and then again it may be due to the fact that the fingers easily tire and it may be due that she was under a nervous tension at the time, and then again it may be due to the injury. If there was an injury which would involve the nerves of what we call the motor nerves. In her case it was the sensory nerves that were severed; that is, the nerves that carry the impulse from the finger to the brain. 30

Q. I am just asking you now, Doctor, to what you attribute this tremor, do you attribute it to one of three things, either the position in which 40

Anthony B. Cucinella, cross.

the hand is held, the excitement incident to a trial or injury? A. Injury to a motor nerve.

Q. All right, you were not here, and did not, of course, observe that she held both hands in the same position, did you? A. No, I was not here at all at the time that she demonstrated it to the jury. 10

Q. And if she did hold both hands in the same position, if there was a tremor in one, there would likely be a tremor in the other, would there not? A. Most likely.

Q. And if it was due to the excitement incident to trial, if there was a tremor in one, there would likewise be a tremor in the other? A. Yes.

Q. So that if the fact is that she held both her hands in the same position and that there was a tremor in one and not a tremor in the other, then it would not be due to position, would it? A. No, if the position of one hand was identical with the other. 20

Q. If a tremor existed in one and not in the other it would not be due to the position in which it was held? A. Yes.

Q. That is correct, isn't it? If it were from excitement incidental to the trial in this case, due to being on the witness stand, if there was a tremor in one, there should be a like tremor in the other, that is true? A. There would be a tremor in all the fingers. 30

Q. All the fingers of both hands? A. Yes.

Q. If she did not have the tremor from either the excitement or the position of holding her hand, that must be due to something else, mustn't it; just yes or no? A. Yes, something else, but allow me to state what—

Q. I just want you to answer the question, please. 40

Anthony B. Cucinella, cross.

Mr. Broadhurst: I submit the Doctor should be entitled to a fair answer, unless it calls for yes or no.

(Question repeated.)

The Witness: I will say yes, but—

10 The Court: That is all the question is, if it was not caused by one of the two causes, then it must be caused by something else and that could be answered yes or no.

Q. When you made your examination over a year ago, or nearly a year ago, April, 1926, this woman also complained of this weakness in the arm, didn't she? A. She complained of weakness in the hand to my recollection.

20 Q. All right, whether it is the hand or the arm. Did you at that time have any reason to doubt that this woman was telling the truth? A. No.

Q. Have you any reason to doubt her testimony on the stand yesterday?

Mr. Broadhurst: I object to that as immaterial.

Mr. Brenner: I have not finished my question.

30 Q. Have you any reason to doubt her testimony on the witness stand yesterday that she has that same complaint that she indicated to you? A. Yes.

Mr. Broadhurst: I object to that on the ground that whether the Doctor believes it or not is entirely immaterial.

Mr. Brenner: I withdraw it, if counsel is going to press the objection.

The Court: It is withdrawn.

40 Q. If there is a weakness there, that weakness

Anthony B. Cucinella, cross.

would be due neither to the position of holding her hand nor would it be due to the excitement incidental to the trial, would it? A. If there is a constant weakness there, it is there. If the patient says so and nobody has reason to doubt it is there, but there is nothing there anatomically or in the function of the arm that would account for a certain weakness. 10

Q. But very often you find a subjective symptom, that is, a symptom that you have to depend on the word of the patient, where there is no objective symptom, isn't that correct, Doctor? A. Might have headaches.

Q. Yes, they have a number of aches where you cannot see anything—might have a backache or an earache or a toothache or any number of aches, and you cannot see anything to account for it, isn't that correct? A. After a while, after the patient is under observation for a while, we generally find what the cause of the ache is. 20

Q. But you have not had this patient under observation for the purpose of determining if she has the ache, what the ache is from? A. I examined her.

Q. I am talking now about observation. You used the term observation. You observe symptoms over a period of time, don't you? A. Not necessarily. 30

Q. How long did you examine this patient? A. Sufficient to establish the nature of the injury.

Q. That is a conclusion. I am asking you how long it took you to make this particular examination? A. I would say about ten minutes.

Q. You never saw this woman before? A. No.

Q. Never saw her since? A. No.

Q. Part of the ten minutes, of course, was used in getting the history of the case? A. Well, the 40

Anthony B. Cucinella, cross.

whole examination, the history was very short, the history was simply that she received an injury to the arm due to some glass that fell on it.

10 Q. What did your examination consist of; what did you do during that ten minutes? A. During the ten minutes I made an inspection of both hands and compared them, an inspection of both arms and compared them, noted the function of the fingers, the nature of the scars, whether there was any muscular atrophy, evidence of fracture in the bones and what restriction of function there was in the joints, if any. That could be done in less than ten minutes.

Q. And it did take you less than ten minutes to do it? A. It took me about ten minutes to do it.

20 Q. You were never this woman's physician, were you? A. No.

Q. And your examination was made merely for the purpose of testifying at this trial? A. At the time it was made in order to establish what her injuries were.

Q. Well, now, Doctor, you were not called in to treat her, were you? A. No, just to see what her injuries were.

30 Q. And at the time you made your examination it was for the purpose of giving information to Mr. Broadhurst so that you could testify at the trial? A. I did not know about a trial.

Q. If there was a trial you expected at the time that you made your examination that you would be called as a witness in that trial, did you not? A. Some time, yes.

Q. And you are being paid for coming here? A. Absolutely.

40 Mr. Brenner: That is all.

Anthony B. Cucinella, redirect.

Redirect examination by Mr. Broadhurst:

10 Q. Doctor, it was brought out by Judge Brenner that there are subjective symptoms which have no objective counterpart, such as headaches and backaches, and so on. Now, when an objective symptom of pain or a weakness is complained of in an extremity like an arm, over a long period of time, is there or is there not from the failure of the patient to use the arm so as to minimize the pain, any objective symptom that you can find? A. There is.

20 Q. What is that objective symptom which you then find? A. There is atrophy of the muscles, of the affected part. That atrophy is either an atrophy of disuse, an atrophy of nerve injury, or to the muscle itself that it cannot recover from the trauma that it received.

Q. An atrophy, Doctor, reducing it to lay language, means a shrinking of the muscles? A. A shrinking of the muscles.

Q. And by comparing one arm with the other was that apparent on that examination? A. There was no atrophy present.

30 Q. I say, would it be apparent on your examination, if it existed? A. Yes, after a year.

Q. This was a year after the accident? A. Yes.

Q. Was there any atrophy between the two arms? A. No.

Recross examination by Mr. Brenner:

Q. You know that an atrophy of the muscles only comes from a total disuse, does it not? A. It may come from a total disuse; it may come from a partial disuse.

40 Q. Where a person is using the hand and using it regularly, but simply stops, due to a tired feeling

Anthony B. Cucinella, recross.

in that arm or in that hand, you would not have atrophied muscle there, would you? A. You might have some atrophy. Most likely you would after a period of a year, and furthermore if there was a nerve injury you surely would have it.

10 Q. Just answer the question, Doctor, please. You say you can get an atrophy of muscle where there is no considerable amount of reduction in the use of the hand or arm? A. Where there is a reduction of the hand or arm you would get an atrophy of the part as compared to its fellow member.

Q. Did you measure the arm or hand? A. No.

Q. By tape—simply by eye measure? A. Eye measure.

20 Q. Could you observe the difference in the circumference of an arm or of a hand if it was only a half inch difference? A. I believe so.

Q. Your eyesight is so perfect as far as measurement is concerned that by looking at my hands you could tell if they were both the same size? A. In the size of the hand a half inch of atrophy in circumference is easily noted, because atrophy in the circumference of the palms may be noted, and when you get down to the fingers where you have a smaller area and the areas of comparison are smaller, the atrophy is easily noted.

30 Q. I am not talking about the fingers now; I am talking about the hand and the arm. And you say that by mere observation that you can tell that one of my hands is as large in circumference as the other is? A. Pathologically atrophy is not regular all through, and you can tell by the different lines and different points of contour of the arm, and different depressions being more pronounced than others, and you can tell whether the smaller muscles will show it more.

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Julius Gershonowitz, direct.

Q. Ordinarily, Doctor, for the purpose of determining whether that is an atrophy of muscle, unless it is very much pronounced, you do that by the use of a tape, do you not? A. The use of a tape is also incorrect.

Q. Well, do you do it by the use of a tape? 10
A. When you want to establish the exact amount we do use a tape.

Q. And that will show you definitely, Doctor, whether the circumference is the same or not? A. No, definitely it cannot.

Q. I am asking you whether it will show it definitely? A. No.

Q. You think you can find out better by the use of your eyesight than you could by the use of a tape measure? A. I cannot find the amount, 20
but I can find out if there is any atrophy.

Q. Do you ever use a tape in determining the amount of difference in circumference? A. Yes.

Q. Whether it is an incorrect method or not, you use it? A. Surely, because that is a handy method.

Redirect examination by Mr. Broadhurst:

Q. Why do you use it? You started to answer.
A. Because a tape is easier to carry around. You 30
cannot carry an instrument for measuring atrophy.

Mr. Broadhurst: That is all.

JULIUS GERSHONOWITZ, sworn.

Direct examination by Mr. Broadhurst:

Q. You were one of the owners of this house in which Mrs. Decker lived at the time that we are talking about, May 16, 1925? A. Yes.

Q. That was 74 Avenue C in Bayonne? A. Yes. 40

Julius Gershonowitz, direct.

Q. Will you tell us how long prior to May 16, 1925, that was that you purchased or became the owner of it? A. About two months.

Q. But Isadore Miller was also a co-owner with you? A. Yes.

10 Q. Can you tell us whether you were ever on the roof of this house at any time? A. I was, yes.

Q. Did you move the skylight, I mean, did you move the scuttle? A. Yes.

Q. Can you tell us how far the skylight is from the edge of the scuttle? A. About three feet.

Q. What is your opinion as to the weight of the scuttle about? A. Between 20 and 25 pounds.

20 Q. What is it made of? A. It is built up of two by fours, around the sides.

Q. I mean, is it wood, iron or what? A. Wood, with a covering of galvanized iron on the inside and outside.

Q. How many times did you approximately go up onto the roof, do you know, between March and May, 1925, between the time you bought it and the time this lady was hurt? A. Probably five or six times.

30 Q. Did you have any difficulty in moving the scuttle off? A. No.

Q. One other point. Did you have any talk with Mrs. Decker as to what her duties were or her services were to be as janitress in the place? A. Yes, sir.

Q. And when did you have that talk with her? A. Immediately after my taking over the property.

40 Q. Will you tell us as near as you can, in your own words, and her replies as to just what was said about that? A. I asked her to keep the prem-

Julius Gershonowitz, cross.

ises in a clean condition, put on and turn off the lights, to show some vacant apartments that were in the building at the time, to clean those up, to keep the property, the grounds around the house in clean condition, and I made a general request of her that she do anything that she possibly can 10 to help me in the operation of the property and that if she noticed that anything at all was wrong, if she would please report it to me, and I would try to remedy the condition.

Q. Did she make any reply to that at all? A. She promised that she would.

Mr. Broadhurst: That is all; take the witness.

Cross examination by Mr. Brenner:

20

Q. How much rent did Mrs. Decker pay? A. I believe it was \$37.

Q. And how much did you give her, a month, for this service that she was to perform? A. \$6 a month.

Q. A little over a dollar a week? A. Yes.

Q. And for that she was to take general charge, be practically a superintendent of that building for a dollar a week, is that the idea? A. Yes, \$6 30 a month.

Q. And she was to have the responsibility not only of cleaning the stairs, as she said, and lighting the lights, as she said, but to take general charge of that building and to wash the building for you and to take care of everything that was going on in that building, night and day?

Mr. Broadhurst: I object to that as immaterial, as to whether the terms of this

40

Julius Gershonowitz, cross.

woman's contract were as liberal as they ought to be or not.

The Court: I think it is immaterial inas-
 10 much as it now becomes a question of fact
 by the plaintiff having denied that she was
 to do anything other than what she testified
 to, and this man testifying that she had
 other duties, then I think on cross examina-
 tion it is immaterial to find out what she
 was paid for that in order to help arrive at
 the conclusion of these facts by the jury.

Mr. Broadhurst: Exception.

A. She was to have no responsibility—

Q. Just answer the question, yes or no? A. She
 20 was to have no responsibility—if you ask for a
 yes or no answer, I must say no.

Q. What do you mean, she was to have no re-
 sponsibility? You said in answer to Mr. Broad-
 hurst's question that she was to wash the build-
 ing and everything that was going on in connec-
 tion with it. Now, that is responsibility, isn't it?
 A. As I construe responsibility no, because if any-
 thing went wrong, despite her efforts, she was not
 to be held responsible.

Q. In other words she did not have to pay for
 30 it if the building burnt down or something?

Mr. Broadhurst: It seems to me that is
 rather far fetched.

Q. What you mean by responsibility is that if
 something happened in spite of her vigilance, that
 she would not have to pay for it out of her pocket,
 is that what you mean? A. I mean, if you ask
 for an instance, I asked her to see that the chil-
 40 dren did not play too much in the hall of the

Julius Gershonowitz, cross.

property, but if despite her efforts they did and
 they marred the wall paper in the hall, she cer-
 tainly was not responsible for it.

Q. In other words, she did not have to pay it?
 A. That is right.

Q. But she was supposed to look after it just
 10 the same? A. I asked her to look after it.

Q. And you expected her to do it? A. Yes.

Q. And you expected her to do it for the salary
 that you were paying? A. Yes.

Q. Now, besides watching the children so that
 they would not mar your property, she was sup-
 posed to look after these vacant apartments that
 you had? A. The consideration of \$6 a month
 was not for her renting of the apartment. If she
 was to rent any of the apartments she was to get
 20 an additional consideration.

Q. Did you tell her so? A. Yes.

Q. Did you tell her what you were going to pay
 her? A. I don't recall.

Q. You did not say anything on direct exam-
 ination that you were going to pay her additional
 for that, did you? A. No, sir.

Q. Did you forget about it? A. Yes.

Q. You did forget about it? A. Yes.

Q. In other words, she was to take general care
 30 and supervision of this entire building, as you say,
 for \$6 a month? A. Yes.

Q. So you assume, Mr. Gershonowitz, that when
 this accident happened that she was working for
 you?

Mr. Broadhurst: I object to that. That
 is a matter of law to be decided here.

(Question repeated.)

A. Well, part of her time.

Julius Gershonowitz, cross.

The Court: Well, I see no harm in it to the defense, as to what he assumes. That won't make it so. It is only a conclusion.

Mr. Brenner: I withdraw it.

10 Q. Did you ever offer to pay this woman any compensation?

Mr. Broadhurst: I object to that as immaterial. That would all hinge on whether the woman made any claim for compensation.

The Court: After the accident?

Mr. Brenner: Yes.

The Court: Objection sustained.

Mr. Brenner: Exception.

20 Q. As a matter of fact she was never paid any compensation after this accident happened, was she? A. You mean for the accident?

Q. For the accident. A. I never paid her anything.

Q. Did she ever talk to you about it?

Mr. Broadhurst: I object to that as immaterial.

The Court: The objection is sustained.

30 Q. Now, when you went up that roof and lifted off the scuttle, did you push it right back as you went up the ladder? A. What do you mean by back?

Q. Back towards the skylight? A. No, sir.

Q. What was your manner of taking it off? A. I would push it either to the side or to the back. The skylight was in front of me as I walked up the ladder.

40 Q. And did you push it over toward the skylight? A. No, sir.

Julius Gershonowitz, cross.

Q. How did you lift it off? A. I lifted it up and put it over on the side.

Q. What was your purpose in doing that, why didn't you just push it right back? A. Because before going up I saw that the skylight was there.

Q. In other words, you realized that if you went up that ladder and pushed this thing frontwards toward the skylight, that it was apt to hit the skylight and injure somebody? A. No, it was not that, but in general I don't believe in allowing two objects to collide with each other. 10

Q. In other words, you realized then that in lifting this scuttle off, that there was a danger of its colliding with the skylight? A. Yes.

Q. It was sufficiently close to the skylight to do just that thing? A. In some conditions it might. 20

Q. And you realized that if it did hit the skylight it was apt to break the glass, didn't you? A. No, sir.

Q. Now, the skylight was made of glass, wasn't it? A. Yes.

Q. Didn't you realize that it might have a tendency to break that glass if it did hit it? A. No, sir.

Q. What was the reason for being so careful then if it could not break anything or harm anything? A. Well, a roof is a very delicate thing for one thing and any number of things might happen, and I would rather not in going up on a roof in one object cut another because leaks are very apt to happen. 30

Q. Oh, you were using so much care then to preserve this property? A. I preserve any property if I possibly can.

Q. But you were doing it to preserve your property against the possibility of leaks. It had noth- 40

Charge.

ing to do with smashing against this skylight? A.
No, sir.

Mr. Brenner: That is all.

Mr. Broadhurst: That is all.

10 That is our case. I renew my motion for a di-
rection of verdict, this time on the ground that
there is no evidence in the case of any negligence
as alleged in the complaint, which was the proxi-
mate cause of the accident, and to elaborate on
that further it is my contention that not only is
there no negligence or the violation of any duty
but it clearly appears that the accident was caused
by the intervening human agency of Mr. Bryce in
his act of going to the roof and throwing this
scuttle back against the skylight.

20 I omitted in making the grounds of my motion
to include, under the undisputed evidence in the
case that the plaintiff's sole remedy is under the
New Jersey Workmen's Compensation Law.

The Court: The motion is denied. I am going
to submit the case to the jury.

Mr. Broadhurst: Exception.

(Both sides sum up to the jury.)

30

Charge.

The Court thereupon charged the jury as fol-
lows:

The Court: Gentlemen of the jury: This is
an action brought by Madeline Decker and her
husband, Ernest Decker, against these two de-
fendants, in which the plaintiff claims damages
for an accident that occurred in a tenement house
in Bayonne which the defendant owned and in
40 which the plaintiff lived. The facts in this case

Charge.

are practically all admitted as far as the happen-
ing of the accident is concerned, and so forth, so
that it does not seem to be necessary for the Court
to take your time or its time in discussing the facts.

It is admitted that on the day in question this
woman plaintiff was in the hall talking to one
10 of her neighbors, on the top floor, the second floor
I think it was, of this apartment house, and that
this accident occurred by the skylight, which was
in the roof of the building, being broken, by hav-
ing the trapdoor or the scuttle, whatever you
might call it, fall over against it and break the
glass and that the glass came down and cut her
hand.

There is some conflict of testimony, some dif-
ference between the parties as to the amount of
20 the damages. Of course, do not misunderstand
me, when I say that the facts are all admitted,
to mean there is no controverted question of how
badly she was injured. I mean, the actual hap-
pening of the accident and the circumstances un-
der which the accident happened are practically
admitted, and so you will not have much trouble
with that feature of it.

When you come to the question, if you do, as
to how much damages she sustained because of
30 this injury, why, then you will recall, of course,
the statements that have been offered here by
each side in order to help you in determining
that amount.

Before I forget it I want to call your atten-
tion to the fact that the refusal of the Court
to direct a verdict in this case or to non-suit
upon motion by the defendant, is not in any sense
to be taken by you as having any weight what-
soever in your determination of what the ver-
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Charge.

dict in this case should be. That simply means that the Court thought that there was a jury question, a fact question for a jury and not for the Court to take the responsibility of deciding. If it is a law question, it is for the Court to pass upon, if it a jury question, that is, if there are two sets of facts upon which the jury would have the right to pass and determine which one of them in the jury's judgment is the proper one, it is for you to pass upon. Because of the fact that the Court considered it a question for you to pass upon, the Court refused to assume the responsibility and merely refused the motion without expressing in any way the Court's personal notion of this case, merely indicating that in its judgment it thought that there was a jury question, a question of fact for you to decide, and that is all that means.

The mere happening of an accident, of course—this is the point it seems to me that this case resolves itself to, and as a matter of fact it is a point that all cases of this kind resolve themselves to—the mere happening of an accident does not mean that somebody has got to pay for it or that anybody was responsible for it. That is not the criterion. The happening of an accident for which a plaintiff can recover must be an accident which was caused by the negligence of someone, the party who is being sued. If it was not, of course, they have nothing to do with it at all. And it must be caused by more than the negligence of the defendant, because the mere negligence of the defendant is not of itself sufficient to entitle a person to recover for an accident. Instead that negligence of the defendant must be the proximate cause of the injury. The

Charge.

party whose negligence is the proximate cause of the injury is the party who is responsible, and that is what you have got to determine in this case, namely, first of all, of course, were the defendant owners negligent? Was the construction of this scuttle, in the manner in which it was constructed, negligent? If it was not, in your judgment, that ends the case, and there must be a verdict of no cause of action.

You have heard it defined as to just what the Tenement House Law requires. I have not got the law to quote it exactly to you, but I may say to you that counsel has quoted it exactly. This case is predicated, as I understand it, by the plaintiffs, upon a violation of the Tenement House Law, plus a violation of the Common Law due to the negligent construction of this particular scuttle.

If you believe that this scuttle was constructed in violation of the provisions of the Tenement House Law, that in itself is not actionable *per se*, is not of itself sufficient to cause a recovery and to say that the defendants were negligent because of that alone. But it is one of those cases wherein if the defendants did allow to continue a scuttle which by its construction was a violation of the act in question, that is one of the facts which may be taken into consideration in determining the whole question of whether or not the defendants in this case were negligent.

Now then, you also will take into consideration the whole construction and operation and maintenance and control of this scuttle and the skylight in question, the roof of this building in which the tenants were living, and to which they had a right to go, and determine whether or not

Charge.

there was a negligent operation, maintenance, control or construction thereof, by the defendants, and whether because of that negligence this plaintiff suffered injuries and whether or not that negligence was the proximate cause of this plaintiff's injuries.

Now, proximate cause has been said to be important in this case, and you will want to know, of course, what the law says proximate cause is. The definition is as follows: Proximate cause is the controlling cause, the efficient cause, the cause which sets the other causes in operation, leading up to the accident and without which, of course, the accident would not have happened. The proximate cause is the efficient cause, the one that necessarily sets the other causes in operation. The causes that are merely incidental or instruments of a superior or controlling agency are not proximate causes, neither are they the responsible ones, though they may be nearer in time to the resulting injury.

Now, then, what was the proximate cause in this case, which was the controlling cause, the efficient cause, the cause which set the things in operation which caused this accident? If it was the defendant's negligence and that negligence was the proximate cause of the injury, then the plaintiffs in this case would be entitled to a recovery.

Now, if you come to the determination that the plaintiffs are entitled to recover, then you will, of course, have to consider the measure of damages in each case. The verdict will not be a joint verdict for the plaintiffs. They will be separate verdicts, one for the wife, as against the defendants, and one for the husband as against the defendants.

Charge.

The wife's measure of damages, if any, would be such an amount in money as would compensate her for the pain and suffering which she endured because of this accident in the past and for the pain and suffering, if any, that she will probably endure in the future. She would be entitled to damages, if there is any permanent injury, in such a sum as you would think would fairly and properly compensate her for her injuries as long as they will probably endure in the future, and then also for permanent injury, if any.

There was a scar on her hand the nature of which there is some controversy about, as to whether it is deep or whether it is just a superficial scar. There is some testimony as to that, but you know just what that feature of the testimony is. There is also testimony that the finger is bent and crippled, and there is testimony that because of the injury the hand, and the arm as a whole, has been made stiff and incapable of the use that she had of it before the accident.

As to the husband's damages, the husband is entitled to recover in money for the sums which he properly expended in curing or attempting to cure his wife of the injury in this case, the doctor's bills, the medicines, the help, if any, that he had to hire. There was no testimony as to the value of the work of the woman who was brought in to do the work, so that you may eliminate that. As I recall there is no testimony about that, but there is some testimony as to the laundry having to be sent out. The testimony is that prior to the accident the wife did that herself. The husband, of course, is entitled to have that done for himself in his household by her as his wife, in the ordinary

Charge.

10 course of her duties as his wife, and if because of this accident he was deprived of that and was forced to pay some outsider extra money to get that done which he had a right to expect under the law his wife to do had she been all right, he would be entitled to recover for that, if he was forced to expend that because of this injury. The figures I believe have been given to you better than I can give them to you. I am afraid to try to quote them. I think the doctor's bill for \$20, and you will recall what that was perhaps. The doctor's bill was \$20, wasn't it?

Mr Broadhurst: Yes, there is no dispute about that.

The Court: And \$2.64 for laundry.

20 The first thing, as I told you at the beginning, to determine is the defendant being under the duty to use reasonable care in having that building in such a condition as to be safe for the tenants who had a right to be there as they were at this particular time, whether he used reasonable care in keeping that safe for them.

30 Now then, first of all you have got to determine were the defendants negligent, not what somebody else did, somebody other than the plaintiff, not so much whether the man going up the ladder was negligent, but were the defendants negligent. If they were, then you have a starting point. If they were not, that ends it. The case is out altogether. If there is no negligence on behalf of these defendants, why, of course, the plaintiff cannot recover.

40 Now, if you find that the defendants were negligent, then you have got the starting point. Then if you should decide that there was also negligence on behalf of the man going up the ladder as well

Charge.

as negligence on behalf of the defendants, you would have to come to the question, which was the proximate cause of this injury? If you find that the proximate cause of the accident was some cause other than the defendants' negligence, that ends the case. But if you decide first that the defendants were negligent, and that their negligence was the proximate cause of this injury, then you would come to the question of damages and apply them as I have stated the rule. 10

Gentlemen, have I overlooked something before the jury retires?

Now, gentlemen, it has been called to my attention that you might be misled by some reference the Court has made to the question of whether or not Mr. Bryce was negligent. I meant by that, of course, that if Mr. Bryce was negligent, and that if his negligence was the proximate cause of the injury, that then the defendants would not be liable, because their negligence would not be the proximate cause, if he was the sole, proximate cause. But if you find that both were negligent and that both were proximate causes of the injury, then you would find a verdict against this defendant, because while Mr. Bryce is not in the case, that does not make any difference. If the negligence of the defendants was the proximate cause of the injury, even if combined with the negligence of some other party, that would not prevent the plaintiff from recovering in this case. 20 30

I have also been asked to say that if the act of Mr. Bryce was the intervention of an independent third person between the wrong complained of and the injury sustained, the plaintiff cannot recover.

I so charge you. 40

Charge.

Mr. Broadhurst: I except to that part of your Honor's charge wherein you said that the question for the jury to decide first is, was the defendant negligent and second was the construction negligent. In other words, I except to that part of your Honor's charge wherein you said that if you believe that the scuttle was constructed in violation of the provisions of the Tenement House Law, that is one of the facts that could be taken into consideration by you in your consideration of the question of whether the defendant was negligent.

I except to that part of your Honor's charge wherein you said that the jury could consider whether or not the whole construction, operation, management and control of the scuttle was negligently done or managed or constructed or controlled or operated, in determining whether the defendant was liable.

I ask an exception to your Honor submitting to the jury at all the question of proximate cause on the ground that I feel that that is a law question.

And I except to the latter part of your Honor's charge, which is really a repetition to some extent of my other exception, wherein your Honor said in conclusion that the defendant was under a duty to use reasonable care to keep the premises safe, and they were to decide was the defendant negligent, in the construction and in a violation of the Statute.

40

Opinion.

(Filed Nov. 25, 1927.)

NEW JERSEY SUPREME COURT.

MADLINE DECKER, *et al.*,
Respondents,

v.

ISADORE MILLER, *et al.*,
Appellants.

10

Submitted May Term 1927. Decided November
, 1927.

On appeal from Hudson County Circuit Court.

For Appellants: COLLINS & CORBIN.

For Respondents: BRENNER & KRESCH.

20

Before—GUMMERE, Chief Justice, and Justices
BLACK and LLOYD.

Per Curiam:

The defendants appeal from a judgment against them in the Hudson Circuit Court. The action was one for damages for injuries occasioned by the fall of part of a trapdoor on the hand of the plaintiff Mrs. Decker.

30

Defendants below were the owners and plaintiffs below were the tenants of a two story tenement house in Bayonne containing two families on each floor. Plaintiffs occupied one of the second story apartments, and on the roof over the hall adjoining their apartment there was a trapdoor or scuttle to which all tenants had access in case of emergency. On May 16, 1925, while Mrs. Decker was standing in the hall her co-tenant on the same floor went to the roof to locate a fire. To do so he had to raise the trapdoor. As he

40

Opinion.

raised the trapdoor he lost control of it and it fell on the skylight, breaking the glass and the broken parts fell on Mrs. Decker's hand, cutting it.

10 The court submitted the case to the jury on the grounds of negligent construction and failure to comply with the tenement house act, and the jury returned verdicts for the plaintiffs.

The grounds of appeal are that the court improperly refused to grant a nonsuit or to direct a verdict for the defendant, and that a portion of the charge was erroneous.

20 The complaint alleges that the trapdoor was permitted to become out of repair and in a dangerous condition, and to this was later added an amendment averring that it was not properly balanced so as to be easily opened.

30 Examination of the proofs fails to exhibit any evidence that the trapdoor itself was out of repair or defective, or that it was not properly balanced. But it is urged by the respondent that the ladder leading to the roof was not erected at an angle of sixty degrees as required by the tenement house act of 1904 (p. 107, amended in 1905, p. 170); that on the contrary it was nearly perpendicular and that in consequence one attempting to reach the roof would be required to devote a part of his strength to maintaining his balance on the ladder to the detriment of his physical ability to raise the trapdoor. Without determining the legal sufficiency of this factor to constitute negligence or passing on its casual relation to the accident, it is sufficient to say that the case presented no issue based thereon; the complaint is directed wholly to the trapdoor itself and its fittings, and not to any fault in the location or placing of the ladder.

40 On this ground the motion for nonsuit or for a direction should have been granted.

The judgment is reversed.

Judgment of Reversal.

(Filed December 6, 1927.)

NEW JERSEY SUPREME COURT,

No. 47, MAY TERM, 1927.

MADELINE DECKER and ERNEST DECKER, <i>Plaintiffs,</i> <i>v.</i> ISIDORE MILLER and JULIUS GER- SHANOWITZ, <i>Defendants.</i>	}	On Appeal from Hudson County Circuit Court.
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20 The appeal in the above entitled action having been duly argued at the May Term, 1927, of this Court, and briefs having been submitted and the appeal having been duly considered by the Court, and the Court being of the opinion that the judgment below should be reversed because the defendants' motions for nonsuit or direction of verdict should have been granted;

20

30 It is on this fifth day of December, 1927, ORDERED AND ADJUDGED that the judgment of the Hudson County Circuit Court be and the same hereby is in all things reversed and set aside and for nothing holden and a *venire de novo* be and the same hereby is issued to the defendants.

30

Rule actually entered this 6th day of December, 1927, on motion of

COLLINS & CORBIN,
 Attorneys of Defendants.

40

Notice of Appeal to Court of Errors and Appeals.

(Filed December 10, 1927.)

NEW JERSEY SUPREME COURT.

10	<p>MADLINE DECKER and ERNEST DECKER, <i>Plaintiffs-Appellants,</i></p> <p style="text-align: center;"><i>v.</i></p> <p>ISADORE MILLER and JULIUS GERSHANOWITZ, <i>Defendants-Appellees.</i></p>	<p>On Appeal from the New Jersey Supreme Court.</p> <p>Notice of Appeal and Grounds.</p>
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20 To Collins and Corbin, Esqs., Attorneys of Defendants.

Sirs:

TAKE NOTICE that the appellants Madeline Decker and Ernest Decker, appeal to the Court of Errors and Appeals in the last resort in all causes in New Jersey, from the whole of the judgment entered in this cause, upon the following ground:

30 Because the New Jersey Supreme Court reversed the judgment of the Hudson County Circuit Court, although there was error in so doing.

BRENNER & KRESCH,
Attorneys and of Counsel for Appellants.

Sat Below:

GUMMERE, C. J.,
BLACK, J.,
LLOYD, J.

Endorsed:

40 Service of the within notice, appeal and grounds is hereby acknowledged this 8th day December, 1927.

COLLINS & CORBIN,
Attorneys for Defendant-Appellees.

New Jersey Court of Errors and Appeals

<p>MADLINE DECKER, <i>et al.,</i> <i>Plaintiffs-Appellants,</i></p> <p style="text-align: center;"><i>v.</i></p> <p>ISIDOR MILLER, <i>et al.,</i> <i>Defendants-Appellees.</i></p>	<p>On Appeal.</p>
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BRIEF OF APPELLANTS.

On May 16th, 1925, Madeline Decker resided at No. 74 Avenue C, Bayonne, and occupied an apartment to the rear of the second floor. The building was frame constructed and consisted of four apartments occupied by two families on each floor (Case, p. 12, lines 12-30).

On this date she was standing in the hallway immediately outside of her own door, as was Mrs. Brice, a tenant occupying an apartment on the same floor (Case, p. 13, lines 1-10). Their reason for being there at that time was to make payment of a bill to the baker, whose boy then came for it (Case, p. 14, lines 10-15). While standing there, a report came of fire and Mr. Brice, the husband of the woman standing in the hallway said, "I am going to see where the fire is," and started for the ladder for the purpose of going to the roof (Case, p. 14, lines 28-35). This ladder lead to a scuttle in the roof, closed with a cover that fitted around it (Case, p. 15, lines 1-15). The cover was of wood and galvanized iron or tin. It

weighed approximately 70 to 75 pounds, was fitted over the edge of the scuttle and was held in place without hinge, balance, counter-balance or other device or protection (Case, p. 32, lines 1-40). In close proximity to it was a skylight in no manner protected against breakage if the cover of the scuttle should come in contact with it (Case, p. 33, lines 1-3). The cover fitted so tightly that to lift it required considerable force (Case, p. 33, lines 20-23). When the cover was lifted back by Brice, it crashed against the skylight, causing the glass therein to break, shatter down upon Mrs. Decker and caused the injuries for which she thereafter brought suit (Case, p. 41, lines 25-40).

Trial was had before Judge CLEARY and a jury in the Hudson County Circuit Court and verdicts rendered in favor of the plaintiffs Madeline Decker and her husband Ernest Decker, and judgment entered thereon (Case, p. 9). On appeal was taken to the Supreme Court, the judgment was reversed (Case, p. 83) and from such reversal, appeal is now taken into this Court.

ARGUMENT.

POINT I.

There was proof of negligence of the defendant.

It is conceded that the building in question was occupied and built to be occupied by more than three families living independently of each other, and that it, therefore, came within the definition of what the statute terms a tenement house.

4 C. S. 5323, Par. 2.

The building, however, not being over three stories in height, it was not necessary to maintain

on the roof thereof a fire proof bulkhead as is required in the larger buildings; but the owner thereof was obliged to maintain on such roof a fire proof scuttle. The statute providing:

“Every Tenement House now existing or hereafter erected not over three stories in height, may have in lieu of such bulkhead, a fire proof scuttle * * *.”

4 C. S. 5329, Sec. 50.

In the following section is prescribed how such bulkhead should be constructed. The statute using the following language:

“No bulkhead or scuttle in any tenement house shall at any time be locked with a key, but it may be kept fastened on the inside by movable bolts or hooks; and said door or scuttle shall not be obstructed in any way and SHALL BE SO CONSTRUCTED, HUNG OR BALANCED AS TO BE EASILY OPENED, and of such size as to provide an easy exit for a grown person.”

4 C. S. 5329, Sec. 51.

Examination fails to reveal any case in this State which gives a legal definition of the words HUNG or BALANCED. A dictionary definition explains in simple language the meaning of these words as follows:

“HANG—To fasten to some elevated point without support from below; suspend.

“To fasten in a manner which will allow of free motion upon the point or points of suspension; said of a pendulum, a gate, a door, etc.

“BALANCE—To bring to an equipoise, as the scales of balance; to cause to be in equilibrium; hence, to support, poise or arrange so that the opposing forces neutralize each other.” WEBSTER'S NEW INTERNATIONAL DICTIONARY.

No point is made that the scuttle was locked or kept fastened by bolts, hooks or otherwise, but it is alleged as a specification of negligence in the complaint that the scuttle was not so constructed, hung or balanced within the definition as given, as to be easily opened.

The complaint as originally drafted did not contain an averment which would cover this specification of negligence. Amendment was, however, allowed, in which the specific charge of negligence is particularly made. The language being as follows:

“(c) That the scuttle or door leading from the hallway to the roof of said premises was not properly constructed, hung or balanced so as to be easily opened.

“(d) That said scuttle or door was so negligently constructed that it could not be easily opened” (Complaint, pp. 8 and 9).

The rule is so well settled as to have become almost elementary that the proof of the violation of a penal statute shall be considered in determining the negligence of a defendant.

In this connection probably no better language could be adopted than that used by Mr. Justice PARKER in the Supreme Court, in which he says:

“In cases of this class where the statute is penal in character and the right of action is predicated on an alleged violation of the statutory duty, the action is governed by the ordinary rules of negligence cases, EXCEPT THAT THE VIOLATION OF THE STATUTE OPERATES AS THE BASIS OF THE DEFENDANT’S LIABILITY, the defendant retaining all the defenses appropriate to an action of negligence that are not affected by the statute.”

Krebs v. Rubsam, et al., 91 N. J. L. 426, 104 A. 83.

The same or similar language has been used and approved in other cases in this State, almost too numerous to be cited.

Kargman v. Carlo, 85 N. J. L. 632, 90 A. 292;

Cittadino v. Shackter, 83 N. J. L. 593;

Pesin v. Ingovitch, 85 N. J. L. 256;

Opreska v. Shapiro, 99 N. J. L. 226.

It may be argued that the cited cases apply only to stairways and passageways. Complete answer to such contention will be found in the decision of Mr. Justice BLACK in which he holds that the rule relative to stairways and passageways is likewise applicable to the roof of a building.

Perry v. Levy, 87 N. J. L. 670, 94 A. 569.

The opinion of the Supreme Court does not seem to take issue with the contention that the violation of the provisions of the Tenement House Act would provide a basis for recovery, but seems to hold that there was a lack of proof that the violation existed, the following language being used:

“Examination of the proofs fails to exhibit any evidence that the trapdoor or itself was out of repair or defective, or that it was not properly balanced” (Case, p. 82, lines 21-23).

In the use of the word “trapdoor” the Court of course meant the same as has been referred to by us and by the statute as scuttle and cover. It is true that there was no evidence to indicate that it was out of repair, and although the complaint so alleges, no attempt was made to supply proof in support thereof. Proof, however, was offered in support of the general allegation that it was defective because not properly constructed as required by the statute and in support of the more specific

allegation in the complaint that it was not constructed, hung or balanced as the statute required. A perusal of the opinion of the Supreme Court will undoubtedly reveal that its determination was predicated solely upon the ground of lack of proof to support the contention then and now made that the statute was violated and that a right of action, therefore, existed.

It is now respectfully urged that in its determination to that effect the Court erred and for the purpose of so indicating it will be necessary to consider the evidence of the several witnesses for the plaintiff whose testimony seems undisputed.

Although the plaintiff Madeline Decker had no knowledge concerning the construction of the scuttle in question, her husband Ernest Decker testified that there was an opening in the roof with an edge around it over which was fitted the scuttle cover consisting of wood and galvanized iron or tin. The cover was heavy, weighing approximately 70 or 75 pounds, his knowledge as to its weight being gained from his experience as an iceman and as such accustomed to lifting heavy objects. He says that the cover was not fastened either by hinges or controlled by a counterbalance of any kind and was so constructed that there was nothing to protect it from being thrown against the skylight which was in close proximity. Besides, he says, that because of its weight and the fact that the cover fitted tightly around the edges, it could not be easily opened, but a considerable amount of force was required to be exerted to lift it from its position (Case, pp. 32-33, lines 1-23).

In this statement he is corroborated by James Brice, whose act in raising the cover had caused it to topple against the skylight, causing the breakage of glass and resultant injury, and he says that it was necessary to keep hold of the ladder lead-

ing to the scuttle with one hand, while attempting to raise the cover with the other. His judgment was that the cover was heavy and weighed between 70 and 80 pounds and that to lift it it was necessary to put some strength or stress behind it (Case, p. 44, lines 30-40; p. 45, lines 10-25).

Not only does this testimony come from the lips of the witnesses for the plaintiff, but it is further corroborated by one of the defendants Gershanowitz, who admits that on 5 or 6 occasions prior to the date of the accident, he had gone to the roof through this scuttle (Case, p. 66, lines 25-30) and was, therefore, chargeable with knowledge of any defect that existed therein. He does not refute the testimony previously given that the cover was not hung or balanced as the statute requires, nor does he attempt to claim that it was easily opened, but to the contrary in realization of the danger that existed, he first lifted it up and then slid it over to the side. Although he would not admit that if the cover came in contact with the skylight it might cause the glass to break, he does say that there was danger that if not carefully opened, it might come in contact with or collide with the skylight, and as he says, the two were sufficiently close that under some conditions there was danger of such contact (Case, p. 71, lines 1-20).

From an analysis of this testimony given in behalf of both parties to the action, the testimony seems uncontradicted and undisputed that by reason of his previous visits to the roof, the defendant mentioned, knew, he being a partner of the other defendant, is presumed to have conveyed to the other defendant knowledge that the scuttle or cover to the scuttle was neither hung nor balanced; that it could not be easily opened and was, therefore, in violation of the statutory requirements, and, therefore, it was obvious that danger existed;

that the cover when lifted if extraordinary precautionary measures were not used was likely to come into contact with the skylight, break the glass therein and occasion injury to persons lawfully in the hallway beneath. It is inconceivable how it can be said in the face of this testimony, that sufficient evidence had not been produced to leave to the jury the question of the existence of the violation and for their consideration the further question of the defendant's knowledge that a dangerous condition existed.

It is, therefore, respectfully contended that a jury question was presented and that the Court below erred in its determination that upon these facts the nonsuit or direction of verdict should be granted.

Further comment is made in the opinion relative to the ladder leading to the scuttle. No contention was made that this could be considered by the jury as one of the specific allegations of negligence. This was made clear at the opening of the case when in response to the Court's question it was admitted that this was not one of the specifications of negligence, with the exception that the position of the ladder might have some bearing on the question of the ease with which the scuttle could be opened (Case, p. 11, lines 35-40). This was reiterated later to the Court when objection came to a question propounded (Case, p. 33, lines 30-40).

Decker testified that the ladder was straight up and down (Case, p. 32, line 2), and Brice said that it was necessary to hold on to the ladder with one hand, while lifting the cover with the other (Case, p. 44, lines 29-32). The position of the ladder as so testified to was not contradicted, and although it is correctly stated in the opinion that this of itself could not be made the basis of a charge of neg-

ligence, there being no allegation in the complaint to support it, the jury certainly had the right to consider and the Court was authorized to leave to the consideration of the jury this uncontradicted evidence given without objection to aid in the determination of whether the construction was such that the cover of the scuttle could be easily opened.

In the Court below, although no consideration was given to the argument, the contention was made and argued at length and will probably be again argued by the appellees in this Court, that negligence has not been established because there was no proof that the scuttle in question or the cover thereof, differed in construction from that ordinarily used in buildings of the type occupied by the appellants. The claim was made and will probably be reiterated, that due to this absence of proof, that it cannot be found that there was a standard of construction and upon failure to establish such a standard, that no recovery could be had.

Numerous citations were referred to, which it was alleged supported this argument, but examination of these citations will reveal that for the most part the decisions are relative to the construction of railroad station platforms and in none of the decisions is there a statutory requirement that the same should be constructed in a designated manner. The basis of the present action as has been hereinbefore argued, is the statutory violation which in the cited cases has been held the basis of an allegation of negligence. It, therefore, becomes immediately obvious that the decisions of our own and other courts relative to a standard of construction have no application.

POINT II.

The negligence of the defendants was the proximate cause of the occurrence of the accident and resultant injury.

The motions for nonsuit and direction of verdict were predicated upon the contention not only that negligence had not been established, but upon the further ground that the alleged negligence was not the proximate cause of the occurrence in question. This phase of the case, although not touched upon in the opinion of the Supreme Court will probably be reargued by the appellees.

Diligent investigation has failed to reveal any case in our own State or in other jurisdictions, in which the facts were identical with those in the present case. The general rules relative to and definitions of proximate cause, however, we believe support the contention that upon the finding of negligence it was the province of the jury and not the Court, to determine whether there was a causal connection between the violation of the statute, the allegation of negligence predicated thereon, and the resultant accident.

The rule concerning proximate cause has been well expressed by the Supreme Court, where it was said:

"It would perhaps be unprofitable to any very great extent to enter upon any examination as to the almost infinite number of cases upon the subject of causal connection, proximate cause, combined and concurrent causes, or intervening efficient causes. If there could be deduced from them the very best possible expression of the rule, it would remain after all to decide each case largely upon the special facts belonging to it, and often upon very nice discriminations; the border line at which natural sequence ceases to exist and becomes

unnatural is, it seems to me, extremely difficult to determine. * * *

"We look for the primal negligence contributing to the injury, and then follow it up to its natural consequence and ascertain whether any independent efficient cause intervened to produce the injury, AND IT MUST BE GENERALLY LEFT TO THE JURY TO DETERMINE ACCORDING TO THE CIRCUMSTANCES OF EACH PARTICULAR CASE WHETHER THE FACTS FIT THE STANDARD OF NATURALNESS. * * *

"WHOEVER DOES A WRONGFUL ACT IS ANSWERABLE FOR ALL THE CONSEQUENCES THAT MAY ENSUE IN THE ORDINARY AND NATURAL COURSE OF EVENTS, THOUGH SUCH CONSEQUENCES BE IMMEDIATELY AND DIRECTLY BROUGHT ABOUT BY INTERVENING CAUSES, IF SUCH INTERVENING CAUSES WERE SET IN MOTION BY THE ORIGINAL WRONGDOER."

Hamill v. Pennsylvania Railroad Company, 56 N. J. L. 370.

As previously outlined, the undisputed evidence is that there was a violation of the statute and if the argument previously made merits consideration, there was properly left to the jury for its determination, the question of negligence and the finding by the jury as a fact that negligence existed is conclusive.

Applying the rule that the wrongdoer is answerable for all the consequences that may ensue in the ordinary and natural course of events, it is now contended that the facts were properly left to the determination of the jury. The defendants could and should have foreseen that the scuttle on some occasion would be used. This is especially true, as it must have been a known fact as testified to, that arials had been placed on the roof by some of the tenants in the building (Case, p. 34, lines 22-40). The owners must have ac-

quired knowledge of that fact because one of the partners admits having gone to the roof on occasions previous to the accident; that the existing danger was known to the defendants is established by the testimony previously referred to that considerable care was used by the one defendant in removing the cover, because he realized that a lack of care would probably result in the cover coming into contact with the skylight that was in such close proximity thereto.

Upon the testimony, therefore, both the Court and jury could reasonably determine that a violation existed; that because of such violation there was danger unless extraordinary care was used in throwing back the cover that it might collide with the skylight; that this danger was known to the defendants; that regardless of the knowledge of the existence thereof, that no effort was made to correct the condition, and that by reason thereof in the use of the scuttle for a legitimate purpose, the cover came into contact with the skylight; that the glass therein was broken and in falling, injured the plaintiff Madeline Decker.

It will, therefore, be observed that there was a natural sequence between the original violation and the resultant accident and injuries.

It will of course be argued that the action of Brice in raising the cover was an intervening act which broke the causal connection and that the determination of this was for the Court's consideration and could not be left to the jury. This argument can be best answered in the language of Mr. Justice SWAYZE speaking for this Court, in which he says:

"The rule of law exempting the one guilty of original negligence from damage due to an intervening cause is well settled. The diffi-

culty lies in the application. LIKE THE QUESTION OF PROXIMATE CAUSE, THIS IS ORDINARILY A JURY QUESTION."

Brauer v. New York Central & H. R. R. Co., 91 N. J. L. 190; 103 A. 166.

The extent to which our Courts have gone in leaving to the jury's determination the question of existence of proximate and intervening causes is well illustrated in the case last cited.

There, as the result of the alleged negligence of the railroad company, the horse of the plaintiff was killed and his wagon destroyed. There was of course no question concerning the right of the plaintiff to recover, if negligence was established, for the value of the horse and wagon. The wagon, however, was loaded with empty barrels and a keg of cider which the Court found were probably thereafter stolen by persons at the scene of the accident. Recovery was sought not only for the value of the horse and wagon but for the stolen property, and the contention was very naturally made that unless there was proof of destruction, there was no right of recovery, the argument being made that the railroad company could not reasonably anticipate a theft and that the loss by theft was not a proximate result, and further that there was an intervening human agency.

In the opinion consideration was given not only to the previous decisions of our own Courts, but like analysis was made of the decisions of other jurisdictions including the English cases, with the result that it was given as the opinion of this Court that the matter is one for a jury's determination.

This Court having gone to the extent of determining that the act of a thief in removing property after the occurrence of an accident is not such an intervening cause as will destroy the causal

connection between the original violation and the resultant loss, it seems utterly inconceivable that it can be held that the act of Brice in removing the cover was so far removed from the original wrongdoing as to defeat a right of recovery.

If the requirements of the statute had been obeyed and the cover secured, Brice's act in removing it could not have caused the damage complained of and his act, therefore, is merely an incident in the chain of causation between the original wrongdoing and resultant injury. In this argument, we believe that we are supported by all of the leading decisions in this State.

D. L. & W. R. R. Co. v. Salmon, 39 N. J. L. 299;

Collins v. N. J. Express Co., 72 N. J. L. 231;

Clark v. Public Service Electric Co., 86 N. J. L. 144; 91 A. 83;

Ferguson v. Central Railroad, 71 N. J. L. 647;

Cittadino v. Shackter, 83 N. J. L. 593;

Batton v. Public Service Corporation, 75 N. J. L. 857.

POINT III.

At the trial exception was taken to a portion of the charge and in the Supreme Court it was urged as a ground for reversal that the charge was erroneous.

As this portion of the charge is set out at length in the printed case, it is not herein repeated (Case, pp. 2-4).

Argument was made in the Supreme Court that this portion of the charge was an incorrect statement of the law, but no case was there cited in support of the contention and examination has failed

to disclose any decision which would indicate that any statement contained in this portion of the charge is not a proper statement of the legal principles involved. Concisely stated, the jury was charged that the mere proof that there was a violation of a penal statute of itself gave no authorization for the rendition of a verdict favorable to the plaintiffs. This statement receives support from numerous decisions, and certainly it cannot be said that it was harmful to the defendants. The Court continued by saying that the violation could be considered by the jury in determining whether negligence existed and in this statement he is supported by the authorities.

Krebs v. Rubsam, et al., supra.

The Court continued in its charge by saying to the jury in effect, that not only must it take into consideration the alleged violation, but also the construction, operation, maintenance and control of the scuttle and skylight in question and the roof in which or upon which the same were located and whether there was negligence in the control, operation, maintenance or construction thereof. In brief, the effect of this charge was to caution the jury that it could not take one isolated proposition or circumstance, but must consider all of the surrounding facts, circumstances and conditions.

Again we urge that this word of caution to the jury far from being harmful to the defendants, was advantageous and that they, therefore, cannot be heard to complain. Besides it is further urged that no case has been cited in the Court below indicating that this was an incorrect statement of the law and none can be found by us which tends to illustrate that the charge in this respect was erroneous.

For the reasons argued, it is now respectfully urged, that in reversing the judgment of the Trial Court the Supreme Court erred, and the judgment of the Trial Court should, therefore, be affirmed.

Respectfully submitted,

BRENNER & KRESCH,
Attorneys and of Counsel
with Plaintiffs-Appellants.

Opinion of Supreme Court upon the First Trial. .

**Opinion of the Supreme Court upon
the first trial.**

NEW JERSEY SUPREME COURT.

JANUARY TERM, 1925.

10

STATE OF NEW JERSEY,
Defendant-in-Error,

vs.

MICHAEL MUSSIKEE and JOSEPH
H. HORNE,
Plaintiffs-in-Error.

Argued January 8, 1925.

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Decided April 16, 1925.

On appeal from Essex Quarter Sessions.

Before Gummere, *C. J.*, and Justices Parker
and Katzenbach.

For the defendant Mussikee, Merritt Lane.

For the defendant Horne, Thomas A. Davis.

For the State, John O. Bigelow, Prosecutor of
the Pleas.

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The opinion of the Court was delivered by
PARKER, *J.*

Defendants were indicted jointly for the vio-
lation of Sections 124 and 126 of the Crimes Act.
Section 124 relates to the wilful and malicious
burning or causing to be burned a building not a
parcel of a dwelling house, etc.; and Section 126
relates to the wilful and malicious burning, etc.,
of a building which is insured with intent to
prejudice the insurer. There was a general

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she was standing at the time. The glass fell because a co-tenant in going up a ladder to the roof threw or pushed the scuttle cover, covering an exit to the roof, over upon the glass skylight.

The jury rendered a verdict in favor of the plaintiffs for \$600.00 (p. 10). The defendants appealed to the Supreme Court and one of the grounds for reversal was that there was no evidence of any negligence on the part of the defendants, as alleged in the complaint, which was the proximate cause of the accident (p. 2 *et seq.*). The Supreme Court reversed the judgment of the Hudson County Circuit Court on that ground (pp. 81, 82), and thereupon the plaintiffs appealed to this Court (p. 84).

(2)

Grounds of Appeal.

The only ground of appeal urged by the plaintiffs is that the Supreme Court erred in reversing the judgment below (p. 84).

(3)

Prefatory Statement.

We think the ground upon which the Supreme Court based its judgment of reversal is unsailable. However, out of an abundance of caution, we shall also argue in this brief the other grounds of appeal urged in the Supreme Court because if the judgment of that Court is sustainable on any ground, it should be affirmed.

Kleinert v. Hutchinson, 98 N. J. L. 831, 835;

Solomon v. P. S. Ry. Co., 87 N. J. L. 284, 286.

In the Supreme Court the following grounds of appeal were urged:

1. The Trial Judge erroneously refused to non-suit the plaintiffs and to direct a verdict in favor of the defendants when thereunto respectively moved, whereas said motions should have been granted on the following ground urged in support thereof:

(a) There was no evidence of any negligence on the part of the defendants, as alleged in the complaint which was the proximate cause of the accident.

2. The Trial Judge erred in submitting two distinct acts of negligence on the part of the defendants to the jury as questions of fact for their decision when there was no evidence to support them. The particular acts of negligence submitted by the Trial Court to the jury, to which exception was taken were:

(a) Whether there was any violation of the Tenement House Law which was the proximate cause of the plaintiff's injury, and,

(b) Whether the construction, operation, maintenance and control of the scuttle and skylight were proper.

(4)

BRIEF OF THE ARGUMENT.**I.**

There was no evidence of any negligence on the part of the defendants, as alleged in the complaint, which was the proximate cause of the accident.

The negligence charged in the amendment to the complaint was as follows (p. 9, lines 15-30):

"5. The negligence of the defendants, Isadore Miller and Julius Gershanowitz, their

agents, servants or employees consisted in this:

(a) They failed to keep the trap door in a safe and proper condition.

(b) That they unlawfully and negligently permitted the said trap door to become defective, thereby creating a dangerous condition in the hallway of said house.

(c) That the scuttle or door leading from the hallway to the roof of said premises was not properly constructed, hung or balanced so as to be easily opened.

(d) That the said scuttle or door was so negligently constructed that it could not be easily opened."

The facts in the case are undisputed, and we respectfully urge that there was no evidence of negligence on the part of the defendants, as a proximate result of which the plaintiff, Madeline Decker, sustained her injuries, but on the contrary, that the undisputed evidence showed her injuries were received as the result of the negligent act of a co-tenant in the house, over whom the defendants had no control.

The plaintiff, Mrs. Decker, testified she occupied as a tenant, the rear apartment on the second floor of a two-story four-family house (p. 12, lines 1-10). The front apartment on the second floor was occupied by Mr. and Mrs. Bryce (p. 12, lines 15-20). The doors of both apartments were about ten feet apart and opened onto a common hall (p. 12, lines 30-40). On the afternoon in question, about 3:30 P. M., she and Mrs. Bryce were standing by their respective doors in the hallway (p. 13, lines 30-35). A baker boy was there to collect the weekly bill from both of them (p. 14, lines 10-20). Mr. Bryce was standing alongside of his wife, while the boy was collecting the money (p. 14, lines 20-30). The baker boy mentioned the fact

that there was a fire somewhere in the city, whereupon Mr. Bryce said, "I am going to see where the fire is," and he started for the ladder to go to the roof (p. 14, lines 30-35). The ladder, made of iron, led from the floor of the top hall where the parties had been standing, through a scuttle or opening in the roof, which scuttle was covered by a scuttle cover made of metal and wood (p. 14, line 35 to p. 15, line 10). Mrs. Decker saw Bryce go up the ladder, put his hands up to push the scuttle cover aside, heard a crash, and a piece of glass fell from a broken pane in the skylight, striking her hand (p. 15, lines 20-30). The skylight was one of the ordinary kind, about four or five feet square at the base, forming a peak at the top (p. 25, lines 10-20). It was located in the roof directly over the hall on the top floor and immediately in front of the door of her apartment (p. 24, lines 30-40). The hallway on the top floor was about two and a half to three feet wide (p. 24, lines 20-30). The skylight contained the regular skylight glass about one-quarter of an inch thick (p. 22, lines 1-10). There was no screening or bars over the skylight (p. 21, lines 30-40). The roof of the house was practically flat (p. 23, lines 10-20). Access to the roof was obtained through an opening designated in the trial as a scuttle, the size of which was about two feet by three feet (p. 26, lines 1-10). The nearest part of the scuttle was from two to two and a half feet from the nearest part of the skylight (p. 26, lines 20-30). The skylight consisted of a number of panes of glass and the one which broke causing her injuries, was the pane on the corner of the skylight nearest the scuttle (p. 28, lines 10-20). Mrs. Decker was never upon the roof or never opened the scuttle cover (p. 27, lines 20-30). She had lived in the house about a year before the accident and Mr. Bryce,

through whose act the scuttle cover came in contact with the skylight causing it to break, had lived there one month. Mrs. Decker was, in fact, the janitress of the place, having the duty of keeping the halls clean and the lights lighted. She had originally performed this work for the owner previous to the defendants obtaining title to the property, and continued right along after they acquired possession, which was about two months before the accident occurred (p. 30, lines 1-20). There was nothing on the roof, except an aerial of a family that lived downstairs (p. 23, lines 30-40).

The ladder had seven or eight steps, its base being on a small step just outside of Mr. Bryce's apartment, and the top was at the scuttle which had a movable cover over its opening (p. 24, lines 1-40). At the time of her injury she had just finished paying the baker boy and was not observing particularly what Mr. Bryce was doing (p. 28, lines 1-10).

Mr. Decker was not present when the accident occurred, but testified he had been upon the roof on two occasions. The scuttle cover was made of wood and covered with a tin on the outside, weighing about seventy to seventy-five pounds (p. 32, lines 20-30). Around the edge of the opening of the scuttle there was a guard perpendicular to the roof, about two and a half to three inches high (p. 32, lines 1-20). The dimensions of the scuttle opening were three feet by two feet (p. 31, lines 30-40). The cover of the scuttle fit around the perpendicular guard tightly so that some force was required to lift it and move it aside (p. 33, lines 1-20). The cover was not attached with hinges or counterbalance (p. 32, lines 30-40). The first occasion upon which Mr. Decker went to the roof was some three weeks before the accident. At this time he went up on the roof with Mr. Gershanowitz,

Mr. Gershanowitz moved the cover of the scuttle to that side of the roof opposite from the skylight and it did not come in contact with the skylight or damage it in any way (p. 36, lines 10-40). On the second occasion when Mr. Decker moved the skylight himself to get on the roof, he held on to the ladder with one hand, pushed the scuttle cover up with the other until it was above the two-inch guard and then moved it sidewise on the roof in the opposite direction from the skylight. He had no difficulty and it did not come in contact with the skylight or break the skylight (p. 37, lines 1-40). The base of the skylight, that is where it was attached to the roof, was made of metal which extended some four or five inches above the roof (p. 38, lines 1-10). The nearest part of the skylight was some two to two and a half feet away from the nearest part of the scuttle (p. 32, lines 30-40).

Mrs. Bryce, called as a witness for the plaintiff, testified that the baker boy was the one who said there was a fire in the city (p. 41, lines 10-20). She observed her husband going up the ladder to the roof and while he was putting the scuttle cover back from the opening, it struck against the skylight, breaking the glass, which fell into the hall, causing the plaintiff's injury (p. 42, lines 1-30). She observed her husband push the scuttle cover toward the skylight instead of to one of the three remaining sides of the roof away from the skylight (p. 42, lines 30-40). Mr. Bryce testified he was going to the roof to see where the fire was. He had lived in the house for two or three weeks, but had never been on the roof before (p. 43, lines 30-40). When he got to the top of the ladder, holding on with one hand, he used the other to raise the cover of the scuttle. He pushed it straight up toward the skylight and it overbalanced so that the end of it fell against the glass

in the skylight, causing a pane of glass to break and fall (p. 45, lines 1-15). He pushed it hard and that caused it to overbalance (p. 45, lines 20-30).

Mr. Gershanowitz, one of the owners, and a defendant, testified he had been on the roof five or six times in the two months that he owned the property, previous to the accident. When he went up on the roof, without difficulty, he moved the scuttle off the opening to the side, away from the skylight (p. 66, lines 1-30). The scuttle cover could be moved to either the right or left of the opening which it covered, or to the front, all of which directions were away from the skylight, and that is the manner in which he moved it when he went up on the roof (p. 70, lines 30-40).

The above is an entire résumé of the testimony in the case, and it will be observed that there is no disputed issue of fact. The Trial Court submitted to the jury two theories of negligence, first, whether the scuttle violated the provisions of the Tenement House Law, and second, whether the construction, maintenance, operation or control of the scuttle were improper. We contend (a) that there is no provision of the Tenement House Law with which the scuttle did not comply, and (b) that there being no proof of any standard or method of construction proven, it was improper for the Trial Court to permit the jury to speculate whether or not a different construction was required on part of the defendants, in the exercise of reasonable care to keep the premises in a reasonably safe condition.

(a)

The Tenement House Law dealing with the construction of scuttles in houses such as the one in question will be found in Vol. 2, Cum. Sup.

to the N. J. Comp. Stat. 1911-1924 on pages 3600 and 3601. Sections 50, 51, 52 and 53 deal with the question. Of these, Section 51 is the only section applicable, because the remaining sections deal with apartment houses of more than three stories in height, or those containing more than four families. The defendants' house, it will be remembered, was only two stories in height and contained four families. Section 51 reads as follows:

"51. No bulkhead or scuttle in any tenement house shall at any time be locked with a key, but it may be kept fastened on the inside by movable bolts or hooks; and said door or scuttle shall not be obstructed in any way, and shall be so constructed, hung or balanced as to be easily opened, and of such size as to provide an easy exit for a grown person. (L. 1904, p. 107 [C. S., p. 5329], as amended L. 1919, c. 228, p. 537.)"

The evidence clearly indicates that the scuttle cover in the case at bar was not locked with a key nor fastened on the inside, and it was so constructed as to be easily opened. Mr. Decker, it is true, testified that the cover fit tightly about the perpendicular guard which was around the edge of the opening, but admitted on two occasions he used the roof, there was no difficulty about moving the cover off the opening, in order to gain access to the roof. The testimony of Mr. Bryce of the occurrence causing the accident indicates that he was standing on a ladder holding on with one hand, raised the seventy-pound cover with the other, and with so much force that he pushed it over backwards onto the skylight. Bearing in mind that the purpose of the opening to the roof under this very statute was undoubtedly for the purpose of permitting

the tenants to have easy access to the roof in case of emergency and that the cover was required to be placed over the opening for the purpose of keeping out the storm during the entire year, it follows that it was necessary for it to fit snugly. If this were not so, it would not be able to keep out the rain and the snow during inclement weather or to remain in its place over the opening when the wind was violent. In this case, it must be borne in mind that the plaintiff was not attempting to raise the scuttle cover and was unable to do so, thereby sustaining her injury. Such cases as *Opreska v. Shapiro*, 99 N. J. L., p. 226, cited by the attorney for the plaintiffs on the trial, are therefore not applicable. In that case, the plaintiff, while attempting to leave her apartment during a fire by means of a fire escape was compelled to get on to the fire escape through a bathroom window. The statute provided that the exit from an apartment to a fire escape should not be made from a bathroom. The Court of Errors and Appeals pointed out that the plaintiff, in attempting to get onto the fire escape through the bathroom was compelled to climb over a bathtub which was in front of the window, and that this contributed to her falling from the window ledge, thus sustaining her injuries. Justice BLACK said (p. 228):

“The plaintiff endeavored to make her escape by means of the fire escape. The bathtub obstructed the way and made it difficult for the plaintiff, Helen Opreska, to get a proper footing.”

(b)

On the other question of negligence which the Court submitted to the jury for its consideration, namely, negligent construction, there was not a

scintilla of evidence in the case that this scuttle was constructed in any different manner than the scuttle of every tenement house in the City of Bayonne and the State of New Jersey. The law in this State is well settled that before a defendant can be held liable for negligence in the construction of his premises, some standard must be proved to which it was incumbent upon the defendants to conform. It cannot be asserted that in a case like this, each jury may say what they deem to be the proper construction, and thus arbitrarily direct the proper construction of each tenement house, not in a general way, but specially according to their individual notion of the proper method in which it should be constructed.

Feil v. West Jersey & Seashore Railroad Co., 77 N. J. L. 502, 504;

Halm v. Freeholders of Hudson, 78 N. J. L. 712, 715;

Kingsley v. Delaware, Lackawanna & Western R. R. Co., 81 N. J. L. 536, 543;

Zebrowski v. Warner Sugar Refining Co., 83 N. J. L. 558, 563;

Raub v. Lehigh Valley Railroad Co., 87 N. J. L. 603, 606.

In *Feil v. West Jersey & Seashore Railroad Co.*, *supra*, this Court, Chief Justice GUMMERE speaking, said (italics ours) (p. 503):

“The degree of care which it is required to take is that which is exhibited by persons of ordinary prudence under like circumstances, and, so, the adoption of a method of platform construction which accords with that in general use by well regulated railroad companies, and which is approved by experience, is a due performance of the duty which it owes to its passengers in that regard. * * * There is nothing in the present case to support the

conclusion that the defendant company failed to observe the degree of care indicated in the construction of its platform at the Millville station. *There is no proof that it differs in its character from platforms in general use by the defendant and other railroad companies, and no presumption of want of due care arises from the fact that a railroad company, presumably to meet the requirements of its traffic, has constructed its platform in such a way that one portion of it is lower than another, when the difference of level is not greater than the height of an ordinary step. Negligence must be proved, and in a case like the present, that can be done only by showing that the platform is of a design which a reasonably careful judgment would disapprove as being likely to cause accident to persons using it as a way to and from trains. To hold otherwise would be to leave railroad companies to the mere caprice of juries, and subject them to the danger of being found guilty of negligence, no matter what plan of construction they might adopt.*"

In *Halm v. Freeholders of Hudson, supra*, the plaintiff was riding in an automobile being operated by his son, which came in contact with a guard rail of a bridge over a body of water that crossed the highway. The guard rail did not extend across the entire road. The plaintiff claimed a right to recover because the guard rail should have extended across the entire road. Justice VOORHEES, speaking for this Court refuting this contention, said (p. 715):

"The ordinary rule must be applied to boards of freeholders regarding the building of bridges, that is, a breach of duty must be demonstrated by proof.

"No proof has been offered that the construction was different from ordinary construction, or that it was not sufficient for the purpose for which it was intended."

In *Kingsley v. Delaware, Lackawanna & Western R. R. Co., supra*, the plaintiff endeavored to hold the defendant responsible for injuries she received while alighting from one of its trains at the Hoboken station, due to her stepping into the space between the step of the car from which she was alighting as a passenger, and the platform of the station. In this case the plaintiff's attorneys realizing that a standard must be proved, attempted to prove the same by construction experts, but failed. Justice MINTURN writing the opinion for this Court said (p. 545):

"In the final analysis, the testimony in the case at bar demonstrates simply a difference of construction between the defendant's car and platform and some of the cars and platforms of other companies; but, upon legal principle, until that difference can be transmuted into a legal generalization indicating a variation from the existence of a standard type, the departure from which by the defendant might be construed as imprudent and negligent, and by which a criterion of duty may be established, the damage incurred under circumstances such as are presented in the case at bar must be held to be *damnum sine injuria* and can impose no liability upon the defendant."

In *Zebrowski v. Warner Sugar Refining Co., supra*, the plaintiff sought to recover for personal injuries while in the employ of the defendant, on the ground that it was the duty of the defendant to adopt rules and a safe system of operation. The point was made that there was an entire absence of a system governing the work. There was proof in the case that other defendants operated their elevators by the use of a different system, but this Court in sustaining judgment for the defendant said (p. 562):

"Whether a particular rule should be enacted should not be left to the jury arbitrarily to find, but there should be proof that the practice of promulgating such rules in similar manufactories under similar conditions is general. In the absence of proof that it is a general usage of other employers, engaged in similar lines of business, to adopt rules, claimed to be necessary, and that they would be practicable and useful, a master will not be charged with negligence for failure to make them.

"What standard was proved by way of system to which it was incumbent upon the defendant to conform? It cannot be asserted that in a case like this, each jury may say what they deem to be a proper rule, and thus arbitrarily direct the conduct of each manufacturing plant under regulations not general, but special, in their application."

In *Raub v. Lehigh Valley Railroad Co.*, *supra*, the plaintiff attempted to hold the defendant negligent because a low bridge over the defendant's tracks with which the plaintiff's intestate came in contact, failed to have any illumination upon it. Justice PARKER, writing the opinion for this Court, sustaining a directed verdict for the defendant said (p. 606):

"It may be that under the circumstances of the particular case the life of deceased might have been saved by the extra precaution of lighting the bridge from without; but the test in cases of this class is not whether a particular safeguard would have been better, but whether similar safeguards were practicable and useful and according to the ordinary usage of railroads. (Cites case.) There was, consequently, no question of negligence to be submitted to the jury."

We respectfully submit, therefore, that (a), there was no evidence of a violation of any pro-

visions of the Tenement House Law with which the scuttle did not comply, and (b), there was no proof of any negligence in the construction, maintenance, operation or control of the scuttle due to the failure of proving any standard method of construction, maintenance, control or operation.

Not only was there no evidence of negligence on either of the two theories which the Trial Judge submitted to the jury, but in addition it clearly appeared from the evidence that the injury sustained by the plaintiff was the result of the negligent act on the part of Mr. Bryce in hurriedly going up the ladder and in pushing the scuttle cover with such force that it overbalanced and fell backward against the skylight. The roof was not used for any purpose by the tenants except one tenant on the lower floor had an aerial erected. By virtue of what arrangement this aerial was erected does not appear. It clearly appeared, however, that Mr. Bryce had never been upon the roof before and the particular occasion which caused him to go on it was nothing more than to satisfy his curiosity in ascertaining where a fire was located in the vicinity. It seems clear that the negligent act of Mr. Bryce, over whose conduct the defendants had no control, falls within that class or cases where it is held that the intervention of the independent act of a third person between the wrong complained of and the injury sustained, which was the immediate cause of the injury, is made a test of the remoteness of damage which forbids its recovery, *Cuff, Admx., v. Newark & New York R. R. Co.*, 35 N. J. L. 17, 32.

If it be conceded for the purpose of this argument that the jury had a right to infer from the undisputed facts in this case, that the scuttle cover was not easily opened, as required in Section 51 of the Tenement House Law or that in their opin-

ion a different method of construction should have been used by the defendants and, therefore, the defendants were negligent; nevertheless, it is clear that such negligence was passive and the accident would not have resulted from it. It was not until the intervention of a negligent act on the part of Mr. Bryce that the injury was occasioned. Such assumed negligence was merely an immobile, inefficient condition, innocuous in itself as a motive power for harm. The negligent act of Mr. Bryce was the efficient operating proximate cause, without whose intervention and instrumentality as a *sine qua non* damage was impossible. Where the cause of the injury was not an operating efficient or proximate cause, which can be said to contain by its activity that potentiality for harm or damage, the defendant is not liable for such is the test upon which the rule of liability in this character of tortfeasance is predicated, *Powers v. Standard Oil Co.*, 98 N. J. L. 730, 735.

In considering this question, it will be helpful to examine some of the numerous cases that deal with the question of proximate cause. A recent decision is *Justesen v. Penn. R. R. Co.*, 92 N. J. L. 257, wherein the rule is stated as follows (p. 259):

"Damages chargeable to a wrongdoer must be shown to be the natural and proximate effects of his delinquency. The term 'natural' imports that they are such as might reasonably have been foreseen, such as occurred in an ordinary state of things; the term 'proximate' indicates that there must be no other culpable and efficient agency intervening between the defendant's dereliction and the loss."

In this case it was held that misinformation given to the plaintiff by one of the defendant's employees in New York City as to the existence of

a quarantine in the State of Virginia was not the proximate cause of the distress and illness resulting to the plaintiff by reason of her being obliged to leave the car in which she was riding after it had been turned over to another carrier for transportation for part of the through journey.

One of the latest decisions in New Jersey on the question of proximate cause is *Powers v. Standard Oil Co.*, 98 N. J. L. 730; affirmed 98 N. J. L. 893. In this case, while the Standard Oil Co. was violating the Traffic Act by parking its large oil truck on the wrong side of a street in the City of Newark, the nine-year-old child of the plaintiff ran from behind the truck in an attempt to cross the street, and, not perceiving the automobile of the co-defendant McGuire coming along the street in a northerly direction, ran into its front mudguard, was injured, and died from the injuries sustained. The action was brought to recover damages for the child's loss. McGuire was made a defendant and the case proceeded to trial against both. The jury found a verdict in favor of McGuire and against the defendant Oil Company. It was contended on appeal that a non-suit should have been granted in favor of the Oil Company, because the proximate cause of the damage was the automobile of McGuire and not the obvious dereliction of the Oil Company defendant in parking the truck on the wrong side of the street. Justice MINTURN in writing the opinion for the Supreme Court upon which opinion the case was affirmed in this Court said (p. 732):

"In such a situation cause necessarily comprehends an efficient operating force or situation, by intervention or otherwise, without which the accident could not have happened. In this situation the truck was an immobile, inactive instrumentality, incapable in its inactive condition of perpetrating harm or

damage. The fact that its reversed situation made its position upon the street at that point a violation of the Traffic Law, did not confer upon the truck either activity or force, so as to constitute it an active, efficient instrumentality for harm. * * * The efficient proximate or intervening cause in such a situation is tantamount in law to the force or operating factor without which the accident could not have happened. Such a power must have been active, operative and carrying and containing within itself the possibility of potentiality for harm, as in the famous *Squib* case, 2 Pl. 892; or in the fire cases emanating from the sparks of a locomotive through the mediation of intervening combustible property (*Delaware, Lackawanna and Western Railroad v. Salmon, supra*); or the case of a runaway horse which was allowed to remain untied upon the highway, and which ran away and collided with a truck which was engaged in an earnest effort to avoid the runaway, in which this Court held the efficient and probable cause of the damage to be the actual operating illegal force in the first instance of the untied horse, without which the accident would not have occurred, even conceding the ill-advised attempt to evade the danger. *Marshall v. Suburban Dairy Co.*, 96 N. J. L. 81; so in *Burton v. W. J. Ferry Co.*, 114 U. S. 474, where an elderly woman was unable to obtain a seat upon a crowded ferry-boat, which collided with a barge, the Court held that the failure of the company to provide her with a seat was not the proximate cause of the injury which she sustained from the collision."

In *Teis v. Smuggler Mining Co.*, 158 Fed. 260, the Circuit Court of Appeals for the Eighth Circuit held the defendant not responsible where the facts which are correctly and succinctly stated under the head note of the case were as follows (p. 260):

"Plaintiff while employed in defendant's mine was overcome by gas, and was after-

ward found by a searching party lying on the ground unconscious. He was taken to the surface by such party on the elevator cage, which was 5½ feet square, two sides being enclosed and two open, and by reason of the projection of one of his feet beyond an open side of the cage it was caught by the timbers of the shaft and his leg broken. Held, that the negligence of defendant in permitting a dangerous quantity of gas in the mine, if conceded, while a remote, was not the proximate cause of the injury to plaintiff's leg, which was the negligence of those who placed him on the cage, and that, under the rule that one committing an act of negligence is responsible only for such consequence as would naturally and probably result and as should reasonably have been foreseen, defendant was not liable for such injury."

In *Mendelssohn v. Davis, D. G.*, 281 Fed. 18, 22 (8th C. C. A.), suit was brought against defendant by a passenger who was thrown from a vestibule train. The negligence charged was having the door of the car open and causing extraordinary jerking of the train precipitating plaintiff through the open doorway. It appeared the door had been opened just previously by a passenger without the knowledge of the defendant's servants. The plaintiff claimed the right to go to the jury on the question of extraordinary jerk being negligence. The Court in affirming a judgment for the defendant held it was the open vestibule door which was the cause of the plaintiff falling off the train; for, had it been closed, the sudden lurch could not have thrown him off the train. The company, it was pointed out, could not be held for the act of the passenger leaving the door open any more than it could if a stranger misplaces a switch or loosens a rail a short time before the arrival of the train which causes it to leave the track.

Davis v. Carolina Cotton Mills Co., 5 Fed. (2nd) 575 (4th C. C. A.), a very recent case, is in point. A badly rusted smokestack of the Carolina Cotton & Woolen Mills Co. was blown down by high wind of not extraordinary force. In falling it tore down a wire crossing the director-general's track. Subsequently a third party fastened the wire to a pole so that trains could pass under it, but not high enough to clear the head of plaintiff, who was riding on top of train. Plaintiff brought suit against his employer, the director-general, and the mill owning the smokestack. In affirming a direction of a verdict for the defendant Mill Co., the Circuit Court of Appeals said (p. 576):

"We may put aside at the start any question of the mill's liability in consequence of the condition of the smokestack which fell. Such fall was not the proximate cause of the harm done Smith. He would not have been hurt, had it not been for the subsequent action of Odell in lifting the wire from the track and making it fast in a position in which it was highly dangerous to any one on top of a freight car passing under it."

Kelson v. P. S. R. Co., 94 N. J. L. 527, is another case illustrating this principle. A passenger on a trolley car had been carried by his station but let off at another station by the conductor and given a ticket to enable him to ride back to his station, the conductor telling the passenger to take another car back; instead of so doing the passenger started to walk back on the private right of way of the railroad company; he stumbled and fell, sustaining the injuries sued for. The Trial Judge submitted the case to the jury, who found a verdict in favor of the plaintiff. In reversing the judgment this Court held there was no causal connection between the injuries sustained and the act of the defendant company in not letting the

passenger off at the right station. This case is authority for the further proposition that whether the cause of the accident is too remote to allow compensation by way of damages is not a question of fact for a jury but is one of law for the Court to decide. Justice BLACK writing the opinion said (p. 529):

"Whether the cause is too remote to allow compensation by way of damages, is a question of law to be decided by the Court."

We respectfully submit, as there was no evidence of any negligence on the part of the defendants, as alleged in the complaint, which was the proximate cause of the accident, the Supreme Court did not err in reversing the judgment.

II.

The Trial Judge erred in submitting two distinct acts of negligence on the part of the defendants to the jury as questions of fact for their decision when there was no evidence to support either one of the said alleged acts of negligence.

The Trial Judge in his charge to the jury submitted for their consideration the question of whether the defendants were negligent in (a), whether the scuttle was constructed in violation of the provisions of the Tenement House Law, and (b), whether the whole construction, operation, maintenance and control of the scuttle were negligent (p. 75, line 10 to p. 76, line 10). Exception was taken to the Trial Judge submitting each of these questions to the jury on the ground that there was no evidence of negligence in that regard (p. 78, lines 10-30). The grounds of appeal raise the legal propriety of submitting either or

both of said questions to the jury (p. 2, line 30 to p. 3, line 35).

The rule is well settled that a verdict, which cannot be supported upon the theory of law on which the case was submitted to the jury, must be set aside.

Hayes v. Penn. R. R., 42 N. J. L. 446;

Harte v. Cumberland, &c., Ins. Co., 44 N. J. L. 478;

Halsey v. L. V. R. R. Co., 45 N. J. L. 26;

Cook v. American Gunpowder Co., 70 N. J. L. 65;

Oakley v. Emmons, 73 N. J. L. 206;

Doran v. Thomsen, 76 N. J. L. 754;

Frit v. Sayre & Fisher Co., 77 N. J. L. 236;

Barnes v. Wellington & Co., 78 N. J. L. 490.

The same rule should apply when a case is submitted to the jury on several theories of law and there is a general verdict, but the record shows that as to some one or more of the theories, either the theory itself is erroneous or there is no evidence in support thereof.

Spencer v. Hanes, 73 N. J. L. 325;

Carroll v. Stark, 85 N. J. L. 438;

Thompson on Trials, Vol. 2, Sec. 2640, p. 1922 (2nd Ed.)

A recent authority is the opinion of the United States Circuit Court of Appeals for the Second Circuit, in the case of *New York Central R. Co. v. Lloyd*, 258 Fed. 111. In that case the Trial Judge submitted four questions of fact on which he said there might be predicated negligence on the part of the defendant's employees. One of these four was that the accident may have been due to negligence on the part of the defendant in failing to provide a sufficient crew for the train whereon the

plaintiff was a passenger at the time of the accident. The Appellate Court reversed a judgment for the plaintiff on the ground that the verdict was a general one, and that there was no evidence to show any negligence in this particular respect. The Court said:

"It is not known whether the jury found the plaintiff in error negligent in respect of all claims of negligence submitted to them or any one of them."

To the same effect are the cases of:

New York Central, &c. Co. v. Banker, 244 Fed. 351, at p. 355;

St. Louis, &c. Ry. Co. v. Needham, 63 Fed. 107, at p. 114.

And see also the case of *Maryland v. Baldwin*, 122 U. S. 490, 28 L. Ed. 822, where the United States Supreme Court said:

"On the trial, evidence was introduced bearing upon all the issues, and if any one of the pleas was, in the opinion of the jury, sustained, their verdict was properly rendered, but its generality prevents us from perceiving upon which plea they found. If, therefore, upon any one issue, error was committed, either in the admission of evidence or in the charge of the Court, the verdict cannot be upheld, for it may be that by that evidence the jury were controlled under the instructions given."

It is clear under the above authorities that if there was no evidence in the case to go to the jury on either a violation of the Tenement House Law, or improper construction due to a variance with a proven standard method of construction, the judgment for the plaintiff in this case cannot stand, for it is impossible due to it being a general verdict to determine upon which one of the

theories submitted by the Trial Court, the jury decided the defendants were negligent.

We have shown that under the evidence as summarized in Point I, there was no proof either that the scuttle did not comply with the Tenement House Act or that there was a standard of construction which the defendant did not comply with in the construction of his premises. We contend that inasmuch as there was nothing in the evidence to justify the Trial Judge in submitting to the jury *either* of these questions he erred in so submitting them to that body for their consideration. In other words, although on the motion for non-suit he may have a right to deny the motion if there was some evidence of negligence on one of these theories, nevertheless, it was error for him to submit to the jury *both theories if there was not in the case evidence which would warrant the submission of both theories to the jury*. The verdict can only be supported on the theories on which the case was submitted to the jury and if there is no evidence to justify the conclusion of legal responsibility on such theory, then the verdict, and the resulting judgment, cannot be sustained. The verdict being a general one, it is impossible to determine on which one of the two theories submitted to the jury by the Trial Court that body based its verdict in favor of the plaintiff. It follows, therefore, that if there was no evidence on EITHER ONE of the theories the Trial Court erred in submitting that theory to the jury.

III.

For these reasons we respectfully submit that the judgment of the Supreme Court should be affirmed.

February Term, 1928.

EDWARD A. MARKLEY,
CHARLES W. BROADHURST,
Of Counsel.

COLLINS & CORBIN,
Attorneys of Defendants-Respondents.

