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Appellee, therefore, respectfully submit that
the final decree of the Court of Chancery should
be in all respects affirmed, with costs.

Respectfully submitted,

IRVING WEINSTEIN,

Solicitor for and of Counsel with
Defendant Appellee.

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Notice of Appeal.

NOTICE OF APPEAL.

Filed June 5, 1926.

Essex County Circuit Court

CLEMENTINE HEINE, <div style="text-align: right; padding-right: 10px;"><i>Plaintiff,</i></div>	}	<i>Action at Law.</i>	10
<i>vs.</i>			
ACME THEATRE COMPANY, <div style="text-align: right; padding-right: 10px;"><i>Defendant.</i></div>	}	<i>Notice of Appeal.</i>	

To Precker & Precker, attorneys of plaintiff.

PLEASE TAKE NOTICE that the defendant appeals to the New Jersey Supreme Court from the whole of the judgment entered in the above-entitled cause. 20

JOSEPH C. PAUL,
Attorney of Defendant.

JACOB SCHNEIDER,
Of Counsel.

Due service of a copy of the within Notice of Appeal is hereby acknowledged this 22nd day of June, 1926. 30

PRECKER & PRECKER,
Attorneys of Plaintiff.

Summons.

SUMMONS.

The State of New Jersey to Acme Theatre Company:

10 (SEAL) YOU ARE SUMMONED to answer the annexed complaint of Clementine Heine in an action at law in the Essex County Circuit Court.

And TAKE NOTICE that unless you file your answer to said complaint with the Clerk of the Essex County Circuit Court at Newark within twenty days after service upon you of this writ and the annexed complaint, the plaintiff may proceed in the suit and judgment may be entered against you.

20 WITNESS, NELSON Y. DUNGAN, Judge of the Essex County Circuit Court, at Newark, this 21st day of March, Nineteen Hundred and Twenty-five.

JOHN H. SCOTT,
Clerk.

PRECKER & PRECKER,
Attorneys of Plaintiff.

30

40

Complaint.

COMPLAINT.

ESSEX COUNTY CIRCUIT COURT.

CLEMENTINE HEINE, <i>Plaintiff,</i> vs. ACME THEATRE COMPANY, <i>Defendant.</i>	}	<i>Action at Law.</i>	10
		<i>Complaint.</i>	

Plaintiff, residing in the City of New York, County of New York and State of New York, says:

1. That on the 7th day of December, 1924, defendant was a corporation of the State of New Jersey with its principal office located in the City of Newark, Essex County, New Jersey. 20

2. That on the day and date aforesaid the said defendant was the owner and operator of a certain theatre commonly known and designated as Shubert Theatre located at Branford Place, Newark, Essex County, New Jersey.

3. That plaintiff did purchase a ticket for a balcony seat from said defendant for the performance which the defendant was conducting at its theatre on the day and date aforesaid. 30

4. That defendant conducted its said theatre aforesaid in a negligent and unlawful manner, in that it maintained a hidden platform in its balcony leading to plaintiff's seat.

5. That as a result of defendant's negligence aforesaid, plaintiff in passing to her seat aforesaid tripped and fell over said hidden platform, 40

Complaint.

thereby becoming unconscious and suffering physical injuries to her face, body and hands and also suffering mental pain and anguish and shock.

10 6. That as a result of said injuries aforesaid plaintiff has been obliged to expend divers sums of money for medicines and medical attendance and has been prevented from carrying on her daily work, thereby losing divers large sums of money.

Plaintiff demands as damages the sum of Five Thousand (\$5,000) Dollars.

PRECKER & PRECKER,
Attorneys of Plaintiff.

20 I hereby appoint and depute Charles F. Hummell, to serve the within writ.

Witness my hand and seal this 23rd day of March, 1925.

Harry B. O'Connell,
Sheriff.

By Alfred W. C. Walker,
Under Sheriff.

Sheriff fees \$3.78 (L. s.)

30 Served the within Summons and Complaint March 25th, 1925, personally upon Morris Schlesinger agent in charge Acme Theatre Company the within named defendant by delivering to him a true copy thereof at their office, 568 Broad street, Newark, N. J.

HARRY B. O'CONNELL,
Sheriff.

By CHAS. F. HUMMELL,
Special Deputy.

40

Answer.

ANSWER.

Filed April 24, 1925.

ESSEX COUNTY CIRCUIT COURT.

CLEMENTINE HEINE, <div style="text-align: right;"><i>Plaintiff,</i></div> <div style="text-align: center;"><i>vs.</i></div> ACME THEATRE COMPANY, <div style="text-align: right;"><i>Defendant.</i></div>	}	<i>Action at Law.</i> <i>Answer.</i>	10
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Defendant answering the complaint of the plaintiff herein says that:

- 1. Defendant admits paragraph 1. 20
- 2. Defendant admits paragraph 2.
- 3. Defendant says that it does not have sufficient knowledge or information to form a belief as to the truth of the allegation contained in paragraph 3.
- 4. Defendant denies paragraph 4.
- 5. Defendant denies paragraph 5.
- 6. Defendant denies paragraph 6. 30

FIRST DEFENSE.

The defendant by his agent and servants were without negligence on their part.

SECOND DEFENSE.

The plaintiff, Clementine Heine, was guilty of contributory negligence in that, at the time and place mentioned in the complaint she was con- 40

Grounds of Appeal.

GROUNDS OF APPEAL.

Filed July 24, 1926.

New Jersey Supreme Court

10

CLEMENTINE HEINE,
Plaintiff-Appellee,

vs.

ACME THEATRE COMPANY,
Defendant-Appellant.

*Action at
Law.*

*On Appeal
from Essex
County
Circuit
Court.*

*Grounds of
Appeal.*

20

The defendant-appellant, Acme Theatre Company, hereby sets forth the grounds of appeal in the above-entitled matter.

30

(1) The Trial Court refused to grant defendant's motion for a non-suit at the close of the plaintiff's case and allowed the case to proceed whereas the said Court should have granted said motion and entered a judgment of non-suit.

40

(2) The Trial Court refused to grant defendant's motion for a direction of a verdict at the close of the case and submitted said case to the jury whereas said Court should have granted said motion and directed a verdict in favor of the defendant.

(3) The Court, over objection by counsel for the defendant, allowed the following question to

Grounds of Appeal.

be answered by the witness Carrie B. Beyer on rebuttal:

"Were there any aisle lights in the aisle next to where Mrs. Heine was seated on the night of the accident?"

JOSEPH C. PAUL,
Attorney of Defendant-Appellant.

10

JACOB SCHNEIDER,
Of Counsel.

Due service of a true copy of within grounds of appeal is hereby acknowledged this 22nd day of July, 1926.

PRECKER & PRECKER,
Attorneys of Plaintiff-Appellee.

20

30

40

Hedwig M. Bremmer, direct.

ESSEX COUNTY CIRCUIT COURT.

May 20, 1926.

CLEMENTINE HEINE	}	<i>Action</i>
<i>vs.</i>		
ACME THEATRE COMPANY.		

at

Law.

10

Before Hon. Worrall F. Mountain, J., and a jury.

For the plaintiff appear Precker & Precker (by Herbert J. Hannoeh).

For the defendant appear Schneider & Schneider (by Jacob A. Schneider).

20

A jury is called and sworn.

Mr. Hannoeh opens for the plaintiff.

Mr. Schneider opens for the defendant.

HEDWIG M. BREMMER, sworn in behalf of the plaintiff.

Direct examination by Mr. Hannoeh.

30

Q Mrs. Bremmer, you reside in Newark, do you? A Yes, sir.

Q Have been residing here for a number of years? A Yes, sir.

Q Do you know Mrs. Heine, the plaintiff in this case? A Yes, sir.

40

Q Were you at the Shubert Theatre the night of December 7, 1924, the date this accident occurred? A I was at the Shubert Theatre the night of December 7, 1924, yes, sir.

Hedwig M. Bremmer, direct.

Q Did you go into the theatre before or after Mrs. Heine? A I came in before.

Q Where is the Shubert Theatre? A On Branford Place near Halsey street.

Q What part of the theatre were you sitting in? A We had seats in the second balcony.

Q How did you get to the second balcony in the Shubert Theatre? A You go upstairs the same as if you are going to the balcony and there is a wide platform and you go from that platform to the second balcony.

10

Q Where does the platform lead from? A From downstairs.

Q Do you use the same platform aisle to get to the first and second balcony? A Yes, sir.

Q If you want to go to the first balcony how do you go? A Down.

Q If you want to go to the second balcony which way do you go? A Up.

20

Q So, you were in the theatre before Mrs. Heine got there? A Yes, sir.

Q Did you come in after her or before her? A No, I came in a little before her.

Q Where was your seat? A In the same row as hers.

Q What row is that? A The first row.

Q Describe the first row of the second balcony. A It is like this (indicating). They have a bar or whatever you call it across and there is a little curtain and that is all open.

30

Q What kind of a bar? A As high as this (indicating).

Q What kind, wood, metal or what? A It seems to be metal.

Q Where are the seats in respect to the platform? A Just in back of that platform would be on the floor and this would be the bar and the curtain in front and the seat where I am sitting.

40

Hedwig M. Bremmer, direct.

Q Is there any wooden rail or anything between the bar and the floor? A No, just a curtain, sort of a velvet affair.

Q How high is the floor of the platform on which the seat is fastened from the platform or the aisle you walk in? A You mean from this end (indicating)?

10 Q No, from in front of you? A I would say just like I am sitting here. If you take this post, this here, and say this was the bar and this was the curtain (indicating) and this was the seat; there wasn't very much room in the front.

Q You say when you refer to the actual part— A For instance this was the seat of the chair.

Q The seat you are sitting in? A Yes, and this I would call a bar.

20 Q That is the top portion of it? A The top portion of it. Then, there is a curtain they had there which would be about the length of these posts here (indicating).

Q That would be about how many feet? A Say, three feet.

Q Then, how high? A Or maybe a little higher; I am not such a good judge.

30 Q How far is the floor on which you were sitting from the passageway that divides the first and second balcony? A Well, I would say about as far as I am sitting here.

Q I haven't probably made myself clear. How far is the floor from the passageway that divides the first and second balcony? A I couldn't tell you in feet or inches, but I would say according to my figuring it would be about the same as I am sitting here.

40 Q That is about two or three feet. That is about the same height as the present floor is from your feet? A It might be a little bit higher.

Hedwig M. Bremmer, direct.

It is a little bit higher; it is more than two and a half feet.

Q How far are the seats in which you sit from the end of this platform? A Not very far.

Q Can people walk in front of you without having you stand up? A When they are going to the balcony down, you mean? You have to get up unless you crowd them. 10

Q How did you get in from the side aisle? A Well, they have stairs. You come up stone steps.

Q How many? A Well, the steps go all the way up.

Q I know that, but in order to get to your seat from the aisle that divides the first and second balcony how did you get to the second balcony? A You go up stone steps that leads from the first row all the way up. 20

Q You were in "A" row? A Yes, sir.

Q How did you get into "A" row? A You have to go up the steps, turn around and go into "A" row.

Q Are there any steps from the aisle into "A" row? A Just the steps that lead all the way up.

30 Q This particular night you were in your seat when Mrs. Heine came in? A No, I was not in my seat. I was in the theatre and we both started to go to our seats and I was in my seat before she got to her seat.

Q Where was she supposed to sit alongside of you, was that nearer to the aisle or further in? A It was nearer to the aisle, because I had taken the furthest seat up this way (indicating).

40 Q When you came into the theatre had the show started? A No, the lights were on, but

Hedwig M. Bremmer, direct.

while we were going to our seats the lights went out and the show commenced.

Q Where were the ushers? A Standing down here (indicating) dividing between the first and second balcony.

Q They were in this aisle (indicating)? A
10 Yes, sir.

Q Were there any ushers to direct you to your seat? A The ushers saw our tickets and directed us up, the way they always do; they do it now, too.

Mr. Schneider. I object and ask that "they do now" be stricken out.

The Court. Strike it out.

Q Did they go up to your seats with you?
20 A No, they did not; they said, "First row up," and pointed.

Q What did you and Mrs. Heine do? A Proceeded to go up.

Q Where were the other ladies? A They were to go up to their seats; our seats were divided.

Q Were they in "A" row? A No, they were in other rows.

Q Describe what happened then? A Well,
30 of course the theatre was dark and we started to go up the aisle and I started to go into my seat and when I looked for Mrs. Heine I didn't see her, and there was a gentleman and a lady seated on the aisle and I looked around for the rest of the folks and this lady said, "Are you looking for an elderly lady?" and I said—

Mr. Schneider. I object to any conversation.
40

Hedwig M. Bremmer, direct.

A (Continuing.) —and she said she—

Q No. How far in from the aisle was your seat, how many seats in? A I think it was about four seats in.

Q Do you know who was sitting on the end?
A A lady and gentleman was seated on the
10 end.

Q Mrs. Heine was next to them? A Yes, sir.

Q And then you? A Yes, sir.

Q You went in and did not see Mrs. Heine?
A No.

Q As the result of what that lady said what did you find out? A I went down to see where Mrs. Heine was.

Q Where did you find her? A In the rest room by the lavatory.
20

Q How long had you been in there before you noticed she was not there? A Almost immediately.

Q You did not see anybody take her down to the rest room? A No.

Q What condition did you find her in? A Oh, she was terribly sick.

Mr. Schneider. I ask that that be stricken out as being a conclusion of a lay witness.
30

Mr. Hannoeh. I am satisfied to have that stricken out.

Q Tell us what you saw. A She had tried to vomit; she had vomited; she was vomiting.

Q Was she bleeding? A Yes, sir, she had bled a little, because her handkerchief had a blood spot on.

Q Did you notice her head at all? A Her head was very red.
40

Hedwig M. Bremmer, cross.

Q Was she bleeding from her head; was there any cuts on her head you could see? A Yes, sir, there was.

Q How soon after did the other ladies come down, if they did come down? A Mrs. Rehberger was with her and Mrs. Beyer was with her.

10 Q Did you go home with her after that? A I stayed with them until they went home with her. They went home with her in a cab.

Q Did you see her at all when they got home? A Yes, sir, they went to 300 Verona avenue to Mrs. Rehberger's home.

Q When did you go to see her? A I don't remember the day. While she was up there.

20 Q What condition did you find her in as you saw her? A I would say a weakened condition, all in; her hand, her thumb.

Q Was her head bandaged? A I didn't see her head bandaged.

Q Was she around? A She was in bed, but I didn't see her in bed.

Q How frequently did you see her after the accident? A I see her on and off even now yet.

30 *Cross examination by Mr. Schneider.*

Q As you go into that balcony you walk up the stairs, I suppose, when you come to the balcony, isn't that right? A Yes, you come to the balcony.

Q You enter the theatre on Market street and walk inside the theatre? A You enter the theatre on Branford Place and go up on the left.

40 Q Then, you go upstairs to your left? A Yes, sir, and then you turn right.

Hedwig M. Bremmer, cross.

Q Then you enter the balcony? A Yes, sir.

Q As you enter the balcony, the first balcony is below you to your left? A It is a big platform, as this would be (indicating).

Q Say this is Branford Place here (indicating), you are walking upstairs here (indicating) and you turn to go into the balcony, right below you is the first balcony and to your right and going up is the second balcony? A Yes, if you stand the way you are standing now.

Q It is all one floor? A Yes, sir.

Q Below is the first balcony and above is the second balcony and has a passageway in between them, you call that a platform? A Well, a passageway or platform, whatever you want to call it.

Q That platform extends the width of the theatre? A Yes, sir.

Q It is five feet wide? A At least that, maybe more.

Q You can walk along that passageway the whole width of the theatre, can't you? A Yes, sir, from one end to the other.

Q It is a regular passageway? A I might call it a passageway or I might call it a platform.

Q As you walk down the passageway or platform, the stairway to your right leads up to the second balcony and there are three stairways? A You mean dividing the theatre from the center of the two sides?

Q As you walk down the platform to your right is the second balcony? A Yes, sir.

Q And there are stairways leading up to the seats? A Yes, sir.

Q There are three aisles that lead up, aren't there? A Three.

Hedwig M. Bremmer, cross.

Q Three aisles? A Yes, sir.

Q Your seats were up the first aisle, weren't they? A Yes, sir, I take it the first stairway as you come in.

10 Q You walk about fifteen feet to get to that first stairway, don't you? A I couldn't describe it in the number of feet. I would say you walk to the first stairway to get to our seats.

Q Have you ever been in that theatre again? A Yes, sir, I go there quite often.

Q You like the shows there? A Yes, sir.

Q When you come in that entrance you go up to the second balcony? A Yes, sir.

20 Q As you come in you walk fifteen feet or so to the stairway? A You walk to the first stairway; I couldn't tell you how many feet it is.

Q You have given us the feet before pretty exactly. See if you cannot give us this measurement. A I haven't been able to give it exactly.

30 Q Do the best you can, we are not going to hold you to the answer exactly. About how far did you walk before you came to that first stairway? A I couldn't tell you. You walk to the first stairway. I couldn't tell you because if I told you fifteen, twelve or twenty feet I would be telling you something I don't know.

Q You do not want to make an estimate like that? A No.

Q As you get to the first stairway you turn to your right and walk up? A Yes, sir.

Q You were in the first row, you had the first seat? A The first row.

Q Three or four seats in? A Yes, sir.

40 Q So, as you turned around to go up your seats were to your right again? A That's right.

Hedwig M. Bremmer, cross.

Q How many steps did you have to go up before you got to "A" row? A There were several steps.

Q How many? A Three or four.

10 Q In other words, you turned around to the right and went up three or four steps. A Have you ever gone up those steps? You have to be very careful going up.

Mr. Schneider: I ask that that be stricken out.

Q You go up three or four steps to get to your row? A Yes, sir.

Q Then you turn around to your right and go into your seat? A That's right.

20 Q I suppose you mean to say those steps are rather steep? A Well, I wouldn't want to say. The steps are rather peculiar steps; they are changed now a little from what they were.

Q You think they are changed now? A Yes, sir.

Q When were they changed? A I don't know.

Q Are you sure they are changed? A I would say yes from what they were.

30 Q When were they changed? A I don't know.

Q You are sure there has been a change made? A It looks very much like as if there was a change there, because the seats were all so pointed and I don't know whether the seats were changed, or the platform, but it looks as if part of the corner was taken off.

Q You are sure there has been a change there? A I would say there has been.

40 Q That is the way it strikes you? A That is the way it strikes me.

Hedwig M. Bremmer, cross.

Q As you get to the top of the three steps you walk into your seat? A Yes, sir.

Q Did you notice who was sitting there in the first seat? A There was a lady and a gentleman sitting right alongside of the aisle.

10 Q Who was at the end of the seat, the lady or the gentleman? A Why, the gentleman was on the other end.

Q Can you describe this gentleman in any way as to how he looked, in a general way? A Kind of a fat man.

Q Something like myself? A No, he was heavier than you.

Q He was sitting in the front row? A He was sitting in the front row.

20 Q Was he much heavier than I, according to your recollection? A I couldn't tell you by pounds. He was stockier. You may not seem so stout yet weigh heavier than he is.

Q That is what you call a fat man? A I call him a stout man.

Q Did this stout man get up to let you in? A Yes, sir.

30 Q Did you have to squeeze past him? A No, he wasn't that stout a man. He got up to let me in. Even if you are thin and you do not get up it is hard to get past.

Q Was there a lot of room between the stout man to get in? A When he got up?

Q Yes. A There was plenty of room, yes, sir, then.

Q You got in and sat down in your seat? A I went in and sat down in my seat.

Q Then, you did not see Mrs. Heine again until you saw her again in the dressing room?

40 A That's right.

Hedwig M. Bremmer, cross.

Q Where was the rest of the party seated, above you? A Above me.

Q In what row? A I don't know.

Q Do you know whereabouts they had their tickets, in what row? A They were in the rear of me; I couldn't tell you the row?

Q Many rows back? A Several.

10

Q When Mrs. Heine fell down the lights were still burning, weren't they, as a matter of fact? A No, they were not, because the lights were out as we went to our seats.

Q Did you notice Mr. Smith, the manager of the theatre, come up there? A He came to the dressing room, yes, sir.

Q Didn't he come in the theatre? A I didn't see him.

Q Do you know who took Mrs. Heine away? A No.

20

Q She was there a little while, wasn't she? A Where?

Q Where she fell? A She couldn't have been, because I took off my coat and looked for her and she was gone.

Q You did not see the slightest suggestion of her at all? A No, I didn't see her at all.

Q You looked as soon as you missed her? A Yes, sir.

30

Q She was not lying there or sitting there? A No.

Q She was all gone? A She had gone.

CLEMENTINE HEINE, plaintiff, sworn in her own behalf.

40

Henry G. Holler, direct.

HENRY G. HOLLER, sworn in behalf of plaintiff.

Direct examination by Mr. Hannoeh.

10 Q You are a practicing physician in the City of Newark? A I am.

Q And have been how many years? A For twenty years.

Q You attended Mrs. Heine, the lady sitting here in the front row? A I did.

Q In December, 1924? A Yes, sir.

Q Where did you first attend her? Where was she? A 300 Verona avenue.

Q At whose home was that? A Mrs. Rehberger.

20 Q Where did you find her? A In bed.

Q What was her condition? What did you find? Tell us what you prescribed for her. A At the time she had a very severe hemorrhage from the nose and throat. She had concussion of the brain which was the cause of the hemorrhage. Contusions or bruises about the scalp. The left thumb was injured and very much swollen and inflamed and the left ankle was bruised.

30 Q Was her body bruised at all? A Occasional parts, but mostly about the head, left hand and left ankle.

Q Did she suffer any pain? A She suffered a great deal of pain and suffered from shock.

Q How old a lady was she? A I don't know.

40 Q What did you prescribe for her? A Local applications, internal medication to relieve the congestion, stop the hemorrhage; absolute rest; very low diet and perfect quiet in order to

Henry G. Holler, direct.

check the hemorrhage which she had which was very severe.

Q How long did you continue to attend her?

A From the 28th day of December, 1924, and the last consultation I had was January, 1926.

Q How frequently did you attend her? A I saw her daily at first at the house and then she came to my office a few times after that. 10

Q What time of day was it you attended her the first time? A I attended her in the morning between nine and ten, as near as I can tell.

Q When did you last see her prior to seeing her here today, do you know? A No.

Q Did she go out of the city? A I believe she went to New York.

Q Do you know approximately when that was? A No, I do not. 20

Q Did you examine her this morning? A Yes, sir.

Q What condition did you find her in? A I found she has an enlarged joint in the left hand, the left thumb, what we call the metacarpal-phalangeal joint.

Q Is that the joint you saw when you attended her? A That is the joint that was injured when I first saw her. 30

Q Is that a permanent condition you saw this morning? A Yes, I would say that was a permanent condition.

Q Outside of the thumb were there any other injuries you observed this morning? A Yes, she is in a highly nervous state; apparently has not recovered from the concussion of the brain she had at that time.

Mr. Hannoeh: At this time I notice our complaint says the 7th of December and 40

Henry G. Holler, cross.

Miss Precker says it should be the 27th of December and I ask leave to amend it from the 7th to the 27th. It was during the Christmas holidays.

Q Have you been paid for your services? A I have.

10 Q What do they amount to? A \$19.

Q You regard that as very reasonable? A I do in these cases.

Cross examination by Mr. Schneider.

Q About how long was she in bed? A Actually confined to bed or on the couch?

Q Actually confined to bed? A To my recollection about a week.

20 Q You are sure of that? A No, I am not sure.

Q It may have been just about three days? A It may have been three to six days or seven or eight days, I couldn't tell.

Q During the time she was confined to bed how often did you see her? A I saw her daily for the first three or four days.

Q At the house there? A At the house.

30 Q After that did you see her at the house again? A After that I saw her at the office.

Q You saw her at the house only three or four times? A As far as I can recollect.

Q Then, she came to your office? A Then she came to my office.

Q How often did she come to your office? A She wasn't in the office over three or four times.

Q So, you have seen her in all about six or eight times? A About that.

40 Q Since then you have not seen her at all or treated her? A I haven't seen her since the last date.

Henry G. Holler, cross.

Q Nor treated her? A No.

Q What do you charge per call? A From three to fifty dollars.

Q You are like we lawyers, we get what the traffic can bear? A I am not as bad as lawyers.

Q It depends upon whether they can afford it or not? A That is it exactly.

10 Q Did you notice she had an enlarged thyroid? A Yes, sir, she had.

Q That is a long standing condition, isn't it? A Yes, indeed.

Q What is that thyroid condition? A We have a gland in the neck called the thyroid gland; that gland is enlarged from many causes.

Q It is organic, isn't it? A Not necessarily.

20 Q In her case it was not due to the accident, was it? A Not at all.

Q Chronic? A It was a chronic condition she had when I saw her.

Q Of long standing? A Apparently of long standing; I never examined her before.

Q You never treated her before? A No.

Q What effect did that have on the patient? A An injury of this kind would tend to aggravate it.

30 Q What effect would the thyroid gland have on a person? A That is irrelevant, isn't it?

Q You are not the judge. What effect would that have on a person? A Different effects. It makes some people nervous and others it does not; it depends on the kind of thyroid.

Q How many kinds are there? A Many kinds. Cystic, fibrous, ophthalmic goitre.

40 Q A goitre is a dangerous thing, isn't it? A Not necessarily. There are thousands and thousands of people with a goitre who live to various ages.

Clementine Heine, direct.

Q A lot of them die from it, don't they? A No.

Q Do you know about how long Mrs. Heine had that thyroid? A I do not.

Q A thyroid condition will often cause nervousness, won't it? A Yes.

10 Q Do you know about how old Mrs. Heine is? A I do not.

Q You did not take any X-rays on any part of her body? A I did not.

CLEMENTINE HEINE, plaintiff, recalled in her own behalf.

20 *Direct examination by Mr. Hanoach.*

Q You are the plaintiff in this case? A Yes, sir.

Q Speak as loudly as you can. A Yes, sir.

Q How old are you? A Seventy-six.

Q Where do you live? A 4453 Park avenue, Bronx.

Q How long have you been living in New York? A Oh, I think forty years.

30 Q How long have you lived at the present address? A I have lived there for four years, something like that.

Q With whom do you live? A It is a little private house; I have rooms there.

Q Have you any family who lives with you there? A No, I have my own little room.

Q What business are you in? A I am a dressmaker; some people say seamstress.

40 Q How long have you been a seamstress? A It must be over twenty years.

Clementine Heine, direct.

Q What was your business at the time of the accident, December, 1924? A Dressmaking.

Q What were you earning at that time? A \$5 a day.

Q For how long a time prior to the accident had you been earning \$5 a day? A How long before? 10

Q How long before the accident had you been earning \$5 a day? A Many years.

Q Do you have regular customers? A Yes, sir, I worked for one lady twelve years.

Q What is that lady's name? A Mrs. Beyer.

Q How often a week do you go to her? A Before the accident I went every day. Then, I have another lady I go to for many years.

Q Have you regular persons to whom you go each day and each week? A Yes, sir. 20

Q What are the names of those people to whom you have been accustomed to going before the accident? A Mrs. Beyer and Mrs. Stringer.

Q What days of the week do you go to Mrs. Beyer? A Now?

Q Not now, before the accident? A I always went to those two ladies, I couldn't say which day—I went to Mrs. Beyer and the other days I went to Mrs. Stringer. 30

Q Would you have any other customers you went to? A Not very much.

Q How much of the week would they take of your time? A Every day in the week and in the middle of the day I had my meals, too.

Q Where? A In the house of the ladies.

Q How much were you paid? A \$5 a day.

Q Where did these ladies live? A One lady, Mrs. Beyer, lives 31 Emerson Park, and the other one is 19 East 61st street. 40

Clementine Heine, direct.

Q How did you get there from where you lived in New York? A By the "L" or express.

Q How long a ride is that? A If I got the express sometimes it takes me a half an hour or an hour.

10 Q During what hours of the day did you go to these houses and come home? A I had to be there at nine o'clock. They didn't mind if I happened to be late; I left home a little after eight.

Q When did you leave their houses to go home? A What time?

Q Yes. A One lady I go at five o'clock, and the other lady I stayed there for dinner and had my dinner there.

20 Q Did you go back and forth without anybody assisting you? A Yes, sir.

Q What sort of work did you do at these houses? A Dressmaking.

30 Q After the accident how long was it before you were able to do sewing again? A It took—I was here five years and Mrs. Rehberger took me over to her home—she took me over and then it took me awhile to walk and then I started again. You know, I have to work, and I went a couple of times a week; I can't work much, I get awfully nervous.

Q What was the condition of your left hand? A Now, it hurts me.

Q Do you use that in sewing? A Yes, I have to hold the things and that makes me tired and I can't work.

40 Q Since starting to work after the accident how many days per week have you been working? A Two days and it makes me so nervous that in the summer I have to go away, I am too nervous, I can't work.

Clementine Heine, direct.

Q Could you have obtained work? A Oh, yes.

Q From whom? A From those ladies.

Q Who do you work for now, the days that you do work? A Mrs. Beyer.

10 Q What about the other lady? A She is on the other side now.

Q So, you are working now exclusively for Mrs. Beyer? A Yes, sir.

Q You paid this doctor's bill he spoke to us about this morning, this \$19? A Mrs. Rehberger.

Q What other expenses have you had beside the accident? A I don't know. They are paid for; in the drug store and things like that.

20 Q Have you paid Mrs. Rehberger back the money? A No.

Q Coming back now to the accident itself. What performance was it you went to see, matinee or evening performance? A The evening performance.

Q Who were you with in the party? A Mrs. Rehberger; I was her guest and she paid for the tickets.

30 Q Who was along? A Mrs. Rehberger and Mrs. Beyer and Mrs. Pfeiffer and Mrs. Baudendistel.

Q You were all in with the party? A Yes, sir.

Q Did you get to the theatre together? A In the front of it and went upstairs together.

Q Who went upstairs with you? A All the ladies went up together.

Q Where was your seat? A In the second balcony, the first row.

40 Q When you went into the theatre had the show started? A No.

Clementine Heine, direct.

Q What happened when you got into the theatre? A I went in and talked and they told me where my seat is and then there was a light and then the light went out.

Q Where were you when the light went out?

A I went to go up to my seat.

10 Q Was there any usher there? A Yes, sir.

Q Where was the usher standing? A Between the first and second balconies.

Q What Mr. Schneider calls a passageway?

A Yes, sir.

Q She was there standing in the passageway? A Yes, sir.

Q In what order, who went up first into the seats? A I think the other ladies went up first.

20 Q Who was in the front row with you? A Mrs. Beyer.

Q None of the other ladies were with you in the other row? A No.

Q Who went into the first row first? A Mrs. Beyer.

Q How many feet in was she sitting? A I didn't went into the seat.

Q Who was seated at the end of the seat? A I think it was a gentleman.

30 Q This gentleman here (indicating)? A I don't know.

Q You do not remember him? A No.

Q There was a gentleman seated at the end seat? A Yes, sir.

Q What did he do? A He got up to let me in.

40 Q What did you do then? Then, what happened? A As you know, I had to go five steps up to get back to the seat, to the row, and it was dark. You know, the performance started

George E. Doud, direct.

and it was dark and I couldn't see where I stepped and there was a hole from the step to the row and I stepped in there and I fell.

Q Then, what happened to you? A I only remember I was sitting in the ladies' room and vomited.

Q That is the next thing you remember? A 10 Yes, sir.

Cross examination by Mr. Schneider.

Q You had a seat in the front row? A Yes, sir.

Q Do you remember was it three seats in? A I don't know; I didn't went in.

Q Do you remember the number of the seat? A No, I didn't have the ticket; Mrs. Rehberger bought the tickets and gave the ticket 20 to the usher; I didn't have a ticket at all.

Q Mrs. Rehberger was not seated with you? A No, she went further up.

Q She went further up? A Yes, sir.

Q How many more were in the party? A Two more.

Q Besides you? A No, some more besides. Mrs. Baudendistel, Mrs. Pfeiffer and Mrs. Beyer.

Q It was a stag party of ladies? A Yes, sir. 30

Q No gentlemen with you at all? A No.

GEORGE E. DOUD, sworn in behalf of the plaintiff.

Direct examination by Mr. Hannoeh.

Q You reside here in Newark, do you? A 40 Yes, sir.

George E. Doud, direct.

Q Where do you live? A Roseville, 127 Roseville avenue, that is my business, and I reside at 190 North Seventh street.

Q Were you in the Shubert Theatre the night of the accident? A The night of the accident, yes, sir.

10 Q Where were you seated? A In the end seat of the first row, next to the aisle.

Q Can you tell us how the second balcony is divided from the first balcony in the Shubert Theatre? A With an alley, passageway, or whatever you term it, I should say four feet wide.

Q In order to get into the first or second balcony do you have to use this passageway? A Decidedly, depending on which way your ticket takes you.

20 Q Going to the first balcony in which direction? A Going to the left as we did, you would naturally go to the left for the first balcony and to the right for the second.

Q Is the first row of the second balcony on a level with this passageway? A I should say four feet higher than the floor of the passageway with a brass railing and a small portiere in front dividing the place, that is, from the end of the second platform flooring, this brass rail and portiere I should say was around three and a half or four feet high, something about that.

30 Q Is there any other material of any kind between the brass rail and the floor? A None other than the portiere, as I recall.

Q In order to get into the first row—let me put it this way: what space is there between the seats and the portiere? A Very limited space. For a man of any size it was necessary, if he had the courtesy, to stand up to allow a woman to

40

George E. Doud, direct.

pass. The space is limited because I am a pretty good sized man and I tried to make it a point when a lady passes me to arise and let her in.

Q You were at the end of the seat? A I have been going there all winter and make it a point to get on the first row aisle depending on where the seats are located.

10

Q And in order to get into the first row from the aisle what do you have to do? A Climb up these stairs, naturally.

Q Are there any additional stairs leading from the aisle into the first row, or is the first row on the level with the aisle landing up from the passageway? A If not mistaken there is about three or four steps up and you strike the level of the floor of the seats naturally going in it, as I recall it. I noticed it time and again that way; I haven't been in there in a year.

20

Q This particular night do you remember this Mrs. Heine coming in? A I only remember the incident.

Q Tell us what you remember of the incident? A I simply supposed, as I was accustomed to do on that end seat, because I made it a point every Saturday night to have one of the end seats, because there was more space on the end seat to turn around in, than to turn around in the middle of the aisle.

30

Q What do you remember of the incident? A I simply recall, as I recall it, she came in. The curtain was up and I simply got up and let her pass me. I stepped down in the step as usual and she was apast me possibly one or two steps; I don't know if she didn't touch me in any way, shape or manner, and as I thought had to step in there, and the first thing I see the crash; I wouldn't call it a crash, a blow on the back, only

40

George E. Doud, direct.

to see this lady fall headfirst down the steps. I attributed it largely to the condition of lack of light.

Mr. Schneider. I ask that that be stricken out.

10 The Court. Strike it out.

A I should not have said that, probably.

Q This woman fell down the stairs? A Fell down the stairs.

Q What did you do then? A I simply—naturally the attendant came and attended to her and took her, I suppose, to the ladies' room down stairs.

Q That's all you know about it? A That's all I know of the incident.

20 Q Are there any lights at all in the stairways?

Mr. Schneider. In the complaint it says nothing at all about lights. The complaint is not based on lights.

A There is a small platform—

30 The Court. The question of lights in the operation of a theatre, while it may not be negligence specifically, I think it is evidential to show the condition at the time an accident happened. The complaint is not lack of light, but I think there is a hole there, but I think you can show that the lights went out, and I will admit what the conditions were when she fell.

Mr. Schneider. Withdraw the objection.

40 Q My question was whether there were any lights in the neighborhood of this staircase at the

George E. Doud, cross.

time the accident took place. A None; that is, not on the steps.

Cross examination by Mr. Schneider.

Q Was the theatre lighted? A At the time of this accident, you mean? 10

Q Yes. A To the best of my memory and to the best of my recollection the theatre was in darkness, that is the play was in motion; the lights we had was coming largely from the stage.

Q Are you sure the play was on at the time, to the best of your recollection? A Yes, to the best of my recollection I firmly believe it was; that is, to the best of my recollection.

Q You always try to get the first seat on the aisle? A I make it a point, a kind of first-nighter on Saturday nights. 20

Q Do you know whether or not Mrs. Heine after she fell was there for any appreciable length of time? A She was taken away very rapidly. The attendants were there attending to her, or the people who came to her rescue, and very briefly she was taken evidently to the ladies' room, supposedly on the next floor.

Q About how long was she there before she was taken away? A A very short time. 30

Q Can you tell us in minutes. A Very briefly. I wouldn't want to say. Half a minute or two minutes. In other words, they came to her rescue very readily.

Q Do you remember the name of the play that was on that night? A I don't, to be frank.

Q Do you remember whether any other lady went in there before Mrs. Heine? A Probably did, because sitting on the end of the row it was quite a natural thing they would and I said whenever I saw anyone come in that way I found 40

George E. Doud, cross.

it better, the space was so narrow, to step out to let them step in.

Q As a gentleman you would do that? A As a gentleman, and I might add it was more to my advantage.

Q It worked both ways? A Yes, sir.

10 Q In the first two seats you and your wife were sitting? A No, it was a friend with me.

Q Was anyone sitting in the third seat there? A That I wouldn't want to undertake to say. I had a friend with me and beyond that if it wasn't for this accident I wouldn't have paid any attention to it.

Q Was anyone seated to your left, beyond the lady who was with you? A I didn't pay particular attention and I wouldn't want to make that statement to say for a surety.

20 Q Do you know whether any lady came in shortly before Mrs. Heine came in? A I wouldn't want to undertake to say that for sure. They were coming in, that is, the ones that got in ahead of me, and they could come from the other end of the aisle.

Q Do you remember any lady coming in directly ahead of Mrs. Heine? A I would say this, that the friend I was with, there was two ladies that she recognized and knew one of them, if my memory serves me right.

30 Q The lady who was with you recognized who? A Someone who went into that row. I wouldn't want to say for sure; it is hazy, and I wouldn't want to make that statement.

Q Some one with Mrs. Heine? A One of the party who was with Mrs. Heine, the friend I was with particularly knew. I wouldn't want to make that statement even at that for I didn't pay any attention and it didn't concern me.

40

Amelia Rehberger, direct.

There may have been four seats or one beyond there, for the reason it didn't concern me; I was occupying my own seat.

Q You cannot tell us whether directly ahead of Mrs. Heine another lady entered? A I wouldn't know Mrs. Heine now. I only know the incident whereas I say to the best of my recollection it was dark.

10

Q Do you remember getting up before she came in to let another lady go in before her? A I wouldn't want to say.

Q You go there every Saturday night? A Not this winter, but during that winter and probably the year before.

Q You have been there since? A Not this winter at all; not that that had anything to do with it, I haven't bothered with theatres as much.

20

AMELIA REHBERGER, sworn in behalf of the plaintiff.

Direct examination by Mr. Hanooh.

Q You reside in Newark, do you? A I do.

Q At what address? A 300 Verona avenue.

30

Q Do you know Mrs. Heine? A I do.

Q Have you known her a number of years? A Yes, sir.

Q She was a guest at your home during the Christmas holidays in 1924? A Yes, sir.

Q Were you with her the night they went to the Shubert Theatre? A I was.

Q Do you know what night it was? A Do you mean the date?

Q Yes. A December 27th.

40

Amelia Rehberger, direct.

Q What performance did you attend? A I couldn't tell you.

Q I mean afternoon or evening? A Evening.

Q Who was in your party? A Mrs. Beyer, Mrs. Baudendistel, Mrs. Kraemer and Mrs. Pfeiffer and myself. 10

Q Where were you supposed to sit with respect to Mrs. Heine? A "E" row.

Q Also in the second balcony? A In the second balcony.

Q You had all the seats? A I bought the tickets.

Q When you went into the theatre had the performance started? A When we went into the theatre the performance had not started, but by the time we got to this aisle or platform that divides the first and second balcony, the lights went out. 20

Q Where were the ushers? A In this aisle that divides the first and second balcony.

Q You were in "E" row, you say? A I was in "E" row.

Q In order to get to "E" row you had to go up the aisle? A I had to go up the aisle.

Q Where were your seats with respect to Mrs. Heine's aisle, if you remember? A On the same side, the same aisle but a few rows back. 30

Q Were you in front of Mrs. Heine or in back of her? A In back. I had the tickets and I was in back, and I let the other ladies go ahead and I was in back.

Q Did you see Mrs. Heine fall? A No.

Q Where were you when she fell? A I had given them the tickets and I saw where her aisle was and found her seat and I stayed with 40

Amelia Rehberger, direct.

her until I showed her where her aisle was and then I went on up to my seat.

Q Where was the usher at that time? A In the passageway that divides the first and second balconies.

Q Was anything said to you by the usher? A She looked at the coupon and said, "Your seats are up there." 10

Q When did you first find out Mrs. Heine met with an accident? A After I got up and got seated I looked down at her row and I saw the seat was vacant and I got up and I saw them leading her out.

Q What did you do? A I followed.

Q Where did you find her? A Just before they started down stairs.

Q What condition was she in? A Bleeding from the nose and mouth. I saw blood, I don't know where it came from, but that I am sure of. 20

Q Did she go to your home? A Yes, sir.

Q How long did she stay there? A Five weeks.

Q During the time she was at your home how long was she confined to bed? A I should say about a week.

Q And after that? A She got tired of staying in bed and we had her on the couch and made her comfortable that way. 30

Q During the time she was at your home was she suffering any pain? A A great deal. I was up many times at night with her putting on applications.

Q Did she go back to New York later on? A No, I took her back.

Q Do you know what business she is in? A Dressmaker.

Q You are not living with her in New York? A No. 40

Carrie B. Beyer, direct.

Q Haven't lived with her in New York? A Never.

Q So you do not know about how frequently she works yourself? A No.

Q Had you visited her in New York? A Yes, sir.

10 Cross examination waived.

CARRIE B. BEYER, sworn in behalf of the plaintiff.

Direct examination by Mr. Hannoeh.

20 Q You were one of the party who attended this theatre on the 27th of December, 1924? A Yes, sir.

Q Where was your seat? A Mine was the fifth seat in "A" row.

Q The same aisle that Mrs. Heine was in? A Yes, sir.

Q Did you go in with them? A No, I was there I judge about five minutes ahead of her.

30 Q Did you see them come in? A I did. They were standing in the passageway and I was looking for them and I was standing in the passageway and I saw the girl motion to them to take their seats and a second after the lights went off and the performance went on and my attention was drawn to the stage.

40 Q When did you first find out Mrs. Heine met with an accident? A In fact the lady with Mr. Doud happened to know me—I didn't recognize her—she leaned over and she said, "Was there an old lady in your party?" and I said, "Yes"; she said, "That lady fell," and I told

Carrie B. Beyer, direct.

Mrs. Baudendistel and Mrs. Baudendistel turned around and she saw Mrs. Rehberger coming down and she immediately got up and left.

Q So you did not see the accident yourself? A I did not.

Q The seat in which you were seated you say was how many seats in? A The fifth. 10

Q How high was that seat you were sitting in above the passageway that divides the first and second balconies? A I judge it is five feet; the rest have been saying four.

Q It is rather high? A Quite high.

Q In order to get into your seat what did you have to do? A To get in "A" row?

Q Yes, the seat you had that night? A If it is permissible I very well remember that when you go in the floor on which the seats are is cut in. I know, because I happened to have sat in that seat and when you sit in the first seat you are not very comfortable, because your left foot is on the floor and your right foot is apt to hang down, because the floor is cut in right there. 20

Q What did you do when you came to the passageway, for instance, you are going up and walk up this passageway between the first and second balcony. Do you enter the aisle that goes all the way up? A Yes, sir. 30

Q How do you get into "A" row? A You go down the passageway, turn to the right, and go up four or five steps.

Q (By Mr. Schneider.) A little louder, please. A You go down the passageway and turn to your right, and this happened to be the first aisle and then you walk up four or five steps—I am not sure how many, I think five.

Q (By Mr. Hannoeh.) Then, what do you do? A Turn to the left to get into the seat. 40

Motion for a Non-suit.

It is a very awkward space that way and it is hard to get into that row.

Q Describe what it is that makes it hard to get into that row? A It is hard to describe, but the flooring is cut in and this side (indicating), if this was the first seat your right
10 foot would hang and it is rather uncomfortable and your left foot is on the floor. Have I made that clear?

Q Are there any additional steps leading from the aisle into the "A" row? A You walk up more steps.

Q You walk up another step? A It is sort of a step, you walk up into that aisle.

Q As far as you know how long did that condition exist? A I know definitely it was
20 that way three weeks before the accident.

Cross examination waived.

PLAINTIFF RESTS.

Mr. Schneider: I respectfully move for a non-suit on the ground there is no negligence shown on the part of the defendant by the plaintiff.

I take it that the proof should follow
30 the complaint and the proof should rest solely on that allegation, and there is no allegation or proof in this case of wrongdoing.

I also urge as a ground for my motion to non-suit the ground of contributory negligence of the plaintiff.

The Court: How can I overlook the statement made by Mrs. Heine that there
40 was a hole from the step to the row, as

Clementine Heine, direct.

she expressed it, and that she stepped into that and fell.

For the purposes of this motion you admit the truth of everything that has been testified to by the plaintiff's witnesses but deny its sufficiency in law and I have to give the plaintiff the most favorable inferences that
10 I can draw from the testimony in the case.

Mr. Schneider: May I suggest on this point that your Honor give me the privilege of asking a question on that?

The Court: I cannot do that. I will deny the motion on the ground the testimony she gave as to their being a hole there and she stepped in between the step and the row and fell, and the question of contributory negligence is a question for
20 the jury.

I will hear the defense.

Defendant's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

CLEMENTINE HEINE, plaintiff, recalled in
30 behalf of the defendant.

Direct examination by Mr. Schneider.

Q I just will ask you one question. When you went up the stairs there, you went up four or five steps? A Five steps.

Q When you stepped down? A Yes, sir, it was a hole and I got into a hole; I didn't know that.
40

Clementine Heine, direct.

Q By a hole you mean a step leading down to the floor where the seats are? A What?

Q When you were standing there, before you stepped, right below you was the floor where your seat is? Maybe you do not understand me? A No.

10 Q You went up five steps? A Yes, sir.

Q And then your seat was to your right? A Yes, sir.

Q So you go up? A Yes, sir.

Q And your seat is to your right? A Yes, sir.

Q About three seats in? A Yes, sir.

Q So you turned around to go to your seat? A I will explain it to you. I went afterwards to look at the place to see where I fell and it was five steps I went up and it was dark and the step only went to here and there was an empty space, and there is the first row (indicating), and I couldn't see the row on account it was dark.

20 Q What do you mean by "hole"? A The step it comes far enough over to the row to the seat, and then I went up later to see where I fell and then I saw that and they put lights on after that.

30 Mr. Schneider: I object to that, "They put lights on after that," and ask that that be stricken out.

A I wanted to know, I wanted to see the place where I fell; I suffered too much.

Q You turned to your right to go to your seat? A I didn't get into the seat.

40 Q You turned to go into your seat? A I only went up to go.

Frank L. Smith, direct.

Q Did you turn around to go to the seat? A I didn't get in.

Q Before you went up did you turn? A I wanted to turn to get in but I didn't get in.

Q Then the man got up who was sitting on the aisle? A Yes, sir.

Q Below you was the floor? A Five steps 10 down where I fell I went to the floor.

Q That is the floor right below where you fell, is the floor? A I think so, I didn't remember anything.

Q When you looked at it afterwards you saw that is the floor? A Yes, sir.

Q If you go along that floor you could get to the seat; that is the floor you walk on to get to the seat? A Well, I went five steps 20 up to get into my seat.

Q There is the floor right below there to get to your seat? A Yes, sir, on account of the poles behind—

Q Where you mean the hole is there the floor is there? A Yes, sir.

Cross examination by Mr. Hanoach.

Q At the bottom of the hole is the floor? A 30 Yes, sir, there is the floor.

FRANK L. SMITH, sworn in behalf of the defendant.

Direct examination by Mr. Schneider.

Q What is your business? A Manager of 40 the Shubert Theatre.

Frank L. Smith, direct.

Q How long have you been the manager of the Shubert Theatre? A Probably about five years, four years.

Q You were the manager in December, 1924? A Yes, sir.

10 Q Was your attention called to Mrs. Heine falling on the second balcony? A Yes, sir.

Q Did you go immediately to see about it? A Yes, sir, I did.

Q Where did you go? A To the ladies' room up on the balcony floor.

Q To where Mrs. Heine was? A Yes, sir.

Q You called a doctor? A Immediately.

Q And had her attended to? A Yes, sir.

Q You are familiar I suppose with the construction of the theatre? A Yes, sir.

20 Q How long have you said you have been manager there? A Between four and five years; I don't know exactly.

Q Did the usher in charge point out the place where Mrs. Heine fell? A Yes, sir.

Q Where is it? A On the steps leading to the rear balcony on the first row of the rear balcony.

Q Row "A"? A Yes, sir.

30 Q Do you know when the theatre was built? A No, I don't know the exact time.

Q Has any change been made in that since? A No, sir.

Q Any change at all of the slightest kind? A No, sir.

Q It is still the same as it was in December, 1924? A Yes, sir.

40 Q Describe to the judge and the jury just what the condition is there? A Well, there is no unusual condition, just steps going to the rear balcony.

Frank L. Smith, direct.

Mr. Hannoeh: I object as a conclusion.

Q Tell us the condition of the steps. A There are four aisles leading to the rear balcony and each aisle has steps leading to it, you go up the steps to your seat.

Q Take for instance row "A" there, what number would three seats in from the aisle be? 10

A I don't know the exact seat number.

Q A person going into that seat, just how would he get there? A They proceed up three or four steps, turn to the right and there is a railing or crossover aisle; on the first row there is a slight elevation and she would have to pass in that first row.

Q How would you get to the first row from the steps? A Bear off to your right. 20

Q Do you have to step down anything? A No.

Q Is it level there? A As each seat goes up they meet the level of the rows, each level.

Q Would you have to step down any to get to row "A" from the steps? A No, sir.

Q Just turn and walk in? A To your right.

Q Of what material are the steps? A Cement.

Q Of what material is the floor? A Cement. 30

Q As you walk into the aisle what is the material? A The natural flooring is cement, concrete.

Q Is there any hole there as you turn from the steps to go into row "A"? A No, sir.

Q Is there anything that can be called a hole?

Mr. Hannoeh: I object to that.

Mr. Schneider: Withdraw the question. 40

Frank L. Smith, direct.

Q Is there anything resembling a hole there?

A No, sir.

Q Any declivity of any kind? A No, sir, positively not.

Q Have you seen that often, that aisle there?

A Every day; every time there is a show I go
10 through the building.

Q Do you know, when your attention was called to the accident, whether the show had started or not? A The show had not started.

Q How do you know that? A Because all the time I was upstairs, I always get the time of an accident, whenever an accident occurs, if there is any such thing, a person turns on their heel or anything at all, I always want to know the exact time.

20 Q What was the time of this accident? A Offhand I couldn't tell you the exact minute; around 8:20, 8:25, 8:15.

Q How do you know it was before the show started? A Because as I went upstairs I immediately did the usual thing in case there is any excitement.

Q Do you know whether the show was on, not what you asked? A Only from information.

30 Q As you went upstairs was the light still on in the theatre? A The lights in the auditorium proper?

Q Yes. A In the entire building when the show has started all the lights are out except the ceiling lights and the aisles.

Q Were the lights on when the show had started? A The aisle lights are on.

40 Q Which lights? A The step lights and the overhead lights; that is a fire regulation, you have to have those burning.

Frank L. Smith, cross.

Cross examination by Mr. Hannoeh.

Q Tell us about the aisle light, what do you mean by aisle light? A On the steps they have a light sunk into the steps.

Q There is a light sunk into the steps? A Yes, sir. 10

Q So that people walking up the steps can see where they are going? A Yes, sir.

Q How soon after the accident were those lights put in?

Mr. Schneider: I object to that question on the ground no allegation has been laid in the complaint for it.

The Court: I will admit it.

Defendant's counsel prays an exception to
20 this ruling of the Court.

Exception noted as ground of appeal.

Q How long after the accident were those lights put in? A They haven't been put in since then; they were in there before.

Q Are you sure about that? A Positive.

Q Are you sure there is a light in this corner of aisle "A" when this accident is said to have
30 occurred. A If I can describe it to you.

Q Sure, go ahead. A Overhead we have drop lights with reflecting shades on, they come from the ceiling and they hang on a cord, and every other step has one of these base lights; on one step it would be on the right and the other on the left.

Q So people walking into their seats from the aisle can see where they are going? A Yes, sir. 40

Frank L. Smith, cross.

Q I am asking you again whether those lights were in there at the time the accident took place? A Yes, sir.

Q Are you sure about that? A Yes.

Q Is the cement painted white now at the entrance to the seats? A The cement is red and on the tread of each step there is white paint.

Q When were they painted white? A They are done every year.

Q Have they been done prior to the accident? A Yes, sir.

Q Are you sure about that? A Oh, I am positive.

Q What makes you certain about it? A Because I have a painter employed at the theatre and he does those things for me.

Q What makes you think the lights were installed prior to the accident? A I know they are in there since the present management, Mr. Schlesinger, had the theatre, because they were put in the first season Mr. Schlesinger had the theatre.

Q Did you make a report of this accident? A Yes, sir.

Mr. Schneider: I object to that.

The Court: I will admit it.

Q Did you refresh your recollection or mind from your report as to when the accident took place? A I could have if I saw it.

Q Had you seen it prior to testifying here? A No, sir.

40

Clarence Miller, direct.

CLARENCE MILLER, sworn in behalf of the defendant.

Direct examination by Mr. Schneider.

Q What is your profession or business? A Structural engineer.

Q For yourself or are you associated with anybody? A W. E. Lehman Company, architects.

Q How long have you been a structural engineer? A Five years.

Q Have you built theatres? A Before the five years I was superintendent of construction.

Q How long? A Fifteen years.

Q What was your business before that? A That is twenty years' experience in the building game.

Q Have you built theatres? A Yes, sir.

Q Did you have anything to do with building the Shubert Theatre on Branford Place in this city? A I was superintendent of construction.

Q Did you supervise it? A Yes, sir.

Q Have you a plan of the theatre there or any part of it? A Yes, I have a plan of the theatre. That was built in 1912; that is the balcony.

Q What? A I have a plan of the balcony only.

Q What they call the first and second balconies? A Yes, sir.

Q Is that in the same condition it was in 1912 as far as construction? A As far as construction it is.

Q As to the stairs? A As far as the stairs, concrete work, it is the same.

Q Describe to the judge and jury the construction of the first and second balconies. A

Clarence Miller, direct.

The first and second balconies are constructed of steel and concrete, a modern construction; the latest construction.

Q The latest construction? A At the time.

Q What is it with reference to the present time or to 1924? A At the time that theatre was
10 built theatres were first beginning to be built of concrete, in fact it was the second theatre in Newark to be built of concrete; before that all theatres were built of wood, since that time theatres are being built of concrete; in other words, that is called a modern construction. Another thing that makes it modern construction is before that time many theatres were built with a first and second balconies above each other. Now, they have what we call a long
20 single balcony, the forward part and the rear part divided in the middle by a crossover which you call an aisle or passage.

Q Describe this particular first and second balcony. A This was built according to the building code of Newark.

Q Was it passed by the building department? A It was passed by the building department, yes, sir. They had a license to open the theatre; you must have a license to open a theatre in
30 Newark.

Q Who gives that? A City officials.

Q Just how are the first and second balconies built? A Of steel and concrete.

Q As you enter it there is a passageway between the first and second balconies? A Yes, sir.

Q To your right there are aisles or stairs? A As you come over the crossover there are four passageways up to the second balcony and
40 four passageways down to the first.

Clarence Miller, direct.

Q Have you been shown this morning, at my request, the "A" row of the second balcony? A I have.

Q At the first passageway from Branford Place entrance? A The first passageway where you can turn to the right or left, where you have seats on the right or left. 10

Q Seats on the right? A Yes, sir.

Q Have you been shown that particular spot? A I have.

Q Describe to the Court and jury just how you get to a seat three or four seats to your right. A You go up straight five steps, turn to your right and go up two—one step and two risers.

Q Just what does that mean? A A step has a tread and if there are ten treads in a pair of stairs then it means there are eleven risers, because it takes one to get to the top platform. 20

Q Are those steps built in the usual manner as theatres are constructed? A Built generally as theatres are built.

Q As you turn to your right to go to a seat there, three or four seats in, you have what? A One side step and the two risers to go up.

Q One side step to go up? A After you go up you have to turn to the right and there is
30 one step and two risers going up.

Q Leading to the seats? A Leading to the seats.

Q Then you take your seat? A Then you take your seat.

Q You say that is the usual construction of theatres of that type? A That is the usual construction of theatres built at that time and today.

Q Is there any hole there where you step from the stairs to the seats? A There is no
40 hole there.

Clarence Miller, direct.

Q Is there anything resembling a hole? A Nothing resembling a hole I could see, or know of.

Q You examined that today? A I did.

Q Is it the same as it was in 1924? A I don't know how it was in 1924.

10 Q Is it the same as when you built it? A As far as the construction it is, as far as the lights it is not.

Q As far as the construction it is the same?

A In so far as the construction goes it is the same.

Q Of course you do not know about the light changes, do you? A No, sir.

Q As to when they were made? A No, sir.

20 Q As far as the construction is concerned, in other words, the possibility of holes is the same as when you built it? A It is the same as when I built it; the concrete is in good condition.

Q The method of construction is the same, isn't it? A Absolutely.

Q In other words, from the point of structural changes or condition it is the same as when you built it? A It is absolutely the same today as when I built it so far as structural conditions are concerned.

30 Q Did you, in your examination this morning, walk in that aisle? A I did.

Q And in towards the seat? A I walked up to the top of the steps only.

Q If you had to walk into the seat you told us about would there be any hole there?

Mr. Hanoach. I object.

The Court. Sustain the objection. Let him tell without leading him.

40 A The step is the same as when it was built; there is no hole there.

Clarence Miller, cross.

Cross examination by Mr. Hanoach.

Q Did you put lights in it when you built it? A No, sir, we had five brackets on the side-walls. At the time it was built it was the way theatres were built at that time.

Q I understood you to say you construct them today the same as you did then? A Yes, sir. 10

Q What do you mean when you say the lights are different? A The lights are an equipment, not structural.

Q You make a distinction between equipment and structure? A I do.

Q Talking about the lights, were there lights in there at the time you built it along the treads of the steps going into the aisles? A No, sir.

Q Are they put in modern theatres? A 20 They are.

Q You do not know yourself when they were put in this theatre? A I do not.

Q You had nothing to do with that? A I had nothing to do with that, no.

Q The question of painting the treads, was that a matter that was taken into consideration in 1912, or is that a modern idea, painting the treads white? A We didn't paint the treads white at that time. They most generally put carpet on the treads. As far as painting the treads white that is a personal opinion of the management to do it. 30

Q In other words, if the manager wants to paint the treads white he can do it and if he doesn't want to do it he doesn't have to do it. A Right.

Q That is up to the manager? A Yes, sir.

Q When you get into the first aisle "A" row, is there a brass rail in front of the seats? A 40

Clarence Miller, cross.

There is a brass rail when you get to the top of the steps.

Q That extends in front of "A" row seats?

A That extends in front of "A" row all the way to the first steps.

10 Q How far or how high would you say, according to your sketch, the floor of "A" row seats is above the floor of the passageway that divides the upper and lower balconies? A It is three feet eight inches.

Q Have you measured it? A I have it here on the steps and levels.

Q What is there between the brass rail and the floor of "A" row seats; in other words, assume this bench is the place in front of "A" row; at the top is a brass rail? A Yes, sir.

20 Q The bottom is the floor of the "A" row seats, and what is there between the back there and the floor? A I don't know.

Q What did you see this morning? A I didn't see.

Q Didn't you look? A I didn't look to see whether any curtain was there.

Q Is there an iron fence or rail there? A There is an iron rail there.

Q That is on top? A Yes, sir.

30 Q What is there in the space in between? A I don't know.

Q What does the plan show? A I haven't that section with me; I only have the plan.

Q What is it you have with you? A I have the plan of the balcony. If you care I will show you where the condition is.

Q It is marked with a yellow square? A That is approximately where it was pointed out to me this morning, the seats.

40 Q Now, I am asking you can you tell from the plans whether there was anything placed in the

Clarence Miller, cross.

construction between the top of the iron rail and the floor "A" row seats? A No, it only shows an iron rail across.

Q That is all your plan shows? A That is all the plan shows.

Q When you were there this morning did you notice whether there was a curtain in between? 10 A I didn't notice that.

Q What is there directly in front of the "A" row seats, right in front of the brass rail? A The crossover.

Q That is the passageway dividing the two balconies? A Yes, sir.

Q That is about three and a half feet below the floor of the "A" row seats? A Right.

Q You say when you were in the "A" row seats looking forward you did not see anything that looked like a hole or declivity? A Nothing 20 but the space there.

Q When you got in the middle of aisle seat A-4 what was there in front of you, any space there? A In A-1, that is the seat that was pointed out to me this morning.

Q Yes, what is directly in front of that? A An iron rail.

Q What is directly in front of that? A The crossover. 30

Q What is in front of that? A Three foot eight.

Q That does not look like a hole? A I wouldn't consider it a hole.

Q Balconies are now constructed with marble in front between the brass rail and the floor? A That is done in the front at the fascia, that is solid down there now.

Q They do not have this open space with curtains on the front at the front of the balcony? 40 A This balcony is solid.

Charles M. Robbins, direct.

Q I do not mean the very front. A Up there they are built the same today with an iron or a brass rail.

Q You do not build any of Stern's theatres that way, do you? A I have this year.

Q Where? A In Orange we had a balcony.

10 Q You had a brass rail in front? A Yes, sir, and a brass rail at the crossover.

Q Your plans show nothing about lights? A No.

Mr. Schneider. I offer the plans in evidence.

Mr. Hannoeh. No objection.

(Same are marked Exhibit D. 1.)

20

CHARLES M. ROBBINS, sworn in behalf of the defendant.

Direct examination by Mr. Schneider.

Q How long have you been a practicing physician? A Thirteen years.

Q In Newark here? A Yes, sir.

30 Q In the general practice of surgery and medicine? A Yes, sir.

Q Did you examine Mrs. Heine this morning? A Yes, sir.

Q Just what did you find? A I found Mrs. Heine had some difficulty in the flexion of her left thumb. Her general condition is practically the same as when I saw her a year ago.

40 Q Just to what extent has she difficulty in flexing her right thumb? A I should say there is a five per cent. disability of the thumb in grasping or closing her hand, together with some

Viola Robinson, direct.

tenderness over this third portion of the hand here (indicating).

Q By flexing, what do you mean? A Closing your hand down to make a fist.

Q What else did you find? A She has a large thyroid condition which is an old affair, which accounts for every symptom of nervousness she has. 10

Q Is the thyroid what is known as a goitre? A Yes, sir.

Q Where is that located? A In the neck.

Q In the front? A Yes, sir.

Q Point to it on yourself. A It is very evident on the patient.

Q Is that a long-standing condition? A Yes, sir, very old.

Q Would that cause nervousness? A Absolutely. 20

Cross examination waived.

VIOLA ROBINSON, sworn in behalf of the defendant.

Direct examination by Mr. Schneider. 30

Q Was that your name in December, 1924? A Yes, sir.

Q Were you married at that time? A Yes, sir.

Q Were you working as an usher in the Shubert Theatre at that time? A Yes, sir.

Q Where were you working as an usher? A What was it you said?

Q Where were you working as an usher? A In the balcony. 40

Viola Robinson, direct.

Q Did you see Mrs. Heine that evening? A Yes, sir, I did.

Q Just where were you stationed as an usher? A I was stationed at the foot of the balcony stairs.

Q Did you take her ticket as she came in? 10 A Yes, sir.

Q What did you do? A Why, she had "A-5" in the first row, the first seat from the aisle. I put her seat down, went up the stairs and showed her three seats in and my duty was finished towards her and I turned and something brushed me and there laying down at my feet lay the woman.

Q She had fallen? A Yes, sir.

Q Did you see who was seated in the first 20 seat? A There was a stout man in the first seat and a woman next to him.

Q Did the stout man get up? A He just pushed back, tipped his seat up; he did not step out into the aisle.

Q Did you help Mrs. Heine? A Did I take her to the ladies room?

Q Yes. A Yes, sir.

Q And did what you could for her? A 30 Yes, sir.

Q Had the show started? A No, sir.

Q As you go to that seat about how many steps do you go up? A How many steps?

Q Yes. A I judge four or five; I wouldn't just be positive.

Q What do you do to get to seat "A-5"? A What do I do?

Q Yes, to get to seat "A-5"? A I just go up.

Q Do you have to turn or what? A Yes, 40 you turn in.

Viola Robinson, cross.

Q In what direction, to the right or left? A It is to the right.

Q What do you do then, walk in? A I put the third seat down, stepped out and showed the person which was her seat.

Q Is there any hole there? A Why, no, sir.

Q What is there there, the floor? A Yes, 10 sir, there is the floor there.

Q Was there any hole there that night? A No, sir.

Q Was there any there? A No, sir.

Cross examination by Mr. Hannoeh.

Q How long have you been an usher in this theatre? A Well, I should judge about five years.

Q At this theatre all the time? A At that 20 theatre.

Q At all performances, matinee and evening? A Matinee and evening and I also worked in the box office.

Q How do you remember Mrs. Heine had "A-5" on that particular night? A Why I don't know how I remember, but she had "A-5."

Q Who told you? A I took her ticket.

Q Did you save it? A No, I gave it back 30 to the patron. I know the woman, that's how I know she had the seat.

Q You saw her just that particular night? A Yes, sir.

Q That was the first time you ever saw her? A Yes, sir.

Q The second time you saw her was when you saw her here today? A No, I have seen her here before.

Q The time before when we were waiting to 40 try the case? A Yes, sir.

Carrie B. Beyer, direct.

Q Because you saw her here before that makes you remember she had "A-5"? A Why, yes, a stout man and a woman had "A-1" and "A-3."

Q Did you see the stout man the last time?
A No, I seen him here this morning.

10 Q Is there anything in particular that makes you remember this particular night? A A woman falling, yes.

Q Have other women fallen? A Yes, sir.

Q Right at the same place? A Yes, sir, right at the same place.

Re-direct examination by Mr. Schneider.

20 Q Do you work for the Acme Theatre Company now? A Yes, sir.

DEFENDANT RESTS.

CARRIE B. BEYER, recalled in behalf of the plaintiff, in rebuttal.

Direct examination by Mr. Hanoach.

30 Q Has there been any change in the equipment of this theatre since the date of the accident? A There has.

Q What has been changed? A Electric lights have been installed in the corner of the steps.

Q How soon was that done after the accident? A About three weeks or a month.

Q How do you know that? A Well, I had a fall myself.

40 Mr. Schneider: I ask that that be stricken out, "I had a fall myself," as irrelevant.

Carrie B. Beyer, direct.

The question was proper but the answer was irrelevant.

The Court: I will strike out the testimony of Mrs. Beyer relating that she had a fall there herself.

Q How are you able to fix the time after the accident when these electric lights were installed? You have told us it was two or three weeks after the accident? A Well, when I saw Mrs. Heine fall I didn't quite—my ankle was black and blue and it had not recovered, and I particularly noticed, knew that it was dark, and after that the next time I went to the theatre I saw the lights and I saw the steps painted white. 10

Mr. Hanoach: The first part should be stricken out. 20

Mr. Schneider: May I have it all stricken out because the allegations of the complaint are being negligent and maintaining a hidden platform, and there is no allegation of lights of any kind.

(Previous question and answer read to the Court.)

Q (By the Court.) You mean the next time you went to the theatre? A It was about three weeks after. 30

Q After the accident to Mrs. Heine? A Yes, sir.

The Court: Strike out the whole answer.

Q (By Mr. Hanoach.) After this accident on December 27th how soon after that time did you attend this theatre? A Three weeks after. 40

Carrie B. Beyer, direct.

Q Where was your seat with reference to where the accident had occurred? A On the night three weeks after?

Q Yes. A Why, it wasn't in the same place.

Q Did you notice the particular space where Mrs. Heine had fallen? A I did, because—

10 Q The answer is yes, you did? A Yes, sir.

Q What did you see there when you came there three weeks after?

Mr. Schneider: I object. I think the question should be more particular, to see whether it is objectionable or not.

Q What did you see with respect to lights and paint on the floor?

20 Mr. Schneider: I object on the ground it is irrelevant to the issues in this case as the complaint alleges a hidden platform and nothing about lights or paint.

The Court: How is that admissible?

30 Mr. Hannoeh: It is admissible now as if they had injected the element by having the witness testify that this theatre has been built the way all modern theatres are built and this particular theatre was not changed since it was built.

The Court: That is a structural question. Their structural engineer said he did not know whether their lights were out. The question of lights, it seems to me; is not in this case. The complaint alleges there was a hidden platform; whatever that may be, or whatever it may mean—it is for the jury to determine what it means, in this balcony.

40 (Argument.)

Carrie B. Beyer, direct.

Mr. Hannoeh: They injected the lights into this case.

The Court: They qualified their testimony. I do not think lights had anything to do with it. You should have pleaded lights if you wanted to stand on the allegation of lights. 10

Mr. Hannoeh: Does your Honor sustain the objection to that question?

The Court: I do not see how it is competent.

(Argument.)

Q Were there any aisle lights in the aisle next to where Mrs. Heine was seated on the night of the accident? 20

Mr. Schneider: I object for the same reason.

The Court: Objection overruled.

Defendant's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

A No.

Q How soon then after the accident did you go to the theatre? A About three weeks after. 30

Q Were there any aisle lights in the aisle where Mrs. Heine was seated three weeks after the accident?

Mr. Schneider: I object on the same grounds and on the ground it is incompetent and immaterial, three weeks after the accident.

40 The Court: Changes made after the accident do not prove the accident.

Carrie E. Baudendistel, direct.

(Argument.)

The Court: Sustain the objection.

Plaintiff's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

Cross examination waived.

10 Mr. Hannoeh: I offer to prove by the next witness, Mrs. Baudendistel, the same thing as Mrs. Beyer has testified to.

CARRIE E. BAUDENDISTEL, sworn in behalf of the plaintiff, in rebuttal.

Direct examination by Mr. Hannoeh.

20 Q You were one of the party the night of the accident? A I certainly was.

The Court: She may testify in contradiction of Mr. Smith's testimony.

30 Q There has been testimony by Mr. Smith to the effect that on the night of the accident there were lights lit, I think, in the aisle where Mrs. Heine was seated. Were you present the night of Mrs. Heine's accident? A Yes, sir.

Q Were there any aisle lights? A No; they made you find your own seats as well.

Mr. Schneider: I object.

The Court: It is too late.

40 Q Did you go to the theatre at any time subsequent to Mrs. Heine's accident? A I certainly did.

Carrie E. Baudendistel, direct.

Q How long after? A Three or four weeks after.

Q Were there any lights lighted in the aisle in which Mrs. Heine was seated at the time you went there three weeks after?

Mr. Schneider: I object.

10

The Court: Sustain the objection.

Plaintiff's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

PLAINTIFF RESTS.

Mr. Schneider: I respectfully make a motion that the jury be permitted to view the premises.

20

(Argument.)

Mr. Hannoeh: I am satisfied to have them view the premises if they will take into consideration there may be a change and there may not have been lights there the night of this accident on the aisle steps.

Mr. Schneider: What I want the jury to see, and the only point in the case—I contend that lights have nothing to do with this case on account of the pleadings—

30

The Court: The lights have nothing to do with the case.

Mr. Schneider: I would like the jury to see the structure of the place and your Honor can instruct the jury to pay no attention to the lights in the case. It is all subject to your Honor's judgment and I simply make the offer for what it is worth.

The Court: Well, it may be instructive to the jury, because I have no idea what is

40

Motion for Direction of a Verdict.

meant by the pleadings when it says, "hidden platform."

Mr. Hannoeh: I have not been in a position to amend to give a description of it, because I do not want the case to be put off again.

10 The Court: You are willing the jury should visit and view the premises?

Mr. Hannoeh: I am satisfied, certainly.

The Court: Then, I will send the sergeant-at-arms to the theatre and have someone take them to the place, but I do not want any gentleman of the jury to ask any questions of any employee of the theatre.

20 Mr. Schneider: May we have it understood that Mr. Smith will show them the seat and then go away and no one will be there except the sergeant-at-arms?

The Court: Yes, but I do not want them to get into a conversation with Mr. Smith. I will permit him to show the place and Mr. Hannoeh can send someone along if he desires to.

RECESS FROM 1 TO 2 P. M.

30 Mr. Schneider: I respectfully move for the direction of a verdict on the ground the pleadings are not sustained by the proof and there has been nothing proven as to a hidden platform on the balcony on the second floor and nothing proven at all as to a hidden platform, lurking danger, and there has not been anything proved and there should be some evidence by the plaintiff to prove there was a hidden platform.

40

Charge to Jury.

Also on the ground of contributory negligence.

The Court: I will deny the motion.

Defendant's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

10

Mr. Schneider sums up for the defendant.

Mr. Hannoeh sums up for the plaintiff.

The Court charges the jury as follows:

MOUNTAIN, J.:

The plaintiff in this case, Clementine Heine, has brought an action against the Acme Theatre Company, the defendant, on the ground of negligence.

20

Under the scheme of our procedure in this State, in the progress after the commencement of a case by a summons the law requires that the pleadings shall be filed. The first pleading filed by the plaintiff is called a complaint and that pleading is in writing and should set forth the cause of action which the plaintiff has against the defendant and does set forth the only cause of action which the defendant has to answer. I emphasize that in this case because it is important. The plaintiff, with the deliberation that one has who has the opportunity and time to file a pleading, has indicated her cause of action against the defendant and if you and I do not regard the alleged cause of action as described in the complaint with consideration it may mean of course that the case will have to be tried over again, and trials in this county are expensive.

30

40

Charge to Jury.

The plaintiff says this to the defendant in the complaint. The defendant conducted this theatre in a negligent and unlawful manner in that it maintained a hidden platform in its balcony leading to the plaintiff's seat. That being the complaint; that being the only thing you can consider when you come to the question of negligence, what has the plaintiff adduced to prove it? The plaintiff, on the 27th day of December, 1924, in company with some other ladies, went to the Shubert Theatre, owned and operated by the defendant, and after tickets had been purchased for them, it appears, as I understand the testimony—and you must take your recollection and not mine of any testimony given by any witnesses—that they intended to go to seats located in the first row of the second balcony. You have viewed the scene of the accident with the permission of the Court and by consent of both counsel, so you have had a better opportunity to see what it looks like than I have to describe it, but as I understood the testimony the division between the first and the second balcony is a crossover made by an aisle or passageway and the seats that are on the side of the aisle or passageway nearest to the curtain or stage are the first balcony and those on the other side are the second balcony and as I understood this instant case the plaintiff had a seat in the first row of the second balcony.

There was testimony that to gain access to these seats one had to go up four or five steps and then turn to the right and that the seats were then in a row which would then face one and directly in front of these seats, after one was seated, there was a metal railing from which a curtain hung and that directly in front of the

Charge to Jury.

railing there was what I will term a drop of some three to five feet down to this aisle or passageway, which I have indicated, and visualize as running transversely across the balcony of the theatre.

The plaintiff is seventy-six years old and she said that when she was going to her seat the lights went out and that there was a hole from the steps to the row and that she stepped in there and fell. Remembering, when you retire to the jury room, that you have to decide as a matter of fact, whether or not the defendant maintained a hidden platform, it is necessary for you to consider the testimony of these witnesses to determine what was meant by a hidden platform. To repeat again, Mrs. Heine said there was a hole from the steps to the row; "I stepped in there and fell." Now, what did she mean by a hole? Fortunately she did give a definition of that because on the defense she was called as the first witness and said, "By a hole I mean the step that leads to where this seat is." Of course, that does not define hidden platform, but it gives her definition of what she meant when she referred on direct examination to a hole and perhaps, taking all of her testimony, you may find it had some application to what has been called in this complaint a hidden platform.

Mr. Doud, who said he sat on the end seat, had this to say as to the fall of the plaintiff: He said he stepped down a step to allow some of these ladies to go in; that it was dark and he could not identify the plaintiff, but there was sort of a blow and she went head first down the stairs. Another witness who was called on behalf of the plaintiff had this to say, and remember again that in narrating this testimony I am not talk-

Charge to Jury.

ing about the injuries but about what has been alleged in the complaint to be a hidden platform. Mrs. Beyer said the floor was cut in; it was hard to get in that row. Your left foot, as I understood her, would be on the platform when you were seated and your right foot, as she expressed it, "hung over," whatever that meant; it may mean something to you because you have seen the place; I do not know whether she was speaking, when she so testified, of her sensations in a particular seat or in any seat, but the testimony was given, and it is for you to determine all questions of fact.

Now we turn to the defendant's case. Mr. Smith, who is the manager of the Shubert Theatre, was called. He testified that on the night in question there was no hole there, nothing resembling a hole, or no declivity. As I understood him there was a row where the seats were and in front of this row there was a metal railing and the curtain, and then there was a drop from the floor where the people would be seated, if they were in this row, to this passageway I have referred to, but he said there was no hole and no declivity and that if one wanted to go from the aisle to a seat one would not have to step down.

The structural engineer stated that the structure is in the same condition it was when it was built and that there were no holes there. He told us that it was three feet eight inches from the floor of this passageway running transversely across the theatre to the floor, as I understood him, of this first row in the second balcony.

When you retire to the jury room, let me call your attention again to the fact that the ques-

Charge to Jury.

tion of lighting, which sometimes is injected into a case of this kind, is not in this case. The plaintiff does not allege that the defendant had improper lighting facilities there, so you cannot consider that, or that the place in question was poorly lighted; that cannot be considered; the only question you have to decide is, first, what is a hidden platform and next, did the defendant negligently and unlawfully maintain a hidden platform in its balcony leading to the plaintiff's seat.

Now, what is a platform? Webster says that a "platform is a flat floor of wood, stone, et cetera, raised above the level of the ground." Another dictionary says that "a platform is a raised level surface, natural or artificial terrace; a raised flooring in a hall." So when you retire to the jury room I should think in an orderly discussion of this case, and certainly in a proper discussion of this case you would first determine what was meant by the plaintiff when she used the term "a hidden platform," and secondly, did the defendant maintain such a platform and thirdly, did it maintain it negligently.

The burden of proof is upon the plaintiff to prove by the greater weight of the evidence that the defendant did negligently maintain such a platform.

Ordinarily, the law in this State as to the general duties of the proprietor or owner of a theatre are as follows: that he or it, if it is a corporation, must use ordinary care to make the premises as reasonably safe as is consistent with the practical operation of the theatre and that if he or it, as the case may be, fails in this duty, liability may be found.

Charge to Jury.

The defendant in this case insists that the plaintiff was negligent and that her contributory negligence bars her from recovery. If you find that she was negligent, it would.

10 Contributory negligence is a question of fact and in a case like this case it is to be judged by the circumstances which induced it if it is found to be present.

You know that ordinarily in a theatre, particularly since we have had the movies where it is impossible almost to have a performance and have light, that one has to proceed along the aisles as best one can to find a seat. Of course the owner and operator of the theatre knows that people are going to go down those aisles and it is not going to be lighted. Of course, the case we have before us is not, as I understand, 20 a moving picture theatre, but the point is this, these aisles are ways provided by the owners of theatres for the patrons to use. When a patron accepts the invitation of an owner of a theatre and buys a ticket and uses the aisles, it is always a question of fact as to whether the person, if there is darkness, exercised reasonable care or whether they did not, under all the circumstances. Sometimes, even when it is dark 30 there may be found conditions which would justify a jury in saying that a man or woman had no business, under the circumstances, to go ahead, and of course, there are cases where the opposite is true. The duty, however, upon the theatre is as I have indicated.

40 If Mrs. Heine can recover she can recover for the bodily injury she has sustained and the pain and suffering she has had and the effect of this injury upon her health as to degree and probable duration. The testimony of her doctor

Charge to Jury.

was that there was a severe hemorrhage from her nose and throat after the accident, swelling of the left thumb and ankle and concussion of the head; that she was in shock and that there was a permanent enlargement of the joint in her left thumb. She can recover in addition to that, if she is entitled to recover, any reasonable amount she has spent to cure herself or alleviate her suffering. The only evidence we have of that is a charge of \$19 which she owes for a doctor's bill. The bill has been paid, we have been told, but she owes the money that went to pay the bill to Mrs. Rehberger. 10

She can recover any pecuniary loss she has suffered by reason of her inability to attend to her vocation, which I understand was that of dressmaker. I think she told us she was earning \$5 a day and as I understood she was at Mrs. Rehberger's home five weeks and that after that she was not able to work as she had been previously able to do. 20

Risking, perhaps, the accusation that I may be tiresome, let me repeat again that when you retire to the jury room you will save a lot of time if you will first decide what a hidden platform is. Second, whether the defendant maintained one and third, whether the defendant maintained it negligently. If you decide those three things you will find your duties are about over. 30

I have been asked to charge some requests on behalf of the plaintiff. I will charge the first and second requests.

40 "The proprietor of a theatre conducted for reward or profit, to which the general public are invited to attend performances, must use ordi-

Charge to Jury.

nary care to make the premises as reasonably safe as is consistent with the practical operation of the theatre, and if he fails in this duty, he may be liable for personal injuries occasioned thereby."

10 "2. People who attend an exhibition in a theatre usually expect to find and take a seat, and ordinarily will have the right to assume that in doing so, following a way prepared by the defendant for that purpose, it was safe, in the absence of any knowledge or warning that it was otherwise."

Then the defendant has asked me to charge and I do charge you.

20 "1. The complaint alleges that 'Defendant conducted its theatre in a negligent and unlawful manner, in that it maintained a hidden platform in its balcony leading to plaintiff's seat.' On the liability you must confine your deliberations to this point. If you find the defendant guiltless on this point, your verdict should be for the defendant."

30 "2. If you find that the defendant did not maintain a hidden platform in its balcony as alleged, your verdict should be for the defendant."

The third I will charge and say, "The defendant's duty, I have outlined, and the defendant is not an insurer of the safety of its patrons."

"4. You should not be swayed by sympathy in this case."

40 "5. The defendant made motions for a nonsuit and for a direction of a verdict, which were denied. This does not indicate the Court's view

Exceptions to Charge.

of the case, being a ruling on the law only and you should not be influenced by it."

Of course you should not be.

Mr. Schneider: I will withdraw the sixth request of the defendant to charge.

The Court: The seventh I will charge. 10

"7. The question of lights have nothing to do with this case as they are not within the issues."

(The jury retires.)

Mr. Hannoeh: I respectfully pray an exception to that portion of your Honor's charge where your Honor said that the question of poor lights or otherwise has nothing to do with the case in that I feel where we have described a platform as a hidden platform the question of hidden being whether you can or cannot see it, the question of lights is important. 20

Exception noted as ground of appeal.

Mr. Hannoeh. I respectfully pray an exception to that portion of your Honor's charge where your Honor referred to Mrs. Heine's definition of a hole. I except to that because I do not think you gave her complete definition. She started to give a definition and then elaborated on it, so there was considerably more about it what she said than what your Honor quoted. 30

Exception noted as ground of appeal.

The Court: My feeling about the lighting is this: As long as I have practiced in the State, with the common law background, I should never try a case where an issue states one thing and counsel tries to persuade me to try it on another issue. If you had wanted to allege proper lighting you should have done so. 40

Supplemental Charge to Jury.

Mr. Hannoeh: The position I take is that we were all right the way we were.

(The jury returns into court.)

The Court: I have recalled you because my attention was called to the fact that perhaps I had not fully defined what Mrs. Clementine Heine said in reference to where she fell, and for the purpose of being accurate I have consulted the stenographer's minutes. You will remember first that there was testimony of a hole from the steps to the row, "I stepped in there and fell," and then later she said, "By a hole I mean a step that leads to where the seat is. I could not see the hole on account it was dark," to use her expression, but she said more than that. She said a little further along in that testimony, "Below me was the floor, as I stepped down where I fell I went to the floor." Then this question was asked, "Where you mean the hole is there the floor is there? Answer: Yes, sir." "Question: At the bottom of the hole is the floor? Answer: Yes, sir, there is the floor." I do not know what interpretation you are going to put on that, but that is of course in direct reference to her claim as to what she refers to in her complaint as the hidden platform, and it may be that you will find that what she calls the floor is the floor of this transverse passageway, or it may be you will find she means the floor of the steps as one ascends, but that may seem inconsistent to you; at any rate, that is as fully as I can give you her testimony and I think as fully as I should without undue emphasis on her particular testimony.

(The jury retires.)

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Defendant's Requests to Charge.

Mr. Hannoeh: May I have an exception to that supplemental charge?

The Court: Yes.

Plaintiff's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

10

DEFENDANT'S REQUESTS TO CHARGE.

1. The complaint alleges that "Defendant conducted its theatre in a negligent and unlawful manner, in that it maintained a hidden platform in its balcony leading to plaintiff's seat." On the liability you must confine your deliberations to this point. If you find the defendant guiltless on this point, your verdict should be for the defendant.

20

CHARGED.

2. If you find that the defendant did not maintain a hidden platform in its balcony as alleged, your verdict should be for the defendant.

CHARGED.

3. The defendant's duty was to use reasonable care; it is not an insurer of the safety of its patrons.

30

CHARGED.

4. You should not be swayed by sympathy in this case.

CHARGED.

5. The defendant made motions for a nonsuit and for a direction of a verdict, which were denied. This does not indicate the Court's view

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Plaintiff's Requests to Charge.

of the case, being a ruling on the law only and you should not be influenced by it.

CHARGED.

6. In order for the plaintiff to recover, you must believe that there was a hole at the point leading to the seat. Otherwise, your verdict
10 should be for the defendant.

WITHDRAWN.

7. The question of lights have nothing to do with this case as they are not within the issues.

CHARGED.

PLAINTIFF'S REQUESTS TO CHARGE.

20 1. The proprietor of a theatre conducted for reward or profit, to which the general public are invited to attend performances, must use ordinary care to make the premises as reasonably safe as is consistent with the practical operation of the theatre, and if he fails in this duty, he may be liable for personal injuries occasioned thereby.

CHARGED.

30 2. People who attend an exhibition in a theatre usually expect to find and take a seat, and ordinarily will have the right to assume that in doing so, following a way prepared by the defendant for that purpose, it was safe, in the absence of any knowledge or warning that it was otherwise.

CHARGED.

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Opinion of Supreme Court.

OPINION OF SUPREME COURT.

Filed January 19, 1927.

NEW JERSEY SUPREME COURT.

No. 28. October Term, 1926.

10

CLEMENTINE HEINE,
Plaintiff-Respondent,

vs.

ACME THEATRE COMPANY,
Defendant-Appellant.

On Appeal.

Submitted October Term, 1926: Decided January 19, 1927.

20

Before Justices Black and Campbell.

For the defendant-appellant: Messrs. Joseph C. Paul and Jacob Schneider.

For the plaintiff-respondent: Messrs. Precker & Precker and Mr. Herbert J. Hannoeh.

PER CURIAM:

The action in this case was brought to recover damages for personal injuries received by the plaintiff, when going to her seat at a performance of the Shubert Theatre at Branford Place in Newark, N. J., on the evening of December 27, 1924. As the plaintiff was going to her seat, the lights were turned off, the theatre became dark and she tripped or fell over a hidden platform or a raised platform something like three feet.

30

The trial resulted in a verdict for the plaintiff. The defendant appeals and files three grounds of appeal.

40

Opinion of Supreme Court.

1st. Error in refusing to non-suit.

2nd. Error in refusing to direct a verdict in favor of the defendant.

3rd. Error in permitting a witness Carrie B. Beyer on rebuttal to answer this question "Q Were there any aisle lights in the aisle next to where Mrs. Heine was seated on the right of the accident? A No."

10

The questions of non-suit and the direction of a verdict are controlled by the cases in the Court of Errors and Appeals of *Andre v. Mertens*, 88 N. J. L. 626; *Donder v. Tenant Motion Picture Co.*, 94 N. J. L. 483. The question objected to was an answer on rebuttal, after defendant had first brought the question of lights into the case. Record, p. 50, l. 38. It was, also, admissible as bearing upon the plaintiff's contributory negligence under the pleadings.

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The judgment of the Essex County Circuit Court is affirmed.

30

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Rule Dismissing Appeal.

RULE DISMISSING APPEAL.

NEW JERSEY SUPREME COURT.

CLEMENTINE HEINE,
Plaintiff,
vs.
ACME THEATRE COMPANY,
Defendant.

*On Appeal
from Essex
Circuit Court.* 10
*Rule Dis-
missing
Appeal.*

This matter coming on to be heard before the Court, upon the defendant's appeal from a judgment entered in the Essex Circuit Court, on May 20, 1926, in favor of the plaintiff and against the defendant, in the sum of \$2,133.00, besides costs, and the argument of counsel having been heard, the Court being satisfied that the judgment should be affirmed and the appeal dismissed: 20

It is on this 21st day of January, 1927, on motion of Precker and Precker, attorneys of plaintiff,

ORDERED that the appeal of the defendant from the aforesaid judgment be and the same is hereby dismissed, and the said judgment is affirmed with costs, and the record remitted to the Court below to be proceeded with according to law and the practice of said Court. 30

Entered January 21, 1927.

On motion of
PRECKER & PRECKER.

A true copy.

EDWARD J. KELLEHER,

Clerk. 40

Notice and Ground of Appeal.

NOTICE AND GROUND OF APPEAL.

NEW JERSEY SUPREME COURT.

10	CLEMENTINE HEINE, <i>Plaintiff-Appellee,</i> <i>vs.</i> ACME THEATRE COMPANY, <i>Defendant-Appellant.</i>	}	<i>Action at Law.</i> <i>On Appeal from Essex County Circuit Court.</i> <i>Notice and Ground of Appeal.</i>
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To Precker & Precker, attorneys of plaintiff-appellee.

20 PLEASE TAKE NOTICE that the defendant-appellant, Acme Theatre Company, appeals to the Court of Errors and Appeals in the last resort in all causes in New Jersey from the whole of the judgment entered in this cause on the following ground: The New Jersey Supreme Court affirmed the judgment of the Essex County Circuit Court, although there was error in so doing.

30 JOSEPH C. PAUL,
 Attorney for Defendant-Appellant.
 JACOB SCHNEIDER,
 Of Counsel.

Service of the within Notice and Ground of Appeal is hereby acknowledged this 17th day of February, 1927.

40 PRECKER & PRECKER,
 Attorneys of Plaintiff-Appellee.

New Jersey Court of Errors and Appeals

CLEMENTINE HEINE, <i>Plaintiff-Respondent,</i> <i>vs.</i> ACME THEATRE Co., <i>Defendant-Appellant.</i>	}	<i>Action at Law.</i> <i>On Appeal from New Jersey Supreme Court.</i>
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BRIEF OF PLAINTIFF-RESPONDENT.

Statement of the Case.

This action was brought in the Essex County Circuit Court to recover damages sustained by the plaintiff as a result of personal injuries received by her while attending a performance at the Shubert Theatre, Newark, New Jersey, on the evening of December 27, 1924.

The plaintiff alleged that the defendant negligently maintained a hidden platform in its theatre, and that while the plaintiff was proceeding to her seat she fell and sustained the injury complained of.

The answer was in the usual form denying any negligence on the part of the defendant and alleging contributory negligence.

At the conclusion of the plaintiff's case a motion to non-suit was made and denied. *After the defense testimony was in, the jury, upon the defendant's application, inspected the theatre.* A motion to direct a verdict for the defendant was made but denied, and the case was submitted to the jury who returned a verdict for the plaintiff in the sum of \$2,133.00.

The defendant appealed to the Supreme Court which affirmed the judgment of the Essex County Circuit Court.

The defendant bases its appeal on three grounds:

1. The Court should have non-suited the plaintiff.
2. The Court should have directed a verdict for the defendant.
3. The Court permitted a certain question to be answered.

The question of contributory negligence of the plaintiff which was strenuously urged at the trial has been abandoned on appeal. (Appellant's Brief, p. 2.)

THE FACTS.

On the evening of December 27, 1924, the plaintiff and her companions attended the theatre to witness the performance. The entire party proceeded to the second balcony in which their seats were located. The seats were not all together, but were spread about in various portions of the balcony. Mrs. Heine, the plaintiff, an elderly woman of 76, held the ticket for seat A-5 (p. 62, l. 11) in the second balcony. When the party entered the main portion of the theatre the performance had not yet started, and the theatre was lighted (p. 31, l. 40; p. 40, l. 17). As they were going to their seats the lights were turned out and the theatre thereby plunged into darkness (p. 23, l. 13; p. 32, l. 4; p. 40, l. 20; p. 41, l. 33). The usher did not escort the parties to their seats, but pointed out the location of the seats to them (p. 41, l. 10).

The defendant's theatre is constructed with a single balcony, divided into a first (front) and second (rear) balcony, which are separated by a crossover or passageway. Aisles lead from this passageway downward to the first balcony and upward to the second balcony. The floor of the first row of seats in the second balcony ("A" row in which Mrs. Heine's seats were located) is elevated above the level of the crossover, thus forming a raised platform at the edge of which is located an iron railing which has a curtain suspended therefrom.

The testimony as to the height of this platform varies from "more than two and one-half feet" (p. 15, l. 1) to five feet (p. 43, l. 13). Mr. Miller, the engineer, who had charge of the original construction of the building, testified from blue prints that the exact height was three feet eight inches (p. 58, l. 12).

Persons having seats in A row of the second balcony would, therefore, be sitting over three feet higher than the floor of the passageway which divides the first and second balconies. The only thing in front of them which would prevent their falling over the edge of this platform is the iron railing, from which is suspended a curtain which extends from the railing down to the top of the platform. In order to reach a seat in this first row one would walk along the crossover to the aisle nearest his seat, walk four steps up the aisle, turn right or left, go up two steps more to the floor level of the first row. In all, six steps had to be taken upward from the crossover in order to reach the first row of the second balcony seats (p. 55, l. 17). The space between the seats and the railing is so narrow that it is necessary for an occupant of a seat to rise in order to permit anyone to pass in front

of him (p. 34, l. 38; p. 35, l. 3; p. 15, l. 11). In addition to this scant passageway the entrance to row A was further endangered by the fact that the floor of this row did not extend out to the aisle (p. 44, l. 18), and that it was necessary to take two steps upward from the aisle in order to reach the seat (p. 55, l. 17).

As Mrs. Heine was going to her seat, the theatre having been plunged into darkness, she stepped into A row and was precipitated downward, head foremost, to the passageway below (p. 36, l. 1). She was rendered unconscious and severely injured by the fall. She was then removed to the ladies' rest room, given medical attention and subsequently taken to the home of Mrs. Rehberger.

The injuries sustained by Mrs. Heine consisted of concussion of the brain, causing a very severe hemorrhage from nose and throat, contusions and bruises about the scalp, injuries and bruises to her left hand, left foot and other parts of her body. She also suffered great pain and shock (p. 24, ll. 21-34).

Prior to the accident she had worked as a seamstress, earning \$5.00 per day (p. 29, l. 4), and was employed every day in the week (p. 29, l. 5). As a result of the accident, she is very nervous, has been deprived of the use of her left hand (p. 25, ll. 22-38) and is able to work only two days of the week at most (p. 30, l. 38).

The Court Properly Refused to Non-Suit.

The argument of the defendant-appellant is directed solely to the contention that the plaintiff failed to establish the existence of a "hidden platform" as alleged in the complaint and that no negligence on the part of the defendant was shown. In *Andre v. Mertens*, 88 N. J. L. 626, at page 628, Justice Trenchard, speaking for the Court of Appeals, states:

"The proprietor of a theatre conducted for reward or profit to which the general public are invited to attend performances must use reasonable care to make the premises as reasonably safe as is consistent with the practical operation of the theatre, and if he fails in this duty he may be held liable for personal injuries occasioned thereby."

In *Dondero v. Motion Picture Co.*, 94 N. J. L. 483, at 485, Justice Bergen states:

"The people who attend an exhibition in a theatre usually expect to find and take a seat, and ordinarily would have the right to assume that in doing so, following a way prepared by the defendant for that purpose, it was safe, in the absence of any knowledge or warning that it was otherwise." (Italics ours.)

There was ample testimony before the Court to indicate that the defendant had failed in the performance of the duties owing by it according to the foregoing cases.

Webster defines a platform as "a flat surface of wood, stone, etc., raised above the level of the ground." Funk & Wagnalls' dictionary defines a platform as a "flat surface above an ascent."

John E. Dowd, a witness, who was sitting on the end seat of A row, and who stood up in order to allow Mrs. Heine to pass to her seat, described

the *locus* of the accident as a "platform" (p. 34, l. 30).

Mrs. Beyer stated that "the flooring is cut in" (p. 44, l. 5), and so of necessity the flooring must be above the level of the cut-in portion.

Mrs. Heine testified that "there was a hole from the step to the row" (p. 33, l. 2), and a hole signifies a descent from a raised level. The same witness again referred to this descent as "an empty space" (p. 46, l. 22).

Mr. Smith, the manager of the theatre, described the *locus* by saying "on the first row there is a slight elevation and she would have to pass in that first row" (p. 49, l. 16).

Mr. Miller, the structural engineer, who built the theatre, stated that in order to reach A row from the stairway, one had to turn right and go up one step and two risers (p. 55, l. 16).

There are numerous other instances in the testimony where the witnesses referred to this raised flooring. There was, therefore, ample testimony to indicate the existence of a "platform."

The plaintiff's witnesses all testified that at the time the plaintiff was proceeding to the seat the theatre was in darkness, and they were left to find their seats without the assistance of the usher (p. 68, l. 34). The only witness who said that the theatre was lighted was Mr. Smith, manager of the theatre, and it developed that his information came as a result of reports made to him (p. 50, l. 29). Mrs. Heine stated that "it was dark and I couldn't see where I stepped, and there was a hole from the step to the row and I stepped in there and I fell" (p. 33, l. 1).

The word "hidden" is defined to mean "out of sight; placed so as not to be seen; unseen."

There was, therefore, evidence from which the jury were justified in finding that there was a "hidden platform." (Funk & Wagnall.)

The jury were justified in concluding that the general structure of the first row was such as to constitute a menace to the patrons. The seats were constructed so close to the edge of the platform that it was necessary for a person who had already taken his seat to rise in order to enable someone else to pass him (p. 22, l. 30). The danger of falling off this platform was very great.

The approach to this row further added to the dangerous arrangement. It was testified that the steps are rather "peculiar steps" (p. 21, l. 21); that "it is very hard to get into that row" * * * "It is hard to describe, but the flooring is cut in" (p. 44, l. 4). The plaintiff described the condition as "an empty space" (p. 44, l. 4), and "a hole" (p. 32, l. 2), and her terminology is fully warranted by the condition there.

The record also shows that the various witnesses in their efforts to describe the scene of the accident were continually drawing comparisons with objects in the court room (see p. 13, l. 34; p. 13, l. 40; p. 14, l. 10; p. 14, l. 18; p. 44, l. 9; p. 46, l. 22, and other instances). The arrangement of the witness stand in the court room enabled the witnesses to refer to it and explain the various distances, position of the rail, curtain, stairway, etc. This testimony was made the more forceful and convincing by the comparison which the witnesses were able to make before the jury.

The testimony established not only that there was a hidden platform, but that the defendant negligently maintained the same.

This was the state of the record when the plaintiff's case was closed, and there was undoubtedly sufficient evidence before the Court to warrant the Court in denying the motion for a non-suit.

The Court properly refused to direct a verdict and left the matter to the jury.

If any doubt existed as to the question of negligence the doubt was dispelled by the testimony of the usher, Viola Robinson, who was produced by the *defendant*. On direct examination she stated that she recalled escorting Mrs. Heine to her seat, and that she was certain that she took Mrs. Heine into the aisle and turned down her seat, so that she could sit down. Upon cross examination (p. 64, l. 10) she stated:

Q Is there anything in particular that makes you remember this particular night?

A A woman falling, yes.

Q Have other women fallen? A Yes, sir.

Q Right at the same place? A Yes, sir, right at the same place.'

This witness was still in the employ of the defendant at the time she gave this testimony (p. 64, l. 19). Her testimony must be given great weight, as she could have no possible motive for coloring it in favor of the plaintiff. Her testimony indicated that the condition of this particular portion of the theatre was such that other people had fallen at the same place. To have allowed this dangerous condition to remain in the face of repeated accidents was evidence of negligence in itself.

If there was any omission in the plaintiff's main case (a thing which we deny), the omission was supplied by this testimony.

In *Wilson v. Brauer*, 97 N. J. L. 482, Justice Trenchard, speaking for the Court of Errors and Appeals, said:

"the refusal to non-suit for failure of proofs will not justify a reversal, where, as here, the defect was supplied by evidence thereafter taken during the progress of the cause" (citing cases).

The testimony of the usher to the effect that she had escorted Mrs. Heine to her seat was denied by the testimony of Mrs. Bremmer (p. 16, l. 20), by Mrs. Heine (p. 32, l. 15), by Mrs. Rehberger (p. 40, l. 24 and p. 41, l. 10), who testified;

*Q Where were the ushers? A In the aisle that divides the first and second balcony * * * she looked at the coupon and said 'your seats are up there.'*

Mrs. Beyer also testified "I saw the girl motion to them to take their seats" (p. 42, l. 31).

This testimony clearly raised a jury question as to whether or not the usher had properly taken care of the patrons.

The defendant also submitted the testimony of the structural engineer who built the theatre a number of years ago and he testified that it was properly constructed. On being interrogated on cross examination, as to whether this particular aisle was properly lighted, he qualified his testimony by stating that he was referring purely to the question of construction and not to the question of equipment.

The Supreme Court has held in its opinion that the cases of *Andre v. Mertens*, 88 N. J. L. 626, and *Dondero v. Tenant Motion Picture Co.*, 94 N. J. L. 483, are controlling upon the questions of non-suit and direction of a verdict. Appellant urges they are not (Brief, pp. 18 and 19). Manifestly, the pleadings and all the facts in those

cases are not, and cannot be, identical in all respects with those in the instant case. But the *principles of law* therein laid down are controlling; and those cases determine the duty of care owed by the theatre proprietor to his patrons, and his liability to respond in damages for his failure to observe that duty; and they further determine that in a case of this nature, with the evidence in conflict, "the question of the defendant's negligence is for the jury."

The fact that the jury viewed the premises at the defendant's request must also be taken into consideration in determining the propriety of the Court's action in refusing to direct a verdict.

In *Hinners v. Fort Lee Railroad Co.*, 75 N. J. L. 514, Justice Garrison, speaking for the Court of Errors and Appeals, said:

"In effect, the jury were told that they might make use of their view of the premises in forming their judgment of the testimony and in reaching an opinion upon its consideration, and that their opinion upon the questions they were to decide should be based upon the testimony as thus understood by them, and applied to what they had seen. This, I think, is a correct charge. * * * The circumstances that a jury's judgment of the testimony may in some instances be modified, and in extreme instances perhaps controlled, by the result of their views, instead militating against the construction contended for, is the strong reason for its adoption, for it is one of the legitimate uses of a view that the jury may understand the testimony. This being so, it may well follow that to understand it, is to discredit it, while as to other testimony, to understand it is to accept it even in the face of contradiction or denial."

With the testimony so strongly indicative of negligence, and with the additional fact in mind

that the jury had viewed the scene, and was then in a better position to understand the testimony of the witnesses, and the repeated reference to objects in the court room, it was the duty of the Court to submit the case to the jury, and its action in so doing was proper.

No improper testimony was permitted by the Court.

The defendant alleges that the Court improperly permitted one of the witnesses to answer the question:

"Were there any aisle lights in the aisle next to where Mrs. Heine was seated on the night of the accident?"

This question, it is submitted, was highly material. The complainant alleged the existence of a "hidden platform." "Hidden," as we have already seen, has been defined to mean "out of sight; placed so as not to be seen; unseen." It is obvious that an object can be hidden as well by an absence of light as by an obstruction. Consequently it is submitted that the evidence as to lights was properly permitted under the pleadings.

Furthermore, the question of lighting was brought into the case by *defendant's counsel*, who, apparently in an effort to show that the platform was not hidden, brought out the statement that there were step lights and overhead lights which were lit at the time of the accident (p. 50, l. 38). It thus became highly important to ascertain whether those lights were actually lit, as the defendant's witness had stated. The question was put to the witnesses, Beyer and Baudendistel, and both answered in the negative (p. 68, l. 32; p. 67, l. 29). It was also brought out by Mrs. Beyer that *these lights were installed after the accident*, and were not in existence at

the time of the accident (p. 64, ll. 33 and 36). In view of the effort of defendant's counsel to prove that the step-lights were lit, it is submitted that the question was relevant and material and the answer was properly permitted.

The Supreme Court so agreed (at p. 84 of the Record) saying:

"The question objected to was an answer on rebuttal, after defendant had first brought the question of lights into the case. (Record, p. 50, l. 38.) It was, also, admissible as bearing upon the plaintiff's contributory negligence under the pleadings."

Should it, however, appear that the question should not have been permitted, it is clear that the error, if any there be, falls far short of the requirements for reversible error.

Section 27 of the Practice Act is as follows:

"No judgment shall be reversed or new trial granted on the ground of misdirection or the improper admission or exclusion of evidence, or for error as to matter of pleading or procedure, unless, after examination of the whole case, *it shall appear that the error injuriously affected the substantive rights of a party.*"

This question and the answer thereto could have had no appreciable effect on the jury. It were merely cumulative. The testimony that the lights were out and the theatre in darkness at the time of the accident had been so repeatedly and convincingly reiterated by witness after witness that there could have been no question as to its truth.

Furthermore, the charge of the Court took away any significance or importance from the question and answer. The Court charged that

"*the question of lighting is not in this case.* The plaintiff does not allege that the defend-

ant had improper lighting facilities there, so you cannot consider that, or that the place was poorly lighted" (p. 74, l. 40).

Plaintiff took serious objection and exception to this comment of the Court. It was certainly most favorable to the defendant. The defendant did not except to the charge. In view of this language any error which may have been committed was cured.

In *Flanigan v. Smelting Co.*, 63 N. J. L. 648, Adams, J., said:

"In view of the guarded language of the charge, the admission of this testimony, even if erroneous, cannot be supposed to have prejudiced the defendant."

We submit, therefore, the question was properly admitted, and if any error was committed in its admission, it was eliminated by the Court's charge.

The Court among other things charged the jury as follows:

"The only question you have to decide is, first, what is a hidden platform, and next, did the defendant negligently and unlawfully maintain a hidden platform in its balcony leading to the plaintiff's seat" (p. 75, l. 10).

"If you find that the defendant did not maintain a hidden platform in its balcony as alleged, your verdict should be for the defendant" (p. 78, l. 28).

These instructions confined the jury to the very issues raised in the pleadings.

The various cases cited by appellant are distinguishable from the case at bar. In most of them, *the instructions* of the Court permitted the jury to consider evidence not properly within the

issues, and these instructions were held to be erroneous. This applies to the cases of

Excelsior Electric v. Sweet, 59 N. J. L. 441;
Murphy v. N. J. Ry. Co., 71 N. J. L. 5;
Gilliard v. P. S. Ry. Co., 94 N. J. L. 288;
Garibaldi v. Rubenstein, 99 N. J. L. 223.

In *Jordan v. Reed*, 77 N. J. L. 584, evidence which was inadmissible under the pleadings was admitted and the case reversed for that reason. In *Case v. Central R. R. Co.*, 59 N. J. L. 471, the plaintiff alleged a "willful and wanton" act. There was no evidence of such an act, nor even of any negligence, the Court said. These cases are quite different from the instant one. There was ample evidence to support the issues raised in the pleadings, all the evidence received was well within the issues, the charge of the Court was strictly and carefully confined to the very issues raised by the pleadings, nor was any exception taken to the charge by counsel for defendant.

The jury having heard the testimony of the witnesses, having heard them describe the condition of the theatre by reference to objects in the court room, having actually inspected the theatre themselves, it was entirely proper for the Court to permit the jury to consider the question as to whether the defendant was negligent as charged in the complaint. The jury having so found, and there being evidence to support their finding, it is respectfully submitted that the judgment should be affirmed.

PRECKER & PRECKER,
 Attorneys for Respondent.

HERBERT J. HANNOCH, and
 JENNIE E. PRECKER,
 On the Brief.

New Jersey Court of Errors and Appeals

CLEMENTINE HEINE,
 Plaintiff-Appellee,

vs.

ACME THEATRE COMPANY,
 Defendant-Appellant.

Action at
 Law.

On Appeal
 from New
 Jersey
 Supreme
 Court.

BRIEF OF DEFENDANT-APPELLANT.

Statement of the Case.

The plaintiff-appellee, Clementine Heine, sued for personal injuries sustained by her on December 7, 1924, while going to her seat at the Shubert Theatre, located at Branford Place, Newark, N. J., which was conducted by the defendant-appellant. She had purchased a ticket for a seat in the second balcony. The allegation of negligence on the part of the defendant, as contained in paragraphs 4 and 5 of the complaint (p. 3), is as follows:

"4. That defendant conducted its said theatre aforesaid in a negligent and unlawful manner, in that it maintained a hidden platform in its balcony leading to plaintiff's seat.

5. That as a result of defendant's negligence aforesaid, plaintiff in passing to her seat aforesaid tripped and fell over said hidden platform, thereby becoming unconscious and suffering physical injuries to her face, body, and hands and also suffering mental pain and anguish and shock."

The defendant entered a general denial to this (p. 5). At the close of the plaintiff's case (p. 44), defendant moved for a non-suit on the

ground that there was no proof of negligence in accordance with the allegation contained in the complaint which has been set forth above, as well as on the ground that contributory negligence on the part of the plaintiff had been shown. The Court denied this motion and granted an exception. Exception likewise was taken to the Court's refusal to direct a verdict in favor of the defendant on the same grounds (pp. 70-71). The jury returned a verdict in favor of the plaintiff for twenty-one hundred and thirty-three dollars.

The defendant appealed to the Supreme Court, which affirmed the judgment of the Essex County Circuit Court (see p. 83 for opinion of Supreme Court and p. 85 for Order of Affirmance).

Three grounds of appeal were set forth (p. 10). The first relates to the refusal to grant the motion for a non-suit and will be argued as Point I; the second relates to the refusal of the Court to direct a verdict for the defendant and will be argued as Point II, and the third relates to the Court's allowance of a certain question to a witness over objection and will be argued as Point III. Under Points I and II, however, the point as to contributory negligence of the plaintiff will be abandoned and the argument confined simply to the point that there is no evidence of negligence in accordance with the allegations of the complaint. Point IV will discuss the Supreme Court opinion.

BRIEF OF THE ARGUMENT.

POINT I.

The Court should have granted the motion of defendant for a non-suit on the ground that at the close of the plaintiff's case no proof of negligence had been adduced in accordance with the allegations of the complaint as embodied in paragraphs 4 and 5 thereof.

The following is an analysis of the pertinent testimony offered by the plaintiff:

HEDWIG M. BREMMER (pp. 12-23) stated that she accompanied Mrs. Heine on the day of the accident (p. 12); that they had seats in the second balcony; that the second balcony was a continuation of the first balcony, viz, on the same floor, excepting that there was a platform between the two, from which the first balcony led down and the second balcony up; that they had seats in the first row of the second balcony (p. 13). She describes the physical condition of the first row as follows: They had a bar across it with a curtain; the seats were in back of the platform and the curtain was in front of them, the floor of the first row seats being about three feet from the floor of the passageway or platform, as the witness called it, meaning the passageway between the first and second balconies (pp. 13 and 14). She then describes the manner of reaching the seat, viz, they walked along the platform, then up to their right up several steps and then to their right into the front row of seats (p. 15). When they arrived at the theatre the show had not yet started; the lights were still on, and, as they were going to their seats, these lights went out (p. 15, l. 39, to p. 16, l. 5); the ushers directed them to their seat by point-

ing to the same and saying, "First row up" (p. 16, ll. 10-25). The witness describes what she knows of the actual occurrence as follows (p. 16, l. 23, to p. 17, l. 23):

"Q What did you and Mrs. Heine do? A Proceeded to go up.

Q Where were the other ladies? A They were to go up to their seats; our seats were divided.

Q Were they in 'A' row? A No, they were in other rows.

Q Describe what happened then? A Well, of course, the theatre was dark and we started to go up the aisle, and I started to go into my seat, and when I looked for Mrs. Heine I didn't see her, and there was a gentleman and a lady seated on the aisle, and I looked around for the rest of the folks, and this lady said, 'Are you looking for an elderly lady?' and I said—

Mr. Schneider: I object to any conversation.

A (Continuing.) —and she said she—

Q No. How far in from the aisle was your seat, how many seats in? A I think it was about four seats in.

Q Do you know who was sitting on the end? A A lady and gentleman was seated on the end.

Q Mrs. Heine was next to them? A Yes, sir.

Q And then you? A Yes, sir.

Q You went in and did not see Mrs. Heine? A No.

Q As a result of what that lady said, what did you find out? A I went down to see where Mrs. Heine was.

Q Where did you find her? A In the rest room by the lavatory.

Q How long had you been in there before you noticed she was not there? A Almost immediately."

Under cross examination (pp. 19, 20 and 21), she describes the physical condition more ac-

curately by saying that to reach the balcony, they ascended a stairway at the top of which a passageway about five feet wide led across the entire floor between the first balcony, which lay below the passageway, and the second balcony, which lay above it, along which were three stairways leading up and down into the balconies. Their particular seats were three or four seats in to the right of the first stairway (p. 20, ll. 35-40). She further testified (p. 22) that a rather stout man sat in the first seat, a lady sat next to him, and then came their seats. The stout man arose to let them in.

CLEMENTINE HEINE, the plaintiff (pp. 28-33), testified as follows:

A party of ladies, including herself, went to the theatre on the night of the accident (p. 31, ll. 20-35); their seats were in the second balcony, first row (p. 31, ll. 35-40). When she entered the theatre and as she was going to her seat the lights went out (p. 32, ll. 1-10). Mrs. Beyer, who had a seat alongside of hers, the rest of the party being further in the rear, advanced into the first row before her, she following (p. 32, ll. 20-30). A gentleman seated at the end seat arose to permit her to step in (p. 32, ll. 30-35). A recital of the accident verbatim is as follows (p. 32, l. 35, to p. 33, l. 10):

"Q What did he do? A He got up to let me in.

Q What did you do then? Then, what happened? A As you know, I had to go five steps up to get back to the seat, to the row, and it was dark. You know, the performance started and it was dark, and I couldn't see where I stepped, and there was a hole from the step to the row and I stepped in there and I fell.

Q Then, what happened to you? A I only remember I was sitting in the ladies' room and vomited.

Q That is the next thing you remember?

A Yes, sir."

GEORGE E. DOUD, the man who sat in the first seat adjoining the aisle in question (p. 34, ll. 10-11), testified as follows: His description of the construction of the place of the accident is as follows (p. 34, l. 12, to p. 35, l. 21):

"Q Can you tell us how the second balcony is divided from the first balcony in the Shubert Theatre? A With an alley, passageway, or whatever you term it, I should say, four feet wide.

Q In order to get into the first or second balcony do you have to use this passageway?

A Decidedly, depending on which way your ticket take you.

Q Going to the first balcony, in which direction? A Going to the left, as we did, you would naturally go to the left for the first balcony and to the right for the second.

Q Is the first row of the second balcony on a level with this passageway? A I should say four feet higher than the floor of the passageway, with a brass railing and a small portiere in front dividing the place; that is, from the end of the second platform flooring, this brass rail and portiere I should say was around three and a half or four feet high, something about that.

Q Is there any other material of any kind between the brass rail and the floor? A None other than the portiere, as I recall.

Q In order to get into the first row—let me put it this way: What space is there between the seats and the portiere? A Very limited space. For a man of any size it was necessary, if he had the courtesy, to stand up to allow a woman to pass. The space is limited because I am a pretty good-sized man and I tried to make it a point when a lady passes me to arise and let her in.

Q You were at the end of the seat? A I have been going there all winter and make it a point to get on the first row aisle, depending on where the seats are located.

Q And in order to get into the first row from the aisle, what do you have to do? A Climb up these stairs naturally.

Q Are there any additional stairs leading from the aisle into the first row, or is the first row on the level with the aisle landing up from the passageway? A If not mistaken, there is about three or four steps up and you strike the level of the floor of the seats naturally going in it, as I recall it. I noticed it time and again that way; I haven't been in there in a year."

His description of the accident is as follows (p. 35, l. 32, to p. 36, l. 15):

"Q What do you remember of the incident? A I simply recall, as I recall it, she came in. The curtain was up and I simply got up and let her pass me. I stepped down in the step as usual and she was apast me possibly one or two steps; I don't know if she didn't touch me in any way, shape or manner, and as I thought had to step in there, and the first thing I see the crash; I wouldn't call it a crash, a blow on the back, only to see this lady fall headfirst down the steps. I attributed it largely to the condition of lack of light.

Mr. Schneider: I ask that that be stricken out.

The Court: Strike it out.

A I should not have said that, probably.

Q This woman fell down the stairs? A Fell down the stairs."

He also testified that there were no lights in the neighborhood of the staircase at the time (p. 36, l. 20, to p. 37, l. 15), and that other patrons came into the same row before the plaintiff and her companion (p. 38, ll. 20-25).

AMELIA REHBERGER, a companion of the plaintiff on the night of the accident, testified as follows:

The lights went out when they reached the passageway that divides the first and second balconies (p. 40, ll. 15-25). She did not see the plaintiff fall (p. 40, l. 37). She knew nothing of the accident proper.

CARRIE B. BEYER, another one of the party, testified that she did not see the accident (p. 42, l. 25, to p. 43, l. 10). She described the premises in question as follows (p. 43, l. 31, to p. 44, l. 20):

“Q How do you get into ‘A’ row? A You go down the passageway, turn to the right and go up four or five steps.

Q (By Mr. Schneider.) A little louder, please. A You go down the passageway and turn to your right, and this happened to be the first aisle, and then you walk up four or five steps—I am not sure how many; I think five.

Q (By Mr. Hannoeh.) Then, what do you do? A Turn to the left to get into the seat. It is a very awkward space that way and it is hard to get into that row.

Q Describe what it is that makes it hard to get into that row. A It is hard to describe, but the flooring is cut in and this side (indicating), if this was the first seat your right foot would hang and it is rather uncomfortable, and your left foot is on the floor. Have I made that clear?

Q Are there any additional steps leading from the aisle into the ‘A’ row? A You walk up more steps.

Q You walk up another step? A It is sort of a step; you walk up into that aisle.

Q As far as you know, how long did that condition exist? A I know definitely it was that way three weeks before the accident.”

Let us now analyze this testimony, bearing in mind the allegation of negligence in the complaint in Paragraphs 4 and 5 that the defendant conducted its theatre in a negligent and unlawful manner by maintaining a hidden platform in its balcony leading to plaintiff’s seat and that on account of said negligence plaintiff, in passing to her seat, tripped and fell over the said hidden platform, thereby injuring herself. The plaintiff’s version of the accident, as shown by her testimony above, is that “There was a hole from the step to the row and I stepped in there and fell.” The only other witness as to the occurrence of the accident, Mr. Doud, says as set forth above, that the plaintiff, after passing him, as he stood up in his seat, fell down the stairs. There is not the slightest suggestion of any hidden platform or of the plaintiff tripping and falling over any hidden platform. The testimony of neither the plaintiff nor Mr. Doud contains the slightest suggestion of this hidden platform business or of tripping over it; in fact, there is nothing whatsoever from which any inference could be drawn to this effect. As a matter of fact, the contrary is true for the companion of the plaintiff preceded her apparently in safety and said nothing of any hidden platform; likewise others, including Mr. Doud and his companion.

Attention is called to the fact that the plaintiff does not allege negligence generally on the part of the defendant but alleges solely as the specific act of negligence the maintenance of a hidden platform. Specifically there is no allegation of negligence concerning the use or lack of use of lights or lighting facilities.

Moreover, the various descriptions of witnesses as to the physical conditions at and adjoining

the place of the accident did not in any way show the existence of a hidden platform nor of anything that would permit an inference that such a platform existed. The entire case is absolutely bare of any such proof. It would simply appear that the plaintiff, unlike others who took their seats in the row in question, missed her footing and accidentally and unfortunately fell, without negligence on the part of the defendant.

The defendant-appellant, therefore, urged, at the close of plaintiff's case, that no actionable negligence had been shown and specifically urged that no negligence had been proven in accordance with the allegation set forth in the complaint. No offer was made by the plaintiff to amend the pleadings. If that had been done, the defendant would have had the opportunity to plead surprise and the Court might then have caused a juror to be withdrawn so that the pleadings could be put in shape and the new issue subsequently tried. The case was tried solely on the allegation of negligence set forth in the complaint. In fact, counsel for the plaintiff tried to extend the proof and issues to the question of lights, etc., but was barred from so doing after vigorous objection by opposing counsel several times in the case. Therefore, this is not a case where the Appellate Court should allow an amendment and thus base the verdict and judgment on the proper pleadings, as such a course is followed only where the case is tried on the broader issues and not strictly on the allegations in the complaint and other pleadings.

It is therefore respectfully urged that since there is no proof of negligence, as set forth in the complaint, motion for a non-suit should have been granted.

Excelsior Electric Co. v. William Sweet, 59 N. J. L. 441, uses *inter alia* the following language (p. 443, bot.):

"If, therefore, we should now introduce this issue into the pleadings, it would not be done in order to maintain a determination of the question which was really in controversy between the parties, but it would support a verdict that may have been rendered upon a matter which the parties have not fairly litigated. For such an end, the power of amendment ought not to be exercised."

This case is cited with approval in *Murphy v. North Jersey Street Ry. Co.*, 71 N. J. L. 5.

The following language is used (p. 6, bot.):

"In the second place, it is a cardinal rule, for the control of a trial court, that only those questions which are within the issues raised by the pleadings should be submitted to the jury, and a failure to observe this rule is legal error."

Likewise the following cases:

Gilliard v. Public Service Ry. Co., 94 N. J. L. 288;

Case v. Central R. R. Co. of N. J., 59 N. J. L. 471;

Jordan v. Reed, 77 N. J. L. 584;

Garibaldi v. Rubinstein, 99 N. J. L. 223;

20 *Ruling Case Law*, page 177, section 146, and

numerous cases cited therein, which support the statement set forth in said section 146 to the following effect:

"Proof permissible under pleadings * * *
But while the courts are liberal with respect

to variances between the allegations and the proof in actions founded on negligence, yet it is a settled rule that the plaintiff must recover, if at all, upon proof establishing the specific acts of negligence alleged in his declaration, complaint or petition. Having pleaded specifically the act or acts constituting the defendant's negligence, other acts of negligence cannot be relied upon, unless the declaration, complaint or petition is amended to conform to the proof."

The trial judge erred in refusing to grant a non-suit.

POINT II.

The trial judge should have granted defendant's motion for a direction of a verdict on the same grounds urged upon the non-suit.

The testimony adduced by the defendant was as follows:

Clementine Heine, the plaintiff, was recalled (pp. 45-47) and said that she went up five steps on her way to her seat (p. 45, ll. 30-35). She reiterated her testimony as to the hole, said her seat was three seats in from the aisle (p. 46, l. 16). On page 47 she states that "Five steps down where I fell I went * * * to the floor" (ll. 10-11). She then gives the following significant testimony (p. 47, ll. 21-25):

"Q There is the floor right below there to get to your seat? A Yes, sir, on account of the poles behind—

Q Where you mean the hole is there the floor is there? A Yes, sir."

She was recalled principally for the sake of explaining what she meant by the word "hole."

FRANK L. SMITH, the manager of the theatre, testified (pp. 47-52) as to the physical con-

ditions of the scene of the accident and the vicinity thereof as follows (p. 49, l. 1; p. 50, l. 10):

"Q Tell us the condition of the steps.

A There are four aisles leading to the rear balcony and each aisle has steps leading to it; you go up the steps to your seat.

Q Take for instance row 'A' there, what number would three seats in from the aisle be? A I don't know the exact seat number.

Q A person going into that seat, just how would he get there? A They proceed up three or four steps, turn to the right and there is a railing or crossover aisle; on the first row there is a slight elevation and she would have to pass in that first row.

Q How would you get to the first row from the steps? A Bear off to your right.

Q Do you have to step down anything? A No.

Q Is it level there? A As each seat goes up they meet the level of the rows, each level.

Q Would you have to step down any to get to row 'A' from the steps? A No, sir.

Q Just turn and walk in? A To your right.

Q Of what material are the steps? A Cement.

Q Of what material is the floor? A Cement.

Q As you walk into the aisle what is the material? A The natural flooring is cement, concrete.

Q Is there any hole there as you turn from the steps to go into row 'A'? A No, sir.

Q Is there anything that can be called a hole?

Mr. Hannoeh: I object to that.

Mr. Schneider: Withdraw the question.

Q Is there anything resembling a hole there? A No, sir.

Q Any declivity of any kind? A No, sir, positively not."

CLARENCE MILLER, Superintendent of Construction, who built the theatre, testified (pp. 53-60) that he had built the theatre in 1912. He describes the premises as follows (pp. 54, 55 and 56):

“Q The latest construction? A At the time.

Q What is it with reference to the present time or to 1924? A At the time that theatre was built theatres were first beginning to be built of concrete; in fact, it was the second theatre in Newark to be built of concrete; before that all theatres were built of wood; since that time theatres are being built of concrete; in other words, that is called a modern construction. Another thing that makes it modern construction is before that time many theatres were built with a first and second balconies above each other. Now they have what we call a long single balcony, the forward part and the rear part divided in the middle by a crossover which you call an aisle or passage.

Q Describe this particular first and second balcony. A This was built according to the building code of Newark.

Q Was it passed by the building department? A It was passed by the building department; yes, sir. They had a license to open the theatre; you must have a license to open a theatre in Newark.

Q Who gives that? A City officials.

Q Just how are the first and second balconies built? A Of steel and concrete.

Q As you enter it there is a passageway between the first and second balconies? A Yes, sir.

Q To your right there are aisles or stairs? A As you come over the crossover there are four passageways up to the second balcony and four passageways down to the first.

Q Have you been shown this morning, at my request, the ‘A’ row of the second balcony? A I have.

Q At the first passageway from Branford Place entrance? A The first passageway where you can turn to the right or left, where you have seats on the right or left.

Q Seats on the right? A Yes, sir.

Q Have you been shown that particular spot? A I have.

Q Describe to the Court and jury just how you get to a seat three or four seats to your right. A You go up straight five steps, turn to your right and go up two—one step and two risers.

Q Just what does that mean? A A step has a tread, and if there are ten treads in a pair of stairs then it means there are eleven risers, because it takes one to get to the top platform.

Q Are those steps built in the usual manner as theatres are constructed? A Built generally as theatres are built.

Q As you turn to your right to go to a seat there, three or four seats in, you have what? A One side step and the two risers to go up.

Q One side step to go up? A After you go up you have to turn to the right and there is one step and two risers going up.

Q Leading to the seats? A Leading to the seats.

Q Then you take your seat? A Then you take your seat.

Q You say that is the usual construction of theatres of that type? A That is the usual construction of theatres built at that time and today.

Q Is there any hole there where you step from the stairs to the seats? A There is no hole there.

Q Is there anything resembling a hole? A Nothing resembling a hole I could see, or know of.

Q You examined that today? A I did.

Q Is it the same as it was in 1924? A I don't know how it was in 1924.

Q Is it the same as when you built it?

A As far as the construction it is; as far as the lights it is not.

Q As far as the construction it is the same? A Insofar as the construction goes it is the same.

Q Of course you do not know about the light changes, do you? A No, sir.

Q As to when they were made? A No, sir.

Q As far as the construction is concerned, in other words, the possibility of holes is the same as when you built it? A It is the same as when I built it; the concrete is in good condition.

Q The method of construction is the same, isn't it? A Absolutely.

Q In other words, from the point of structural changes or condition, it is the same as when you built it? A It is absolutely the same today as when I built it so far as structural conditions are concerned.

Q Did you, in your examination this morning, walk in that aisle? A I did.

Q And in towards the seat? A I walked up to the top of the steps only.

Q If you had to walk into the seat you told us about, would there be any hole there?

Mr. Hannoeh: I object.

The Court: Sustain the objection. Let him tell without leading him.

A The step is the same as when it was built; there is no hole there."

VIOLA ROBINSON, an usher at the theatre, testified that she conducted the plaintiff to her seat, put the seat down, turned away, and then discovered that the plaintiff had fallen (p. 62). She did not see the accident itself. There was no hole at the scene of the accident (p. 63, l. 9).

CARRIE B. BEYER, called in by the plaintiff in rebuttal (p. 64), testified about lighting conditions.

CARRIE E. BAUDENDISTEL, on rebuttal (p. 68), testified about lights.

On motion of defendant's counsel, the jury was permitted to view the premises (p. 69).

At the close of the entire case no additional proof, therefore, appeared as to the manner in which the plaintiff met with her accident. Moreover, there was no additional proof of any kind, either direct or circumstantial, from which an inference could be raised in any way whatsoever as to the existence of a hidden platform. The same contentions urged in the argument on the motion for a non-suit are, therefore, here reiterated and urged. The specific allegation in the complaint as to the hidden platform was unsupported by any evidence whatsoever. Furthermore, there was no evidence at all of the plaintiff having tripped over a hidden platform of any kind.

It may be urged that the fact that the jury viewed the premises may change the situation. It certainly would not make any change in the fact that the plaintiff did not sustain her allegation as to the manner in which she met with her accident, namely, that she tripped over a hidden platform. As to the other phase, that is, as to whether the jury, in its view, might not have seen the hidden platform, suffice it to say that that would be stretching the thing rather far, as the premises were described fully by numerous witnesses and nothing of the kind appeared in the testimony. The jury, therefore, must have based its verdict on something outside the scope of the pleadings or on sympathy or some other improper reason.

The trial judge, therefore, erred in refusing to grant defendant's motion for a direction of a verdict.

POINT III.

The trial judge should not have allowed the following question to be answered:

Mrs. Beyer was asked the following question on rebuttal (p. 67, ll. 17-20):

Were there any aisle lights in the aisle next to where Mrs. Heine was seated on the night of the accident?"

Counsel for defendant objected on the ground that the question of lights was irrelevant, as the plaintiff based the point of negligence on the maintenance of a hidden platform. The Court allowed the question and granted an exception.

As argued before, the specific negligence alleged in the complaint was the maintenance of the hidden platform. There was no allegation as to the lights, nor was there any general allegation of negligence. It was, therefore, error to permit a question of this kind unless it was for the purpose of showing absence of contributory negligence on the part of the plaintiff. If it was for that purpose, defendant could have no objection to it, especially since it has abandoned the point relating to plaintiff's contributory negligence.

POINT IV.

The Supreme Court decision is not in point.

The opinion of the Supreme Court (pp. 83-84) cites the following two Court of Errors cases:

Andre v. Mertens, 88 N. J. L. 626;

Dondero v. Tenant Motion Picture Co.,
94 N. J. L. 483.

It specifically says that the questions of non-suit and the direction of a verdict are controlled by these cases. In the first of these two cases, the liability is predicated upon the absence of lights for a stairway where the defendant had assumed to furnish the same. *The instant case is entirely different as the question of lights does not appear in it at all*, excepting perhaps as affecting the veracity of witnesses. The pleadings do not mention lights, and as shown above, the question was entirely eliminated by the rulings of the Court.

In the second of these cases, the plaintiff, while proceeding to his seat, fell while descending steps when the place was in a darkened condition. In the instant case, as set forth above, the question of lights or of darkness played no part. *The plaintiff alleged that the defendant maintained a hidden platform in its balcony leading to the seat and that the plaintiff tripped and fell over said hidden platform. There is not the slightest scrap of testimony in the whole case as to a hidden platform or anything of the kind.* The only testimony was that of the plaintiff, who said that she stepped into a hole. Nowhere in the case does it appear just what she meant by this statement. *At any rate, there is no evidence to substantiate the allegation of negligence in the complaint as to the hidden platform. And that was the basis for the motion for a non-suit and for a directed verdict.*

It is evident, therefore, that the Supreme Court missed the point.

Conclusion.

It is, therefore, respectfully submitted that the judgment of the New Jersey Supreme Court, affirming the judgment of the Essex County Circuit Court, should be vacated and set aside and that the judgment of the Essex County Circuit Court should be vacated and set aside and a *venire de novo* granted.

SCHNEIDER & SCHNEIDER,
Attorneys of Defendant-Appellant.

JACOB SCHNEIDER,
On the Brief.

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