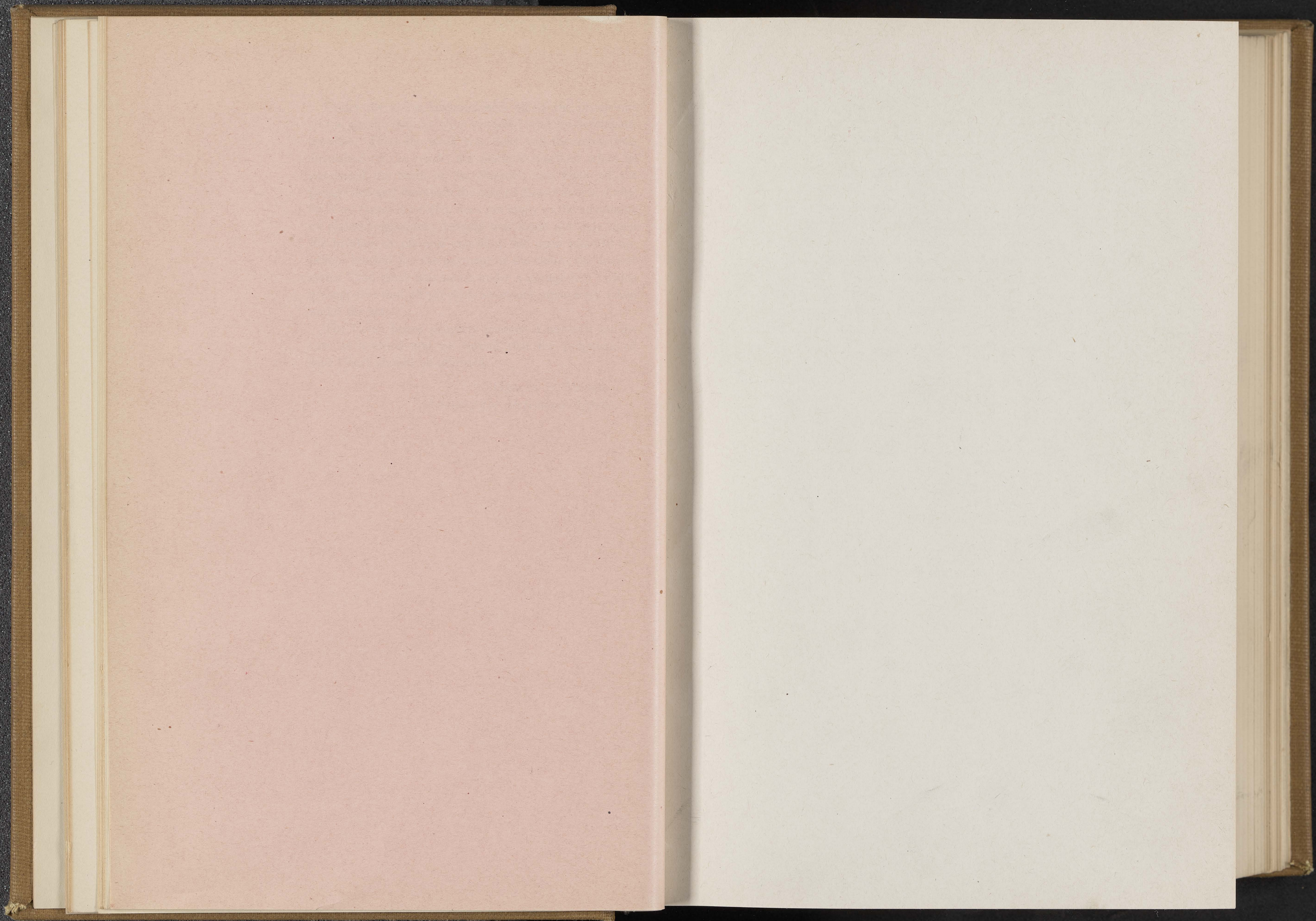




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(Filed April 6, 1927)

New Jersey Supreme Court
BERGEN COUNTY

Louise Kuchler and
Frank Kuchler,

Plaintiffs,

vs.

New Jersey and New York Rail-
road Co., a corporation, The
Erie Railroad Co., a corpora-
tion, Borough of Riverside
and Alvin Cooper,

Defendants.

Action At Law

10

NOTICE AND GROUNDS OF APPEAL

To Mackay & Mackay, attorneys for defendant, 20
Borough of Riverside.

Sirs:

Please take notice that the plaintiffs ap-
peal to the Court of Errors and Appeals of New
Jersey from the whole of the Judgment entered in
this cause on the following ground.

Because the court granted the motion of the de-
fendant, the Borough of Riverside and struck out
the complaint as to the said defendant.

Dated: March 29, 1927.

30

Freeman & Freeman,
Attorneys for Plaintiffs.

Notice and Grounds of Appeal

(Filed April 5, 1927)

NEW JERSEY SUPREME COURT
BERGEN COUNTYLouise Kuchler and
Frank Kuchler,

Plaintiffs,

vs.

New Jersey and New York Rail-
road Co., a corporation, The
Erie Railroad Co., a corpora-
tion, Borough of Riverside
and Alvin Cooper,

Defendants.

Action At Law

NOTICE AND GROUNDS OF APPEAL

To Hobart & Minard, attorneys for New Jersey
and New York Railroad Company, a corporation,
and Alvin Cooper.

Sirs:

Please take notice that the plaintiffs ap-
peals to the Court of Errors and Appeals of New
Jersey, from the whole of the judgment entered in
this cause on the following ground.The Trial Court nonsuited the plaintiff when
thereunto moved by the attorney for the defendants,
whereas the motion should have been denied and
the issues submitted to the jury for their decision.

Dated: March 29, 1927.

Freeman & Freeman,
Attorneys for Plaintiffs.*Transcript of Pleadings for Trial*

NEW JERSEY SUPREME COURT

BERGEN COUNTY

Louise Kuchler and
Frank Kuchler,

Plaintiffs,

vs.

New Jersey and New York Rail-
road Co., a corporation, The
Erie Railroad Co., a corpora-
tion, Borough of Riverside
and Alvin Cooper,

Defendants.

Summons issued April 20, 1926.

TRANSCRIPT OF PLEADINGS FOR TRIAL

Freeman & Freeman,
Attorneys of Plaintiffs.Hobart & Minard,
Attorneys of Defendant,
N. J. & N. Y. Railroad Co.,
and Erie Railroad Company
and Alvin Cooper.Mackay & Mackay,
Attorneys of Defendant,
Borough of Riverside.The plaintiffs, Louise Kuchler and Frank Kuch-
ler, her husband, residing in the Borough of River-
side, County of Bergen, and State of New Jersey,
say, that:

Transcript of Pleadings for Trial

First Count

1. On or about the 21st day of January, 1925, and for a long time prior thereto, the defendants, the New Jersey & New York Railroad Co., and the Erie Railroad Co., owned and operated a railroad depot and property surrounding the same, known as River Edge in the Borough of Riverside, County of Bergen, and State of New Jersey.

10 2. In the rear of the said depot was a high bank with a flight of steps leading from the depot to the top of the bank and connected with the streets, etc. built and maintained for the use and convenience of passengers and others going to and from the said railroad depot.

20 3. On different occasions covering a few days prior to the said 21st day of January 1925, there occurred some snow storms as a result of which great quantities of snow fell and lodged upon the steps and other property in the vicinity, where it remained until the aforesaid day. The travel on the steps caused the snow to become packed down, icy, and caused the steps to be in a very slippery and dangerous condition.

30 4. The railroad had both actual and constructive notice of the said dangerous condition of the said steps, which remained in the said dangerous condition for a long time prior to the night of January 21, 1925. It thereupon became the duty of the said New Jersey & New York Railroad Co., and the Erie Railroad Company and its agents and servants, to clean the steps and remove the ice and snow and make travel safe for persons using the said steps. The said New Jersey & New York Railroad Co. and the Erie Railroad Co., and its agents and servants

Transcript of Pleadings for Trial

had ample opportunity to remedy the said condition and remove the ice and snow, and notwithstanding the aforesaid facts, negligently and carelessly failed so to do.

5. On the evening of the said day, after 6:00 P. M. it was dark and the steps were poorly lighted.

6. At the said time and place, the plaintiff, Louise Kuchler, proceeded to the steps, at the express or implied invitation of the said New Jersey & New York Railroad Co. and the Erie Railroad Co., in order to get to the said depot known as River Edge. The said Louise Kuchler, while lawfully upon the said steps, without negligence or fault on her part, and while carefully proceeding, slipped upon the said snow and ice, which caused her to fall down the steps with great force and violence by reason of the negligence of the said New Jersey & New York Railroad Co. and the Erie Railroad Co., and its servants and agents.

7. By reason whereof, and as a result thereof, her body was severally injured, causing her to suffer a broken back and numerous bruises and injuries about her body and limbs, and caused her to be injured internally; as a result of which she was confined to her home and to the hospital for a long period of time, necessitating the removal of a portion of her spine and causing her to suffer great pain and discomfort, and preventing her from attending to her ordinary duties. As a result of the said negligence of the defendants, the plaintiff, Louise Kuchler, is an invalid and a cripple and will remain so for the rest of her life and will always undergo great pain, suffering, and discomfort as long as she lives and will not be able to attend to her duties, etc.

Transcript of Pleadings for Trial

Second Count

1. The plaintiff, Frank Kuchler, was on the 21st day of January 1925, the husband of Louise Kuchler and so remains.

2. Paragraphs one to seven both inclusive of the First Count are repeated.

10 3. The plaintiff, Frank Kuchler, thereby lost the comfort, society and services of his said wife and was obliged to expend large sums of money for hospital expenses, medical care, treatment and medicines, in an endeavor to cure his wife and relieve her of her suffering and injuries and also to take care of her duties in the homes, etc., and will in the future, be obliged to expend large sums of money for like purposes, as long as she lives as well as losing her comfort and society.

20

Third Count

1. The plaintiff, Louise Kuchler, repeats paragraphs one to seven of the First Count inclusive.

2. The Borough of Riverside entered into a certain lease or agreement in writing with the said New Jersey & New York Railroad Co. and the Erie Railroad Co. prior to January 21, 1925 whereby the said Borough of Riverside leased from the New Jersey & New York Railroad Co. and the Erie Railroad Co., the steps mentioned aforesaid, and land adjoining the same and therein and thereby as stipulated in the said lease, assumed the duty of caring for the said steps and keeping them safe and in good repair and also assumed responsibility for injuries and damages arising from negligence or other breach of the aforesaid duties.

30

Transcript of Pleadings for Trial

3. The said lease is not in the possession of the plaintiff nor any copy thereof, but is within the peculiar knowledge of the New Jersey & New York Railroad Co. and the Erie Railroad Co., and the Borough of Riverside or their officers, servants or agents, and the plaintiff is therefore unable to annex the copy of the said lease.

4. Although the said Borough of Riverside had actual and constructive knowledge of the dangerous condition of the steps aforesaid and had ample opportunity to remedy the serious condition and remove the snow and ice, and notwithstanding the aforesaid duty, the said Borough of Riverside and its officers, servants and agents negligently and carelessly allowed the said snow and ice to remain upon the said steps, causing the injuries to the plaintiff before alleged, and thereby wholly disregarding its duty.

10

20

Fourth Count

1. The plaintiff, Frank Kuchler, repeats paragraphs one to seven of the First Count inclusive.

2. The plaintiff, Frank Kuchler, repeats paragraphs one to three inclusive of the Second Count.

3. The plaintiff, Frank Kuchler, repeats paragraphs one to four inclusive of the Third Count.

4. The plaintiff, Frank Kuchler, says, that by reason of the duty assumed by the Borough aforesaid and by reason of its breach and neglect of said duty aforesaid and his wife's injuries resulting therefrom as aforesaid, he was obliged to expend large sums of money and will be obliged to expend large sums of money in the future, as well as losing the

30

Transcript of Pleadings for Trial

comfort, society and services of his wife all as mentioned in the Second Count aforesaid.

Fifth Count

1. The plaintiff, Louise Kuchler, repeats paragraphs one to seven of the First Count inclusive.

2. The plaintiff, Louise Kuchler, repeats the second paragraph of the Third Count.

3. Notwithstanding the aforesaid lease and agreement, the said Borough of Riverside neglected and refused to clean the said steps of snow and ice of which it had notice, both actual and constructive, and neglected and refused to remedy the conditions as aforesaid although it had ample opportunity so to do before the evening of January 21, 1925 and the said Borough of Riverside has thereby broken its contract.

4. The said lease is a contract for the benefit of third persons to wit; the residents of the Borough and others using the aforesaid steps, and therefore the plaintiff alleges that the said Borough, in neglecting to carry out its agreement to keep the said steps clean and in good condition, has broken its contract, and the plaintiff is entitled to damages as a third person for whose benefit the said contract was made.

Sixth Count

1. The plaintiff, Frank Kuchler, repeats paragraphs one to four both inclusive of the fifth count.

2. The plaintiff, Frank Kuchler, says that he was at the aforesaid time, the husband of Louise Kuchler, and still remains so and as a result of the afore-

Transcript of Pleadings for Trial

said injuries, arising out of the negligence and the breach of contract and duty of the said Borough of Riverside, he was obliged to expend large sums of money for medical attention and service for his wife, and lost her comfort, attention and society, as stated in the Second Count, and will in the future be obliged to expend large sums of money and lose her service, comfort, and society.

3. The plaintiff, Frank Kuchler, further alleges that he is a resident and tax payer of the Borough of Riverside, and that since the aforesaid contract was a contract for the benefit of third persons, he has suffered damages as aforesaid and is entitled to compensation and damages as a third person for whose benefit the said contract was made.

Seventh Count

1. The plaintiff, Louise Kuchler, repeats paragraphs one to seven inclusive of the First Count.

2. The plaintiff, Louise Kuchler, further alleges that the defendant, Alvin Cooper, was at the time of the aforesaid accident and prior thereto, employed by the New Jersey & New York Railroad Co. and the Erie Railroad Co., as station agent and manager of the aforesaid depot, and it was his duty, under the said employment, to clean the aforesaid steps of snow and ice and keep the same in a safe condition to be traveled on.

3. The said Alvin Cooper had both actual and constructive knowledge of the dangerous condition of the said steps aforementioned.

4. The said Alvin Cooper had ample time and opportunity before the night of January the 21st,

Transcript of Pleadings for Trial

1925 to clean the said steps of snow and ice and make them safe for travel.

5. Notwithstanding the aforesaid condition, duty, and knowledge, the said Alvin Cooper negligently and carelessly neglected and refused to clean the said steps and as a result of the said negligence, the plaintiff, without carelessness on her own part, fell and suffered the severe pain and injuries as aforesaid.

Eighth Count

1. The plaintiff, Frank Kuchler, repeats paragraphs one to five of the Seventh Count.

2. The plaintiff, Frank Kuchler, repeats paragraph one of the Second Count.

3. By reason whereof, the plaintiff, Frank Kuchler, lost the comfort, society and services of his said wife and was obliged to expend large sums of money for hospital expenses and medical care in the endeavor to cure his said wife and also to hire someone to care for her duty in the home, and will in the future be obliged to furnish large sums of money and will also lose the comfort, society and services of his said wife.

The plaintiff, Louise Kuchler, demands as damages the sum of \$75,000.00 on the First, Third and Fifth and Seventh Counts.

The plaintiff, Frank Kuchler, demands as damages the sum of \$25,000.00 on the Second, Fourth, Sixth and Eighth Counts.

Freeman & Freeman,

Attorneys of Plaintiffs.

Filed: May 15, 1926.

Transcript of Pleadings for Trial

The defendant, New Jersey & New York Railroad Company, a corporation of the State of New Jersey, having its principal office at the foot of Pavonia Avenue, Jersey City, Hudson County, for its answer says that:

First Defense to First Count

1. It admits that on January 21, 1925, and for a long time prior thereto it operated a railroad and depot known as River Edge in the Borough of Riverside, County of Bergen and State of New Jersey and denies the remaining allegations of paragraph 1.

2. It denies paragraph 2 except that it admits that to the rear of the depot building there is a flight of steps leading from the railroad property to a part adjacent to a public highway.

3. It denies paragraph 3 except that it admits that on different occasions covering a few days prior to January 21, 1925 there were snowstorms, as a result of which great quantities of snow fell upon the steps to the rear of the station building and surrounding property.

4. It denies paragraph 4.

5. It admits that it was generally dark at six P. M. on January 21, 1925, but it denies the remaining allegations of paragraph 5.

6. It denies paragraph 6.

7. It denies paragraph 7.

First Defense to Second Count

1. It has no knowledge or information sufficient to form a belief as to the allegations of paragraph 1.

2. It repeats and reiterates its answers to para-

Transcript of Pleadings for Trial

graphs 1 to 7, both inclusive of the first count hereof.

3. It denies paragraph 3.

First Defense to Third Count

1. It repeats and reiterates its answers to paragraph 1 to 7 both inclusive of the first count hereof.
- 10 2. It denies paragraph 2.
3. It denies paragraph 3.
4. It has no knowledge or information sufficient to form a belief as to the allegations of paragraph 1.

First Defense to Fourth Count

1. It repeats and reiterates its answers to paragraphs 1 to 7, both inclusive, of the first count hereof.
- 20 2. It repeats and reiterates its answers to paragraphs 1 to 3, both inclusive, of the second count hereof.
3. It repeats and reiterates its answers to paragraphs 1 to 4, both inclusive of the third count hereof.
4. It has no knowledge or information sufficient to form a belief as to the allegations of paragraph 4.

First Defense to Fifth Count

- 30 1. It repeats and reiterates its answers to paragraphs 1 to 7, both inclusive, of the first count hereof.
2. It repeats and reiterates its answer to the second paragraph of the third count hereof.

Transcript of Pleadings for Trial

3. It denies paragraph 3.

4. It denies paragraph 4.

First Defense to Sixth Count

1. It repeats and reiterates its answers to paragraphs 1 to 4, both inclusive, of the first count.
2. It has no knowledge or information sufficient to form a belief as to whether or not Frank Kuchler 10 is the husband of Louise Kuchler and it denies the remaining allegations of paragraph 2.
3. It denies paragraph 3.

First Defense to Seventh Count

1. It repeats and reiterates its answers to paragraphs 1 to 7, both inclusive, of the first count hereof.
2. It denies paragraph 2. 20
3. It denies paragraph 3.
4. It denies paragraph 4.
5. It denies paragraph 5.

First Defense to Eighth Count

1. It repeats and reiterates its answers to paragraphs 1 to 5, both inclusive of the seventh count hereof.
2. It repeats its answers to paragraph 1 of the first count hereof. 30
3. It denies paragraph 3.

Second Defense to All Counts

At the time of the accident as alleged in the com-

Transcript of Pleadings for Trial

plaint the plaintiff, Louise Kuchler, was guilty of contributory negligence and by reason of the premises the plaintiffs cannot recover therefor.

Third Defense to All Counts

At the time of the alleged accident as set forth in the complaint the plaintiff, Louise Kuchler, was
 10 guilty of contributory negligence in that she did not exercise reasonable care for her own safety. By reason of the premises the plaintiffs cannot recover therefor.

Fourth Defense to All Counts

At the time of the alleged accident as set forth in the complaint the plaintiff, Louise Kuchler, was
 20 guilty of contributory negligence in that she did not make reasonable observations of the conditions existing upon the flight of steps referred to in the complaint. By reason of the premises the plaintiffs cannot recover therefor.

Fifth Defense to All Counts

At the time of the alleged accident as set forth in the complaint the plaintiff, Louise Kuchler, after having observed the condition of the flight of steps
 30 referred to in the complaint, nevertheless, undertook to descend the same, thereby assuming risks or dangers incident thereto and in so doing she did not exercise the degree of care the conditions she

Transcript of Pleadings for Trial

found existing warranted. By reason of the premises the plaintiffs cannot recover therefor.

Hobart & Minard,
 Attorneys for Defendant,
 N. J. & N. Y. R. R. Co.

Filed June 10, 1926.

The defendant, Erie Railroad Company, a corporation of the State of New York, having its principal office in New Jersey at the Foot of Pavonia Avenue, Jersey City, Hudson County, for its answer says that: 10

First Defense to First Count

1. It denies paragraph 1.
2. It denies paragraph 2.
3. It denies paragraph 3. 20
4. It denies paragraph 4.
5. It denies paragraph 5.
6. It denies paragraph 6.
7. It denies paragraph 7.

First Defense to Second Count

1. It has no knowledge or information sufficient to form a belief as to the allegations of paragraph 1.
2. It repeats and reiterates its answers to paragraphs 1 to 7, both inclusive, of the first count hereof. 30
3. It denies paragraph 3.

Transcript of Pleadings for Trial

First Defense to Third Count

1. It repeats and reiterates its answers to paragraphs 1 to 7, both inclusive, of the first count hereof.
 2. It denies paragraph 2.
 3. It denies paragraph 3.
 4. It has no knowledge or information sufficient
- 10 to form a belief as to the allegations of paragraph 1.

First Defense to Fourth Count

1. It repeats and reiterates its answers to paragraphs 1 to 7, both inclusive of the first count hereof.
2. It repeats and reiterates its answers to paragraphs 1 to 3, both inclusive, of the second count hereof.
- 20 3. It repeats and reiterates its answers to paragraphs 1 to 4, both inclusive, of the third count hereof.
4. It has no knowledge or information sufficient to form a belief as to the allegations of paragraph 4.

First Defense to Fifth Count

1. It repeats and reiterates its answer to paragraphs 1 to 7, both inclusive, of the first count hereof.
- 30 2. It repeats and reiterates its answer to the second paragraph of the third count hereof.
3. It denies paragraph 3.
4. It denies paragraph 4.

Transcript of Pleadings for Trial

First Defense to Sixth Count

1. It repeats and reiterates its answers to paragraphs 1 to 4, both inclusive, of the first count.
 2. It has no knowledge or information sufficient to form a belief as to whether or not Frank Kuchler is the husband of Louise Kuchler and it denies the remaining allegations of paragraph 2.
 3. It denies paragraph 3.
- 10

First Defense to Seventh Count

1. It repeats and reiterates its answers to paragraphs 1 to 7, both inclusive, of the first count hereof.
 2. It denies paragraph 2.
 3. It denies paragraph 3.
 4. It denies paragraph 4.
 5. It denies paragraph 5.
- 20

First Defense to Eight Count

1. It repeats and reiterates its answers to paragraphs 1 to 5, both inclusive, of the seventh count hereof.
 2. It repeats its answers to paragraph 1 of the first count hereof.
 3. It denies paragraph 3.
- 30

Second Defense to All Counts

At the time of the accident as alleged in the complaint the plaintiff, Louise Kuchler, was guilty of contributory negligence and by reason of the premises the plaintiffs cannot recover therefor.

Transcript of Pleadings for Trial

Third Defense to All Counts

At the time of the alleged accident as set forth in the complaint the plaintiff, Louise Kuchler, was guilty of contributory negligence in that she did not exercise reasonable care for her own safety. By reason of the premises the plaintiffs cannot recover therefor.

10

Fourth Defense to All Counts

At the time of the alleged accident as set forth in the complaint the plaintiff, Louise Kuchler, was guilty of contributory negligence in that she did not make reasonable observations of the conditions existing upon the flight of steps referred to in the complaint. By reason of the premises the plaintiffs cannot recover therefor.

20

Fifth Defense to All Counts

At the time of the alleged accident as set forth in the complaint the plaintiff, Louise Kuchler, after having observed the condition of the flight of steps referred to in the complaint, nevertheless, undertook to descend the same, thereby assuming risks or dangers incident thereto and in so doing she did not exercise the degree of care the conditions she found existing warranted. By reason of the premises the plaintiffs cannot recover therefor.

30

Hobart & Minard,
Attorneys for Defendant,
Erie Railroad Company.

Filed: June 10, 1926.

Transcript of Pleadings for Trial

The defendant, Alvin Cooper, residing in the Town of River Edge, County of Bergen and State of New Jersey, for his answer says that:

The only counts of the complaint which purport to charge any duty or negligence on the part of this defendant are counts 7 and 8 and this defendant has, therefore, confined his answer to those counts.

First Defense to Seventh Count

10

1. He has no knowledge or information as to the allegations of paragraph 1 of the first count of the complaint which is made a part of this count by reference.

He admits that in the rear of a depot building known as River Edge, in the Borough of Riverside, there is a flight of steps leading from the station level up to the level of a public park adjacent to a public street in said Borough, but he denies the remaining allegations of paragraph 2 of the first count which were made part of this count by reference.

20

He admits that on different occasions covering a few days prior to January 21, 1925, there occurred several snowstorms, as a result of which great quantities of snow fell upon the aforesaid steps and surrounding property, but he denies the remaining allegations of paragraph 3 of the first count which were made part of this count by reference.

30

He denies the allegations of paragraph 4 of the first count which were made part of this count by reference.

He admits that it was dark after six P. M. on January 21, 1925, but denies the remaining allega-

Transcript of Pleadings for Trial

tions of paragraph 5 of the first count which were made part of this count by reference.

He denies the allegations of paragraph 6 of the first count which were made part of this count by reference.

He denies paragraph 7 of the first count which was made part of this count by reference.

10 2. He admits that he was employed by the New Jersey and New York Railroad Company as station agent, but denies the remaining allegations of paragraph 2.

3. He denies paragraph 3.

4. He denies paragraph 4.

5. He denies paragraph 5.

First Defense to Eighth Count

20 1. He repeats and reiterates his answers to paragraphs 1 to 5, both inclusive of the seventh count hereof.

2. He has no knowledge or information sufficient to form a belief as to the allegations of paragraph 1 of the second count which were made part of this count by reference.

3. He denies paragraph 3.

Second Defense to All Counts

30 At the time of the accident as alleged in the complaint the plaintiff, Louise Kuchler, was guilty of contributory negligence and by reason of the premises the plaintiffs cannot recover therefor.

Transcript of Pleadings for Trial

Third Defense to All Counts

At the time of the alleged accident as set forth in the complaint the plaintiff, Louise Kuchler, was guilty of contributory negligence in that she did not exercise reasonable care for her own safety. By reason of the premises the plaintiffs cannot recover therefor.

10

Fourth Defense to All Counts

At the time of the alleged accident as set forth in the complaint the plaintiff, Louise Kuchler, was guilty of contributory negligence in that she did not make reasonable observations of the conditions existing upon the flight of steps referred to in the complaint. By reason of the premises the plaintiffs cannot recover therefor.

20

Fifth Defense to All Counts

At the time of the alleged accident as set forth in the complaint the plaintiff, Louise Kuchler, after having observed the condition of the flight of steps referred to in the complaint, nevertheless undertook to descend the same, thereby assuming risks of dangers incident thereto and in so doing she did not exercise the degree of care the conditions she found existing warranted. By reason of the premises the plaintiffs cannot recover therefor.

30

Hobart & Minard,
Attorneys for Defendant,
Alvin Cooper.

Filed: June 10, 1926.

Transcript of Pleadings for Trial

The plaintiffs, Louise Kuchler and Frank Kuchler, replying to the answer of the defendant, the Erie Railroad Company say:

Reply to Second Defense to All Counts
Plaintiffs deny second defense.

Reply to Third Defense to All Counts
Plaintiffs deny third defense.

10 Reply to Fourth Defense to All Counts
Plaintiffs deny fourth defense.

Reply to Fifth Defense to All Counts
Plaintiffs deny fifth defense.

Freeman & Freeman,
Attorneys of Plaintiffs.

Filed: June 21, 1926.

20 The plaintiffs, Louise Kuchler and Frank Kuchler,
replying to the answer of the defendant, Alvin
Cooper, say:

Reply to Second Defense to All Counts
Plaintiffs deny second defense.

Reply to Third Defense to All Counts
Plaintiffs deny third defense.

Reply to Fourth Defense to All Counts
Plaintiffs deny fourth defense.

30 Reply to Fifth Defense to All Counts
Plaintiffs deny fifth defense.

Freeman & Freeman,
Attorneys of Plaintiffs.

Filed: June 21, 1926.

Transcript of Pleadings for Trial

The plaintiffs, Louise Kuchler and Frank Kuchler, replying to the answer of the defendant, the New Jersey and New York Railroad Company say:

Reply to Second Defense to All Counts
Plaintiffs deny second defense.

Reply to Third Defense to All Counts
Plaintiffs deny third defense.

Reply to Fourth Defense to All Counts 10
Plaintiffs deny fourth defense.

Reply to Fifth Defense to All Counts
Plaintiffs deny fifth defense.

Freeman & Freeman,
Attorneys of Plaintiffs.

Filed: June 21, 1926.

This matter coming on to be heard on a Notice of Motion to strike out the Complaint filed in the above-entitled cause insofar as the same relates to the Borough of Riverside, a municipal corporation of the State of New Jersey, and Mackay & Mackay, attorneys, appearing for the Borough of Riverside, and Freeman & Freeman, attorneys, appearing for the Plaintiffs, and the court having heard the arguments of counsel thereon: 20

It is, on this 22nd day of May, 1926, ordered that the Complaint filed in the above-entitled action by Louise Kuchler and Frank Kuchler, insofar as the same relates to the Borough of Riverside, a municipal corporation of the State of New Jersey, be stricken out. 30

Let this rule be entered.

C. W. Parker,
Justice of the Supreme Court.

Transcript of Pleadings for Trial

Entered: May 28, 1926.

On Motion of
Mackay & Mackay,
Attorneys for Borough of Riverside.

10 I, Edward J. Kelleher, Clerk of the Supreme Court of the State of New Jersey, do certify that the foregoing is a true transcript of the pleadings in the above-stated cause as the same remain on file in my office.

In testimony whereof I have set my hand and the seal of said Court of Trenton, this eighteenth day of February, A. D. nineteen hundred and twenty-seven.

Edward J. Kelleher,
Clerk.

20

30

Plaintiff's Opening

NEW JERSEY SUPREME COURT
BERGEN COUNTY

Louise Kuchler and
Frank Kuchler,

Plaintiffs,

vs.

N. J. & N. Y. R. R. Co., Erie
Railroad Co., Borough of
Riverside and Alvin Cooper,
Defendants.

Action at Law

10

TESTIMONY

Hackensack, N. J., February 21, 1927.

Before:

Hon. Newton H. Porter, Judge, and a Jury.

20

Appearances:

For the Plaintiffs,

Messrs. Freeman & Freeman.

For the Defendants,

Messrs. Hobart & Minard.

John E. Selser, Esq., of Counsel.

A jury was empanelled, accepted and sworn.

Mr. Freeman opens the case to the Jury on behalf of the Plaintiffs. (Plaintiffs' opening taken at the request of the Defendants' Counsel, and is as follows:)

30

Mr. Freeman—May it please the Court, and Ladies and Gentlemen of the Jury: This

Plaintiff's Opening

10 is an action brought on behalf of Louise Kuchler and Frank Kuchler, her husband, for injuries sustained on January the 21st, 1925, at the depot on the New Jersey & New York Railroad known as River Edge. The plaintiff, Mrs. Kuchler, was going to meet her husband a little after six o'clock in the evening, when it was dark, descended a flight of steps that was in the rear of the station, in order, as I said, to meet her husband. As she was coming down these steps, she slipped and fell. We will endeavor to show you to your satisfaction that these steps had not been cleared of snow and ice. There had been some snow storms for two or three days prior to the accident, but there had been no storm on the day on which the accident occurred. That was a clear day. We will endeavor to show you that, since that was a clear day, the railroad had an ample opportunity to clean those steps, or to put ashes or sand upon them, which they failed to do, and by reason of their negligence she fell. They were cement steps, and she fell from the second step near the top to the landing, and by reason of this fall she suffered a fracture of the spine, and as a result of this fractured spine, the doctor tried to let the injury heal, but it did not heal and he was obliged to take her to a hospital and remove the lower portion of the woman's spine.

20

30

Now, before this accident happened, we will show you that she was well, and well able to do her housework; she was a housewife; and she did all her own work, and since the

Plaintiff's Opening

injury she is partly crippled and becomes paralyzed at different times, and she is unable to do her housework; she has to have someone come in and do that for her.

She was in the hospital for a long time, and then she was obliged to take a trip to Michigan to endeavor to recuperate, and we will produce the doctor before you who will tell you that she will never be the same again. One leg is shorter than the other. She is unable to walk properly. She is unable to sit on an ordinary chair unless she has a rubber cushion to sit upon. And her husband has been obliged to outlay considerable expense in doctors' bills and hospital bills in endeavoring to cure or relieve her pain, and he will be in the future obliged to outlay more money. And we are going to ask you for \$100,000. for Mrs. Kuchler, and \$25,000. for Mr. Kuchler for the expense they have been put to and the expense they will be put to in the future. Thank you.

10

20

The Court—Who do you ask it from, Mr. Freeman?

Mr. Freeman—From the New Jersey & New York Railroad, the Erie Railroad, and Alvin Cooper. The Borough of Riverside is not a party to the action.

The Court—Why?

Mr. Freeman—The complaint has been dismissed as to the Borough of Riverside.

30

The Court—Very well.

Mr. Selser—Negligence as against Cooper and the Erie Railroad Company? It has been confined to the New Jersey & New York, and

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I want to move for a nonsuit on the opening. Your allegations of negligence in your opening have been confined to the New Jersey & New York Railroad Company. I should like to hear what you have to say as to Cooper and the Erie Railroad Company.

10 Mr. Freeman—Well, as to Cooper, Cooper was the station agent, and we contend it was his duty as the station agent to clean these steps and keep them free and clear of ice.

The Court—Well, what about the Erie Railroad Company?

Mr. Freeman—Well, the Erie Railroad, I understand, I do not know just what the connection is, but I understand—

20 The Court—Well, that is your job to show the responsibility of the various defendants, and the counsel for the defendant here is entitled, in your opening, to have you state the theory on which you proceed against the respective defendants. Now, you say, with respect to Cooper, he was the station agent, and you contend that he neglected a duty that the law imposed upon him. Now, I am asking you the theory of action against the two railroad companies.

30 Mr. Freeman—The New Jersey & New York Railroad are the owner of the property by stipulation. At the time the action was started, I did not know which railroad owned the real estate. It has been stipulated (I have the stipulation) that the New Jersey & New York Railroad are the owner of the property.

Mr. Selser—Subject, however, to a lease

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giving the occupancy to the Borough of Riverside.

Mr. Freeman—Now, as I say, at the time I did not know which railroad owned that property. That has been cleared by this admission.

The Court—That they own it, subject to a lease?

Mr. Freeman—Yes.

10

The Court—Well, if they have leased it to someone else, do you contend that the owner of the property is responsible rather than the lessee?

Mr. Freeman—In this case, yes, your Honor.

The Court—Well, you are maintaining that the New York Railroad Company is the owner?

Mr. Freeman—The New Jersey & New York Railroad. 20

The Court—Is the owner, and responsible, therefore, to remove this snow and ice?

Mr. Freeman—That is true, your Honor.

The Court—Well, where does the Erie fit in, then?

Mr. Freeman—I understand this is part of the Erie system, a branch of the Erie; but I am unable to show just how they are affiliated.

30

The Court—Well, you contend that the Erie is also responsible, as well as the owner of the property?

Mr. Freeman—If the Erie has a management or partial management of the road, they are responsible.

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The Court—Well, do you contend they have?

Mr. Freeman—Yes.

The Court—All right.

10 Mr. Selser—I move for a nonsuit, your Honor please, on the opening of counsel, first, as to the defendant Alvin Cooper, whom counsel in his opening says was the agent or servant of the New Jersey & New York Railroad Company, and failed to perform a duty merely owing by him to the New Jersey & New York Railroad Company. Certainly, there is no law in the world which compels a servant to clean steps, assuming that the property is that of the railroad company, to clean steps upon the railroad company's property so as to render the servant liable in damages to a third person who is injured. It is purely a violation of a duty he owes to his master, and his master alone could hold him.

The Court—What do you say as to that?

30 Mr. Freeman—Why, he is acting in a capacity here where he owed a duty to the public, the same as if a motorman or a conductor acting for a railway or a company, they owe a duty to the public by reason of their employment; and they are responsible for their negligence that happens in the line of their duty. And in this case, if it was his duty, as we will endeavor to show, to keep the steps clean by reason of his position, that was a public duty the same as a motorman, or a conductor.

The Court—Well, I have a man employed in my house as a servant and among his

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general duties is the duty to clean the snow from my front sidewalk. He neglects to do that duty in my absence; we will assume someone is injured. Would the suit lie against him or against me?

Mr. Freeman—Oh, that is a different proposition, your Honor.

The Court—Why?

10 Mr. Freeman—For the reason that a common carrier has a higher degree of responsibility, and a person acting for a common carrier is, in a sense, a public servant, and has a much higher degree of duty than the case that you cite.

The Court—Well, I have a duty imposed upon me to keep my premises free from ice and snow, under certain circumstances, and just because the railroad company is in the business of a common carrier, do you think 20 that the law imposes a greater duty on them?

Mr. Freeman—I am sure of it.

The Court—Have you any authority?

Mr. Freeman—Yes, I have, your Honor.

The Court—Let me have it.

Mr. Selser—I think counsel is confusing those cases in which the servant's negligence was an act of commission rather than an act of omission.

The Court—I think so, too.

30 Mr. Freeman—The case of the D. L. & W. Railroad vs. Trautwein, 19 Atlantic Reporter, 178; it is a case in the New Jersey Court of Errors & Appeals, where the plaintiff was injured at a railroad station.

Mr. Selser—That case is not against the

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servant; that is against the railroad company only.

Mr. Freeman—The point that the Judge asked was regarding the railroad's duty.

The Court—No, no. The point is whether there was any legal duty on a servant of the railroad company to remove the snow.

10 Mr. Freeman—Then I misunderstood your Honor.

20 The Court—No. You were holding, or seeking to hold, Alvin Cooper, who you say was the station master there, on the theory that he owed a duty to the traveling public, on the theory that it is distinguishable from the case that I cited, the ordinary servant, because of the nature of the work or the nature of the business that the master was engaged in, namely, a common carrier of passengers, that he himself owed a duty to the public which made him personally responsible, and you cite the operator of a train, and that is not in point. If there is negligence, of course, on the part of an engineer, or any operator of a train, while in the performance of his duty in carrying passengers, he himself would be responsible, as well as the master who employed him. But here is a man that was engaged as a station master, whom you allege was under a duty to the public to have the premises safe, and that is quite a different proposition than the operator of a train, and I doubt if you have any authority on that particular point.

30 Mr. Freeman—The point I wish to bring out is that a common carrier is under a duty

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to have its platforms and stations clear and accessible. The duty does not cease when a man gets off the train.

The Court—We are not talking about that. We are talking about the duty that Mr. Cooper owed this lady, not what duty the railroad company owed the lady, this individual, the servant of the railroad company, you seek to make personally responsible for this woman's injuries, because he, you say, neglected to do a duty that he owed her, one of the traveling public.

10 Mr. Freeman—Well, it is my contention that by reason of his position he was responsible.

The Court—But you have no authority on that point?

20 Mr. Freeman—Not directly on that point, your Honor.

The Court—The motion is granted, a non-suit as against Mr. Alvin Cooper.

30 Mr. Selser—I move for a nonsuit on counsel's opening as to the defendant the Erie Railroad Company on the ground that there is no relationship whatsoever existing between Mrs. Kuchler at the time of the accident and the Erie Railroad Company. Counsel in his opening says that she was going down to the station of the New Jersey & New York Railroad Company at River Edge, and that she was injured while upon lands owned by the New Jersey & New York Railroad Company leased to the Borough of Riverside. There is no relationship whatsoever between the plaintiff and that defendant, no duty, cer-

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tainly, owing by that defendant to that plaintiff, and I cannot see anything in counsel's opening upon which he could predicate a recovery.

The Court—Except that he says that the Erie Railroad Company was the lessee of this property.

10 Mr. Selser—No, he did not say of the property. He says there was some agreement between the two companies, what it is, he does not know, an operation agreement.

20 Now, I move for a nonsuit as to the two railroad defendants on the ground that, from the opening of counsel, it appears that the accident happened upon lands leased to the Borough of Riverside. I rely for authority upon the case of McKeown vs. King, 99 N. J. Law, 251, opinion by Justice Katzenbach for the Court of Errors & Appeals. Your Honor will notice in the complaint they do not charge a structural defect; the charge is purely a failure to remove ice and snow; so that, assuming the property is owned by either of the railroad companies and leased to the Borough of Riverside as a tenant, the railroad company as owner would not be liable, except the structure was a nuisance in its construction. The duty of maintenance is upon the tenant and not upon the landlord. If the allegation 30 of the complaint was that there was a structural defect and that the device had been constructed, or that the flight of steps had been constructed, by the railroad company, and she was injured as a proximate result of the structural defect, then there might be

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some foundation for this cause of action. But, as I say, this is purely a failure to maintain. (Citing *Mc Keown vs. King*, supra.)

(Argument and citing cases: *Costello v. The Director General of Railroads*, 112 Atl. 861; *West Jersey & Seashore Railway Co. v. The Board of Public Utility Commissioners*, 87 N. J. L. 170, or 94 Atlantic 57; *Buckley v. Bangor*, 93 Atlantic, 67; *Coleman vs. Penna. R. R. Co.*, 89 Atlantic, 87; 69 L. R. A., p. 682). 10

The Court—You see the facts in this case seem to be outside of the pale of those cases in that this stairway was not used nor occupied nor owned by the company; nor were they there for the purpose of the convenience of the company's passengers. Now, whether the Trautwein case is in point, where they went from one track to the other at a place not provided for that purpose, and what had 20 begun and had ripened into a custom, might bring this case within the ruling of that case, because this stairway, while not provided for that purpose, was used by the passengers of the railroad with the connivance or consent, passively, at any rate, of the railroad company, whether that did not bring it within the Trautwein case—

Mr. Selser—I should like your Honor to read the Trautwein case.

The Court—I shall read it before I decide this motion and I, therefore, will reserve decision. 30

Mr. Selser—May I suggest that you read the case of *DeVoe v. New York, Ontario &*

Louise Kuchler—direct

Western Railroad, 63 N. J. L. 276, and Dieckman vs. D. L. & W., 81 N. J. L. 460?

The Court—That is all you have to cite?

Mr. Selser—I think they are enough.

The Court—All right. Do not give me any that are not necessary.

Mr. Selser—Does your Honor wish me to open, nevertheless?

10 The Court—Yes. I will reserve decision. (Mr. Selser opens the case to the Jury on behalf of the Defendants.)

LOUISE KUCHLER, sworn as a witness on behalf of the Plaintiffs, testified as follows:

Direct Examination by Mr. Freeman:

20 Q. Mrs. Kuchler, you are the plaintiff in this case? A. Yes.

Q. Can you tell, or do you recall the 21st day of January, 1925? A. I do.

Q. Will you tell us where you were on that day, and what you did? A. I was visiting on Myrtle Avenue.

Q. You were visiting?

The Court—A little louder, Mrs. Kuchler.

30 A. I was visiting.

Q. And at what time in the day? A. I left my place about half past one.

Q. Yes. And to whose house did you go? A. To Mrs. Westervelt's.

Louise Kuchler—direct

Q. Where is Mrs. Westervelt's house? A. On Myrtle Avenue.

Q. In what town? A. River Edge.

Q. Now, what time did you leave Mrs. Westervelt's house? A. I should think it was about quarter or ten minutes of six, something like that.

Q. And where did you go from there? A. Right direct to the station.

10 Mr. Selser—Your Honor please, the jurors cannot hear.

The Court—Mr. Stenographer, will you read the last questions and answers to the jury, please.

(Previous testimony read.)

Q. For what purpose did you go to the station?

A. I was on my way to meet the train, and my husband was on that train. 20

Q. And do you know what time the train came in? A. Six twenty-two.

Q. Was it light or dark at that time of the day?

A. It was dark.

Q. And what means did you take of going to the train to meet your husband? How did you proceed? A. What do you mean? All the way from Myrtle Avenue down, or just—

Q. Well, just tell us how you got to the station. A. Well, I came down Midland Avenue to Kinderkamack Road, and from Kinderkamack Road down Lincoln Avenue and through the park to the station. 30

Q. And the name of that station was what?

A. River Edge station.

Louise Kuchler—direct

Q. Now, what was the condition of the weather on that day? A. It was a clear day.

Q. Did it storm that day? A. It did not.

Q. And what was the condition under foot? A. Ice and snow.

Q. And when, about what time, did you reach the station of River Edge? A. Well, the train was coming in at the station when I started down the stairs, so it must have been around six twenty-
10 two.

Q. Now, as you got to the stairs, tell us just what happened, and in what condition you found it? A. Well, when I got to the stairs, I noticed that they were full of ice and snow, and I looked down, and I saw that there was just a foot path where the people had come up and down. And I started down that side, and as I just started down, there was a person coming up, or about
20 halfway up the stairs. So I stepped to my right to get ahold of the railing so that this person could pass, and before I reached the railing, I slipped.

Q. This place that you call a pathway, or a place where people had been coming up and down, was there any snow on that portion of the steps? A. Well, it looked to me as if it was—I know it was covered with ice.

Q. Ice? A. It looked to me as though there was snow there too.

Q. And was there any ashes or sand or any other material upon the steps? A. I did not
30 see any.

Q. What did you have on your feet? A. Rubbers.

Q. Now, was there a light at the station? A. Yes.

Q. And did it reflect upon the stairway? A.

Louise Kuchler—direct

Well, it didn't show much of a light, because it was a very poor light.

Q. Now, after you slipped, tell us what happened? A. Well, I—I don't remember anything until they were picking me up.

Q. Were you conscious the whole time? A. No.

The Court—What was the answer, "No"?
The Witness—"No." 10

Q. And where were you when you say they picked you up? A. On the—at the second landing, about in the middle of the stairway, I should judge.

Mr. Freeman—With your Honor's permission and the permission of the opposing counsel, I will use this photo. 20

Mr. Selser—If you will state first when it was taken.

Mr. Freeman—Yes. This photo was taken last week.

Mr. Selser—And state also the fact that the pathway leads right out to Bridge Street.

Mr. Freeman—Yes. Opposing counsel wishes me to state that the pathway on this side of the station leads out to a public street. 30

Mr. Selser—To the foot of the stairs.

The Court—Is there any objection to it being introduced in evidence?

Mr. Selser—No. With that admission, I said to counsel before I would permit it to go in.

Louise Kuchler—direct

The Court—Very well. Let it be marked in evidence first.

(Photograph marked Exhibit P-1 in evidence.)

10 Q. Now, Mrs. Kuchler, will you just take the pencil and indicate about where you were at the time that you slipped? A. Well, I couldn't have been more than the second step down.

The Court—The second step from the top, on the right part of the step to you; is that right, Mrs. Kuchler? You were at the right of the—

The Witness—I started down this side here (indicating), this is where the—

20 Q. Indicating the left side? A. This is where the path was (indicating), see? And I saw this person coming up. It must have been just about along here (indicating). So I stepped over to my right to get ahold of this railing here (indicating).

Q. Indicating the railing on the right? A. On the right side, when I—shall I mark this here (indicating)?

Q. Yes.

30 The Court—I do not know that it will do much good to mark; the point is, it was about the second step from the top?

The Witness—Yes.

The Court—The jury will remember that, on the right of the stairs.

Mr. Freeman—(Showing photo, Exhibit

Louise Kuchler—direct

P-1 to the Jury). The witness indicates the second step from the top.

A Juror—Going up or down?

Mr. Freeman—Going down.

By the Court:

Q. When you speak of a path, do you mean that there was a place on the stairs that had been cleared of the snow? A. No, it wasn't cleared. 10 It was just where the people had tramped it down, that is, going up and down the stairs.

Q. And the rest of the stairs were— A. Was all ice, was right even with the steps.

Q. Where there had been no path? A. No path at all.

Q. And it was on that part that you stepped?

A. I stepped over to let this—

Q. To let this other person— A. Yes.

Q. —get by on the step? A. Yes. 20

By Mr. Freeman:

Q. Now, did you tell us just where you were when they picked you up?

The Court—Yes. At the bottom of the first flight, she says, at the landing.

A. At the landing.

Q. At the landing? A. Yes.

Q. Now, will you tell us just what you did after that? A. Well, I—I didn't do anything. I was picked up and put in an automobile and taken home. 30

Q. Who was there who helped pick you up?

A. A man by the name of Mr. Matthews.

Q. And anyone else? A. Mr. Jacobs came along after.

Louise Kuchler—direct

Q. And in whose car did you go home? A. In Mr. Anders'.

Q. Did you feel any pain at that time? A. I did.

Q. Will you tell us where and how? A. Well, in the back where I struck the spine.

Q. Now, you say you went home; is that correct? A. Yes.

10 Q. And after you reached home, what did you do? A. Well, they sent for the doctor.

Q. And what doctor was it? A. Doctor King.

Q. Doctor King. And what did he do for you?

A. Well, I don't know what he done, but—I couldn't say; you will have to ask the doctor.

Q. Well, do you recall everything that he did to you? A. No.

Q. What was the first thing that he did you?

20 A. Well, he just examined me. And then he gave me a hypodermic, and then I didn't know nothing after that.

Q. And how long did you remain at home? A. Four weeks.

Q. And during that time, did you have the doctor? A. I did.

Q. How often? A. Every day.

Q. And after the end of this four weeks, where did you go? A. To the hospital.

Q. What hospital? A. Hackensack.

Q. And did you receive treatment at the hospital? A. I did.

30 Q. And what treatment did you receive? A. Well, they operated, and took some of the spine off.

Q. What was the nature of the operation? A. They operated on the spine; took three inches, I believe, of it off.

Louise Kuchler—direct

Q. Do you know what condition they found the spine in? A. No.

The Court—Only by hearsay; that is all she could know.

The Witness—Yes.

The Court—So you can prove that by others. Do not waste time asking her things that she only knows by hearsay.

10

Q. When you say "they operated," who do you mean? A. Doctor Conrad done the operation.

Q. And how long did you stay in the hospital? A. Seven weeks.

Q. And where did you go from there? A. Home.

Q. And how long were you at home? A. I was home until—let us see—in April, the following April.

20 Q. And after you went home, what was your condition? A. Well, I was weak and nervous and—

Q. Were you able to work? A. No, I was not.

Q. Were you able to walk? A. No, not for a while.

Q. How long were you unable to walk? A. I came home in—let us see—April. I guess it was about three or four weeks before I could walk around.

30 Q. And were you able to walk alone? A. No.

Q. Where did you go after that? A. I went out to Michigan.

Q. For what purpose? A. Well, for to rest up for the nerves, and—

Q. Did you ask the doctor about it? A. Yes.

Louise Kuchler—direct

Q. What did he tell you? A. He told me to go.

Q. How long were you in Michigan? A. Two months.

Q. And where did you go from there? A. I came home.

Q. Now, what was the state of your health before the accident? A. Why, I was all right.

10 Q. Just speak up a little bit louder. A. Why, all right. I was well and healthy.

Q. Did you have anything particular troubling you? A. No.

Q. Did you do any work? A. I did my housework.

Q. How much of your housework? A. All of it.

Q. Did you do any washing and ironing? A. I did.

20 Q. And after the accident, what is your present condition? A. Well, I cannot get around; I cannot walk very good.

Q. Has there been any effect upon your physical make-up, or your limbs? A. Yes, there has.

Q. What is the effect? A. Well, I lose control of my right side.

Q. That is, you have become paralyzed? A. It becomes like paralyzed, yes.

Q. And do you notice any other effect on your limbs? A. Not on my limbs, no.

30 Q. Are you able to walk naturally now? A. No.

Q. Why not? A. Well, on account of that one foot that doesn't reach the floor.

Q. Which foot doesn't reach the floor? A. My left—or my right foot.

Louise Kuchler—direct

Q. And are you able to sit down as an ordinary person does? A. No.

Q. And what is the difference? A. Well, it bothers me. When I sit, I have to sit on a rubber ring, a rubber cushion.

Q. Do you get up every morning? A. Yes.

Q. And are you able to stay up all day? A. No. I lay down in the afternoon.

Q. Do you do any washing and ironing now? 10 A. No.

Q. Do you do any housework now? A. Not very much. Maybe a little, to dust, or something like that.

Q. Do you have anyone help you? A. I have a woman to come in.

Q. How often? A. Once a week.

Q. And do you have any members of your family help you? A. Yes.

Q. Who helps you? A. My mother. 20

Q. Anyone else? A. No.

Q. During the time while you were sick at home or in the hospital, did your husband go to work every day? A. Well, not every day, no.

Q. And what did he do?

Mr. Selser—Was she there? Does she know?

A. He came to the hospital to see me.

Q. What is that? A. He came down to the 30 hospital to see me.

Q. When you were at home, did he go to work every day? A. Not the first week, he didn't.

Q. Did you see him? A. Yes.

Q. What was the name of the woman who employed you? A. Miss Faley.

Louise Kuchler—cross

Q. I beg your pardon. Whom you employed?
A. Miss Faley.

Q. Will you tell us how long Miss Faley worked for you? A. Ten weeks.

Q. Have you noticed any effect upon your nervous system? A. Yes.

Q. What is the effect? A. Well, I just—go all to pieces sometimes, it gets the best of me.

10 Q. Have you suffered any pain since the accident? A. I always have pain.

Q. At the present time? A. Yes.

Q. Did you suffer any pain while you were in the hospital? A. Yes.

Mr. Freeman—Cross examine.

Cross Examination by Mr. Selser:

20 Q. Mr. Kuchler, you fell once before and injured your spine, didn't you? A. Well, I did fall.

Q. A number of years ago? A. But it wasn't much of an injury.

Q. Wasn't there a fracture of the base of the spine at that time? A. Not that I know of.

Q. You were under a doctor's care, weren't you? A. Yes.

Q. For quite a while? A. No, not long.

Q. How long? A. Oh, I do not think it was more than a week that he—

30 Q. I see. A. A couple of weeks, but I was nervous from the nervous strain; that was all.

Q. And that injury had entirely cleared up before this accident— A. Oh, yes.

Q. —occurred? A. That was 15 years ago.

Q. Yes. Were ex-rays taken at that time? A. No.

Louise Kuchler—cross

Q. Now, this shortening of your right leg, Mrs. Kuchler, did that exist prior to the accident at all? A. No.

Q. Your legs were apparently the same length at that time? A. Yes.

Q. To what extent is your right leg shorter than the left, so far as you can observe, of course?

A. Well, I would think about an inch or an inch and a half.

Q. Do you wear a special shoe? A. No. 10

Q. And you are wearing normal shoes? A. Yes.

Q. The standard shoe? A. Yes.

Q. That a woman wears. Do you then notice any difference? A. Why, yes. I cannot—I have to walk lame.

Q. I see. Doesn't the heel of the shoe compensate for the shortage? A. Well, it doesn't exactly, that I could walk straight, you know; I have to—it makes me limp in walking. 20

Q. Did you have any injury to your leg, directly to your leg? A. No.

Q. The only injury you had as a result of this fall was that at the base of the spine, wasn't it?

A. That is right.

Q. Now, as I understand it, you left this house on Myrtle Avenue at about quarter of six? A. Yes.

Q. And you did not live on that side of the tracks, did you? A. No.

Q. You lived on the other side of the tracks? 30
A. On the other side.

Q. When you went up to that house about noon time, you say, about one-thirty— A. Yes, about one-thirty.

Q. —did you pass over the tracks at River

Louise Kuchler—cross

Edge, or near River Edge station? A. Yes, I crossed the tracks.

Q. You went over Bridge Street, didn't you? A. Yes.

Q. And did you at that time go through the park? A. No.

Q. Then going up Bridge Street, did you turn at Main, or Park Avenue it is called now, isn't it? A. Yes.

10 Q. Did you turn up Park Avenue? A. No.

Q. You continued right on up Bridge Street? A. Yes.

Q. To what street? A. To Kinderkamack Road.

Q. To Kinderkamack Road? A. Yes.

Q. And then over Kinderkamack Road and finally into Myrtle Avenue? A. Yes.

Q. Now, coming back, you got into Kinderkamack Road, the same way? A. Yes.

20 Q. But turned off Kinderkamack Road at Lincoln Avenue? A. Lincoln Avenue.

Q. Instead of continuing to Bridge? A. Yes.

Q. Did you have special reason for doing that, Mrs. Kuchler? A. No. Only it was shorter to get to the station; that was all.

Q. Then down Lincoln Avenue to Park Avenue? A. Yes.

Q. Or Main Street? A. Yes.

Q. And over that to one of the pathways in the park? A. Yes.

30 Q. And then through the park? A. Yes.

Q. Now, you say when you got to the head of this flight of steps, you then saw the condition— A. Yes.

Q. —that was there? You actually observed,

Louise Kuchler—cross

did you, that there was snow upon the steps? A. Yes.

Q. And that that snow extended over the entire step? A. Yes.

Q. Except that narrow pathway? A. Yes.

Q. Where persons had trodden it down? A. Yes.

Q. That, however, was not clean, was it? A. No.

Q. And did you observe closely, Mrs. Kuchler, 10 as to whether it was snow upon the steps or just ice? A. Well, I think it was both.

Q. You think it was both? A. Yes, because the—there was deep snow.

Q. Are you prepared positively to say, Mrs. Kuchler, that there was snow there as well as ice? A. Yes, I think I can.

Q. You would say so? A. Yes.

Q. And to that extent all the way down the steps? A. Yes. 20

Q. And clean across from side to side? A. Yes.

Q. Now, did you see this person coming up the steps before you started to descend? A. No.

Q. As soon as you saw him—was it a he or a her? A. Well, that I couldn't tell you.

Q. You do not know? A. I do not know.

Q. As soon as you saw that person, you immediately undertook to step over? A. Yes, so that he could pass, or her pass, whatever it was. 30

Q. You then stepped into the portion of the stairway— A. Yes.

Q. —which was in much worse condition than that upon which you had undertaken to descend? A. Yes.

Q. Now, will you describe, Mrs. Kuchler, as

best you can, the condition of the stairway to the side of this trodden pathway as to whether it was filled up more or less like a toboggan slide, the snow being piled in up to the steps, or whether there was just a little collection upon it? A. Well, the way it looked to me, as if the whole—it was a pile up from side to side; that is the way it looked like.

10 Q. More or less like a toboggan slide? A. Yes. And I was going to pick the way down, because, as I say, the train was coming, and I thought I would get down where everybody else had trodden down.

Q. And this whole pile you have referred to, to the side of the trodden pathway— A. Yes.

Q. —was covered with ice? A. It was.

Q. Now, the trodden pathway itself, just about how wide was that? A. Well, just so that a person could walk down.

20 Q. Well, now— A. I do not think it—

Q. —can you give us, as nearly as you can, the width of it? A. Oh, it was just a small—

Q. You are indicating now about ten inches, aren't you? A. Yes; hardly a foot.

Q. About ten inches; barely enough to put one foot on it? A. Yes.

Q. Is that correct? A. Yes.

Q. Could you stand there with your two feet? A. I do not believe you could.

30 Q. You do not think you could? A. No, I do not think you could.

Q. And how far was that from the extreme left hand side of the stairway, that trodden pathway? A. Well, it was over the—towards the railing.

Q. Was it near enough so that one could hold onto the railing? A. Yes.

Q. And you had been holding onto the railing? A. I was holding onto the railing as I was going down.

Q. And you say that that was slippery too? A. Yes.

Q. And were holding the railing as you were helping yourself down? A. Yes.

Q. But when you stepped off to the side, you 10 let go of the railing? A. Yes, I had to.

Q. You had to in order to get over to the side, didn't you? A. Yes.

Q. So that this pathway wasn't immediately next to the railing; there was a slight space— A. Yes, sure.

Q. —from the left side of the steps to the pathway? A. Yes.

Q. And then the additional space? A. Yes.

Q. To the right side? A. Yes. 20

Q. Now, how wide would you say that stairway is? A. Well, I should think five or six feet.

Q. Five to six feet? A. Yes.

Q. You couldn't, from the trodden pathway in which you undertook to descend— A. Yes.

Q. You couldn't reach the railing— A. No.

Q. —on the right? A. No.

Q. How many steps would you have had to take before you did get ahold of that railing on the right? A. Well, I guess I—

Q. As nearly as you can. A. I guess I would 30 have had to have taken two or three, anyway.

Q. Two or three. Now, as I understand it, were you on your way home? In other words, you were going to make a stop and pick up your husband who comes in on the six-twenty-two?

A. Yes; on that train.

Q. And then go on to your home with your husband? A. Yes.

Q. That was your purpose going down there? A. Yes.

Q. Did your husband know you were coming, or were you going to surprise him? A. Yes. He knew I was coming. I had told him in the morning.

10 Q. And you told him that you would meet him as he came in on the six-twenty-two? A. Yes.

Q. Did your husband, in fact, meet you, do you know? A. Well, he was on the train, but I wasn't there; so he went on home. He thought that I had gone on.

Q. He did not know that you were— A. No.

Q. —then at the— A. No.

Q. —bottom of the first flight of steps? A. No.

20 Q. So that, not seeing you immediately there— A. Yes.

Q. —he continued right home? A. Yes.

Q. And you got home sometime after he did? A. Yes. He just about got in the house when they brought me home.

Q. The shoes you were wearing at the time, Mrs. Kuchler, were those of the kind of shoe a woman calls "tie," or a man too calls a "tie," a pump? A. Yes.

30 Q. Or were they laced high shoes? A. No. They were ties.

Q. Ties? A. Yes.

Q. Well, what style were they? Were they the fashionable shoe? A. No.

Q. Or the comfortable shoe? A. The comfortable shoe.

Q. Married woman's shoe? A. That is true.

Q. What kind of a heel did they have, a big, broad heel, or was it the—well, the married woman's stylish heel? A. Yes. Oh, not no stylish heel; just a common sense heel.

Q. There is a distinction between the married woman's stylish heel and the flapper's stylish heel. Now, was it—just describe it, as nearly as you can. These ladies will know all about it. A. Well, it was a heel about that high (indicat- 10 ing).

Q. You are indicating now about— A. About an inch and a half.

Q. And was it a broad treading surface, or a narrow treading surface? A. Broad.

Q. How much of a treading surface, would you say? A. Well, just about like that, I guess (indicating).

Q. About the same as you indicated before? A. Yes; just about. 20

Q. About an inch and a quarter, or an inch and a half? A. Yes.

Q. They were not new shoes, were they? A. (Witness shakes head in the negative.)

The Court—The answer is "No." Do not shake your head, please.

The Witness—No. Pardon me.

Q. And you say, over your shoes, you were 30 wearing rubbers? A. I did.

Q. Were they the storm rubber, or the dressy rubber? A. The storm rubber.

Q. With just a heel to it, or without a heel to it? A. A storm rubber.

Q. A storm rubber. You, on your way up to

Louise Kuchler—cross

this place you were visiting, di not observe the condition of the steps at all? A. No, I did not.

Q. You did not know what condition they were in then? A. No.

Q. Do you remember that it snowed the day before? A. Well, I couldn't say exactly whether it snowed the day before, or it was two days before.

10 Q. Would you say whether or not it had snowed the night before? Of course, I do not want you to say unless you know. A. I do not think it did.

Q. You do not think so? A. No.

Q. Now, the day of the accident you went visiting, that was a fairly— A. Clear day.

Q. —warm day? A. Yes.

Q. It had been melting, hadn't it? A. Yes.

20 Q. And when you went up at one o'clock, did you observe the condition under foot as to whether it was slushy or wet? A. Well, it wasn't very slushy.

Q. It wasn't very slushy? A. No.

Q. But it was wet, wasn't it? A. Well, I cannot say that it was wet, no.

Q. Did you notice the pathways in the park as you went by as to whether water was running down those pathways? A. There was no water running.

Q. Then you did notice that, Mrs. Kuchler?

A. Not going up.

30 Q. You did not, going up? A. No. Because I couldn't see that.

Q. Coming down, it had gotten colder again?

A. Of course; then it was at night.

Q. Did you notice, Mrs. Kuchler, whether or not the stairway had the appearance of ashes

Louise Kuchler—cross

having been sprinkled upon it? A. I didn't see any ashes.

Q. You did not see any? A. No.

Q. Do you remember, Mrs. Kuchler, talking with Mr. Carmichael, who is a representative of the railroad company, discussing with him the accident itself? A. Do I remember speaking to him?

10 Q. Do you remember discussing with Mr. Carmichael—do you recall Mr. Carmichael at all, the gentleman here with the gray suit? (Man stands.)

A. Oh, I guess at the hospital.

Q. Yes. A. Yes.

Q. Do you remember discussing with him the facts of the accident at that time? A. Yes.

Q. Now, merely for the purpose of refreshing your recollection, Mrs. Kuchler,— A. Yes.

20 Q. This is two years ago, I realize. Do you remember saying to him, "I went west on Bridge Street in order to stop at my grocer's"? A. Yes.

Q. You were going to stop at the grocer's? A. Yes, I stopped at the grocer's.

Q. And was that before the accident occurred that you stopped at the grocer's? A. Yes.

Q. You had already stopped? A. Yes.

Q. And where was the grocer's? A. Right at the—well, on the corner of Park, it used to be Main Street, and Bridge.

Q. And Bridge? A. Yes.

30 Q. So that after you came down from your visit on Myrtle Avenue, you went along Main Street, or Park Avenue; is it Park Avenue or Park Street? A. I do not know. I only know it by Main Street; that is all.

Q. Main Street, to the corner of Bridge and

Louise Kuchler—redirect

Main, and made your purchases? A. No. I stopped at the grocer's before I went.

Q. Oh, I see. That was on your way up?

A. Yes. On my way up, going up Bridge Street.

Q. Not on your way down? A. No.

Q. Then you say, now referring to coming down, "I went west on Bridge Street, and this accident happened about six twenty-two P. M.; the weather was clear. It was about dusk. I noticed that ashes had been thrown on the steps. It appeared that after the ashes had been put on, the ice had melted, washed over the ashes, and then froze." Does that refresh your recollection at all, Mrs. Kuchler? A. No.

Q. You do not remember having said that? A. I do not remember saying that at all.

Q. And your memory now is you did not observe any such condition? A. I did not observe any ashes at all.

20

Mr. Selser—That is all, Mrs. Kuchler.

Redirect Examination by Mr. Freeman:

Q. Mrs. Kuchler, before the accident happened, did you sleep well? A. Did I sleep well?

Q. Yes. A. Yes.

Q. And how do you sleep since that time?

A. Well, some nights I do not sleep at all. Some nights, I—

30 Q. Have you ever had to take—

The Court—Well, didn't that ever happen before?

The Witness—What is that?

The Court—Weren't you troubled with sleeplessness before?

Louise Kuchler—redirect

The Witness—No.

The Court—You say some nights now you do not sleep at all?

The Witness—Yes.

The Court—And that was not true before the accident?

The Witness—No. No. I slept before the accident.

The Court—You slept well?

The Witness—Yes.

10

The Court—Always?

The Witness—Yes.

Q. Do you find it necessary to have any support for your back? A. Yes. I wear a belt.

Q. Do you wear that all the time? A. Yes.

Q. Do you recall whether this particular day it was a cold day or a warm day? A. Well, it wasn't—I cannot say it was a bitter cold day, only it wasn't a warm day either.

20

Q. The ice that you spoke of before on the steps, can you tell us whether that ice was flat on the steps, or was it rounding? A. Well, it looked to me as if it was rounding.

Q. Did you notice as you went up in the street whether the water was running down in the street or whether it wasn't? A. I did not take notice; I couldn't say.

Mr. Freeman—That is all.

Mr. Selser—That is all, Mrs. Kuchler.

30

John J. Matthews—direct

JOHN J. MATTHEWS, sworn as a witness on behalf of the Plaintiffs, testified as follows:

Direct Examination by Mr. Freeman:

Q. Mr. Matthews, what is your occupation?
A. Buyer.

Q. For whom? A. Western Electric Company.

10 Q. And do you recall the night of January 21st, 1925? A. On or about that time, yes.

Q. And do you recall ever seeing Mrs. Kuchler on that day? A. I do not recall the name or know anybody at that time.

Q. Do you recall seeing the lady who was on the stand here? A. Yes, I did.

Q. And just tell us when and where you saw her? A. I came off that train leaving New York at five-fifty-two, which is due at River Edge at
20 six twenty-two.

Q. Yes. A. And walking around the station—walking around the station to go up these steps which, at that time, was covered with what had been snow and been trodden and frozen, which had made it ice, I found Mrs. Kuchler lying on the steps.

Q. Yes. A. I passed her by and paid no attention, thinking it being a cold day, I thought there was—must be something the matter with her to be sitting or in a lying position on those
30 steps on such a day. I turned around and asked her if there was anything the matter, and she said yes, she had fallen and hurt herself.

Q. She had fallen and hurt herself? A. She had fallen and hurt herself, yes.

John J. Matthews—cross

Q. What did you do? A. I started to pick her up, and Mr. Jacobs came along; he and I took her down the steps as best we could and put her in an automobile, and that is about all I know.

Q. Did you have any difficulty getting her down the steps? A. Yes. We had quite a little difficulty. It was very slippery.

Q. And do you recall what kind of a day that had been? A. Why, it was clear and cold, not
10 very cold; I imagine it would be somewhere a temperature of somewhere around twenty-eight to thirty.

Q. And did it storm that day? A. No.

Q. Were you in the custom, in the habit, of going up and down these steps? A. Yes.

Mr. Freeman—That is all.

Cross Examination by Mr. Selser:

Q. Mr. Matthews, where had you been all day?
A. Sir? 20

Q. Where had you been all day? A. Where had I been?

Q. Yes. A. In New York.

Q. So you do not know what the weather conditions were in Riverside, do you, except as comparing them with the conditions that you observed in New York? A. Except in the morning, and at night going home.

Q. Were you in New York downtown? A. 30
Downtown.

Q. Had the snow been removed from the streets there? A. Yes. Partly removed.

Q. So you did not observe it was warm enough for snow to melt, did you? A. Well, it

John J. Matthews—cross

wasn't warm enough for it to melt; there is no question about that.

Q. It wasn't warm enough for it to melt?

A. No.

Q. How do you know? A. How do I know?

Q. Did you look at a thermometer? A. No. But you can tell pretty easily.

Q. You guess that the temperature was between twenty-eight and thirty? A. Somewhere
10 around there.

Q. Yet you did not look at a thermometer?

A. (The witness shakes head in the negative.)

Q. What is your business? A. Buyer.

Q. Of what? A. Western Electric Company.

Q. What do you buy? A. Hardware, tools, railroad supplies.

Q. You are not associated with the Weather Department, are you? A. No.

Q. Not particularly skilled, do you think—
20 Sir?

Q. Are you particularly skilled, do you say, in estimating temperature? A. Not at all.

Q. Now, had you come down the steps that morning? A. Yes, sir.

Q. Were they in the same condition at night as they had been in the morning? A. They were worse at night than they were in the morning, as I recall it.

Q. Icier? A. There was soft snow there in the morning, as I recall it, and that had been
30 trodden and frozen at night.

Q. You mean fresh snow? A. Well, it had fallen, I presume, possibly the day before, or two days before. I cannot—I do not recall now.

Q. But the snow that you observed as you came down that morning had not been trodden?
A. Not to any extent, no.

John J. Matthews—redirect

Q. Was it crushed with ice, or was it soft snow? A. It was soft at that time.

Q. Soft snow. Then, in the evening, when you came up, it was— A. Trodden.

Q. —trodden, and icy? A. And icy.

Mr. Selser—That is all.

By the Court:

10

Q. How much of a fall of snow would you say there was on those steps in the morning when you went down? A. I presume approximately three inches.

Q. About three inches? A. About three or four inches.

Q. And that would bring it up to the level of the top of the step, wouldn't it? A. Pretty close to it; yes, sir.

Q. Not entirely? A. Not entirely, no. 20

Q. You could see the steps? A. Oh yes.

Q. And you went down them? A. Yes.

Q. The tracks were then lower than the street, the tracks were depressed at that point? A. Yes.

Q. You went down the steps to get to the track? A. Yes.

Q. And up the steps to get out of the station? A. Surely.

Q. All right.

30

Redirect Examination by Mr. Freeman:

Q. Did you observe any ashes or sand upon the steps?

The Court—When?

Mr. Freeman—On the night the accident happened.

Frank Kuchler—direct

A. Not that I recall, no.

Mr. Freeman—That is all.

Mr. Selser—That is all.

FRANK KUCHLER, sworn as a witness on behalf of the Plaintiffs, testified as follows:

10 Direct Examination by Mr. Freeman:

Q. Mr. Kuchler, you are one of the plaintiffs in this suit? A. Yes, sir.

Q. And your wife is Louise Kuchler that was before on the stand? A. Yes, sir.

Q. And do you recall this night of January the 21st, 1925? A. Yes, sir.

Q. And where were you on that evening? A. Well, I was—I come up on that six twenty-two
20 train to meet my wife, because she told me when she was going in the morning.

Q. Speak up louder. A. She told me when she was going in the morning. When she left, she told me she would meet me on that train coming in.

Q. Did you look for her? A. I did.

Q. Did you see her? A. No.

Q. What did you do? A. I went straight home.

Q. And when you got home, what did you do?
30 A. Well, when I got home, I—the boy says to me, he says, “Mother home yet?” I says, “No, I didn’t see anything of her.” I says, “I waited down there, and I didn’t see nothing of her.” So it wasn’t any more than—I didn’t have my hat and coat off yet, when a car drove up, and Mr. Jacobs

Frank Kuchler—direct

said, “Your wife is outside here.” And I says, “Why, what happened?”

Mr. Selser—Not your conversation. Just what you did.

The Court—Do not tell us conversations.

A. (Continuing) Well, a car drove up there with my wife in it, and she was hurt pretty
10 badly.

Q. Did they bring her in? A. They carried her into the house.

Q. Did you send for a doctor? A. Mr. Jacobs, I believe, got the doctor. He says, “I will get the doctor, and you wait down here.”

Q. And did the doctor come? A. He did.

Q. What did he do? A. Well, I believe he tried to set the spine; that is what I—

Mr. Selser—I object to what you believe,
20 and ask it be stricken out.

The Court—Strike it out.

Mr. Selser—Are you going to have him here?

Mr. Freeman—The doctor will be here.

Q. How long was she at home? A. Well, I think she was home about five weeks.

Q. And where did she go after she left home?
A. She went to the hospital.

Q. And how long was she in the hospital?
30 A. I think she was there six weeks.

Q. And after that, what did she do? A. Well, she—got out of the bed the best she could; she was—of course, she laid in the bed, I think, about a week or more after she come home, and then she

Frank Kuchler—direct

managed to get out and tried to struggle along the best she could.

The Court—Tried to what?

The Witness—Tried to get along the best she could.

10 Q. During the time she was in the hospital, or while she was in bed, did you have anyone in the house? A. I did.

Q. Who? A. Miss Faley.

Q. And after she came home from the hospital, what did she do? A. After my wife come home from the hospital?

Q. Yes. A. I brought her home in the ambulance, and put her back to bed again.

Q. And how long was she at home? A. Before she got out of the bed, that is?

20 The Court—No. How long was she at home after she came home from the hospital?

The Witness—Well, she went away on the following—I do not know; in April sometime, she went to Michigan; I do not know just exactly.

Q. How long did she stay there? A. She was there about two months.

30 Q. And then where did she go? A. Well, then she come home.

Q. Before the accident happened, do you know what the state of her health was? A. All right.

Q. And did she do any work? A. She done all the work.

Frank Kuchler—direct

Q. Since the accident happened, what is the state of her health? A. Poor, very poor.

Q. In what manner? A. Well, at times she has paralytic spells on the one side. She is probably laid up for—oh, maybe a couple of days before she gets out again. We have to send for the doctor.

Q. And have you noticed at any time since the accident any effect on her mentality, any mental effect? A. Yes, I do, at times. 10

Q. When? A. At times she goes out of her mind.

Q. When? When did she do that? A. Well, she had a spell about a month ago, I believe.

Q. And when was the first time you noticed that? A. Well, the first time was—I cannot exactly recall; it might be two or three months before that.

Q. Do you know what the occasion was that caused her to go out of her mind? 20

Mr. Selser—I object to that. You mean something that he observed? I suppose it is all right. Let it go.

Q. Do you know? A. Why, I said she went out of her mind.

Q. Do you know what caused it? A. Well, it must have been through the accident. I do not know what else. She never had them before. 30

Q. Did she have any excitement about that time? A. Well, she did one time, and—

Q. Well, if you do not know, why, all right. A. I cannot just recall.

Q. Have you had any expenses as a result of this accident? A. Lots of them.

Frank Kuchler—direct

Q. Can you tell us what you have spent? A. Well, I can name over the—probably the items. I guess I am not—

Q. I show you these papers and ask you what they are? A. (Referring) They are hospital bills, yes.

Mr. Freeman—Any objection to offering those in evidence?

10

Mr. Selser—No.

Q. What are the amounts? A. Well, I do not know them.

Q. What are the amounts of the hospital bills? A. About \$150 for the hospital.

Mr. Selser—You can read them off; there is no objection.

20

A. (Continuing) Well, this one is one hundred and six; this one is twenty-five; this one is twenty-eight.

Mr. Freeman—I will offer those in evidence.

The Court—Let them be received and marked.

(Bills marked Exhibits P-2, P-3 and P-4 in evidence.)

Mr. Selser—No objection to this going in evidence.

30

The Court—Let it be received and marked.

Mr. Freeman—Doctor Conrad's bill.

The Court—How much?

Mr. Freeman—\$200.

Mr. Selser—It has not been paid, has it?

Mr. Freeman—I do not know.

Frank Kuchler—direct

The Court—Has it been paid, Doctor Conrad's bill?

The Witness—I did not pay the amount yet, no.

(Bill marked Exhibit P-5 in evidence.)

Q. Do you know the amount of Doctor King's bill? A. \$349, I think.

Q. And have you received a bill from the house-keeper? A. I did. 10

Q. What was the amount? A. \$250.

Q. \$250. A. Yes.

Mr. Freeman—I offer that.

(Bill marked Exhibit P-6 in evidence.)

Q. Have you had any other expenses? A. Well, I had the trip to Michigan, yes.

Q. How much was that? A. In the neighborhood of about two hundred and some odd dollars, I believe. 20

Mr. Selser—Did you go?

The Witness—No, I did not.

Q. You paid her expenses? A. I did.

Q. Have you had any other expenses? A. Well, a belt.

Q. How much was that? A. Oh, around \$25., I believe. 30

Q. Have you had any other expense? A. Yes.

Q. What? A. A woman coming in there cleaning; a woman to come in there and clean once a week.

Frank Kuchler—direct

Q. How much have you paid for that? A. In the neighborhood of about \$450, I think.

Q. And have you had any other expense? A. Well, the time that I lost.

Q. How much time did you lose?

Mr. Selser—I object to that.

10 Mr. Freeman—That is proper, your Honor, whatever time he had to stay home and help take care of her.

A. I stayed home one full week before I could get anybody to take care of her. I took care of her myself. I couldn't get anyone right away.

The Court—He said he stayed home one full week before he could get anyone to take care of her.

20

A. (Continuing) At other times—

The Court—Just a moment, please.

Mr. Freeman—I think that is proper.

The Court—I will allow it.

A. (Continuing) And so there was other time I did lose.

Q. How much did you lose by staying home that week? A. About \$45.

30

Q. Have you had any other expenses? A. I got the doctors and the hospital.

Q. That is all you remember? A. Well, I guess that is all.

Q. Did you see the stairs, these steps, on which your wife fell about that time?

Frank Kuchler—direct

Mr. Selser—I object to that.

Q. Did you see them that night? A. I did.

Q. And how did you happen to see them? A. How did I happen to see them?

Q. Yes. A. I had to go over to the druggist's, and on the way over I stopped and looked at the stairs.

Q. Waht was the condition of them? A. Well, 10 full of ice and snow.

Q. Any ashes on them? A. No.

Q. Any sand or other materials— A. No.

Q. —to— What kind of a day was that? A. It was a clear day.

Q. Had it stormed that day? A. No, it didn't.

Q. Have you, since the accident, heard her express any pain?

Mr. Selser—I object to that.

20

A. Well,—

Mr. Selser—It is perfectly obvious she has the pain, but why carry it on any further with this man's testimony? It wouldn't make any difference whether she expressed evidence of pain.

The Court—You can have him tell what he observed, but not what she told him. She 30 has already told us.

Mr. Freeman—Well, I will withdraw that.

Mr. Selser—I do not contend for a moment she is not having pain; I know she is.

Mr. Freeman—Cross-examine.

Frank Kuchler—cross

Cross Examination by Mr. Selser:

Q. Mr. Kuchler, where do you work, in New York? A. I work over in Brooklyn.

Q. Where? A. In Brooklyn.

Q. Did you work in Brooklyn then at the time of this accident? A. No. I worked in New York.

Q. Where did you work in New York? A. For the Waterman pen people, Waterman fountain pens.

10 Q. On Broadway, the Broadway store? A. No. I worked down at the factory in Fletcher Street.

Q. How much a week did you make? A. I averaged about \$45. a week.

Q. Time work or piece work? A. No, piece work.

Q. You were on the six twenty-two train that day, weren't you? A. What is that?

20 Q. You were on the six twenty-two train that day, weren't you? A. Yes, sir.

Q. What side of the train did you get off, the right or the left side? A. Well, let me see. I got off the right side.

Q. The right side? A. Yes.

Q. And that was the side away from Main Street? A. Yes; the post office.

Q. The side nearest to the Hackensack River? A. Yes.

Q. Wasn't it? A. Yes.

30 Q. Now, when you got off, did you wait for the train to pull out? A. Well, that night I got off on the other side; my wife was going to meet me.

Q. You got off, then, on the left side? A. Yes.

Q. And that would be the side nearest to Main Street? A. Yes.

Q. And did you wait for the train to pull away?

Frank Kuchler—cross

A. I did; waited there for a little while; I didn't see my wife, and I went right on home.

Q. How long did you wait there? A. What, after the train pulled out?

Q. Yes. A. Not very long.

Q. Well,— A. Just—

Q. —that doesn't mean anything, Mr. Kuchler. I know it is not possible for you to tell the minutes, of course. A. Probably a few minutes; we will say a minute or so; I looked around, all around. I didn't see anybody. 10

Q. You looked around and, not seeing her, you then walked home? A. I then walked home; yes, sir.

Q. Now, you have spoken of the conditions exhibited by Mrs. Kuchler to suggest that she is losing her mind, did you? A. Well, I tell you. I hope she ain't.

Q. Will you suggest that she is? A. But probably the Doctor could tell you better. 20

Q. Yes. A. Because I can't.

Q. I am not asking you to talk upon the medical features— A. No.

Q. —of the case at all. A. But he told me that he wouldn't want—

Q. No. Not what he told you. I am asking you as to your opinion? A. If I think that she will lose her mind?

Q. Do you think that she will? A. Well, at times, she does go out of her mind. 30

Q. I see. A. Yes, sir. She don't know anything for two or three days. She don't even know that the doctor has been there. Do you want me to tell you—

Fred Blankenhorn—direct

Q. Do you suggest that she raves? A. Yes, sir.

Q. She does actually rave? A. Yes, sir. I would like to tell you one of the spells that she had, if you would like to hear about it.

Q. No, you needn't tell us about it, Mr. Kuchler.

Mr. Selser—That is all.

10

A. All right.
(Witness excused).

FRED BLANKENHORN, sworn as a witness on behalf of the Plaintiffs, testified as follows:

Direct Examination by Mr. Freeman:

20

Q. Mr. Blankenhorn, do you remember the night of January 21st, 1925? A. Yes.

Q. And where were you that evening? A. I was sleigh riding on Lincoln Avenue.

Q. And do you remember anything particular that happened? A. Yes, going up to the fire house, and the janitor asked me to take some ashes down and put on the stairs.

Q. And what did you do? A. Well, I took the sleigh and went down there; it was all snow and ice on the stairs.

30

Q. And what did you do? A. Took ashes down and put them on the stairs.

Q. What was the condition of the stairs before you put the ashes on? A. Full of snow and ice.

Q. Do you remember what kind of a day it was? A. It was clear, cold.

Fred Blankenhorn—cross

Q. Had it stormed that day? A. No.

Mr. Freeman—That is all.

Cross Examination by Mr. Selser:

Q. Do you know when it did storm prior to that day? A. No.

Q. Did it storm the night before? A. I do not think so. 10

Q. You do not think so? A. No.

Q. Did it storm the day before? A. I am not sure.

Q. You are not sure at all? A. No.

Q. Now, who told you to take the ashes down?

A. The janitor.

Q. The janitor of the fire house? A. Yes.

Q. Of the city hall, the borough hall? A. Yes.

Q. And were you working for the borough? A. I used to go up and help him once in a while. 20

Q. You used to help the janitor? A. Yes.

Q. Had you ever put ashes on the stairs before? A. No.

Q. So that, at the request of the janitor of the borough hall— where is the borough hall, by the way? A. On Kinderkamack Road.

Q. And that is about how far away from the steps, the park? A. A little over a block.

Q. A little over a block. Kinderkamack Road runs the same direction as the tracks, doesn't it? 30
A. Yes.

Q. And it is the next block further away from Main Street? In other words, it is going up here from the tracks, up Main Street, you first come to Bridge Street, and then Kinderkamack Road? A. Yes.

Fred Blankenhorn—cross

Q. And at the request of that janitor, you came down with the ashes, sprinkled them on the steps, and then you went back with the can? A. Well, a lot of people asked him to take them down.

Q. Were you there when Mr. Chapman, the Borough Clerk, came? A. No.

Q. You were not? A. No.

Q. Do you know whether or not he did come?

10 A. I could not say.

Q. You do not know. These steps, when you got down there with the ashes, were icy, weren't they?

A. Yes, sir.

Q. A hard crust of ice there? A. Yes, sir.

Mr. Selser—That is all.

By the Court:

20 Q. Where are the steps? A. Right off Main Street, back of the station.

Q. At the station, eh? A. Yes.

Q. All right. Leading to the park? A. Yes.

Q. Was there any snow on the steps? A. Well, it was all trampled down and froze.

Q. Any loose, soft snow? A. A little.

Q. Whereabouts? What part of the steps? A. The lefthand side.

Q. Going up or going down? A. Going down.

30 Q. The left-hand side going down? A. Yes, sir. Most of the people used the right hand side, so that was trampled down most.

Q. That right hand side going down was trampled on the most? A. Yes, sir.

Q. Are you sure? A. Positively.

Q. All right.

Chester A. King—direct

By Mr. Selser:

Q. These steps, son,— I call you son— were in the park, weren't they? A. Yes, sir.

Q. Yes.

Mr. Selser—That is all.

Mr. Freeman—That is all.

By the Court:

Q. How old are you, Mr. Blankenhorn? A. Six-
10 teen.

Q. Sixteen? A. Yes, sir.

Q. How old were you when you put the ashes on the steps? A. Fourteen.

Q. All right.

CHESTER A. KING, sworn as a witness on behalf of the Plaintiffs, testified as follows: 20

Direct Examination by Mr. Freeman:

Q. Doctor King, are you a physician licensed in the State of New Jersey? A. I am.

Q. And how long have you been a doctor? A. Twenty years.

Q. Do you know the plaintiff, Mrs. Kuchler? A. I do.

Q. Have you ever had occasion to treat her? A. I have. 30

Q. Did you have occasion to treat her in the month of January, 1925? A. I did, yes.

Q. Will you tell us just what you did, and what the occasion was? A. I was called to see Mrs. Kuchler on the evening of January 21st.

Chester A. King—direct

By the Court:

Q. What are you referring to, Doctor? A. I am referring to a card which is my office record.

Q. And made when? A. And made at the—that is, each day, I would check these off.

Mr. Selser—I have no objection to the use of the card. I know Doctor King.

10 The Court—To refresh your recollection only.

Mr. Selser—And I have no objection to anything he may say.

The Witness—Thank you. I was called to see Mrs. Kuchler on the evening of January 21st, shortly after six o'clock. I saw her at her home, and she had sustained an injury to the lower end of her spine. On examination, I found that the coccyx had been fractured.

Q. The coccyx is the end of the— what is left of our tails, isn't it? A. That is it, sir.

Q. Is it? A. That is it, yes. I found that the coccyx had been fractured, and I attempted to replace it, and I gave Mrs. Kuchler medicine to relieve the pain, and left her.

By Mr. Freeman:

30 Q. When did you— A. I saw her—

Q. Go on, proceed. A. I saw her daily for several days, and then intermittently covering a period up to the 20th of February, and during—

Q. What did you do then? A. And during which time she had apparently been suffering pain.

Chester A. King—direct

Inasmuch as she was not progressing as I thought she ought, I took her to the Hackensack Hospital, and Dr. Conrad operated on the 20th of February, 1925. I assisted him. He removed the coccyx, and I made the subsequent dressings, treating her daily up to the 5th of March, missed the sixth, and then practically every day until the 10th of April. Then I have seen her intermittently following that up until the 8th of June. That was in 1925.

10 Q. What condition did you find this coccyx in at the time you removed it? A. It had been fractured, that is, it had been broken from the sacrum to which it is normally attached, and was bent in at right angles to the sacrum; normally it should be in the same line, but it was bent in at right angles.

Q. Did you get it all out in one piece? A. No. It broke up into several pieces in taking it out.

Q. Will you tell us what her present condition is? A. She is highly nervous and seems to suffer a great deal of pain at times.

Q. Have you noticed any physical disability? A. Yes. She— she apparently is not able to get her heels to the floor. There is some contracture of the muscles of the leg.

Q. And have you noticed any other physical disability? A. Why, yes. She has— she has sustained evidently a partial dislocation of the sacroiliac joint resulting in a condition which causes her left leg to be apparently shorter than the other.

Q. Have you noticed or heard that she complains of any disability about her arms or shoulders? A. Well, she has had some pain, some neuritic pains.

Q. Have you noticed at any time since the accident any mental effect? A. Yes. At times, she

Chester A. King—direct

has been highly nervous and over-wrought, and once or twice I recall seeing her when she was unconscious, apparently from an over-wrought nervous condition.

Q. Would you say that was the result of this accident? A. Yes. I think it is.

Q. And when was the first time on which you found her in this mental condition?

10

Mr. Selser—In this unconscious condition?

Mr. Freeman—This unconscious condition.

Mr. Selser—Lack of mental condition.

A. Well, I do not recall, other than the 29th of February, 1926.

Q. Yes. Now, what state was she in at that time? A. Why, she was— she was totally unconscious; she did not respond to any stimulus.

20

Q. Did you see her on that date? A. I saw her twice on that day.

Q. Where was she when you went to see her?

A. She was at the home of a neighbor, Mrs. Frisch.

Q. And did she know you? A. She did not know me at all.

Q. What did you do with her? A. What?

Q. What did you do with her? A. I tried stimulation, and then we took her to her home, and put her to bed.

30

Q. Could she walk home? A. No. We carried her over there in a chair.

Q. And how long did she remain that way? A. All that day, the entire day. I saw her in the evening, and she was still— well, she was then rather semiconscious, and the next morning she was grad-

Chester A. King—direct

ually clearing up, and it went on for two or three days, and gradually cleared up.

Q. Did she talk? A. She did not talk the first time I saw her on that day, this is, on the 29th of October. Toward evening, I could get a word or two out of her, as I recall, and the next day, a little bit more.

Q. Will the present physical condition, from your experience as a medical doctor, will you say that her present physical condition will improve as time goes on? A. I think she has improved as far as she probably will. 10

By the Court:

Q. Well, what was the matter with her this day in October that you describe? A. She was evidently in a hystero-epileptic condition.

By Mr. Freeman: 20

Q. Do you know what brought that on? A. Only from what I have been told.

Q. What is that?

Mr. Selser—Do you mean relating to this accident, Doctor?

The Witness—I believe that the lawyers had been there talking with her, and this—

Mr. Selser—I see.

The Witness—was a nervous reaction to the conversation.

Mr. Selser—I see.

Q. Do you know what lawyers? A. No, I do

Chester A. King—direct

not. She said the lawyers from the railroad had been there.

Mr. Selser—The lawyers from the railroad. When was that, Doctor?

The Witness—That was the 29th of October.

10 Mr. Freeman—She received good treatment on that day. I will say that for the railroad. She was very well treated.

By the Court:

Q. Then you think it was due to the excitement caused by the examination the lawyers gave her that day? A. Yes, I do.

Q. Is she having a fit now? A. Well, she is lying downstairs there, apparently all in. She is relaxed, and—

20 Q. No epilepsy? A. No epilepsy, no.

Q. All right. A. Just too exhausted to go any further.

Q. All right. Did you give her a little stimulus? A. Yes. The best we could get.

By Mr. Freeman:

Q. Have you rendered your bill for services up to this time, Doctor? A. I have rendered my bill up to the first of January.

30 Q. And what is the amount of that bill? A. \$349.

Q. In your opinion, will it be necessary for her to have any doctors' bills or doctors' services, medical treatment, in the future as a result of this accident? A. I think that she will need medical attention from time to time.

Chester A. King—direct

Q. Have you heard her express any numbness or paralysis of any portion of her body?

Mr. Selser—I object to it. What she may have expressed certainly is not evidential.

The Court—The doctor has told everything that he could think of with respect to her condition, but has not said anything about paralysis.

10 Mr. Selser—No. I particularly noted that.

The Court—And so did I. And this is objectionable for two reasons: It is leading, in the first place.

Mr. Selser—Yes, sir. And, in the second place, it does not make any difference what she may have said.

The Court—That is quite correct.

Mr. Freeman—I will withdraw the question.

20 The Court—It is not a part of the history, you know.

Mr. Freeman—Yes, sir.

The Court—I do not think it is quite a part of the history.

Mr. Freeman—I withdraw the question.

The Court—All right.

Q. Just after the operation, you treated her in the hospital, did you not? A. Yes.

Q. And what hospital was that? A. Hackensack Hospital.

Q. Have you any connection with the hospital? A. I have.

Q. What connection? A. I am a member of the staff, and also a member of the Medical Board.

Q. Do you know how much Doctor Conrad charged?

Mr. Selser—I admit that Doctor Conrad's bill is reasonable for the operation, \$200. He is a good surgeon, and certainly worth \$200.

Mr. Freeman—That is all.

10 Cross Examination by Mr. Selser:

Q. Doctor King, are you sufficiently trained in that specialized part of medicine having to do with brain conditions to say whether or not Mrs. Kuchler is bordering on insanity? A. No. I would not say so.

Q. You would say not? A. I have never thought that she was.

Q. No. She has not developed a disease in the spine known sometimes as Pott's disease, or tubercular spine, has she? A. She has not.

Q. That has been entirely prevented? A. Yes.

Q. This partial dislocation of the sacroiliac joint, is that improved? A. Well, the condition has been relieved by a belt—

Q. Yes. A. —which supports the joint.

Q. When her back was opened, Doctor, and the coccyx was being removed, did you at that time inspect the sacroiliac joint? A. No. We were working below that.

30 Q. You were working below it? A. Yes, sir.

Q. So that you did not examine that at all? A. Only externally. We wouldn't have cut into that anyhow; there was no occasion for any operation.

Q. Did you at that time determine that there was a partial dislocation of the sacroiliac, or has that

been a later development? A. That is a later condition.

Q. That may have developed since this accident, may it not? A. I do not think it has developed since the accident. I think the condition has been there, but the symptoms simply became obvious later on. On account of her injury, we had interpreted her pains as coming from the coccyx.

Q. I see. A. And when that condition had been cleared up and eliminated, then we had to look further, and located this sacroiliac condition. 10

Q. She is not cured of the sacroiliac condition? A. She is not cured of it, no.

Q. There is a cure, isn't there? A. I do not believe so; those things are liable to recur.

Q. It is true they are liable to recur. I may break my leg, and I am liable to break it again if I have another accident; but assuming that treatment is given to the sacroiliac region, cannot the dislocation be reduced entirely? A. It can be reduced, but there is— it is uncertain, it is rather questionable whether it will remain so. As soon as weight is put on it, it may slip again. 20

Q. Anything is possible in medicine, isn't it? A. Anything is possible.

Q. Well, let us talk about probabilities. A. All right.

Q. We will confine ourselves to probabilities. In the realm of probability, couldn't this sacroiliac dislocation be reduced entirely? A. It may be reduced entirely, but that does not insure its staying reduced. 30

Q. In other words, I may be alive today, but it does not insure that I will be alive tomorrow, does it? A. Absolutely not.

Chester A. King—redirect

Q. Did you treat Mrs. Kuchler ten or twelve years ago when she had a former injury to her spine? A. I did, yes.

Q. What was the nature of that injury, Doctor King? A. That was a dislocation of the coccyx.

Q. And how did you determine that fact? Did you have ex-rays taken, or— A. No.

Q. —by external examination? A. By a physical examination.

Q. A dislocation of the coccyx? A. Yes.

Q. What treatment did you give her at that time? A. Why, I reduced the dislocation.

Q. Entirely? A. Yes.

Q. A coccyx dislocation can be reduced entirely? A. It can be reduced entirely.

Q. Successfully? No probabilities there that would slip out again, are there,— A. There are probabilities in everything.

Q. —as soon as the weight is put upon her? A. Well, that is not in the location where it would get such weight.

Q. It wouldn't.

Mr. Selser—I think that is all, Doctor.

Re-Direct Examination by Mr. Freeman:

Q. Doctor, did you consider, or do you know whether or not she was cured of the first dislocation? A. Yes. She was entirely cured of that condition.

Q. Did she suffer any physical or other bad effects from it? A. Following that injury, she was incapacitated for some time by a highly neurotic condition; she was, as I recall it, confined to her

Harry D. Coleman—direct

bed for sometime with the nervous condition, which gradually cleared up.

Q. And she became entirely well? A. Entirely well, as far as I know, yes.

Q. How long ago was that? A. I do not recall the date. I recall the incident, but I do not recall the date.

Mr. Freeman—That is all.

10

Re-Cross Examination by Mr. Selser:

Q. Mrs. Kuchler is what is recognized in the medical profession as more or less of a nervous person, isn't she? A. Yes. She has a neurotic temperament.

The Court—A neurotic temperament; is that right?

The Witness—Yes, sir.

20

Mr. Selser—That is all, Doctor.

HARRY D. COLEMAN, sworn as a witness on behalf of the Plaintiffs, testified as follows:

Direct Examination by Mr. Freeman:

Q. Mr. Coleman, where do you live? A. River Edge.

Q. Do you recall the night of January 21st, 1925? A. Yes, sir.

30

Q. Did you on that night see the steps in the rear of the station at River Edge? A. Not—in the evening.

Harry D. Coleman—direct

Q. About what time? A. Sometime between nine and half past nine.

Q. And what was the occasion for your seeing those steps? A. Well, someone came up to the borough hall, and said the stairs were all ice.

Mr. Selser—I object to that.

10 The Court—Objection sustained. Do not tell us what anyone said.

Q. What did you do? A. I went down to the steps to put ashes on them.

The Court—As a result of something that somebody told you?

The Witness—Yes, sir.

The Court—All right.

20 Q. Were there one or more complaints?

Mr. Selser—I object to that.

The Court—Objection sustained. What difference does it make? What materiality has it? He has not said there was any complaint yet, anyway.

Mr. Freeman—Well, the materiality is that, if the steps were in this condition for sometime, and there had been other complaints about them,—

30 The Court—You will find, probably, there were no complaints until it was discovered that a lady fell down, I assume, I do not know, and that all happened after the accident and, of course, if the woman fell down

Harry D. Coleman—cross

from the steps, every citizen in the place might have called up. It is absolutely immaterial.

Mr. Selser—Even assuming there were complaints, it is not evidential, it is hearsay, at the best.

Mr. Freeman—I will ask for an exception.

The Court—You may have an exception.

Mr. Freeman—That is all.

10

Cross Examination by Mr. Selser:

Q. What time did you go down and put ashes on? A. At about nine or half past nine, as near as I can remember.

Q. Did you put the ashes on yourself? A. With the aid of a boy.

The Court—What boy?

The Witness—Frederick Blankenhorn.

20

Q. Did you notice the condition of the steps when you got down there? A. They were covered with ice.

Q. All the way across? A. A little path on one side.

Q. Where was the path? A. What?

Q. Where was the path? A. I should judge on what you call the left hand side going down, or right hand side coming up.

30

Mr. Selser—That is all.

Mr. Freeman—That is all. That is the plaintiffs' case, your Honor.

The Court—That is your case?

Mr. Freeman—Yes, sir.

Motion for Non-suit

MOTION FOR NONSUIT

Mr. Selser—Your Honor please, I move for a nonsuit as to the Erie Railroad Company. Now, first, certainly, there is nothing in the case as against them at this time. As to the New Jersey & New York Railroad Company, and the Erie, if your Honor does not think we should have it for the first, merely because they have proved no negligence, on the ground that Mrs. Kuchler at the time of the accident was a mere licensee, assuming that there was any duty owing whatsoever with respect to the maintenance of the steps, assuming that it can be said that the New Jersey & New York Railroad Company had any relationship whatsoever with their maintenance.

I rely upon the case of Fleckenstein vs. Great Atlantic & Pacific Tea Company, 91 N. J. L. 145, decided by the Court of Errors & Appeals, 1917; Chancellor Walker wrote the opinion.

(Argument.)

Mr. Selser—Now, further than that, I have this motion, as urged before in my motion for a nonsuit. They have not proved a single thing against the railroad company as to its custom to maintain. Quite to the contrary, they have proved that the very town or borough of Riverside caused the ashes to be spread upon the steps after the accident occurred. There is not a thing whatsoever in the case to associate the railroad company with the accident. They have not offered the admission in evidence, but I assume they

Motion for Non-suit

intended to and we will consent to it, if they wish, that we were the owners of the property, but it was leased to the borough of Riverside, and the borough of Riverside actually were taking advantage of their right to occupancy by the fact that later that same evening, it is proved by the fact that later that same evening they went down and sprinkled the ashes on the dangerous condition which was just being called to their attention.

The Court—(Referring to paper) Mark that, Mr. Stenographer.

(Paper marked Exhibit P-7 in evidence,—stipulation.)

(Argument.)

Mr. Selser—Mrs. Kuchler was not an invitee; a mere licensee; the Erie Railroad Company having nothing whatever to do with it, on all the evidence of the case, I certainly cannot see any question at all for the jury, and I do move for a nonsuit on all those points.

(Further argument.)

The Court—The only doubt I have had in the case at all was with respect to the extent to which the Trautwein case goes. Now, after having heard your prima facie case, the duty being on you to prove the negligence by a prima facie case, and the duty of the defendants, I have no doubt at all in my mind that you have failed in the duty that devolves upon you, and I cannot believe that the Trautwein case could possibly be controlling in the situation that has been de-

Exhibits P-2, P-3, P-4

veloped here, and I therefore will grant the motion for a nonsuit.

Mr. Freeman—Your Honor will allow me an exception?

Mr. Selser—As to both defendants?

The Court—As to both defendants. You may have it.

10

EXHIBITS**EXHIBIT P-2**

Hackensack, N. J., March 30, 1925.

Mrs. Louise Kuehler.

To The Hackensack Hospital Association, Dr.
Bills payable weekly in advance.

March 26-31, For Room, 5 days, \$20.00. For Ambulance \$5.00. Total \$25.00.

Paid. Hackensack Hospital Association, Mary J. Stone Conklin, Supt. Per. M. E. K.

EXHIBIT P-3

Hackensack, N. J.

Mrs. Louise Kuchler.

To The Hackensack Hospital Association, Dr.
Bills payable weekly in advance.

March 19-26. For Room, \$28.00.

Paid. March 28, 1925. Hackensack Hospital Association, Mary J. Stone Conklin, Supt. Per. G. De F.

30

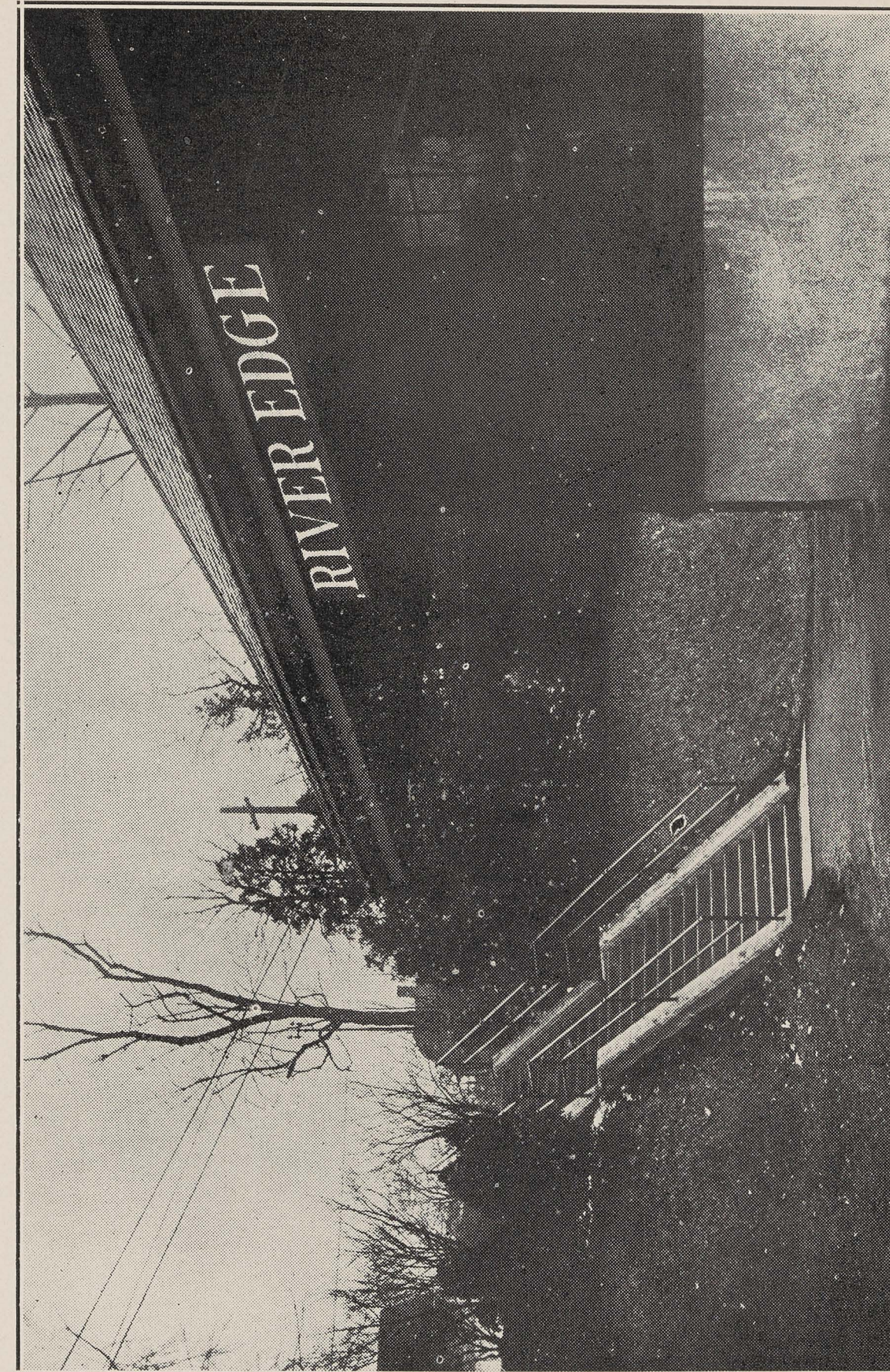
EXHIBIT P-4

Hackensack, N. J., March 12, 1925.

Mrs. Louise Kuchler.

To The Hackensack Hospital Association, Dr.
Bills payable weekly in advance.
Room 205.

EXHIBIT P-1



Exhibits P-5, P-6

February 19. For Room, to March 19, 4 weeks, \$112.00. For Operating Room, \$10.00. For Anesthetist, \$10.00. Feb. 20-24, For Laboratory Fees, \$4.00. For Telephone, Stamps, etc. \$.05. Feb. 20, Ambulance, \$5.00. Total \$141.05. Credit \$106.00. Feb. 23, By Cash, \$35.05.

Paid. March 15, 1925, Hackensack Hospital Association, Mary J. Stone Conklin, Supt. Per Lts.

10

EXHIBIT P-5

Hackensack, N. J., Dec. 2, 1925.

Mrs. Louise Kuchler,

Voorhis Ave., River Edge.

To E. K. Conrad, M. D. Dr.,

Hospital Avenue

For Professional Services to

Operating including assistance of Dr. King, \$200.

EXHIBIT P-6

20

Dec. 8, 1925.

Bill for taking care of Mrs. Kuchler, for 10 weeks, \$25.00 a week.

Jessie Boehly.

30

EXHIBIT P-7

NEW JERSEY SUPREME COURT
Bergen County

Louise Kuchler and
Frank Kuchler,

Plaintiffs,

vs.

10 New Jersey & New York Rail-
road Company, a corporation,
The Erie Railroad Company,
a corporation, Borough of
Riverside and Alvin Cooper,
Defendants.

Action at Law

ADMISSION

To: Messrs. Freeman & Freeman,
Attorneys of Plaintiff.

20 The New Jersey & New York Railroad Company,
in response to a Demand for Admission heretofore
served upon its attorneys does hereby admit that
it is the owner in fee of the land upon which the
steps mentioned in the complaint are located, sub-
ject, however, to an indenture of lease dated Sep-
tember 15, 1922, made by it to Borough of River-
side, a municipal corporation of the State of New
Jersey, and the covenants, terms and conditions
thereof.

30 Respectfully,
Hobart & Minard,
Attys. for N. J. & N. Y. R. R. Co.
Dated: September 20, 1926.

NEW JERSEY SUPREME COURT

New Jersey & New York Rail-
road Co., a corporation, The
Erie Railroad Co., a corpora-
tion and Alvin Cooper,

Defendants,

ads

Louise Kuchler and
Frank Kuchler,

Plaintiffs.

Action at Law
On Postea

10

JUDGMENT OF NON SUIT

It is ordered that judgment of non suit be and
hereby is entered in favor of defendants and against
the plaintiffs with costs to be taxed nisi.

Entered February 25, 1927.

On motion of

Hobart & Minard,
Attys. of Defts.

20

Costs \$

A true copy, Edward J. Kelleher, Clerk.

30

Judgment of Nonsuit

NEW JERSEY SUPREME COURT

On Postea

Louise Kuchler and
Frank Kuchler,

Plaintiffs,

vs.

New Jersey & New York Rail-
road Co., a corporation, The
Erie Railroad Co., a corpora-
tion and Alvin Cooper,
Defendants,

Action at Law

10

JUDGMENT OF NON SUIT

Hobart & Minard,
Attorneys.20 Judgment entered this twenty-fifth day of Feb-
ruary, A. D., nineteen hundred and twenty-seven in
favor of defendants and against the plaintiffs for
the sum of costs.

Costs \$

Wm. S. Gummere,
C. J.

A true copy, Edward J. Kelleher, Clerk.

30

Postea

NEW JERSEY SUPREME COURT

Bergen County

On Postea

Louise Kuchler and
Frank Kuchler,

Plaintiffs,

vs.

New Jersey & New York Rail-
road Co., a corporation, The
Erie Railroad Co., a corpora-
tion and Alvin Cooper,
Defendants,

Action at Law

10

POSTEA

20 This case was tried before Judge Newton H. Por-
ter with a jury at the Bergen Circuit on February
21, 1927. The defendant Alvin Cooper moved for
a nonsuit immediately after counsel for the plain-
tiffs opened the case to the jury, which motion was
granted. At the close of the plaintiffs' testimony
the defendants, New Jersey & New York Railroad
Company, a corporation, and the Erie Railroad Com-
pany, a corporation, moved for a non-suit, which
motion was granted,Newton H. Porter,
JudgeEntered this 25th day of February, 1927, on mo-
tion of30 Hobart & Minard,
Attorneys of Defendants,
New Jersey & New York
R. R. Co., Erie R. R. Co.,
and Alvin Cooper.

A true copy, Edward J. Kelleher, Clerk.

JUDGMENT FOR DEFENDANT
NEW JERSEY SUPREME COURT
BERGEN COUNTY

10 Louise Kuchler and
Frank Kuchler,
Plaintiffs,
vs.
New Jersey & New York Rail-
road Company, a corporation,
The Erie Railroad Company,
a corporation, Borough of
Riverside and Alvin Cooper,
Defendants.

JUDGMENT FOR DEFENDANT

20 Defendant moved to strike out the Complaint as
to both plaintiffs on the ground that it discloses
no cause of action; upon which motion arguments
of the plaintiffs and the defendant, the Borough of
Riverside, a municipal corporation, by their respec-
tive counsel, were duly heard, and the Court being
of opinion that the complaint discloses no cause of
action insofar as the same related to the Borough
of Riverside, ordered that the same be struck out.

30 Whereupon it is adjudged that the complaint of
the plaintiffs be struck out insofar as it relates to
the Borough of Riverside, a municipal corporation,
and that the defendant recover from the plaintiffs
its costs, which are taxed at \$

Judgment entered April 11, 1927.

Chas. W. Parker,
Justice.

New Jersey Court of Errors and Appeals

Louise Kuchler and Frank
Kuchler, her husand,
Plaintiffs-Appellants,
vs.
New Jersey and New York Rail-
road Co., a corporation, the
Erie Railroad Co., a corpora-
tion, Borough of Riverside
and Alvin Cooper,
Defendant-Appellees.

Action at Law
Plaintiffs' Appeal
from Supreme
Court

BRIEF FOR PLAINTIFF-APPELLANTS.

After night fall on January 21, 1925, Louise Kuch-
ler, while descending a flight of stairs, covered with
snow and ice, on land owned by defendant, New
Jersey and New York Railroad Co., but leased by it
to the Borough of Riverside, Bergen County, fell
and sustained injuries both serious and permanent.
In this suit, in which her husband joined, to recover
for her and his resultant damages, their complaint
(Case, pages 3-10) was struck out, on motion, as to
defendant, Borough of Riverside, on the ground that
it disclosed no cause of action as against it (Case,
page 23, lines 19 to bottom and page 96). From
that order and judgment, plaintiffs appeal (Case,
page 1). On the trial, a non-suit was granted in
favor of defendant, Alvin Cooper, on the opening of
plaintiffs' counsel (Case, page 33, lines 21-22) (to
which no exception was taken) and in favor of de-
fendants, Erie Railroad Company and New Jersey

and New York Railroad Co., at the conclusion of plaintiffs' case (Case, pages 88-90). To the latter non-suit exception was duly taken and allowed (Case, pages 90, lines 1-10). From the judgment entered thereon (Case, page 93) plaintiffs also appeal (Case, page 2).

A photograph (reproduced in Case, opposite page 91) admitted in evidence as Exhibit P-1 (Case, page 39, line 12 to bottom and page 40, lines 1-5) pictures the stairs in question and the location of the same with reference to the River Edge station of defendant, New Jersey and New York Railroad Co. In its answer to plaintiffs' complaint, that defendant admits that "to the rear of the depot building there is a flight of steps leading from the railroad property to a park adjacent to a public highway" (Case, page 11, paragraph 2). In a written stipulation, Exhibit P-7 (Case, page 92), it further admits "that it is the owner in fee of the land upon which the steps mentioned in the complaint are located," subject to a lease, dated Sept. 15, 1922, made by it to Borough of Riverside.

The evidence shows that a public park, traversed by paths (Case, page 48, lines 29-31), lay at the head of this flight of steps (Case, page 37, lines 27 to bottom); and that these paths through the park led to public streets (Case, page 48, lines 18-30). At the base of the steps a path led "right out to Bridge Street" (Case, page 39), and Bridge Street crossed over the depressed tracks of the railroad company (Case, page 48, lines 1-4 and page 61, lines 23-30).

It further appears from the evidence that this open stairway was used by intending passengers and arriving passengers. It rose from the station property in the rear of the station and a little off the public street and ascended to the park (Case, page 74, lines 19-22). From certain points in the Borough of Riverside, it was the shortest way to the station (Case, page 48, lines 24-26). On the night of this accident, the witness, John J. Matthews, who resided in the borough (Case, page 59, lines 21-29), walked "around the station to go up these steps" (Case, page 58, lines 17-22) upon arriving at the River Edge station at 6:22 (Case, page 58, lines 10-26). He had come down those steps in the morning to reach the station and take a train for New York (Case, page 60, lines 23-24). It was his custom and habit to use those steps to get to and from the station (Case, page 59, lines 15-16): he went down them to get to the station and up them to get out of it (Case, page 61, lines 25-30).

After spending the afternoon at the home of a friend in Riverside, Mrs. Kuchler started shortly before 6:00 P. M. for the railroad station (Case, page 36, lines 19 to bottom, and page 37, lines 1-9); and arrived at the head of the flight of stairs just as the 6:22 train from New York was coming in (Case, page 38, lines 6-11); it was then dark (Case, page 37, lines 21-24); there was a light at the station, but it was dim and ineffectual (Case, page 38, last 3 lines, and page 39, lines 1-2).

It had snowed either one or two days before (Case, page 54, lines 6-16), but this day was clear and cold (Case, page 38, lines 1-3; page 59, line 14; page 69, lines 14-16; page 72, last 2 lines; and page

toms and usages of the carrier, its employees and patrons. For instance, the custom of friends and relative to accompany to the station persons leaving by train, for the purpose of assisting or of comforting them, or merely as a mark of friendly interest and affection, as well as the custom of friends and relatives going to the station for like reasons to meet persons coming in, is so uniform, universal, and long-standing, and is so much a part and parcel of the business of carrying passengers, and has been so uniformly acquiesced in for so long by the carrier, that it would be absurd to regard a person coming to a railroad station to meet an incoming friend or relation either as a trespasser or a bare licensee to whom the carrier owes no duty but that of refraining from wanton or willful negligence. On the contrary, such persons are to be regarded as invitees, or licensees to whom the carrier owes the duty of reasonable and ordinary care, and if they suffer injury as a result of any neglect or default of the carrier in the performance of that duty, it will be responsible therefor. The duty of keeping its stations, their approaches and surroundings, safe for the use of persons in the exercise of ordinary care, includes the obligation of seeing that such places are properly lighted. A large number of cases illustrating the applications of the principles thus stated to varying conditions of fact are collected in notes to *G., H. and S. A. R. Co., vs. Matzdorf*, 20 L. R. A., (N. S.) 833, and 20 L. R. A.

528, and *Hurch. Car. par. 991*. The care which the carrier is required to exercise under such circumstances differs in degree from that which it is bound to exercise in the actual transportation of its passengers, and the obligation for its exercise arises from a different source. For while in the transportation of its passengers the contract of transportation imposes upon the carrier the duty of exercising "the utmost care and diligence which human foresight can use" to protect the passenger (*B. & O. R. Co., vs. Breinig*, 25 Md. 378, 90 Am. Dec. 49; *P. B. & W. R. Co. vs. Allen*, 102 Md. 110, 62 Atl. 245), in the case of an invitee its duty is to use only ordinary and reasonable care for his protection, and that duty arises by implication as a matter of law (4 R. C. L. 1053).

In the notes to *Donovan vs. Griffith*, 2 L. R. A. (N. S. 833), many later cases are collected on the same point and to the same effect.

The evidence showed that the cause of Mrs. Kuchler's accident was the accumulation of ice and snow upon the steps; that a sufficient interval of time had elapsed since the precipitation of the snow to afford opportunity either for its complete removal or for making the stairway reasonably safe by the sprinkling of ashes or sawdust or the like, upon it.

The cases hold that carriers of passengers for hire are legally responsible for injuries happening to the passengers from dangers produced by the elements when they have as-

sumed a dangerous form (such as the accumulation of ice on the car steps, so as to cause the passenger using ordinary care to slip and fall), and when sufficient previous opportunity has been had to remove their effects or to remedy the danger; and their duty in such regard is not performed simply by appointing servants, whose duty it is to keep the car steps in a safe condition, nor is it any excuse that such servants neglected their duty; and, where a substantial doubt as to the actual performance of such duties by the servants appears by the evidence, the question should be settled by the jury. **Murphy v. North Jersey St. Ry. Co.** 80 Atl. Rep., 331. (Court of Errors and Appeals of N. J.)

A carrier is liable for injuries due to an accumulation of ice on a stairway at its station which it had negligently permitted to remain after the expiration of a reasonable time to charge it with notice of the danger incident to the use of the way in that condition. **Costello, et al. vs. Director General of Railroads.** 112 Atl. Rep. 861.

As between Mrs. Kuchler and the New Jersey and New York Railroad Company, the fact that the latter had leased to the Borough of Riverside, the ground on which the steps in question were located, is immaterial; the evidence shows that the stairs were in such close proximity to the railroad station that the public was accustomed to use them as a means of getting into and away from the station;

and that in the nature of things, this use of the steps as a way of passage for this purpose must have been recognized and assented to by the company. There was access to the park from adjacent public streets; paths traversed the park, which converged at the head of the steps; the steps, located on the railroad's premises, led down an embankment to the lower ground; and the railroad station was but a step from the foot of the stairs. In these circumstances, the doctrine of **D. L. & W. R. R. Co. vs. Trautwein**, 52 N. J. L. 169, applies.

In that case, a stairway rested against the embankment of the railroad; it was on the company's grounds and led to the public street. From the depot building to the top of this stairway there was a gravel walk. It was, apparently, a way provided as a means of access to and from the company's depot grounds. The test of liability was said by this Court to be:

If, to persons of ordinary understanding and discernment, it appeared to be such a way, and by the company it was allowed to remain and be in use by passengers going to or from trains, any one going to and from a train as a passenger was authorized to make use of it.

In the instant case, the stairs were **apparently** a way of passage.

In **Van Noordt vs. D. L. & W. Co.**, 112 Atl. Rep. 189, this Court held that the trial court rightly refused to non-suit plaintiff, the facts being that the

railroad company had erected a foot bridge over its right of way to connect the ends of a public street terminating on each side of the railroad tracks; the plaintiff, who was not an employee of the railroad company, nor had any business with it, crossed the bridge at day break and in descending a flight of steps on one side of it, slipped on some snow and ice, fracturing the base of her spine. There is evidence that the railroad company made no effort to clear away the ice and snow, although it had had abundant time to do so; there is an implied invitation on the part of the railroad company for the public to use the bridge.

The plaintiff being an invitee, and the stairway being located upon the company's station premises, and the steps by every external sign being a way of passage to and from the public park and station, we think the cause should have been submitted by the trial court to the jury.

II.

THERE WAS ERROR IN STRIKING OUT THE COMPLAINT IN FAVOR OF DEFENDANT, BOROUGH OF RIVERSIDE.

For the purposes of the motion to strike out, the counts in the complaint (Case, pages 6-9) touching this defendant, must be assumed to be true. Paragraph 2 of the Third Count charges that in and by a lease executed prior to the date of the accident, the railroad company leased the steps in question to the Borough of Riverside and that the Borough, in

the same instrument, assumed the duty of caring for the steps and keeping them safe for the use of pedestrians. Paragraph 4 of the same count, alleges that the Borough of Riverside had both actual and constructive knowledge of the dangerous state of the steps and ample opportunity to remove the snow and ice, but negligently allowed the same to remain there.

These counts against Borough of Riverside are so framed as to repeat the statements in First Count of complaint. The second paragraph in that First Count charges:

In the rear of the said depot was a high bank with a flight of steps leading from the depot to the top of the bank and connected with the streets, **built and maintained for the use and convenience of passengers and others going to and from the said railroad depot.**

So far as appears by the allegations of the complaint, these stairs were restricted to the use of persons going to and from the depot, and were not for a general public use.

The question of the liability of Borough of Riverside turns upon the fact as to whether that municipality, in accepting a lease of the steps and undertaking therein to maintain them and keep them in a safe condition, was exercising a governmental or non-governmental function. If the function was governmental, there is no liability; if it was non-governmental, the complaint stated a case of liability. *Karpinsky vs. Borough of South River*, 88 Atl. Rep., 1073; *Bisbing vs. Asbury Park*, 80 N. J. L. 416; 28 Cyc. 1257.

We think that the Borough stood in this instance, upon the same footing as a private corporation, because it was maintaining a way of passage, not for the public generally, but only for such persons as had occasion to go to and from the railroad station. Under the allegations of the complaint, the steps were not an extension of a public street. On the contrary, they constituted a private right of way to and from private premises only; they stood upon private property.

How can it be said that the maintenance of a right of way over private property to and from privately owned premises is a public function?

We think the complaint was wrongly struck out as to Borough of Riverside.

Respectfully submitted,

FREEMAN & FREEMAN,

Attorneys for and of Counsel
with Plaintiffs-Appellants

New Jersey Court of Errors and Appeals

LOUISE KUCHLER and FRANK
KUCHLER, her husband,
Plaintiffs-Appellants,

v.

NEW JERSEY & NEW YORK RAIL-
ROAD COMPANY, a corporation,
ERIE RAILROAD COMPANY, a cor-
poration, BOROUGH OF RIVER-
SIDE and ALVIN COOPER,
Defendants-Appellees.

Action at Law.

Plaintiffs' Appeal
from the
Supreme Court.

BRIEF FOR DEFENDANT-APPELLEE THE BOROUGH OF RIVERSIDE.

Statement.

The complaint in this cause contains eight counts, Count Three (Case, p. 6) and Count Five (Case, p. 8) on behalf of the plaintiff Louise Kuchler contain the allegations with reference to the Borough of Riverside. Count Four (Case, p. 7) and Count Six (Case, p. 8) are those of the husband, Frank Kuchler, for the loss of services and for the medical expenses of his wife as against the Borough of Riverside.

The complaint, upon a motion made before Mr. Justice PARKER, in so far as the same related to the Borough of Riverside, was stricken out on the ground that it disclosed no cause of action, which judgment was entered on April 11th, 1927; the order having been made by Mr. Justice PARKER on the 22nd day of May, 1926. From this judgment the plaintiffs-appellants have taken an appeal, alleging as their only ground for reversal that the Court erred in striking out the complaint.

POINT I.

That the complaint discloses no cause of action on behalf of the plaintiffs as against the defendant, The Borough of Riverside, and the Court below did not err in striking out the same.

The Third Count (Case, p. 6) which relates to the claim against the Borough of Riverside, is upon the theory that because of the lease entered into prior to the happening of the accident between the Erie Railroad Company, the New Jersey and New York Railroad Company and the Borough of Riverside, that it became the duty of the Borough to care for the steps and keep them in a safe condition and that the municipality also assumed the responsibility for injuries and damages arising from the negligence or other breach of the aforesaid duties, and that the Borough had constructive and actual knowledge of the dangerous condition of the steps, but disregarding that duty, they allowed the snow and ice to remain upon the steps, whereby the plaintiff was injured.

This count seems to us to be bad because it is a conclusion upon the part of the pleader as to what the contents of the lease are. There are no specific allegations in the count to show the contents of the lease or the pertinent provisions thereof, if any, casting upon the municipality the duty which the plaintiffs-appellants contend the municipality assumed.

Paragraph 2 of the Third Count (Case, p. 6) also alleges that by reason of the lease, that the municipality assumed the responsibility for injuries and damages arising from negligence.

The allegation of negligence in all counts is, that as a result of a snow storm, great quantities of

snow fell and lodged upon the steps, where it remained until the day of the alleged injury. That the travelers upon the steps had caused the snow to become packed down and icy and that by reason of the failure to remove the snow and ice, the municipality was guilty of negligence. The steps in question are upon a piece of ground in the rear of the station.

There is no allegation in the complaint that an attempt was made by the officials of the municipality to remove the snow and did so carelessly, nor is there any allegation made that they removed the snow after it had fallen in its natural state and then permitted the steps to become icy and slippery. In other words, they charged that the negligence consisted in allowing the snow to remain as it had fallen.

This Court said, in the case of *Sewall v. Fox*, reported in 98 Law, page 819:

"The common law imposed no duty upon an abutting owner on a highway to keep the sidewalk in front of his premises free from snow or ice."

The condition of the steps in this case was the result of natural causes and was not caused by any act upon the part of the Borough of Riverside, and the Borough owed no duty to her except to refrain from the commission of some affirmative tort which resulted in damage to her. The plaintiff was using the premises in question as a short-cut to the railroad station and did so with the mere permission or acquiescence of the Borough of Riverside.

"Mere permission to pass over dangerous lands or acquiescence in such passage for the benefit or convenience of the licensee, creates no duty on the part of the owner except to refrain from acts wilfully injurious." (*Phillips v. Library Company*, 55 N. J. L. 307.)

There is no allegation in the pleadings of the purpose for which the municipality rented this parcel of land from the railroad company and therefore we think that the Court, in the absence of any allegation of the purpose, could properly assume that the ground was leased by the municipality for public purposes, such as park purposes, and that therefore the municipality, in performing a governmental function, cannot be charged with the negligence of its agents and servants in the performance of a governmental duty.

The complaint charges in the Third Count (Case, p. 6) that the municipality assumed responsibility for injuries and damages arising from negligence and other breach of the aforesaid duties under its lease with the railroad company. Assuming this to be true, it seems that the municipality would have no power to make such a contract or to assume any such liability. We have been unable to find any statute which would permit a municipality to assume any such responsibility. However, in the case of the *Hill Dredging Company v. Ventnor City*, in the Court of Chancery, reported in 78 Atlantic, page 677, the Court there held that:

"A municipal corporation cannot be bound by an engagement which it had no power to make and the corporate powers of such a corporation cannot be extended by the operation of the doctrine of estoppel."

To the same effect is *Dillon on Municipal Corporations*, 5th Edition, Volume 2, Section 814.

The Fifth Count (Case, p. 8) is apparently upon the theory that the lease which they allege in the Third Count is a contract made for the benefit of a third party, to wit, the plaintiffs. We think this theory is disposed of in the case of *Styles v. Long Company*, reported in 67 N. J. L. 419, where the Court said:

"We take it to be quite plain that the rule that no one can sue upon a contract unless he is a party to it cannot be evaded by bringing what is really an action for breach of contract in the form of an action of tort. It follows that, in order to maintain an action of tort for breach of a contractual duty, the plaintiff must have the same status under the contract as would entitle him to maintain an action upon contract for a breach of its stipulations."

Counsel, in their brief for the plaintiffs-appellants, argue that the liability of the Borough of Riverside depends upon the question of whether or not, in renting the premises, they were exercising a governmental or non-governmental function. There is no allegation in either count of the complaint alleging that in executing the lease, the municipality was performing a non-governmental function. Counsel cites in support of this, the case of *Karpinsky v. Borough of South River* in 88 Atlantic 1073. We feel that this case has no application to the case at bar.

Counsel also cites the case of *Bisbing v. Asbury Park*, reported in 80 N. J. L. 416 and 78 Atlantic 196, wherein this Court said:

"It is not controverted, and could not well be under the law as expounded in this state, since the year 1840, that, in the absence of statute, an action will not lie against a municipal corporation at the instance of an individual who has sustained special damage in consequence of the neglect of such corporation in the performance of a public duty."

But in that case, the plaintiff sought to bring herself within the exception to the general rule on the theory that the municipality was not performing a public duty but was holding the property in that case for the benefit of the municipality and

receiving income therefrom. In our case there is no allegation in the complaint of the reason for the lease made by the municipality. The Court there held that the plaintiff had not brought herself within the exception to the rule regarding municipalities. There is no allegation in either count against the Borough of Riverside that in the making of the lease as alleged, the municipality was performing a non-governmental function, which seems to us is a necessary allegation in all actions against municipalities for the failure of its officers and servants to perform an act.

We therefore respectfully submit that the judgment striking out the complaint insofar as the Borough of Riverside is concerned, should be affirmed, with costs.

MACKAY AND MACKAY,
Attorneys for Borough of Riverside.

J. WALLACE LEYDEN,
Of Counsel.

23 OCT. T. 1927

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NEW JERSEY

Court of Errors and Appeals

LOUISE KUCHLER and FRANK
KUCHLER, her husband,
Plaintiffs,

vs.

NEW JERSEY and NEW YORK
RAILROAD Co., a corporation,
the ERIE RAILROAD Co., a corporation,
BOROUGH OF RIVERSIDE and ALVIN COOPER,
Defendants.

On Appeal
from the
Supreme
Court.

**BRIEF OF HOBART & MINARD IN FAVOR
OF NEW JERSEY AND NEW YORK RAIL-
ROAD COMPANY, ERIE RAILROAD COM-
PANY AND ALVIN COOPER, DEFEND-
ANTS (RESPONDENTS).**

(1)

Statement of the Case.

This case comes before the court on appeal of the plaintiffs from a judgment of nonsuit entered against them and in favor of the defendants, New Jersey and New York Railroad Company, Erie Railroad Company and Alvin Cooper, entered at the trial of the case at the Bergen Circuit on February 21, 1927 (p. 95).

Prior to the trial the complaint was struck out by order of Justice Parker, in so far as the same related to the remaining defendant, the Borough of Riverside (p. 23).

An appeal has been taken to this court from the order striking out the complaint (p. 1) and a separate appeal has been taken from the judgment of nonsuit (p. 2).

This brief will deal only with the question of the propriety of the nonsuit as against the defendants other than said Borough.

The suit was brought to recover damages for personal injuries sustained by the plaintiff Louise Kuchler and the resulting damage to the plaintiff Frank Kuchler, her husband, for loss of services, medical expenses, etc., by reason of an accident sustained by Mrs. Kuchler on January 21, 1925, at the River Edge station of the defendant New Jersey and New York Railroad Company, in the Borough of Riverside, Bergen County, New Jersey.

The complaint has eight counts, as follows:

The First and Second Counts allege negligence on the part of the railroad companies.

The Third, Fourth, Fifth and Sixth Counts allege negligence on the part of the Borough of Riverside.

The Seventh and Eighth Counts allege negligence on the part of the defendant Cooper.

As to the railroad companies, the charge of the complaint is that said defendants owned and operated a railroad depot known as River Edge, in the rear of which was a high bank, and a flight of steps, leading from the depot to the top of the bank and connected with the streets, built and maintained for the use and convenience of passengers and others going to and from the depot; that prior to the date of the accident on Janu-

ary 21, 1925, there were several snow storms, as a result of which snow fell and lodged upon the steps and other property and became packed down and icy, thereby causing the steps to be slippery and dangerous; that "the railroad" had actual and constructive notice of the dangerous condition of the steps, and it thereby became the duty of the railroad companies and their agents and servants to clean the steps and remove the ice and snow and "make travel safe" for persons using the steps; that the companies and their servants had ample opportunity to remedy the condition and remove the ice and snow, but negligently failed to do so; that on the evening of the day of the accident it was dark and the steps were poorly lighted and that while the plaintiff Louise Kuchler was lawfully upon the steps "at the express or implied invitation of the companies" in order to go to the depot, she slipped upon the snow and ice and fell with great force and violence and thereby sustained the injuries for which suit was brought.

The Seventh and Eighth Counts repeat the allegations of negligence asserted against the railroad companies and add the further charge, as against the defendant Cooper, that he was employed by the railroad companies as "station agent and manager" of the depot and that it was his duty "under the said employment" to clean the steps and keep them in safe condition, and that he neglected to do this and the accident happened as a result of such negligence on his part (pp. 4-10).

The answer of the New Jersey and New York Railroad Company denied the allegations of the complaint, except it admitted that it operated the railroad and depot and that at the rear of the depot there was a flight of steps leading from the railroad property to a park adjacent to a public

highway, and that there were snow storms a few days prior to the accident.

The answer of the Erie Railroad Company denied all the allegations of the complaint.

The answer of the defendant Cooper denied all the allegations of the complaint, in so far as the same related to him, except that he admitted the physical conditions at the station and admitted that he was employed by the New Jersey and New York Railroad Company as "station agent."

Each of the answers also alleges contributory negligence on the part of the plaintiff Louise Kuchler (pp. 11-21).

At the trial in the Bergen Circuit the opening of counsel for the plaintiffs was reported and after argument thereon a motion for nonsuit as against the defendant Cooper was granted (p. 33, line 20).

Motion for nonsuit was also made at that time in behalf of the railroad companies, and decision reserved (p. 36, line 10).

The plaintiffs then offered their evidence and the motion for nonsuit having been renewed, the same was granted (p. 90) and judgment entered accordingly.

It was admitted that the defendant New Jersey and New York Railroad Company was the owner in fee of the land upon which the steps mentioned in the complaint were located, subject to a lease dated September 15, 1922, to the Borough of Riverside (Exhibit P-7, p. 92; p. 28, line 30).

No exception was taken to the ruling as to the defendant Cooper; and no claim is made in the brief of the plaintiffs-appellants that the judgment of nonsuit was erroneous as to the defendant Erie Railroad Company.

We will hereafter refer to the New Jersey and New York Railroad Company as "the railroad company."

(2)

Brief of the Argument.

I.

The motion for nonsuit was properly granted on the ground that at the time of the accident the plaintiff Louise Kuchler was a mere licensee and there was no allegation or proof of wilful or wanton injury.

II.

The motion for nonsuit was properly granted on the ground that at the place where the accident happened the property was in the possession of a third party, to wit, the Borough of Riverside, under a lease from the railroad company.

III.

The motion for nonsuit was properly granted on the ground that the plaintiff Louise Kuchler was chargeable with contributory negligence as a matter of law.

I.

The motion for nonsuit was properly granted on the ground that at the time of the accident the plaintiff Louise Kuchler was a mere licensee and there was no allegation or proof of wilful or wanton injury.

In the afternoon of the day of the accident Mrs. Kuchler was visiting a friend at River Edge and

left the latter's home shortly before 6 P. M. to go to the station to meet her husband on the train that arrived at 6.22 P. M. (p. 37, lines 1-20). She had walked along certain streets of the borough and then "through the park to the station" (p. 37, line 32).

The train was coming into the station and she started down the stairs; as she was in the act of so doing she saw a person about half-way up the stairs and she stepped to her right to grasp the railing so that this person might pass and before reaching the railing she slipped and fell (p. 38, lines 10-20).

She was about at the second step from the top when she fell (p. 40, line 10).

The plaintiff Frank Kuchler said that when he left his wife in the morning of the day of the accident she told him she would meet him on the 6.22 P. M. train; on the arrival of the train he looked for her and did not see her and went home (p. 62, lines 10-30; p. 71, line 10).

This is the only evidence on this phase of the case. It is, therefore, undisputed that Mrs. Kuchler had no business whatever with the railroad company, and it is equally undisputed there is no evidence of any express invitation extended by the railroad company to her to make use of the steps.

Under these circumstances, the first question in the case is what duty rested upon the railroad company.

In *Fleckenstein v. The Great Atlantic & Pacific Tea Co.*, 91 N. J. L. 145, Chancellor Walker said:

"Merchants invite the public to enter their stores to buy wares. It cannot be said that they invite the entrance of those who accompany them, but who have no intention of purchasing; such persons are mere licensees.

While it may be that they invite those who enter, who, after inspecting their wares may become purchasers, such an invitation did not extend to young Fleckenstein, when he accompanied his friend Young into the store, as he, Fleckenstein, admittedly, had no intention of purchasing anything."

In *Bardenhagen v. Crossman Co.*, 130 Atl. 545, the plaintiff, a tugboat captain, was injured while in the act of walking from his tug to the shore cross a barge which was between his tug and the dock in order to reach a telephone at the office of the defendant for the purpose of telephoning to his employer for instructions. It appears that the plaintiff had frequently used the telephone before under similar circumstances, but its use was in nowise connected with the business of the defendant, but was entirely for his own convenience. In sustaining a nonsuit this court said:

"The situation thus depicted obviously places the plaintiff in the status of a mere licensee, who could legally expect from the defendant, under the well-settled rule, while engaged in the permissive use of defendant's property, nothing more than compliance with the obligation that it would refrain from acts wilfully injurious to the plaintiff."

The underlying principle of the rule is that there is no mutuality of interest in the purpose of the visit between the owner of the premises and the visitor, and, therefore, the visitor is a mere licensee and assumes all risks arising out of the want of ordinary care. Those who keep premises for the carrying on of business impliedly invite people to come and transact business with them. A common carrier impliedly invites persons to enter upon its station grounds to inquire about accommodations,

to arrange for the shipment or receipt of freight; and where a passenger is aged or infirm or overburdened with luggage the invitation extends to those who assist them. The invitation to the companion depends upon a reasonable requirement of the passenger to be assisted by the companion in some way directly associated with the relationship of carrier and passenger. If the invitation were extended to friends who were bidding the passenger adieu or welcoming him upon the end of his journey it may easily be seen that that which was a mere incident to the business of a common carrier would become his principal burden. Instead of facilitating the discharge of the carrier's duties, it would seriously impede them. The friend might very well board the train to say "good bye" and the company would be charged with a duty of seeing that all such persons were safely off the train before it was started. It would be required to determine whether persons boarding the train were passengers or companions who desired to leave the train before it started. There would be no limit to the resulting duties and obligations.

Applying the rule that there must be a mutuality of interest in the purpose of the visit, Mrs. Kuchler was not an invitee, but a mere licensee, and it is not contended that there was a violation of a duty arising from such a relationship.

As a licensee the railroad company owed to Mrs. Kuchler the duty only to refrain from wilful or wanton injury. There was no allegation and no proof of any such injury, and, hence, the nonsuit was properly granted on that ground.

It may be conceded that a railroad company is under a duty to exercise reasonable care to keep its property reasonably safe for the use of persons (whether passengers or otherwise) invited to use

same. But this principle does not extend to property which may be customarily used by such persons but not actually maintained by the carrier.

In *De Voe v. N. Y. O. & W. R. R. Co.*, 63 N. J. L. 276, the decedent came upon the lands of the defendant by the use of a stile over the defendant's fence, which stile had been built by persons in the neighborhood over four years before the date of the accident and customarily used by them and particularly the decedent. Just before reaching the station platform and while upon the lands of the defendant the decedent was struck by a train. It was held that a judgment entered against the defendant must be reversed.

In *Dieckman v. D. L. & W. R. R. Co.*, 81 N. J. L. 460, it appeared that the railroad was built upon an embankment and crossed Stuyvesant Avenue in Lyndhurst, N. J., by a bridge. The station of the railroad was situated east of the railroad and near the avenue. To this station a stairway ran from the street. On the opposite side of the railroad a path started from the avenue, which had been worn by the feet of persons passing from the street diagonally up the railway embankment to the west side of the road. Along this side of the railroad, along the top of the embankment, the company had built a fence extending from the avenue to a point beyond the line of the railroad station on the opposite side. Persons using the path up the embankment had been accustomed to pass the end of this fence and turn in on the two railroad tracks and cross to the station. In front of the station the ground was level to permit passengers to reach the cars upon the two tracks. There was nothing to indicate a pathway across the tracks from the westerly side. The plaintiff's intestate passed up the path

around the end of the fence and started to cross the tracks to the station when he was struck by a train and killed. It was held that the railroad company was not liable.

The steps on which Mrs. Kuchler slipped were part of a public highway leading to the station. The mere fact that the company had the fee to the land where the steps were constructed, does not make them any the less a part of the highway. If the company is liable in this case, it would be equally liable to a person using *any* public highway for the purpose of traveling to the station.

Counsel for appellants cites two cases in this connection, to wit: *Delaware etc. R. R. Co. v. Trautwein*, 52 N. J. L. 169, and *VanNoordt v. Delaware etc. R. R. Co.*, 112 Atlantic 189 (officially reported in 95 N. J. L. 219).

In the *Trautwein* case, the accident occurred upon a stairway which had been constructed by the railroad company upon its embankment, the stairway leading to the public highway from the depot below. The negligence charged was the failure of the company to exercise ordinary care in maintaining the stairway in a reasonably safe condition. The court found that the use of the stairway by passengers was permitted by the railroad company. In the present case, the stairway was not in the possession of the company, as the lands upon which it was constructed were leased to the Borough of Riverside. They were in the actual possession of the Borough under that lease, and the Borough had undertaken the maintenance thereof.

In the *VanNoordt* case, the injury was sustained upon a private stairway and bridge constructed by the railroad company over its tracks connecting the two ends of Factory Street in the

City of Passaic. The evidence showed that Factory Street was never actually opened across the railroad company's right of way, but that highway travelers trespassed upon the tracks of the company in coming from one end of the highway to the other. In an attempt to prevent the use of the tracks for that purpose the company built a stairway and foot bridge and directed its employees to make use of the bridge rather than to walk upon the tracks, and employees of the company had directed highway travelers to make similar use of the bridge. The question involved in that case was whether the bridge was a public way or a private way and the court held that since it was never dedicated to public use, it having been privately constructed and maintained by the railroad company, it was a private way and that the company owed a duty of reasonable care in maintaining it. In the course of the opinion the court said:

"If the bridge was a public way, then no duty was imposed on the railroad company to clean the natural accumulation of snow and ice from the structure."

In the present case it is to be noted that there was a pathway leading from the foot of the stairway in question out to Bridge Street, a public highway, which crossed the railroad tracks a short distance from the railroad station (Record 39, lines 8 to bottom).

II.

The motion for nonsuit was properly granted on the ground that at the place where the accident happened the property was in the possession of a third party, to wit, the Borough of Riverside, under a lease from the railroad company.

There is no proof that the railroad company had possession of the property whereon the steps were built; on the contrary, the only proof on the subject shows that that property had been leased to the Borough of Riverside by lease dated September 15, 1922 (Exhibit P-7, p. 92).

There is no proof whatever that at any time after the making of this lease the railroad company retained possession of the steps or undertook to exercise any supervision or control over them. On the contrary, the only evidence in the case is that at about 9.30 o'clock on the evening of the accident the janitor of the Borough Fire House asked a boy to sprinkle ashes on the steps (pp. 72, 73), and that the janitor, himself, helped spread the ashes (pp. 86-87).

There is no claim that any employee of the railroad company, either before or after the accident, undertook to maintain the steps.

The only claim of negligence is a failure to clean the snow and ice from the steps; there is no claim that the railroad company had constructed the steps or that there was any defect in the steps themselves.

In *McKeown v. King*, 99 N. J. L. 251, Mr. Justice Katzenbach said:

"The complaint does not allege a structural defect. This implies that the drain

and cover were properly constructed. For permitting a sidewalk to become out of repair and thereby dangerous a tenant is responsible, as the tenant's duty is to use ordinary care to make the sidewalk reasonably safe."

In *City of Lowell v. Spaulding*, 4 Cush, 277, cited with approval in *McKeown v. King*, *supra*, Chief Justice Shaw said:

"By the common law the occupier and not the landlord is bound, as between himself and the public, so far to keep buildings in repair they may be safe for the public; and such occupier is *prima facie* liable to third persons for damages arising from any defect. If, indeed, there be an express agreement between landlord and tenant that the former shall keep the premises in repair so that in case of a recovery against the tenant he would have his remedy over, then, to avoid circuity of action, the party injured by the defect and want of repair may have his action in the first instances against the landlord."

The cases support the contention that a failure to remove snow and ice from an otherwise safe flight of steps will not render the landlord liable in damages to one injured as a result of such failure, when, as in this case, the entire lands and the structure itself are leased to a tenant who at the time of the accident was in actual possession of the premises.

III.

The motion for nonsuit was properly granted on the ground that the plaintiff Louise Kuchler was chargeable with contributory negligence as a matter of law.

The general rule is undisputed that a person walking along a highway which was used for public travel may assume that the highway is reasonably safe for that purpose; but when the highway is obviously dangerous or when the traveler actually sees the dangerous condition, he must, himself, use care to avoid injury.

In *Vorrath v. Burke*, 63 N. J. L. 188, the court said:

"If we assume negligence in the landlord, still no right of recovery against him was established. Knowledge of the danger compels the assumption of the risk of use in such a case. *Mullen v. Rainear*, 16 Vroom 520; *Frank v. Couradi*, 21 Vroom 23. The plaintiff's daughter was fully aware of the condition of the door when she attempted to hold it on her return down the stairway. She knew the weights were off and deliberately assumed what risk there was in descending * * *."

In *Saunders v. Smith Realty Co.*, 84 N. J. L. 276, it was held that a person, being *sui juris*, who undertakes to use a dangerous way, with full knowledge of its unsafe condition, assumes the risk of injuries which may result to him from such use.

In *Rooney v. Siletti*, 96 N. J. L. 312, the plaintiff fell down the cellar steps of a building due to the fact that the stairs were covered with frozen snow

and ice. The testimony of the plaintiff, herself, was that she observed this condition and knew it was dangerous, but that she wanted to get some coal "and was compelled to take the chance." Held, error to refuse to grant a nonsuit on the ground that the plaintiff assumed the risk of the accident because she had full knowledge of the danger.

In the present case, Mrs. Kuchler, on her own very candid statement of the condition that she observed, is chargeable with contributory negligence. She testified:

"Q. Now, as you got to the stairs, tell us just what happened, and in what condition you found it? A. Well, when I got to the stairs, I noticed that they were full of ice and snow, and I looked down, and I saw that there was just a foot path where the people had come up and down. And I started down that side, and as I just started down, there was a person coming up, or about half-way up the stairs. So I stepped to my right to get ahold of the railing so that this person could pass, and before I reached the railing, I slipped.

Q. This place that you call a pathway, or a place where people had been coming up and down, was there any snow on that portion of the steps? A. Well, it looked to me as if it was—I know it was covered with ice.

Q. Ice? A. It looked to me as though there was snow there, too.

Q. And was there any ashes or sand or any other material upon the steps? A. I did not see any.

Q. What did you have on your feet? A. Rubbers.

Q. Now, was there a light at the station? A. Yes.

Q. And did it reflect upon the stairway? A. Well, it didn't show much of a light, be-

cause it was a very poor light" (p. 38, line 12, to p. 39, line 1).

* * * * *

"Q. Now, Mrs. Kuchler, will you just take the pencil and indicate about where you were at the time that you slipped? A. Well, I couldn't have been more than the second step down.

The Court: The second step from the top, on the right part of the step to you; is that right, Mrs. Kuchler? You were at the right of the——

The Witness: I started down this side here (indicating), this is where the——

Q. Indicating the left side? A. This is where the path was (indicating), see? And I saw this person coming up. It must have been just about along here (indicating). So I stepped over to my right to get ahold of this railing here (indicating).

Q. Indicating the railing on the right? A. On the right side, when I—shall I mark this here (indicating)?

Q. Yes.

The Court: I do not know that it will do much good to mark; the point is, it was about the second step from the top?

The Witness: Yes" (p. 40, lines 5-33).

* * * * *

"Q. When you speak of a path, do you mean that there was a place on the stairs that had been cleared of the snow? A. No, it wasn't cleared. It was just where the people had tramped it down; that is, going up and down the stairs.

Q. And the rest of the stairs were— A. Was all ice, was right even with the steps.

Q. Where there had been no path? A. No path at all.

Q. And it was on that part that you stepped? A. I stepped over to let this——

Q. To let this other person— A. Yes.

Q. —get by on the step? A. Yes" (p. 41, lines 8-20).

On cross-examination:

"Q. Now, you say when you got to the head of this flight of steps, you then saw the condition— A. Yes.

Q. —that was there? You actually observed, did you, that there was snow upon the steps? A. Yes.

Q. And that that snow extended over the entire step? A. Yes.

Q. Except that narrow pathway? A. Yes.

Q. Where persons had trodden it down? A. Yes.

Q. That, however, was not clean, was it? A. No.

Q. And did you observe closely, Mrs. Kuchler, as to whether it was snow upon the steps or just ice? A. Well, I think it was both.

Q. You think it was both? A. Yes, because the—there was deep snow.

Q. Are you prepared positively to say, Mrs. Kuchler, that there was snow there as well as ice? A. Yes, I think I can.

Q. You would say so? A. Yes.

Q. And to that extent all the way down the steps? A. Yes.

Q. And clean across from side to side? A. Yes.

Q. Now, did you see this person coming up the steps before you started to descend? A. No.

Q. As soon as you saw him—was it a he or a her? A. Well, that I couldn't tell you.

Q. You do not know? A. I do not know.

Q. As soon as you saw that person, you immediately undertook to step over? A. Yes, so that he could pass, or her pass, whatever it was.

Q. You then stepped into the portion of the stairway— A. Yes.

Q. —which was in much worse condition than that upon which you had undertaken to descend? A. Yes.

Q. Now, will you describe, Mrs. Kuchler, as best you can, the condition of the stairway to the side of this trodden pathway as to whether it was filled up more or less like a toboggan slide, the snow being piled in up to the steps, or whether there was just a little collection upon it? A. Well, the way it looked to me, as if the whole—it was a pile up from side to side; that is the way it looked like.

Q. More or less like a toboggan slide? A. Yes. And I was going to pick the way down, because, as I say, the train was coming, and I thought I would get down where everybody else had trodden down.

Q. And this whole pile you have referred to, to the side of the trodden pathway— A. Yes.

Q. —was covered with ice? A. It was.

Q. Now, the trodden pathway itself; just about how wide was that? A. Well, just so that a person could walk down.

Q. Well, now— A. I do not think it—

Q. —can you give us, as nearly as you can, the width of it? A. Oh, it was just a small—

Q. You are indicating now about 10 inches, aren't you? A. Yes; hardly a foot.

Q. About 10 inches; barely enough to put one foot on it? A. Yes.

Q. Is that correct? A. Yes.

Q. Could you stand there with your two feet? A. I do not believe you could.

Q. You do not think you could. A. No, I do not think you could.

Q. And how far was that from the extreme left-hand side of the stairway, that trodden pathway? A. Well, it was over the—towards the railing.

Q. Was it near enough so that one could hold onto the railing? A. Yes.

Q. And you had been holding onto the railing? A. I was holding onto the railing as I was going down.

Q. And you say that that was slippery, too? A. Yes.

Q. And were holding the railing as you were helping yourself down? A. Yes.

Q. But when you stepped off to the side, you let go of the railing? A. Yes, I had to.

Q. You had to in order to get over to the side, didn't you? A. Yes.

Q. So that this pathway wasn't immediately next to the railing; there was a slight space— A. Yes, sure.

Q. —from the left side of the steps to the pathway? A. Yes.

Q. And then the additional space? A. Yes.

Q. To the right side? A. Yes" (p. 48, line 30, to p. 51, line 20).

On her own evidence there can be no doubt about the fact that Mrs. Kuchler saw the condition of the steps before she attempted to walk down the same. She admits that she observed that they had not been shoveled and that the steps were not cleared at all except for a point where people had "tramped down"—this space being about 10 inches wide.

She also admits that when she started to descend the steps she had been holding onto the rail and that she let go of same in order to move over to one side for the purpose of making way for the person who was ascending, so that at the moment she fell she did not have hold of either railing and that in order to grasp the railing again she would have to take two or three steps (p. 51, line 30).

This stairway was but one of several means of access to the station. Mrs. Kuchler voluntarily selected a way of approach which was obviously

dangerous, and her own evidence shows that she knew and appreciated the danger.

There is no dispute in the evidence, either as to the condition of the steps or as to what she saw and observed; likewise there is no dispute as to what she did or failed to do in attempting to make use of the steps. The inference is conclusive that the unfortunate accident was due at least in part to her own negligence and for this reason also, the judgment of non-suit was properly granted.

IV.

For these reasons the judgment of nonsuit as to the defendants New Jersey and New York Railroad Company, Erie Railroad Company and Alvin Cooper should be affirmed.

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